

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Donna Chapin, :
 :
 Petitioner :
 :
 v. : No. 2193 C.D. 2009
 :
 Department of Public Welfare, : Submitted: April 23, 2010
 :
 Respondent :

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
 HONORABLE PATRICIA A. McCULLOUGH, Judge
 HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION
 BY JUDGE COHN JUBELIRER**

FILED: July 28, 2010

Donna Chapin (Petitioner), pro se, petitions for review of the November 10, 2009 order of the Secretary of Public Welfare (Secretary) denying reconsideration of the October 14, 2009 Final Administrative Action Order (Final Order) of the Bureau of Hearings and Appeals (BHA). In its Final Order, BHA adopted the Recommended Adjudication of an Administrative Law Judge (ALJ) to dismiss Petitioner’s appeal from the Department of Public Welfare’s (Department) denial of her request to reinstate benefits pursuant to Section 1 of the Act of December 8, 1959, P.L. 1718, as

amended, 61 P.S. § 951 (Act 534)¹ on the grounds that Petitioner abandoned her appeal by failing to comply with the ALJ's orders.

The undisputed facts are as follows. On August 16, 2007, Petitioner, who was employed by the Department at the Danville State Hospital, was injured at work. (ALJ's Recommended Adjudication, Findings of Fact (FOF) ¶ 1.) Thereafter, Petitioner applied for and received benefits pursuant to Section 1 of Act 534 and the Workers' Compensation (WC) Act.² (FOF ¶ 1.) At some point, Petitioner returned to work, and she stopped receiving Act 534 and WC benefits. (Petitioner's Br. at 5; FOF ¶¶ 1-2.) Subsequently, Petitioner sought reinstatement of her Act 534 and WC benefits alleging that, on October 10, 2008, she suffered a recurrence of the August 16, 2007 injury. (FOF ¶¶ 1-2.)

By letter dated March 18, 2009,³ the Department advised Petitioner that CompServices, Inc., the Department's Third Party Administrator, was denying

¹ Section 1 of Act 534 provides, in relevant part, that where an employee of a state mental hospital is injured during the scope of her employment by an act of an inmate or a person committed or confined to the hospital, the Commonwealth of Pennsylvania shall pay the employee her full salary until such time as the disability arising from that injury no longer prevents the employee from returning to her employment at a salary that is equal to that earned at the time of the injury. 61 P.S. § 951.

² Act of June 2, 1915, P.L. 736, as amended, 77 P.S. §§ 1-1041.4, 2501-2708. Pursuant to Section 1 of Act 534, during the time an employee receives her full salary under Act 534, any WC payments received or collected by the employee for that period must be turned over to the Commonwealth of Pennsylvania and paid into the General Fund. 61 P.S. § 951.

³ The Department sent an earlier letter denying Petitioner the reinstatement of benefits, but apparently this letter was somehow defective. The Department then sent Petitioner the March 18, 2009 "corrected" letter, which also denied the reinstatement of Act 534 and WC benefits.

Petitioner's WC claim and that the Commonwealth of Pennsylvania was, likewise, denying Petitioner's request for the reinstatement of Act 534 benefits. (Letter from the Department to Petitioner (March 18, 2009); FOF ¶ 2.) Petitioner's counsel (Counsel), acting on Petitioner's behalf, filed a timely appeal from the March 18, 2009 notice denying the reinstatement of Act 534 benefits (Act 534 Appeal). (Letter from Counsel to the Department (April 6, 2009); FOF ¶ 3.) The matter was assigned to the ALJ.

At a May 19, 2009 pre-hearing conference with the ALJ, Petitioner requested a stay in her Act 534 Appeal in order for her to decide whether to proceed with her request for the reinstatement of Act 534 benefits or to file a petition to reinstate her WC benefits. (FOF ¶ 4.) On May 22, 2009, the ALJ issued an order staying Petitioner's Act 534 Appeal for thirty days (Stay). (FOF ¶ 4.) The Stay directed Petitioner to do any of the following within thirty days after the issuance of the Stay: (1) submit a settlement agreement; (2) withdraw her request; (3) submit a written request for the matter to proceed to a hearing; or (4) file a status report every thirty days from the date of the Stay, detailing the length of the additional time requested and the reason that additional time is needed. (FOF ¶ 4.) Despite the Stay's directive, Petitioner did not file any of these items within the thirty-day period set forth in the Stay. (FOF ¶ 5.) Thus, on July 23, 2009, approximately two months after the issuance of the Stay, the ALJ issued a Rule to Show Cause (Rule) ordering Petitioner to show cause or explain why her Act 534 Appeal should not be dismissed for abandonment and directing her to comply with the Stay. (Rule, July 23, 2009; FOF ¶ 5.) The Rule also advised Petitioner that: "failure to timely respond in writing can further result in the dismissal of this case." (Rule, July 23, 2009; FOF ¶ 5.)

Sometime between the issuance of the Stay and the Rule, Counsel sent notice to the ALJ that she no longer represented Petitioner. (Petitioner's Br. at 13; Department's Br. at 3.)

Petitioner failed to comply with the Rule by advising the ALJ that she was not abandoning her Act 534 Appeal or by complying with the Stay by submitting one of the required responses. (FOF ¶ 6.) Consequently, on October 7, 2009, the ALJ issued a Recommended Adjudication, which held that Petitioner was afforded sufficient time and opportunity to comply with the Rule and had failed to do so or to ask for an extension of time within which to do so. (ALJ's Recommended Adjudication at 2.) Citing to Greensburg Nursing and Convalescent Center v. Pennsylvania Department of Public Welfare, 633 A.2d 249, 252 (Pa. Cmwlth. 1993), the ALJ held that Petitioner's failure to respond to or comply with the Rule justified the dismissal of Petitioner's Act 534 Appeal. (ALJ's Recommended Adjudication at 2.) The Chief ALJ of the BHA reviewed the ALJ's Recommended Adjudication and adopted it in its entirety as the Department's Final Order and Adjudication regarding Petitioner's Act 534 Appeal. (Final Order, October 14, 2009.)

Petitioner filed an Application/Petition for Reconsideration with the Secretary, alleging that: Counsel had not followed through with Petitioner's Act 534 Appeal, Petitioner was not an attorney, and the thirty-day Stay was too short of a period of time for Petitioner to find an attorney to represent her in her Act 534 Appeal. (Petitioner's Application/Petition for Reconsideration, October 26, 2009.) Petitioner further indicated that she did not know that she had to submit her request by August 23, 2009 and that she wrote her request to proceed to a hearing on August 27, 2009.

(Petitioner’s Application/Petition for Reconsideration, October 26, 2009.) The Secretary denied reconsideration for the reasons set forth in the Final Order, i.e., because Petitioner had abandoned her appeal by failing to comply with the Rule. (Order Denying Reconsideration, November 10, 2009.)

Petitioner petitioned this Court for review⁴ and she sought, and was granted, leave to proceed *in forma pauperis*. Thereafter, she filed a brief with this Court setting forth not only the above facts, but also additional facts regarding, *inter alia*, the circumstances surrounding Counsel’s withdrawal, Petitioner’s attempts to obtain new counsel, a WC order and stipulation of facts, and medical opinions regarding her medical condition. The Department filed a Motion to Strike Petitioner’s brief on the grounds that it contained information outside the record in violation of Rule 1551 of the Pennsylvania Rules of Appellate Procedure. By order dated March 9, 2010, this Court denied the Department’s Motion to Strike all of Petitioner’s brief, stating that: “the sole issue reviewable by this Court is whether [Petitioner] abandoned her appeal by failing to comply with a rule to show cause;” and “Petitioner’s brief contains argument relative to this issue.” Chapin v. Department of Public Welfare, (Pa. Cmwlth., No. 2193 C.D. 2009, filed March 8, 2010) (Chapin Order). However, this Court directed that the merits of the Department’s Motion to Strike certain facts and argument relating to the merits of the matter from Petitioner’s brief be decided with the merits of Petitioner’s Petition for Review. Chapin Order.

⁴ “Our review of the [BHA’s] adjudication is limited to determining whether the adjudication is in accordance with the law, does not violate constitutional rights, and is supported by substantial evidence in the record.” Burch v. Department of Public Welfare, 815 A.2d 1143, 1145 n.2 (Pa. Cmwlth. 2002).

We will address the Department's Motion to Strike first because, if we decide that Petitioner's brief is so defective as to preclude effective appellate review, our Court would grant the Department's Motion to Strike and its request that this Court quash Petitioner's Petition for Review pursuant to Pa. R.A.P. 2101. With a few exceptions that do not apply here, Pa. R.A.P. 1551(a) limits this Court's scope of review to the record made before the governmental unit and to questions raised before the governmental unit. It is improper to include, in an appellate brief, factual allegations that a fact finder has not addressed below, and an appellate court may not rely on statements of fact made in an appellant's brief that are not in the record. American Housing Trust, III v. Jones, 548 Pa. 311, 319 n.6, 696 A.2d 1181, 1185 n.6 (1997). Further, Pa. R.A.P. 2101 requires that all briefs and reproduced records filed with our Court conform to the Rules of Appellate Procedure. The failure to conform may lead to the suppression of the nonconforming brief or reproduced record or to the quashing or dismissal of the appeal if the defects in an appellant's brief or reproduced record are substantial. Pa. R.A.P. 2101.

We agree with the Department that Petitioner's brief contains numerous citations to facts outside of the record, including references to: (1) a WC Order and Stipulation of Facts, (Petitioner's Br. at 5-6); (2) Petitioner's current "total disability," (Petitioner's Br. at 6); (3) medical diagnoses by Jose F. Derr, D.O., (Petitioner's Br. at 6); (4) a report of Eric E. Hill, LCSW issued to an unknown source purportedly dated July 15, 2009, (Petitioner's Br. at 7); (5) Petitioner's dismissal from her employment, (Petitioner's Br. at 8, 19); (6) correspondence dated August 27, 2009 from Petitioner to the ALJ purporting to request an additional stay or the scheduling of a hearing, (Petitioner's Br. at 8); (7) Petitioner's alleged diagnoses and her

capacity to work, (Petitioner's Br. at 10); (8) Petitioner's attempts to reach Counsel, Petitioner's conversations with Counsel regarding Petitioner's medical and employment status, and information that Counsel did or did not obtain, (Petitioner's Br. at 11-13); (9) Petitioner's conversation with Michael Dryden, Esq., (Petitioner's Br. at 12); (10) actions taken by Eric Hill and Dr. Derr and the fact that information from these individuals was sent to Counsel, (Petitioner's Br. at 13); and (11) the existence of unequivocal medical evidence of disability related to her alleged October 10, 2008 work injury, (Petitioner's Br. at 15, 18). We strike the above references from Petitioner's brief and will not consider them, as support for these facts is not found in the record.⁵ However, the defects in Petitioner's brief are not so substantial as to require that her Petition for Review be quashed. Accordingly, we grant the Department's Motion to Strike from Petitioner's brief all references to facts that are outside of the certified record, but we deny the Department's request to quash Petitioner's Petition for Review.

We now address the question of whether the BHA erred and/or abused its discretion when it accepted and adopted the ALJ's Recommended Adjudication dismissing Petitioner's Act 534 Appeal based on Petitioner's failure to comply with the Rule.

⁵ We decline to strike Petitioner's references to her August 16, 2007 work injury as it is undisputed that Petitioner's initial work-related injury occurred on that date and that Petitioner was disabled as a result. Moreover, Petitioner's references to the October 10, 2008 injury on pages 15 and 18 of her brief are consistent with her allegations in the record that she sustained a recurrence of the prior work injury on that date. These allegations, and the Department's denial thereof, were the precipitating factors in the matter presently before us; thus, we decline to strike Petitioner's references to this alleged injury in her brief.

Petitioner argues that the BHA violated her constitutional rights to due process by dismissing her Act 534 Appeal and terminating her Act 534 benefits without holding a hearing on the merits of that appeal as required by Squire v. Department of Public Welfare, 696 A.2d 255 (Pa. Cmwlth. 1997).⁶ Essentially, Petitioner claims that, because she filed her Act 534 Appeal and requested a hearing in that appeal, it was legal error or an abuse of discretion to dismiss such appeal without ever holding a hearing on the merits and “where it was clear that she had not abandoned her appeal.” (Petitioner’s Br. at 18-19.) In response, the Department asserts that Petitioner’s due process rights were not violated by the dismissal of her Act 534 Appeal where she failed to comply with the Rule and that Petitioner’s reliance on Squire is misplaced, as that case is factually and legally distinguishable. We agree with the Department.

“Due process requires a person be provided notice and an opportunity to be heard prior to an adjudication affecting that person’s rights.” Burch v. Department of Public Welfare, 815 A.2d 1143, 1145 (Pa. Cmwlth. 2002). However, due process does not confer upon a party the absolute right to be heard. Id.; Goetz v. Department of Environmental Resources, 613 A.2d 65, 67 (Pa. Cmwlth. 1992). This Court has long “recognized the inherent power of [administrative] agencies to control their own dockets through the dismissal of appeals where parties have failed to comply with a rule or order.” Barr Street Corporation v. Department of Public Welfare, 881 A.2d 1278, 1285 (Pa. Cmwlth. 2005). Consequently, we have consistently held that the

⁶ Petitioner makes no argument regarding whether the Department had to prove that it was actually prejudiced by her failure to comply with the Rule in order to support the dismissal of her Act 534 Appeal.

dismissal of a proceeding for a party's failure to prosecute, failure to respond or comply with an administrative agency's notices and orders, or failure to appear at a hearing without good cause does not violate due process. Fountain Capital Fund, Inc. v. Pennsylvania Securities Commission, 948 A.2d 208, 214 (Pa. Cmwlth. 2008) (dismissing an appeal without holding a hearing on the merits where the appellants were required to request a hearing by a certain date and failed to do so); Burch, 815 A.2d at 1145-46 (dismissing an appeal for failure to prosecute and failure to respond to agency's notices); Greensburg Nursing and Convalescent Home, 633 A.2d at 252 (dismissing an appeal for repeatedly failing to file pre-hearing memorandum); Goetz, 613 A.2d at 67 (dismissing an appeal for failure to follow agency procedures and failure to timely respond to a rule to show cause).

Here, the record establishes that Petitioner received proper notice and that her due process rights were not violated. The March 18, 2009 letter notified Petitioner that her request for the reinstatement of Act 534 benefits was denied and that she had thirty days in which to appeal that denial. (Letter from the Department to Petitioner (March 18, 2009).) Petitioner timely filed her Act 534 Appeal and requested a hearing, (Letter from Counsel to the Department (April 16, 2009)); however, she thereafter requested, and was granted, a stay of that hearing on May 22, 2009. The Stay notified Petitioner that:

failure to submit a *timely* settlement agreement, withdrawal request, written request to proceed to a hearing in this matter or status report(s) as set forth [in the Stay, i.e., on or before thirty days following the issuance of the Stay,] *will result in the automatic lifting of the [S]tay and a Rule to Show Cause may be issued to determine whether this matter should be deemed abandoned and, therefore, dismissed for cause.*

(Stay, May 22, 2009 (emphasis added).) Finally, the Rule put Petitioner on notice that her “failure to timely respond in writing [could] further result in the dismissal of this case.” (Rule, July 23, 2009.)

With regard to Petitioner’s due process right to an opportunity to be heard, the facts here, as found by the ALJ and supported by the record, demonstrate that Petitioner was given that opportunity. While it is accurate that Petitioner requested a hearing when she first appealed the denial of the reinstatement of her Act 534 benefits, she thereafter requested, and was granted, the Stay. Had Petitioner complied with the Stay by submitting a settlement agreement, withdrawal request, written request for a hearing, or a request to extend the Stay, the Rule would not have been issued. Moreover, had Petitioner responded to the Rule, the ALJ would not have dismissed Petitioner’s appeal for her abandonment of that appeal based on her failure to comply with the Rule. To the extent that Petitioner relies upon her alleged August 27, 2009 letter to the ALJ, there is nothing in the record that indicates what that correspondence actually requested or that the ALJ ever received the letter. In fact, the ALJ found in her Recommended Adjudication, dated *October 7, 2009* and issued approximately one and a half months after the expiration of the Rule and three and a half months after the expiration of the Stay, that Petitioner had “failed to comply with the Rule by explaining that she has not abandoned her appeal and/or [by] complying with the [Stay] by submitting a settlement agreement, withdrawal request, *written request to proceed to a hearing* or a status report.” (FOF ¶ 6 (emphasis added).) Had Petitioner prosecuted her appeal and complied with the Rule, she would have had the opportunity to present evidence at a hearing. However, Petitioner did not, and the

dismissal of her appeal based on that failure does not violate Petitioner's due process rights. Fountain Capital Fund; Barr Street; Burch; Greensburg; Goetz.

We also agree with the Department that Petitioner's reliance on Squire is misplaced. In Squire, this Court held that an employee receiving Act 534 benefits has a property interest in those benefits and that existing Act 534 benefits could not be *terminated* without a prior due process hearing, at which the administrative agency bore the burden of proving that the employee's disability had ceased. Id., 696 A.2d at 258-59. Unlike the situation in Squire, the matter presently before this Court involves the *reinstatement* of Act 534 benefits, not the termination of those benefits.⁷ It is the employee who bears the burden of proving the causal connection between a prior work-related injury and a subsequent recurrence of disability when seeking the reinstatement of benefits under Act 534. Mihok v. Department of Public Welfare, 670 A.2d 227, 232 (Pa. Cmwlth. 1996). Thus, Squire is factually distinguishable from the situation here. In addition, unlike the employee in Squire who received no due process before the unilateral termination of her Act 534 benefits,⁸ Petitioner here

⁷ To the extent that Petitioner appears to argue that her Act 534 benefits were improperly terminated in the past, the proper time for her to have challenged the change in her disability status and suspension of her Act 534 benefits would have been at that time.

⁸ In Squire, the appellant received a letter stating that her Act 534 benefits would be terminated within thirty days of the date of the letter and that she could appeal the decision to terminate. Id., 696 A.2d at 256-57. After thirty days had passed, the appellant's employer, a state hospital, terminated her Act 534 benefits without holding a hearing. Id. The appellant filed an appeal, which was dismissed as untimely because it was not filed within thirty days of the letter announcing the termination of the benefits, even though the appeal was filed within thirty days of the actual termination of benefits. Id. at 257. This Court reversed, holding that the unilateral termination of benefits, i.e., terminating benefits without a pre-deprivation hearing, resulted in a denial of due process. Id. at 259.

received notice of the denial of her reinstatement request and an opportunity to be heard had she followed through with her appeal.

For the foregoing reasons, we: (1) grant the Department's Motion to Strike certain parts of Petitioner's brief for being outside of the record as indicated in the above opinion; (2) deny the Department's request to quash Petitioner's Petition for Review in its entirety; and (3) affirm the order dismissing Petitioner's Act 534 Appeal.

RENÉE COHN JUBELIRER, Judge

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Petitioner	:	
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v.	:	No. 2193 C.D. 2009
	:	
Department of Public Welfare,	:	
	:	
Respondent	:	

ORDER

NOW, July 28, 2010, we **GRANT** the Department of Public Welfare's (Department) Motion to Strike certain portions of Donna Chapin's (Petitioner's) brief as set forth in the foregoing opinion, and we **DENY** the Department's request to quash Petitioner's Petition for Review. The order of the Secretary of Public Welfare in the above-captioned matter is hereby **AFFIRMED**.

RENÉE COHN JUBELIRER, Judge

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BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE PATRICIA A. MCCULLOUGH, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

DISSENTING OPINION
BY SENIOR JUDGE KELLEY

FILED: July 28, 2010

I respectfully dissent.

The certified record in this case does not support the Majority's conclusion that Petitioner abandoned her Act 534 Appeal. The Rule to Show Cause specifically directed both Petitioner and her counsel, by name, to respond within thirty days. In addition, there is absolutely nothing in the certified record of this case which shows that counsel withdrew from representing Petitioner after the Rule was issued, and before the BHA issued its Final Order dismissing Petitioner's Act 534 Appeal. Thus, the certified record demonstrates that Petitioner's counsel utterly failed to respond to the Rule, as directed by the ALJ, and denied Petitioner the

opportunity to proceed with her Act 534 Appeal based upon counsel's inexplicable inaction. It is clear that the Secretary abused her discretion in denying Petitioner's request for reconsideration where, as here, Petitioner's counsel acted in such a negligent and incompetent manner to Petitioner's prejudice.¹

¹ See, e.g., Bickel v. Workmen's Compensation Appeal Board (Williamsport Sanitary Authority and Hartford Insurance Group), 538 A.2d 661, 663-664 (Pa. Cmwlth. 1988) ("In the case of *Johnson v. Workmen's Compensation Appeal Board*, [321 A.2d 728 (Pa. Cmwlth. 1974)], this Court held that the substantive due process right to effective assistance of counsel is not applicable to civil or administrative proceedings. Judge, now President Judge, Crumlish also wrote in that opinion, however, that '[t]his is not to suggest that – though not constitutionally mandated – a proven incompetency of counsel could not constitute "cause shown" under Section 426 [of the Workers' Compensation Act (Act), Act of June 2, 1915, P.L. 736, as amended, 77 P.S. § 871,] which would permit the Board to exercise its statutory discretion in granting a rehearing.' *Id.* at [730]. Rehearing was not granted in *Johnson*, and no abuse of discretion found, because it was determined that the attorney's conduct in that case did not amount to incompetence. Upon reviewing the record in the instant case, including the medical records which were conditionally admitted into evidence at the April 12, 1984, hearing, we can find no reasonable explanation for counsel's actions. The referee, opposing counsel and Petitioner all expected Petitioner's counsel to present medical testimony. As mentioned earlier in this opinion, he repeatedly stated that he would do so. Of course, Petitioner's counsel never did present this testimony, and no reason for his failure appears in the record before us. Reviewing the record of Petitioner's pro se appeal to the Board, it appears that this situation came as a surprise to Petitioner and that he discharged his counsel for that reason. It is quite apparent that the presentation of this evidence was Petitioner's only means of medical proof of his injury, his disability and the causal connection between his work-related injury and his disability. Mindful that the Act's provisions are remedial in nature and are to be liberally construed, *Builders Exchange, Inc. v. Workmen's Compensation Appeal Board*, [439 A.2d 215 (Pa. Cmwlth. 1982)], we are of the opinion that the Board abused its discretion when it did not order a rehearing to give the Petitioner the opportunity to show that medical evidence was available which was not presented due to his counsel's negligence. If the Board is satisfied that those are the true circumstances, it then shall proceed to redetermine the Petitioner's claim in light of the evidence.") (footnotes omitted).

Accordingly, unlike the Majority, I would reverse the Secretary's order denying Petitioner's request for reconsideration of the BHA's Final Order, and remand the matter for a hearing on the merits of Petitioner's Act 534 Appeal.

JAMES R. KELLEY, Senior Judge