U.S. Department of Labor

Office of Administrative Law Judges
90 Seventh Street, Suite 4-800
San Francisco, CA 94103-1516

(415) 625-2200
(415) 625-2201 (FAX)

Issue Date: 22 December 2017

Case No. 2012-STA-00059

In the Matter of:

BENJAMIN HECKMAN,
Complainant,

v.

M3 TRANSPORT, LLC; SLT EXPRESS WAY, INC; LYONS CAPITAL, LLC; ROADMASTER GROUP; ROADMASTER SPECIALIZED, INC.; & ROADMASTER TRANSPORTATION, INC.
Respondents.

ORDER OF DISMISSAL

This case arises under the employee protection provisions of the Surface Transportation Assistance Act and its implementing regulations.[1] The case has been pending at the Department of Labor for more than seven years since Complainant filed an OSHA complaint. It has been in litigation at this Office since 2012. Complainant retained lawyers earlier in the litigation, but they have withdrawn, and Complainant has represented himself since September 11, 2013.

In February 2014, Complainant experienced a series of transient ischemic attacks ("mini-strokes"). He began filing a great many motions – almost all without merit – and generally litigating in a vexatious manner.

Judge Dorsey was then the presiding administrative law judge. He did not learn of Complainant's mini-strokes until nearly two years later. At that time, he required Complainant to submit a doctor's statement about Complainant's condition, including how it affected his ability to represent himself. That statement and records of Complainant's Social Security disability benefit application left Judge Dorsey doubtful about whether Complainant was able to continue representing himself, especially given the accommodations he said he needed and the disruptive litigation tactics in which he had been engaging after the mini-strokes.

The case was reassigned to the undersigned after Judge Dorsey retired at the end of 2016. I reviewed the file and became concerned as Judge Dorsey had. Reviewing the applicable law, I determined that I must give Complainant an opportunity (1) to update the evidence about his

[1] 49 U.S.C. § 31105; 29 C.F.R. Part 1978.

medical impairments and his ability to represent himself, and (2) to address whether it was necessary for me to appoint a guardian *ad litem*. Complainant opposed the appointment of a guardian *ad litem.* He submitted a supplemental medical opinion. But this update only added to my concern that Complainant was unable to represent himself. I also was concerned – as was Judge Dorsey – that to allow Complainant to continue to represent himself could have due process implications for the defense. Opposing Complainant's views, Respondents argued that the appointment of a guardian *ad litem* was necessary.

I decided that Complainant was not able to represent himself and that, under applicable law, I was required to appoint a guardian *ad litem.* I issued an order explaining my decision and requiring Complainant to cooperate in the selection and appointment of the guardian. I warned Complainant that, if he failed to cooperate, I would dismiss the case.

Complainant filed two responses. But he refused to cooperate in the appointment of a guardian *ad litem.* Instead, he re-argued his contentions about why a guardian is unnecessary.

I conclude that Complainant's lengthy period of self-representation has been vexatious and costly for the defense and excessively expended the limited resources of this Office, has (for a long time) precluded the case from progressing to hearing, and will (according to Complainant) require accommodations that would place an undue hardship on this Office and on Respondents and that ultimately would deprive Respondent of due process. Under the circumstances, I conclude that, owing to Complainant's recalcitrance, this matter cannot progress to a fair hearing, and I am left with no viable option but to dismiss it.

Facts and Procedural History

Complainant filed an administrative complaint with the Occupational Safety & Health Administration on June 21, 2010. He alleged that about two months after he was hired, his employer terminated the employment on February 10, 2010, in retaliation for his reporting certain safety issues. On August 13, 2012, OSHA issued findings favorable to Complainant.[2] Respondents (or some of them)[3] filed objections and requested a hearing before an

[2] OSHA corrected typographical errors in a letter issued August 22, 2012.

[3] The named Respondents at the time were M3 Transport, LLC; SLT Express Way, Inc.; Lyons Capital, LLC; and Roadmaster Group. OSHA found that an entity to which it referred as Express Way Group hired Complainant in December 2009, and that Express Way Group operated through three companies: M3 Transport, LLC; SLT Expressway, Inc.; and M30 Transport, LLC.

Changes in ownership of these companies led to a need to identify and join successors-in-interest. According to OSHA, after the termination of Complainant's employment, all three of the Express Way Group operating companies became wholly-owned subsidiaries of SLT Secured Systems, LLC. On July 29, 2011, Lyons Capital, LLC foreclosed on the assets of SLT Secured Systems, LLC. According to OSHA, Lyons Capital, LLC formed "Roadmaster Group," which operated through four companies: SLT Expressway, Inc.; Roadmaster Specialized, Inc.; Roadmaster Transportation, Inc.; and Roadmaster Equipment Leasing, Inc.

Complainant has filed a number of motions, some meritorious and some not, to join a various respondents. Now, more than five years into the litigation, he continues to file these motions.

administrative law judge. On September 12, 2012, OSHA transferred the case to the Office of Administrative Law Judges for adjudication.

The case was assigned to Judge Dorsey of this Office on October 24, 2012. The Department of Labor had discretion to prosecute the case but declined in a letter filed on November 5, 2012. Complainant thus proceeded into the litigation as a private party.

Attorney Paul Taylor appeared on Complainant's behalf on November 30, 2012. Mr. Taylor might be the most experience attorney in the country who specializes in the representation of complainants on cases under the Surface Transportation Assistance Act. He withdrew two weeks after appearing. He stated only that there had been a mistake and that Complainant in fact had not retained him. On Complainant's motion, Judge Dorsey stayed discovery to give Complainant time to retain counsel.

On February 19, 2013, attorneys Dennis Wilenchick and John Wilenchick appeared on Complainant's behalf. After conferring with all counsel, Judge Dorsey set the matter for a hearing in Phoenix, Arizona to begin nearly a year later, on January 21, 2014. All parties at that time were located in Arizona, and that is where the employment had taken place. Complainant's attorneys promptly served initial disclosures on his behalf and began discovery.

At the parties' request, this Office provided a settlement judge who mediated the case in June 2013. The mediation was unsuccessful. Within two months, Complainant's attorneys withdrew from the representation on or about September 11, 2013. On Complainant's motion, Judge Dorsey again stayed discovery to allow Complainant time to retain another attorney. He vacated the hearing scheduled for January 21, 2014.

Despite the discovery stay, on October 7, 2013, Complainant propounded 41 requests for admissions as well as interrogatories and requests for production. Respondents answered the requests for admission and objected to the remaining discovery demands.

On February 3, 2014, Complainant notified Judge Dorsey that he was no longer trying to find counsel and would be representing himself. A week later, Judge Dorsey lifted the discovery stay and required that by May 1, 2014, the parties report on when they would be ready for a hearing.

On the day Judge Dorsey lifted the discovery stay, Complainant propounded another set of requests for admission, this time numbering a remarkable – and outrageous – 491 separate requests. Complainant also again propounded the interrogatories and requests for production to which Respondents had earlier objected. One of the interrogatories required that, for each request for admission that the answering party did not admit, the answering party must state all facts on which it based its denials. The interrogatory effectively required answers to as many as 491 separate contention interrogatories – one for each request for admission.

On a defense motion, Judge Dorsey relieved the answering parties of any obligation to answer this discovery. In an order issued on February 24, 2014, he limited Complainant to a total of 50 requests for admission and 50 interrogatories. He stated that, if Complainant persisted with the interrogatory demanding the answering parties' contentions as to each of 50 requests for

admission, it would count as 50 interrogatories and would exhaust the limit on the number of interrogatories Complainant was permitted to propound.

By the time of this order, two changes had occurred in Complainant's condition. First, he had moved from Arizona to Massachusetts. He notified this Office of his changed address.

Second, and more consequentially, Complainant had sustained a series of transient ischemic attacks. These "mini-strokes" impaired Complainant's cognition and memory in a way that, in time, would lead the Social Security Administration to determine that he could no longer work as a truck driver or do any other substantial gainful activity and that he was entitled to Social Security Disability benefits.

As best I am able to discern, Complainant did not disclose the disabling mini-strokes to Judge Dorsey for the better part of two years. He only disclosed his condition to the ALJ to support a series of motions, in which he sought to relocate the hearing and to be accorded a wide range of unusual accommodations at the hearing itself. I will return to Complainant's disability and the cognitive and memory impairments it entails. But first I will describe the difficulties that arose as Complainant continued to represent himself despite the impairment that was, for the time, still unknown to Judge Dorsey.

Complainant revised his discovery requests consistent with Judge Dorsey's limiting order, and Respondents answered the discovery. The litigation then appears to have been relatively quiet for nearly a year.

In May 2015, Complainant filed a motion to expedite the hearing and to change its location to the locale in Massachusetts to which he had moved. He offered no explanation other than that he had moved.

Judge Dorsey denied both requests. He held that the applicable regulation required him to "consider the convenience and necessity of the parties and the witnesses in selecting the . . . place of the hearing." 29 C.F.R. § 18.40(b). Everything related to the case was located in the Arizona, except for Complainant, who had moved away. Complainant said nothing in the motion about any difficulty traveling or any other impairment or disability that would keep him from attending a hearing in Phoenix. He mentioned no other accommodation he might need at the hearing. What little he did offer failed to meet the regulatory requirements for a change in the location of the hearing. As to expediting the hearing, Complainant offered no basis addressed to the applicable regulatory standard in 29 C.F.R. § 18.42.

In the following month, the parties filed cross-motions for summary decision. Judge Dorsey set a briefing schedule. Respondents promptly moved to strike Complainant's motion because Complainant had submitted no evidence to support it. Only then did Complainant submit a declaration addressed to the facts. Before Respondents had an opportunity to respond to the declaration, Complainant filed another motion, asking Judge Dorsey to grant summary decision because Respondents had not opposed his motion. Judge Dorsey allowed Respondents time to respond to Complainant's motion as amended with the declaration Complainant had filed.

But before Judge Dorsey could rule on either of the parties' cross-motions, Complainant filed a second and separate motion for summary decision.

On September 23, 2015, Judge Dorsey denied all of the motions for summary decision, including both of Complainant's motions. He included in his detailed order the following:

> Complainant misunderstands how summary decision works. Even if the Respondents submit nothing, he cannot win on summary decision unless he shows there is *no* genuine dispute of material fact and that *he is entitled to judgment as a matter of law*. He cannot win unless he proves [that] each element of his claim is not subject to dispute.

Order Denying Motions (Sept. 23, 2015) at 2 (emphasis in original). Judge Dorsey found, for example, that Complainant offered no evidence to link his protected activity to any discipline or the termination from employment.

Commenting on Complainant's second motion for summary decision, Judge Dorsey wrote:

> The filings in the case have gotten out of hand. The Complainant went so far as to file a second motion for summary decision before [I] had decided the first, not to mention the completely unnecessary separate request that I consider his first motion for summary decision . . . . I will not entertain serial motions for summary decision from one party. I have already denied two motions for summary decision from the Complainant. He may file no other.

Id. at 6.

Undaunted, Complainant wrote to Judge Dorsey, asking him to clarify his order and other pending issues. He also asked Judge Dorsey to reconsider the summary decision and the motion to expedite the hearing and move it to Massachusetts. Finally, he filed a motion to compel discovery.

On November 16, 2015, Judge Dorsey issued an order in which he explained relevant procedural, evidentiary, and other aspects of the litigation. He summarily declined to reconsider either of Complainant's motions for summary decision. As to the expedited hearing, Judge Dorsey observed that Complainant was filing a succession of motions to compel, that this necessarily meant that discovery was incomplete, and that a hearing could not be set until the parties were ready. On Complainant's motion to compel, Judge Dorsey denied the motion as to 20 of the 21 discovery demands on which Complainant sought additional production.

Finally, and most relevant here, Judge Dorsey observed that, on reconsideration about the location of the hearing, Complainant had, for the first time, disclosed the series of transient ischemic attacks that he'd sustained well over a year earlier, in February 2014. But, as Complainant offered neither proof of the medical incidents nor a doctor's opinion that he could not travel, his motion to change the location of the hearing was still inadequately supported.

A month later, on December 22, 2015, Judge Dorsey had to address four more motions. One of these was Complainant's third request to change the location of the hearing. This time, Judge Dorsey issued no order but indicated that *he was inclined* to conduct the hearing by telephone (with Complainant in Massachusetts, Respondents in Phoenix, and Judge Dorsey in San Francisco) in 8-hour per day segments. He gave Respondents 14 days to object. He stated that if there was a need to adjust the plan to spend 8 hours on the phone each day, he would address it when the need arose. Ultimately, Judge Dorsey did not issue an order regulating how the hearing would be conducted.

Addressing a defense motion, Judge Dorsey concluded that Respondents had to be protected against the cost of responding to those of Complainant's many motions that were transparently without merit. Judge Dorsey found that: "Pre-trial litigation in this matter has grown excessive." He ordered that Respondents need not respond to any of Complainant's motions unless ordered to respond. Judge Dorsey stated that he would not decide a motion adversely to Respondents without giving them notice and an opportunity to oppose the motion.[4]

Less than a week later, on December 28, 2015, Judge Dorsey decided another of Complainant's motions. He denied Complainant's request for sanctions concerning discovery demands Complainant had propounded into "comparable pay."

On January 28, 2016, Judge Dorsey denied Complainant's frivolous motion to take Respondents' default. He observed that the Respondents were actively involved in the litigation and that there were disputed issues. He repeated that the filings had "gotten out of hand." He also ordered Complainant to stop changing the case caption on his filings; the ALJ controls the case caption, and changing it requires a motion. Nonetheless, Complainant continues to do this and currently has been adding footnotes to the caption.[5]

Complainant next purported to renew his previously denied motion for sanctions concerning his discovery demands about "comparable pay" of workers similarly situated. On February 23, 2016, Judge Dorsey denied the motion, finding that he cannot order Respondents to produce documents that they've shown do not exist.

After several additional filings, Complainant returned to the subject of the location of the hearing. He requested that the hearing proceed, to the extent possible, on written filings; that it be located either near his new residence in Vermont or be done by telephone; and that it be broken into multiple short segments.

In support of this renewed motion, Complainant submitted a Notice of Award from the Commissioner of Social Security. The Notice states that Complainant became disabled within the meaning of the Social Security Act on February 15, 2014, and was entitled to Social Security

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[4] At the time of this order, Judge Dorsey had been a federal ALJ for some 20 years and had previously been a State ALJ. I am familiar with his body of work. This is the one instance in all his years on the bench that he needed to issue an order of this kind.

[5] When filings are not properly captioned, there is a risk that they will not be properly filed and might not come to the attention of the judge – or at least a risk that consideration of the filings might be delayed.

Disability Insurance benefits. It appeared to Judge Dorsey that the Commissioner's determination occurred in October 2015.

In an order issued on July 7, 2016, Judge Dorsey concluded that the Commissioner's determination brought into question whether Complainant "is capable of presenting his case himself, even in short segments, over several sessions." Judge Dorsey added that conducting the hearing in this manner might "impair Employer's ability to defend" the claim. He therefore ordered that Complainant file within 21 days "a statement from a physician or psychologist that explains the specific limitations his condition imposes on his physical or mental ability to travel, to present his case in one session, and to proceed without a lawyer."[6]

Activity in this forum appears to have ceased at this point for more than three months. This occurred when, on or about July 23, 2016, Complainant filed an appeal with the Administrative Review Board. On November 3, 2016, after being briefed, the Board declined interlocutory review and dismissed the appeal. The litigation at OALJ appears to have resumed after that.

Judge Dorsey retired at the end of 2016, and this matter was reassigned to the undersigned ALJ. Complainant promptly resumed filing motions, including a motion to compel discovery (Feb. 21, 2017); a motion to compel compliance with a subpoena (Feb. 21, 2017); a motion to clarify the name of one of the respondents (Feb. 21, 2017); another motion to compel discovery (Feb. 22, 2017); a motion for sanctions (May 5, 2017); a renewed motion for sanctions (May 8, 2017); a motion resubmitting motions (May 24, 2017); a "case briefing" and a motion resubmitting motions (May 31, 2017); and a motion to join corporate officers individually (June 30, 2017). Included in these motions are Complainant's accusations that various persons have suborned perjury and engaged in the falsification of documents. He has moved that I disqualify certain of the parties' representatives.

But my focus has been on the issue Judge Dorsey identified: whether Complainant is capable of representing himself. If Complainant is not able to represent himself, I should not consider the motions he filed until the person who will act on his behalf reviews those motions and determines which, if any, Complainant will continue to pursue. If appropriate, Respondents could then file oppositions to those motions.

Reviewing Complainant's response to Judge Dorsey's Order of July 7, 2016, I found that Complainant did not, as Judge Dorsey required, provide a statement that was from a physician or psychologist. Instead, he submitted a letter dated July 22, 2016, from physician's assistant Natalie Harding. Ms. Harding is Complainant's primary care provider. Nothing in her letter suggests that she has any specialization in the diagnosis, treatment, or progression of transient ischemic attacks, strokes, their sequelae, or any related condition.[7] Complainant also submitted additional Social Security documents to show that he is disabled.

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[6] The order also required Complainant to state whether he remains licensed as a commercial driver. Complainant has not complied with this.

[7] Complainant offered nothing to establish Ms. Harding's education, training, experience, skills, or areas of specialization (if any).

Ms. Harding states in her letter that Complainant and his family told her that Complainant was having mood changes, fatigue, "what amounts to cognitive impairment," and "difficulty processing information." She observed that, in a medical interview, Complainant could not answer multiple questions without becoming tearful, confused, and frustrated, which led to responses that were delayed and "muddl[ed]." Complainant often looked to his wife to answer questions for him. Ms. Harding observed that Complainant's condition left him unable to understand simple questions, such as his address, his phone number, recent events, or questions about his daughter (who was then three years old). Ms. Harding described Complainant as easily fatigued; for example, he needed a nap after emptying the dishwasher. Ms. Harding expected that Complainant would receive further treatment, but she offered no prognosis.

Beyond her observations, Ms. Harding also offered some opinions. She opined that Complainant was unable "to work in a traditional setting" and that "prolonged travel" would cause him additional fatigue and increase his symptoms. Aware that Complainant was requesting (as one option) that the hearing be conducted on the telephone and that it be in one-hour sessions, Ms. Harding opined that: "Teleconferencing may be the best option, and will be appropriate if other participants are aware of [Complainant's] limitations." Ms. Harding offered no explanation for these opinions.

Having considered Ms. Harding's letter, on June 9, 2017, I issued an order requiring Complainant to show cause why I should not find: (1) that he is not competent to testify as a witness, and (2) that he is not able to represent himself. I discussed the applicable legal standards and my views on Ms. Harding's letter and the determination at Social Security. I asked Complainant to submit an updated medical opinion about his ability to testify and to represent himself. I advised him that I might be able to give additional weight to an opinion from a medical provider who specialized in the treatment of persons living after transient ischemic attacks, strokes, or similar events.

Further, I stated that, if Complainant was not able to represent himself, it would be necessary to appoint a guardian *ad litem.* I explained what a guardian *ad litem* was. I suggested that, along with his views on his ability to represent himself, Complainant might also want to nominate someone as his guardian *ad litem* and submit a statement from that person. I told Complainant that he could request a hearing on the issue, and if he wanted a hearing, he must describe the witnesses and evidence he would offer at the hearing. I also allowed Respondents to file a response to whatever Complainant submitted.

Answering the order to show cause, Complainant did not request a hearing on the questions of his ability to represent himself or the need for a guardian *ad litem*. He submitted another letter from Ms. Harding and a letter from his wife, Catherine Lumenello. He also submitted a brief in which he offers no legal argument or authority to bring into question the legal standards that I discussed in the order to show cause.

Physician's Assistant Harding's update letter of June 16, 2017, states that her view on Complainant's ability to testify is unchanged. Turning to Complainant's ability to represent himself, Ms. Harding states that, in her opinion, Complainant can present his case, "but with

accommodation and allowance for additional time to best afford the questioner access to Mr. Heckman's opinion and history of his experiences as they pertain to this case." She adds:

> The request for teleconferencing as a substitute venue for in-person court appearance, as well as the provision of additional time, the support of his wife during questioning, and a modified pace of questioning, would all seem appropriate in assisting anyone interviewing Mr. Heckman about the history of his current condition and legal complaint, in eliciting a good history. Pressured questioning, prolonged time spent answering questions, and lack of support person, would, in my opinion, likely provoke fatigue and stress, possibly leading to confusion.

Harding letter (June 16, 2017) at 1.

Opposing these views, Respondents argued that a guardian *ad litem* is necessary.

In a Second Order to Show Cause (Oct. 20, 2017), I concluded that the litigation could not continue with Complainant representing himself and that I must appoint a guardian *ad litem*. I set out the relevant law, made findings of fact, assigned weight to the evidence, and made credibility determinations. I discussed the purpose and function of a guardian *ad litem*. I will recapitulate some of this in the legal discussion below.

I then ordered Complainant to nominate at least one person to serve as his guardian *ad litem*. I required that Complainant submit a statement from the person, agreeing to serve and making certain representations, such as that the guardian would put Complainant's interests above all others' interests (including his or her own) and would act independently. I advised Complainant that he could nominate one person or multiple persons, given the possibility that some nominees might be ineligible for some reason. I explained what the guardian's responsibilities and authority would be once appointed. I discussed issues concerning pay for the guardian's services. I discussed the possibility that the guardian might retain counsel or a non-attorney representative to represent Complainant in this litigation.

Finally, I cautioned Complainant about the consequences of any failure to comply with the order. As I stated:

> If Complainant fails to comply with this Order, I will dismiss this case. Three attorneys have appeared and withdrawn. Complainant was given considerable time to retain another attorney. Before his transient ischemic accidents, he filed his decision to represent himself. He has continued to be self-represented since then. He cannot continue to represent himself under the terms of this Order and for the reasons stated above. If he is not represented, cannot represent himself, and will not cooperate in the appointment of a person authorized to act on his behalf, the prosecution of the case must be at an end.

Second Order to Show Cause at 13-14.

Complainant filed two written responses, the second of which was untimely.[8] He does not nominate any person to be his guardian *ad litem*, nor does he submit any of the required statements to support such a nomination. He does not state or suggest that he made diligent efforts to identify someone who would serve but was unsuccessful, or that he made any effort whatever to comply with the Second Order to Show Cause. He did not ask for additional time to comply.

Instead, in both filings, he disputes the findings of fact in the Second Order to Show Cause and the propriety of the order requiring the appointment of a guardian *ad litem*. Had Complainant raised those arguments *and also complied with the order*, that would have presented different circumstances, but he did nothing whatever to comply.[9]

Discussion

Complainant requires a guardian ad litem. The capacity of an individual to sue without a representative is determined by the law of the individual's domicile. FED. R. CIV. P. 17(b)(1).[10] Even in criminal cases, the right of self-representation is not absolute. *Indiana v. Edwards*, 554 U.S. 164, 171 (2008). Judges may "take realistic account of the particular defendant's mental capacities by asking whether a defendant who seeks to conduct his own defense at trial is mentally competent to do so." *Id.* at 177-78.

Thus, in *Edwards*, the Supreme Court cited with approval the undisputed view of the American Psychiatric Association that "'[d]isorganized thinking, deficits in sustaining attention and concentration, impaired expressive abilities, anxiety, and other common symptoms of severe mental illnesses can impair the defendant's ability to play the significantly expanded role

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[8] "Objection to the Court's Declaration of Complainant's Incompetency (*i.e. Second Order to Complainant to Show Cause*)," filed November 13, 2017; and "Addendum to Complainant's November 7, 2017 *Objection to the Court's Declaration of Complainant's Incompetency* (*i.e. Second Order to Complainant to Show Cause*)," filed November 21, 2017.

[9] I decline to construe Complainant's filings as a motion for reconsideration of the determination that a guardian *ad litem* be appointed. Generally, motions for reconsideration are not aimed at providing a "second bite at the apple." *Bhatnagar v. Surrendra Overseas, Ltd.*, 52 F.3d 1220, 1231 (3rd Cir. 1995) (forum *non conveniens*). "Whatever other circumstances may justify reconsideration, mere presentation of arguments or evidence *seriatim* does not." *Id.* "Reargument 'should not be used as a means to argue new facts or issues that inexcusably were not presented to the court in the matter previously decided.'" *Id.* (citation omitted). "It is not the purpose of allowing motions for reconsideration to enable a party to complete presenting his case after the court has ruled against him. Were such a procedure to be countenanced, some lawsuits really might never end, rather than just seeming endless." *Frietsch v. Refco. Inc.*, 56 F.3d 825, 828 (7th Cir. 1995) (Posner, C.J.).

Nonetheless, I address in the discussion section in the text below the arguments Complainant raised in these filings, and I conclude that they are without merit. *See* discussion at 15-16 below. Thus, even were I to accept the filings as a motion for reconsideration, I would deny the motion.

[10] I rely on the Federal Rules of Civil Procedure as follows: In cases under the Surface Transportation Assistance Act, procedures for litigation before an administrative law judge are set out at 29 C.F.R. Parts 1978 and 18. *See* 29 C.F.R. § 1978.100(b). If the Act's implementing regulations at 29 C.F.R. Part 1978 do not establish a particular procedure, this Office's general procedural rules apply. *See* 29 C.F.R. § 1978.107(a). If the general rules also are silent about a particular procedure, we apply the Federal Rules of Civil Procedure. *See* 29 C.F.R. § 18.10(a). As the Surface Transportation Assistance Act, its implementing regulations, and our general procedural rules all are silent about capacity to sue as a self-represented party, I look to the Federal Rules of Civil Procedure.

required for self-representation even if he can play the lesser role of represented defendant.'" *Id*. at 176.

> A minor or an incompetent person who does not have a duly appointed representative may sue by a next friend or by a guardian *ad litem*. The court must appoint a guardian *ad litem*—or issue another appropriate order—to protect a minor or incompetent person who is unrepresented in an action.

FED. R. CIV. P. 17(c)(2).

There is no indication that Complainant's condition is a "mental illness," but his cognitive and memory impairments and other symptoms are the same as those to which the Supreme Court referred in *Edwards*. The record – including Physician Assistant Harding's observations and her reports of Complainant's family's observations – shows these impairing symptoms.

For the present purposes, I give considerable weight to Ms. Harding's observations. As a physician's assistant she should be a trained observer about the condition of patients whom she sees. She stated that Complainant's family reported observations similar to those Ms. Harding personally made during a medical interview. The symptoms include mood changes; fatigue; cognitive impairment; difficulty processing information; an inability to answer questions clearly and without delay; needing to rely on his wife to answer questions for him; an inability to understand simple questions (such as his address and phone number, recent events, or questions about his young daughter); and fatigue (including the need to nap after minor effort such as emptying a dishwasher).

Unlike the weight I assign to Ms. Harding's observations, I give little weight to her opinions. Ms. Harding is not a neurosurgeon, a neurologist, a psychiatrist, a psychologist, or a person who specializes in the rehabilitation of persons who are living after a stroke, a series of mini-strokes, or any similar condition. She is not a medical doctor or a mental health professional. She said nothing in her letter to establish any specialization or expertise in these areas of medicine or psychology. She does not even say how long she has been practicing as a physician's assistant.[11]

Moreover, from Ms. Harding's opinions about Complainant's ability to represent himself, it is certain that she has no expertise in what is required to present a case at an adversarial hearing in a courtroom. In her updated letter, Ms. Harding does not recant her initial observations that Complainant cannot remember simple facts such as his address and phone number and often must rely on his wife's recollection. She does not recant any of her other observations about Complainant's impairments. She continues to emphasize that Complainant would need his

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[11] Even were I to give weight to Ms. Harding's opinion, for example, on the travel question, she opined that Complainant cannot do "prolonged" travel, but she does not define what she means by "prolonged," nor does she specifically opine that Complainant could not travel to Phoenix. There are flights between Burlington, Vermont and Phoenix that take less than seven hours.

Complainant himself offers no evidence concerning what travel he has done since February 2014, when he had the transient ischemic attacks. He offers nothing to suggest that he has attempted to travel and found himself unable to do so. He offers nothing from the physician who treated him for the strokes to suggest that he cannot travel if, for example, his wife accompanies him.

wife's support when answering questions at a hearing. She believes all of these must be accommodated if Complainant is to present his case.

But, when a person is testifying, he or she must answer multiple questions. Ms. Harding observed that, even in a medical interview, Complainant could not do this without becoming tearful, confused, and frustrated, which led to responses that were delayed and "muddl[ed]." Muddled answers are insufficient and would lead to multiple follow-up questions that, if Ms. Harding is correct, would serve only to confuse and frustrate Complainant more.

Ms. Harding's comments about Complainant's requiring his wife's support while answering questions is vague, but to the extent it means that Complainant might need to consult with his wife about the answer (as Ms. Harding observed Complainant often did), that would be impermissible at an evidentiary hearing: A witness must provide independent testimony based on his or her own recollection of events, not the surmises of a spouse. No accommodation will help if Complainant's memory is so compromised that he cannot remember his address or phone number and must depend on others to answers questions for him. After all, the greater part of the evidence at the hearing will concern events that occurred during a two-month period in early 2010, a time so long ago that even witnesses with intact memory would have some – and perhaps considerable – difficulty remembering.

These same limitations, in my view, mean that Complainant is unable to represent himself. As the Supreme Court held, symptoms such as Complainant's, even if they would not preclude his playing "the lesser role of represented defendant," "can impair [his] ability to play the significantly expanded role required for self-representation." *Edwards, supra*, 554 U.S. at 176. Whistleblower cases are technical, complicated, involve multiple witnesses and documentary exhibits, and often require responses to difficult motions (pre-trial and post-trial). Relevant questions focus on contributed to decisions people made. This questioning can be probing and personal – even accusatory.

This case is further complicated because of the multiple respondents. Multiple lawyers will be voicing separate objections to evidence, offering arguments, and examining witnesses. As in any case, Complainant will need to offer argument that is grounded in the law and facts.[12] He will have to comply with procedural rules, orders of the administrative law judge, and the formalities of a courtroom. He will have to present witnesses without extended delay, given the cost and inconvenience that delay would impose on other parties and witnesses and the burden delay would impose on this Office's limited resources.

Complainant presents with the symptoms that the *Edwards* court found crucial to a determination that a party cannot represent himself: "'[d]isorganized thinking, deficits in sustaining attention and concentration, impaired expressive abilities, anxiety, and other common symptoms." One source of this finding is the observations Ms. Harding made. Also relevant are the Social Security findings. A third source of relevant information is the course of the litigation as Complainant has managed it since his mini-strokes.

[12] *See* 29 C.F.R. § 18.35.

I am unpersuaded that the accommodations Ms. Harding suggests would address Complainant's difficulties, and I do not believe the accommodations, taken as a whole, are consistent with due process. Ms. Harding's opinion about an accommodation that would work reflects an absence of expertise about the demands put on a person presenting a case at a trial. And, as I stated, I am unconvinced that Ms. Harding has even the medical expertise to opine meaningfully on what accommodations Complainant would need to put on an adversarial hearing.

In particular, how can a person so impaired that he cannot competently testify for the reasons stated above be able effectively to cross-examine witnesses, present the testimony of even supportive witnesses, argue points of law, respond to evidentiary objections, identify the documentary evidence to support his contentions, exercise judgment about motions to file or raise at the hearing, file memoranda of points and authorities on legal and factual issues, follow a judge's orders, and respect a judge's rulings? He cannot.

Moreover, parties cannot be asked to have witnesses and counsel ready and present for weeks and weeks of daily, one-hour sessions. Complainant's direct and cross-examination alone could take two weeks of daily one-hour sessions to complete.[13] Nor can cross-examining opposing counsel be required not to ask questions that, simply because of their number or persistence, might leave Complainant in tears. To the contrary, opposing counsel cross-examining a party at a trial must be allowed considerable latitude to challenge the testimony and impeach the party. Even an ordinarily able party witness generally finds cross-examination stressful for these reasons. But due process requires it, for we depend on effective and rigorous cross-examination to elicit the truth and to give each party a fair opportunity to present evidence.

Much as Judge Dorsey found, I agree that the Social Security records show that Complainant has been disabled within the meaning of that Act since the time of his mini-strokes in mid-February 2014. This means that Social Security concluded that Complainant has been unable to perform any of the work he performed at any time since 2000 in the manner in which he previously performed it.[14] It also means that Social Security concluded that Complainant is unable to engage in any other substantial gainful employment in the geographical areas where he was living at the time of the determination to pay him benefits.[15]

The history of the litigation also supports an inference that Complainant is unable or at least is having difficulty complying with the administrative law judge's orders, exercising judgment in deciding what motions to file and what discovery to seek, and preparing his case for a hearing.

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[13] Breaks between sessions would allow witnesses to be coached or at least to discuss their testimony with others before the testimony resumed after each adjournment. This could partly be addressed with an order directing witnesses not to discuss their testimony with others. Orders to sequester witnesses generally are granted on any party's request. But the more adjournments that occur, the more difficult it is for the order to be effective, as people tend to discuss with others matters of interest to them, especially when their ability to meet with others outside the courtroom is not limited.

[14] For this purpose, the Social Security Administration looks back 15 years, and it reached its conclusion in 2015.

[15] In 2014 when Complainant became disabled, employment was substantial and gainful for purposes of Social Security disability benefits if it paid $1,070 or more per month. The minimum has increased each year since then. It currently is $1,170 per month. *See* https://www.ssa.gov/OACT/COLA/sga.html.

In view of the behavior Ms. Harding observed, the decision of the Social Security Administration, and the course of the litigation thus far, I concluded that Complainant is unable to represent himself and therefore needs a guardian *ad litem* if the litigation is to continue.

Complainant's arguments against a guardian ad litem are without merit. In his written responses to the Second Order to Show Cause, while failing to meet the Order's requirement that he nominate a guardian *ad litem*, Complainant raises several arguments against the appointment. The arguments lack merit.

First, Complainant argues that I have not met with or spoken to him and thus cannot evaluate his ability to represent himself. But the initial Order to Show Cause offered Complainant a hearing on the issue if he asked. His choice not to request a hearing waived the opportunity to be heard in person. He cannot complain now that he never had a chance to present his evidence and arguments in person.

Second, Complainant argues that the Americans with Disability Act requires the Department of Labor to accommodate him. Even assuming the application of that Act, the Act requires only a reasonable accommodation that would not cause undue hardship. As I held above, the accommodations that Complainant apparently requires would impose a hardship sufficient to deprive Respondents of due process (not to mention the demands on this Office's resources). There is no requirement that this Office go that far to accommodate any party. Moreover, Complainant neglects that the applicable rules supply the appropriate accommodation: It is the appointment of a guardian *ad litem*. *See* FED. R. CIV. P. 17(c)(2), and cases cited above. That is precisely what I ordered.

Third, in a previous order, I observed that Complainant's use of legal terms throughout his filings suggest that someone with at least some exposure to the law is assisting him. I made this observation as part of a suggestion that, as Complainant apparently trusts this person's advice, he might want to nominate this person as his guardian *ad litem*.

Complainant now argues that he "has personally signed all filings that have been submitted under his name," and thus he "is fully responsible for their content." So far – so good. But Complainant then asserts that this means he should be credited with the ability to draft these papers. On the contrary, Complainant does not state that he drafted any of these papers; he states only that he signed them. In addition, I did not mean to suggest that the papers are well-drafted, persuasive, or even present non-frivolous arguments. I meant only, as I stated at the time, that Complainant apparently trusted the advice of the person who drafted the papers for him and might want to nominate this person as a guardian *ad litem.*

Finally, Complainant argues that, without due process, I have "declared [him] mentally incompetent." On the contrary, Complainant has been accorded due process on this issue. He was given notice that it was an issue (including an extensive explanation of the reasons and the legal considerations), an opportunity for an in-person hearing (which he chose not to pursue), and in fact was heard when he filed a number of briefs and exhibits addressed to the issue, all of which I considered and addressed in my findings and orders.

In addition, Complainant has an exaggerated the finding that I made about his impairments and his abilities. I have determined that Complainant's impairments leave him unable to represent himself in this case. I have not held or even suggested that he is generally mentally incompetent in the sense that he needs a court-appointed conservator to manage his ordinary needs. I have not suggested that he is unable to enter into a contract, marry, divorce, travel, move, or generally make decisions for himself. I have determined nothing that, as he posits, could jeopardize his right to vote, bear arms, drive a car, or maintain custody rights of his child.

As the Supreme Court held in *Edwards*, some people are able to participate as a party in litigation but only when represented by others.[16] My holdings here are consistent with that and decide nothing more; indeed, the idea was to accommodate Complainant so that he could pursue the litigation with the support and direction of, not just any guardian *ad litem*, but of a guardian *whom he chose*. The recognition of Complainant's right to select the guardian is the opposite of how a court would manage the rights of a person who was, for all purposes, mentally incompetent.[17]

The dismissal. Congress has authorized administrative law judges to regulate the course of hearings and act to assure the soundness of the factfinding.[18] Administrative law judges also have inherent authority to control the cases before them.[19] The "right of access to the courts is neither absolute nor unconditional, and conditions and restrictions on each person's access are necessary to preserve judicial resources for all other persons."[20] "Vexatious law suits threaten the availability of a well-functioning judiciary to all litigants."[21] The authority to dismiss a case

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[16] Similarly, a person's capacity to stand trial in a criminal case differs from his competence to represent himself. *See, e.g., State v. Connor*, 292 Conn. 483, 2009 WL 1941780 (Conn. 2009).

[17] Complainant makes much about the Social Security Administration's appointment of a representative payee to receive Complainant's disability payments on his behalf. When Judge Dorsey observed the evidence of a representative payee in papers Complainant submitted, he noted that, under applicable Social Security regulations, this reflects a finding that Complainant is incapable of managing or directing the management of his benefits payments, citing 42 C.R.F. § 404, subpart U. I expressed concern that, as any potential settlement of this litigation would require Complainant to make important financial decisions, his need for a representative payee was another sign that a guardian *ad litem* might be needed, especially if he did not have the advice of an attorney or non-attorney representative.

Complainant responded that Social Security did not *require* him to have a representative payee; it only suggested one. In my view, that was an insufficient response because Complainant (and his wife) *agreed* to have a representative payee. This suggests their agreement with (or at least acquiescence in) Social Security's concern about Complainant's ability to manage his money.

Determined to rebut this finding, Complainant persuaded the Social Security Administration to start paying him directly. I accept this result and do not rely for my holdings here on the past appointment of the representative payee.

[18] 5 U.S.C. § 556(c)(5).

[19] *See Saporito v. Florida Power & Light Co.*, ARB Nos. 09-009, 010, slip op. at 2 (Feb. 28, 2011); *see also, Blodgett v. Tennessee Dep't of Env't & Conservation*, ARB No. 03-138 (Mar. 22, 2004); *Secretary of Labor v. Janssen, Inc.*, 19 F.M.S.H.R.C. 665 (1997).

[20] *Saporito v Florida Power & Light Co.*, ARB Nos. 09-072, 128, 129, 141 (Apr. 29, 2011), citing *Cofield v. Alabama Pub. Serv. Comm'n*, 936 F.2d 512, 516 (11th Cir. 1991) (quoting *In re Green*, 669 F.2d 779, 785 (D.C. Cir. 1981).

[21] *Miller v. Donald*, 541 F.3d 1091, 1096 (11th Cir. 2008).

comes from an administrative law judge's inherent authority to manage and control his or her docket and to prevent undue delays in the orderly and expeditious disposition of pending cases.[22]

Complainant's pattern of vexatious litigation appeared at and after the time of his transient ischemic attacks. It included so many, not only meritless, but actually frivolous motions that Judge Dorsey had to issue an extraordinary order relieving Respondents from any obligation to answer Complainant's motions absent an order requiring them to answer. Complainant's treating health care provider submitted two statements that confirm symptoms that the *Edwards* Court held to be inimical to a party's ability to represent himself. Consistent with this, the Social Security Administration found that the transient ischemic attacks left Complainant debilitated such that he cannot perform enough work to earn about $1,100 per month, if he can perform any work at all.[23]

After Complainant was fully informed and notified about the issue concerning appointment of a guardian *ad litem*, and after he submitted a number of briefs and exhibits that I considered, I ordered Complainant to nominate one or more guardians *ad litem* whom I could appoint so that the litigation could continue consistent with the teachings of *Edwards* and with the due process rights of Respondents. Though Complainant submitted two separate responses to the order, he failed and refused to nominate a guardian *ad litem*. He did not request more time. He did not state that he tried diligently – or at all – to find someone who would act as guardian but was unable to find anyone. Having already been heard, he simply continued to argue against the order, and he failed to nominate a guardian *ad litem*. This was a step he needed to take for the litigation to continue.[24] The Second Order to Show Cause expressly warned Complainant that if he failed to comply with the requirement that he nominate a guardian *ad litem*, I would dismiss the case. Second Order to Show Cause at 13.[25]

Order

Three attorneys have appeared and withdrawn from representation of Complainant. Before he was impaired, Complainant elected to proceed into the litigation representing himself. Complainant is not able to represent himself consistent with Supreme Court authority and with the due process rights of Respondents. He refuses the appointment of a guardian *ad litem* as

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[22] *See Link v. Wabash RR. Co.*, 370 U.S. 626 (1962) (inherent power of district court); *Townsend v. Bigdog Holdings, Inc.*, 2016-SOX-00028 (ALJ Mar. 14, 2006).

[23] *See* the factfinding above for a more precise meaning of the extent of disability required for Social Security to approve disability benefits.

[24] The guardian *ad litem* might have been an attorney or might have engaged an attorney who would provide Complainant the expert assistance and guidance he needs.

[25] "A pro se litigant 'cannot generally be permitted to shift the burden of litigation his case to the courts, nor avoid the risks of failure that attend his decision to forego expert assistance.'" *Pik v. Credit Suisse AG*, ARB No. 11-034, slip op. at 4-5 (May 31, 2012) (quoting *Ray's Lawn & Cleaning Svcs.*, ARB No. 06-112, slip op. at 7-8 (Aug. 29, 2008). "Thus, although an ALJ has some duty to assist pro se litigants, a judge also has a duty of impartiality and must refrain from becoming an advocate for the pros se litigant. In the end, pro se litigants have the same burdens of proving the necessary elements of their cases as litigants represented by counsel." *Id.* at 5 (internal citations omitted).

required in the applicable rules. As the rules and precedent provide no other options, and Complainant points to none, the litigation cannot go forward. Accordingly,

This matter is DISMISSED in its entirety.

SO ORDERED.

STEVEN B. BERLIN
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: https://dol-appeals.entellitrak.com. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1978.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You may be found to have waived any objections you do not raise specifically. *See* 29 C.F.R. § 1978.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, on the Associate Solicitor for Occupational Safety and Health. *See* 29 C.F.R. § 1978.110(a).

If filing paper copies, you must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review. If you e-File your petition and opening brief, only one copy need be uploaded.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and may include an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies. If you e-File your responsive brief, only one copy need be uploaded.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board. If you e-File your reply brief, only one copy need be uploaded.

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1978.109(e) and 1978.110(b). Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. § 1978.110(b).