IN RE B & L PLATING, INC.

CAA Appeal No. 02-08

ORDER DISMISSING APPEAL

Decided October 20, 2003

Syllabus

On April 5, 2002, an EPA Administrative Law Judge ("ALJ") issued a Default Order and Initial Decision ("Default Order"), which found Respondent B & L Plating, Inc. ("B & L") liable for violations of the Clean Air Act and assessed a penalty of $42,600. The ALJ issued the Default Order because of B & L's failure to comply with the ALJ's pre-hearing order.

Several months later, well after the period for seeking reconsideration had run, B & L filed a Motion for Reconsideration of Initial Decision, arguing, in essence, that the ALJ should set aside the Default Order because the penalty was excessive. B & L argued further that, despite the lateness of its filing, it should not be precluded from challenging the Default Order because it did not receive timely notice of the issuance of the Default Order due to the illness of its prior counsel. On August 20, 2002, the ALJ dismissed the Motion for Reconsideration on the grounds that it was untimely and that the ALJ, accordingly, lacked jurisdiction to consider it. B & L's appeal was not filed with the Board until October 18, 2002, although the deadline for filing an appeal was, at the very latest, September 24, 2002.

Held: The Board concludes that B & L's appeal to the Board was untimely under any view of the circumstances, including those most favorable to B & L's position. The appeal itself provides no explanation whatsoever for the late filing with the Board, nor has the Board otherwise found any "special circumstances" that would warrant relaxation of the deadline for filing an appeal in this case. Accordingly, the Board dismisses B & L's appeal as untimely. Moreover, the Board concludes that, even if it were to treat the appeal as timely, it would nonetheless conclude that the ALJ did not under the circumstances err in declining to set aside the Default Order.

Before Environmental Appeals Judges Scott C. Fulton, Ronald L. McCallum, and Edward E. Reich.

Opinion of the Board by Judge Fulton:

I. *INTRODUCTION*

In the proceeding below, Administrative Law Judge Barbara A. Gunning ("ALJ") issued a Default Order and Initial Decision ("Default Order") on April 5, 2002, which found liability on the part of the Respondent in this case — B & L Plating, Inc. ("B & L") — for violations of the Clean Air Act, 42 U.S.C. §§ 7401-7671q, and assessed a civil penalty of $42,600. Several months later, well after the period for seeking reconsideration had run, B & L filed a Motion for Reconsideration of Initial Decision, arguing, in essence, that the ALJ should set aside the Default Order because the penalty was excessive. B & L argued further that, despite its late filing, it should not be precluded from challenging the Default Order because it did not receive timely notice of the order due to the illness of its prior counsel. On August 20, 2002, the ALJ dismissed the Motion for Reconsideration on the grounds that it was untimely and that the ALJ, accordingly, lacked jurisdiction to consider it.

In its appeal before this Board, B & L argues, in effect, that the ALJ erred in dismissing its Motion for Reconsideration. As for relief, B & L seeks either a reduction in the penalty or an opportunity to be heard as to the penalty amount.

As discussed more fully below, B & L did not file its appeal in a timely manner, even if we were to accept its arguments as to the date of service of the Default Order. While the illness or incapacity of counsel can, in appropriate circumstances, excuse out-of-time filings, the alleged illness of B & L's former counsel does not explain B & L's failure to file a timely appeal, and B & L has offered no other cognizable justification for its late filing. Moreover, if we were to treat the appeal as timely, we would nonetheless uphold the ALJ's decision not to set aside default based on the record before us. Accordingly, the appeal is dismissed.

II. *BACKGROUND*

B & L is the owner or operator of a decorative chromium electroplating facility in Warren, Michigan. Default Order at 5. Decorative chromium electroplating is the process by which a thin layer of chromium is electrodeposited on a base metal, plastic, or undercoating to provide a bright surface with wear and tarnish resistance. *Id.* (citing 40 C.F.R. § 63.341). As the owner or operator of such a facility, B & L is subject to national emission standards for hazardous air pollu-

tants ("NESHAP"), promulgated under the Clean Air Act, 42 U.S.C. § 7412.[1] *Id.*

On July 31, 2000, Region V of the United States Environmental Protection Agency ("Region") completed service of its Complaint, alleging violations of the NESHAP for chromium and seeking a penalty of $42,600.[2] B & L's Answer should have been filed by August 30, 2000. 40 C.F.R. § 22.15(a) (an answer must be filed with the Regional Hearing Clerk within 30 days after service of the complaint). Nevertheless, no answer had been filed as of February 13, 2001, when the Region advised B & L's counsel at that time, Kathleen Allender, of its intent to file a motion for default unless B & L filed an answer by mid-March.[3] Ms. Allender finally filed an Answer on B & L's behalf on March 20, 2001, nearly seven months after the due date to respond to the Complaint.[4] The Answer requested the opportunity for a hearing and objected to the penalty amount proposed by the Region.

The ALJ's Prehearing Order, dated April 18, 2001, directed B & L to submit information including the following: (1) names of witnesses and narrative summaries; (2) copies of documents and exhibits intended to be introduced at the hearing; (3) a preferred hearing location; (4) a statement as to why the proposed penalty should be reduced or eliminated; and (5) supporting documentation, such as certified copies of financial statements or tax returns, if claiming inability to pay the proposed penalty or an adverse effect on ability to continue to do business. Prehearing Order at 2-3. The Prehearing Order specified that B & L was to file its prehearing exchange by July 28, 2001. *Id.* at 3. Additionally, the Prehearing Order informed B & L that if it only intended to defend through cross-examination and thus forgo a presentation of direct and rebuttal evidence, B & L was to serve a statement to that effect on or before the date for filing its

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[1] Specifically, B & L is subject to the NESHAP for Chromium Emissions for Hard and Decorative Chromium Electroplating and Chromium Anodizing Tanks, 40 C.F.R. part 63, subpart N. Default Order at 1-2, 5.

[2] Service of a complaint is complete only after the return receipt is signed, but service of all other documents is complete upon mailing or when placed in the custody of a reliable commercial delivery service. 40 C.F.R. § 22.7(c).

[3] Although the letter conveying the Region's intent was not filed with the Regional Hearing Clerk until March 21, 2001, B & L has never contested that it received the letter on or about February 13, 2001.

It is unclear from the record when and how Ms. Allender identified herself as B & L's counsel of record. Nevertheless, the Board has no reason to question the Region's representation that Ms. Allender was B & L's counsel at that time.

[4] B & L's Answer was apparently mailed to the Regional Hearing Clerk on March 15, 2001 (the date B & L typed on the Answer), but was stamped as received by the Regional Hearing Clerk on May 20, 2001. Under the Consolidated Rules of Practice, a document is not "filed" until received by the appropriate Clerk. 40 C.F.R. § 22.5(a)(1).

prehearing exchange. *Id.* at 4. The Prehearing Order concluded by advising the parties that failure to comply with the prehearing exchange requirements, including a statement electing only to rely on cross-examination, could result in a default judgment. *Id.*

In keeping with the Prehearing Order, the Region filed its prehearing exchange on June 27, 2001. The Region's rebuttal prehearing exchange, filed in mid-August of 2001, indicated that B & L had not filed a prehearing exchange as required by the ALJ's Prehearing Order. In fact, B & L never filed a prehearing exchange or statement of intent to defend only through cross-examination.[5] Moreover, B & L has never, either in its filings before the ALJ or before this Board, attempted to explain its utter failure to comply with the ALJ's April 18, 2001 Prehearing Order.

On October 30, 2001, the Region filed a Motion for Default Judgment and served it on Kathleen Allender by certified mail with return receipt requested. Nothing in the record suggests that, at the time the Motion for Default was sent, Ms. Allender had notified the Region, the ALJ, or the Regional Hearing Clerk of any illness, withdrawal from the case, or closure of her office.

On April 5, 2002, the ALJ issued the Default Order finding liability and assessing the Region's proposed penalty of $42,600, an amount the ALJ determined to be appropriate based on the record before her. Default Order at 10-16. Default was found because B & L had not complied with the Prehearing Order and had not shown good cause to prevent the entry of default. *Id.* at 1, 9, 16. The ALJ also noted that B & L's Answer had been delinquent by several months and that this alone could have constituted grounds for default. *Id.* at 8. The Default Order was sent by certified mail, return receipt requested, to Ms. Allender.

On May 21, 2002, B & L's current counsel, Philip Tannian, received a faxed copy of the Default Order from the Region, which was partially unreadable. Motion for Reconsideration of Init. Dec. ¶ 5; Appeal, Ex. 8. Not until June 17, 2002, did the ALJ receive Mr. Tannian's notice of substitution of counsel.[6] Order

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[5] On August 13, 2002, long after the prehearing exchange deadline, B & L did file several documents that fell within its prehearing exchange obligations, those being three financial documents attached to its Motion for Reconsideration. Given that this filing did not include other required prehearing information, such as names of witnesses and narrative summaries, a preferred hearing location, or a statement of intent to defend only through cross-examination, it cannot even arguably be viewed as fully satisfying, even in an untimely manner, B & L's prehearing obligations.

[6] It is unclear from the record when precisely the Region became aware that B & L had a new attorney. As noted by the ALJ, Mr. Tannian's notice of substitution of counsel was undated, and there is no record of his filing this notice with the Regional Hearing Clerk. Order Dismissing Respondent's Motion for Reconsideration of Init. Dec. at 2 n.3. Although Mr. Tannian, in the Motion for Reconsid-

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Dismissing Respondent's Motion for Reconsideration of Init. Dec. at 2. On July 20, 2002, Mr. Tannian received the Default Order by certified mail. Motion for Reconsideration of Init. Dec. ¶ 6.

On August 13, 2002, Mr. Tannian filed a Motion for Reconsideration of Initial Decision, which, in essence, sought to set aside the Default Order. The Motion for Reconsideration challenged the finality of the Default Order based on alleged invalid service of the order. Brief in Support of Defendant's Motion for Reconsideration of Init. Dec. at 1-2. Mr. Tannian indicated there had not been proper service of the Default Order because it had been sent to Ms. Allender, who had ceased representing B & L due to illness. *See* Motion for Reconsideration of Init. Dec. ¶¶ 1-3. In particular, the motion made the following allegation about Ms. Allender's illness:

> After a string of personal tragedies Ms. Allender was unable to continue legal representation in this matter.
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> > * * * Ms. Allender was on personal leave from her law firm for health reasons as of September 1, 2001 and the law firm effectively ceased functioning at this time. Kathleen Allender never returned to her firm.

Id. ¶¶ 2-3. The motion also contended that proper service was not perfected until July 20, 2002, when Mr. Tannian received a legible copy of the order by mail. *Id.* ¶¶ 5-6. In addition, the Motion for Reconsideration challenged the penalty, focusing in particular on the economic benefit, actual harm, and ability to pay penalty assessment factors set forth in the Clean Air Act.[7] Brief in Support of Defendant's Motion for Reconsideration of Init. Dec. at 2-4. As for relief, the Motion for Reconsideration requested the following: reconsideration of the Default Order, withdrawal of the default judgment, the opportunity to be heard as to the economic impact and adverse effect on B & L, and the opportunity to appear and make arguments as to a reasonable penalty. *Id.* at 4.

In an order issued August 20, 2002, the ALJ dismissed the Motion for Reconsideration on the ground that the Default Order had become a Final Order, and therefore B & L's Motion for Reconsideration was untimely and she lacked juris-

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eration, alleged that he "made several attempts to contact [the Region's counsel] regarding the substitution of counsel in this matter in April and May of 2002," he offers no explanation for why his substitution of counsel was not filed until June 17, 2002.

[7] As noted, attached to the Motion for Reconsideration were three of B & L's financial documents.

diction to consider it. Order Dismissing Respondent's Motion for Reconsideration of Init. Dec. at 3 & n.8. In so doing the ALJ concluded, "The claims concerning Ms. Allender's situation and her representation of Respondent are not presented in affidavit form by either Ms. Allender or Respondent, and there is no evidentiary support for these claims."[8] *Id.* at 3. The ALJ observed that the return receipt for the Default Order was "not in the record before me," but noted that the order was not returned to the ALJ's office as undeliverable mail. *Id.* The ALJ also noted that the Motion for Reconsideration did not claim that neither Ms. Allender nor B & L received the Default Order. *Id.* The ALJ's Order Dismissing the Motion for Reconsideration was served on Mr. Tannian on August 20, 2002.

Mr. Tannian did not mail B & L's appeal to the Board until October 3, 2002,[9] and it was not filed with the Clerk of the Board until October 18, 2002. The Region has not filed a response to the appeal.

III. *DISCUSSION*

This administrative civil penalty case was brought pursuant to section 113(d) of the Clean Air Act, 42 U.S.C. § 7413(d). Accordingly, the rules and procedures that govern these proceedings are the United States Environmental Protection Agency's ("Agency") Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits ("Consolidated Rules of Practice"), contained in 40 C.F.R. part 22.[10] 40 C.F.R.

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[8] In a footnote, the ALJ noted, "Attorney Tannian's averments concerning Attorney Allender's representation in this matter are tantamount to a claim of in-competent representation." Order Dismissing Respondent's Motion for Reconsideration of Init. Dec. at 3 n.7.

[9] This fact is evidenced by the postmark on the appeal's envelope.

[10] The Region served B & L with a copy of the Consolidated Rules of Practice as an attachment to the Complaint. In its appeal, B & L, without explanation, alternates between citing to the Consolidated Rules of Practice, part 22, and part 27of Title 40 of the Code of Federal Regulations, the latter of which only applies to Program Fraud Civil Remedies Act ("PFCRA") proceedings. *See* 40 C.F.R. § 27.1. The PFCRA rules contained in 40 C.F.R. part 27 govern the administrative procedures for imposing civil penalties and assessments against persons who make false, fictitious, or fraudulent claims or written statements to the Agency, and they set forth the hearing and appeals rights in such proceedings. *Id.* § 27.1(b) (defining the scope of part 27). There has never been a part 27 claim in this proceeding.

In addition, B & L argues that the Agency is required to adhere to Rule 4 of the Federal Rules of Civil Procedure ("FRCP"), which governs service of process in the federal district courts. While the Board may, in its discretion, refer to the FRCP for guidance when the Consolidated Rules of Practice do not clearly resolve a procedural issue, *e.g.*, *In re Zaclon, Inc.*, 7 E.A.D. 482, 490 n.7 (EAB 1998); *In re Lazarus, Inc.*, 7 E.A.D. 318, 330 & n.25 (EAB 1997); 40 C.F.R. §§ 22.1(c), .4(a)(2), it is well settled that the Agency is entitled to set its own procedural rules and is not required to follow the

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§ 22.1(a), (a)(2) ("These Consolidated Rules of Practice govern all administrative adjudicatory proceedings for: * * * The assessment of any administrative civil penalty under section[] 113(d) * * * of the Clean Air Act * * * .").

The Consolidated Rules of Practice provide in pertinent part as follows:

> *Within 30 days* after the initial decision is served, any party may appeal any adverse order or ruling of the [ALJ] by filing an original and one copy of a notice of appeal and an accompanying appellate brief with the Environmental Appeals Board * * * .

Id. § 22.30(a)(1) (emphasis added). "Filing" occurs when a document "is received by the * * * Clerk." *Id.* § 22.5(a). Where, as here, an initial decision has been served by mail rather than by overnight or express delivery, "5 days shall be added to the time allowed by these [rules] for the filing of a responsive document." *Id.* § 22.7(c).

A. *B & L's Appeal Is Not Timely*

Under the controlling rules, B & L's appeal was clearly untimely under any view of the circumstances at hand, including those most favorable to B & L's position.[11] Specifically, B & L has urged the Board to accept July 20, 2002 — the date B & L's current counsel received a copy of the Default Order by certified mail — as the date of service of the order. If we accept this date as the date of service for purposes of argument,[12] B & L's Motion for Reconsideration of the

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FRCP. *Katzson Bros., Inc. v. EPA*, 839 F.2d 1396, 1399 (10th Cir. 1988) (a service of process case, holding that the Agency is not bound to adhere to the FRCP); *see also* FRCP 1 (defining the scope and purpose of the FRCP). In the case at bar, we find that the Consolidated Rules of Practice provide sufficient guidance. We note also that without specific supporting citations, B & L vaguely asserts that Title 29 of the Code of Federal Regulations requires the Agency to follow the FRCP for purposes of service of process. Appeal, Brief at 2. Title 29 of the Code of Federal Regulations, however, relates to labor matters, not environmental cases.

[11] As a threshold matter, the Board notes that it is not precluded from ruling on B & L's appeal solely by virtue of the May 9, 2002 routine notice from the Clerk of the Board to the ALJ, which observed that the Default Order had become a Final Order because no appeal had been filed and because the Board had not elected to review the case *sua sponte.*

[12] B & L has not advocated any later date for service of the Default Order. Indeed, as reflected by the ALJ's rejection of B & L's Motion for Reconsideration, there is an arguable basis for concluding that service of the Default Order was perfected much earlier. As noted, because of the absence of any affidavit or evidentiary support for B & L's representations regarding the illness of its prior counsel, the ALJ refused to credit prior counsel's circumstances in her analysis. Accordingly, she concluded that service had occurred upon mailing to B & L's prior counsel — on April 5, 2002. Because
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Default Order, filed with the Regional Hearing Clerk on August 13, 2002, would have been timely. *See* 40 C.F.R. § 22.27(c)(3) ("The initial decision of the [ALJ] shall become a final order 45 days after its service upon the parties and without further proceedings unless: * * * A party moves to set aside a default order that constitutes an initial decision * * * ."). Upon the ALJ's August 20, 2002 Order Dismissing the Motion for Reconsideration, the clock would have starting running anew at that point for purposes of filing an appeal. *See id.*; *cf.* 40 C.F.R. § 22.28(b). Accordingly, B & L would have had 30 days after service of the August 20, 2002 dismissal order in which to file an appeal, plus an extra five days, because the ALJ's Order Dismissing B & L's Motion for Reconsideration was not served by overnight or express delivery. *Id.* §§ 22.30(a)(1), .7(c). Thus, the deadline for filing an appeal was September 24, 2002.

Nevertheless, B & L did not even mail the appeal until October 3, 2002, and it was not received by the Clerk of the Board, and was accordingly not filed, until October 18, 2002. Therefore, even if the Board were to agree with B & L's proposed service of process date, the appeal would still have been filed *24 days late*. As discussed further, absent special circumstances, the Board will not entertain a late appeal.

B. *There Were No "Special Circumstances" to Excuse the Late-Filed Appeal*

The Board does not excuse a late-filed appeal unless it finds special circumstances to justify the untimeliness. *In re Outboard Marine Corp.*, 6 E.A.D. 194 (EAB 1995); *In re Production Plated Plastics, Inc.*, 5 E.A.D. 101 (EAB 1994). In the case at bar, the appeal provides no explanation whatsoever for the late filing with the Board, and we are otherwise unaware of any special circumstances to

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we conclude that the appeal was untimely even if we use the service date proposed by B & L for purposes of computation, we do not need to reach the question of which of these dates (i.e., April 5 or July 20) is the correct service date or the subsidiary question of whether the ALJ's predicate evidentiary ruling (i.e., the ALJ's rejection of B & L's unattested representations regarding the illness of prior counsel) was correct. This being said, we note that the Board has generally accorded ALJs' evidentiary rulings "substantial deference," absent an abuse of discretion. *E.g., In re CDT Landfill Corp.*,11 E.A.D. 88 (EAB 2003); *In re Titan Wheel Corp. of Iowa*, 10 E.A.D. 526, 541 (EAB 2002), *aff'd subnom Titan Wheel Corp. of Iowa v. EPA*, 291 F. Supp. 2d 899 (S.D. Iowa 2003), *aff'd* No. 04-1221 (8th Cir. Nov. 23, 2004), *See also Yaffe Iron & Metal Co. v. EPA*, 774 F.2d 1008, 1016 (10th Cir. 1985). The Board also observes that there is still no affidavit in the record to support the allegations of B & L's current counsel about the illness of B & L's previous counsel. B & L's current counsel did execute an affidavit on October 3, 2002, but that affidavit conspicuously omits any reference to the illness of B & L's prior counsel.

excuse the untimeliness.[13] To the contrary, this oversight follows a succession of B & L failures to abide by the rules and orders designed to promote the efficient resolution of disputes.[14] This case is now approximately three years old, due in no small part to B & L's failure to make timely filings both before the ALJ and before this Board. The Board has an interest in bringing finality to the Agency's administrative proceedings and will preserve its limited resources for parties who are diligent enough to follow its procedural rules. *In re Gary Dev. Co.*, 6 E.A.D. 526, 533-34 (EAB 1996). Accordingly, the appeal is dismissed on timeliness grounds.

C. *The ALJ's Decision Not to Set Aside Default Was Appropriate in Any Event*

Even if the Board were to treat the appeal as timely, we would still conclude that the ALJ did not err in declining to set aside the Default Order.[15] Generally, in reviewing an ALJ's ruling on a motion to set aside a default order, the Board determines whether there is "good cause" to set aside the default. *In re Rybond*,

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[13] It does not strike us as credible that the illness of B & L's prior counsel — the only mitigating circumstance alleged in this proceeding — could have even arguably contributed to the failure to file a timely appeal.

[14] Although the Board may exercise its discretion to excuse a late-filed appeal when needed to achieve equitable treatment, such is not the case here in light of B & L's repeated failures to adhere to the procedural requirements. *See Am. Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532, 539 (1970) (it is "within the discretion of a court or an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it."); *see also In re Nello Santacroce & Dominic Fanelli d/b/a/ Gilroy Assocs.*, 4 E.A.D. 586, 591 & n.16 (EAB 1993).

[15] As a preliminary matter, it should be noted that we do not disagree with the notion that an attorney's illness may, in some circumstances, serve as a basis for excusing a party from timely compliance with procedural requirements. If an attorney is so ill as to be incapacitated at the time of service and does not have the opportunity to change the address for service of process or notify his or her client before service is made, then a late filing may be excusable. *Accord, Islamic Republic of Iran v. Boeing Co.*, 739 F.2d 464 (9th Cir. 1984) (per curiam) (allowing a late-filed appeal where counsel provided a sworn affidavit with specific details showing his illness to have been of such a character and magnitude that counsel was both physically and mentally incapacitated during the crucial period in which to file the appeal); *Bibeau v. Northeast Airlines, Inc.*, 429 F.2d 212 (D.C. Cir. 1970) (per curiam) (in allowing the case to be reinstated, the court took into account that the attorney filed an affidavit attesting to his illness, the attorney had been diligently prosecuting the case, the delay imposed on the opposing party was minimal, and the attorney's clients were minors). *Cf. In re AES Puerto Rico L.P.*, 8 E.A.D. 324, 329 (EAB 1999) (excusing as a "special circumstance" a one-day late filing, where the delay in the overnight delivery was due solely to aircraft problems, as attested by Federal Express, and the party promptly notified the Board of the unanticipated delay), *aff'd sub nom. Sur Contra La Contaminacion v. EPA*, 202 F.3d 443 (1st Cir. 2000). The alleged illness of B & L's prior counsel, however, does nothing to cure or mitigate the late filing of the appeal by B & L's current counsel.

Inc., 6 E.A.D. 614, 625 n.19 (EAB 1996); *see also In re Jiffy Builders, Inc.*, 8 E.A.D. 315, 320 n.8 (EAB 1999).

In the matter at hand, the circumstance that gave rise to the Default Order was B & L's failure to make its prehearing exchange as directed by the ALJ's order.[16] Curiously, in neither its filings below nor in its filings with this Board has B & L made any effort whatsoever to articulate a "good cause" basis for this failure.[17]

Under the Consolidated Rules of Practice, default is appropriate where, as here, there has been a failure to comply with an ALJ's order.[18] 40 C.F.R. §§ 22.17(a), .19(g)(3). Given B & L's failure to articulate a good cause basis for setting aside the default, and in the absence of any other indication in the record of such a basis,[19] even if we found the appeal timely we would conclude that the ALJ did not err in declining to set aside the default. *See In re Jiffy Builders, Inc.*, 8 E.A.D. 315, 320 n.8 (EAB 1999).

IV. *CONCLUSION*

B & L filed its appeal late and without any special circumstances to excuse its untimeliness. Accordingly, we dismiss B & L's appeal as untimely. Moreover, even if the Board were to treat the appeal as timely, we would still uphold the ALJ's decision not to set aside the default. The Board would agree that default is

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[16] As noted, this failure came on the heels of B & L's earlier, substantial delay in filing its Answer.

[17] The alleged illness of prior counsel to which B & L points as an excuse for not timely seeking reconsideration of the Default Order was, of course, later in time and is thus irrelevant to B & L's earlier failure to comply with the ALJ's Prehearing Order. Specifically, the deadline for B & L's prehearing exchange was July 28, 2001. Not until September 1, 2001, did Ms. Allender allegedly become ill. Furthermore, B & L did not bring the alleged illness to the ALJ's attention until August 13, 2002.

[18] We note that, while the Region served its Motion for Default by certified mail, return receipt requested, there is no return receipt in the record, thus raising the prospect that B & L never received the Region's motion. While unfortunate, we do not regard this potential as legally significant. This is because an ALJ has the authority to find a party in default *sua sponte* when there has been a failure to file a prehearing exchange. *See* 40 C.F.R. § 22.19(g)(3); *see also In re Wu*, Dkt. No. RCRA-3-99-9006-003, "Order Granting Motion for Partial Default" at 12-13 (ALJ, Oct. 23, 2000), *available at* http://www.epa.gov/oalj. This *sua sponte* authority insures that the presiding judge has the ability to efficiently bring proceedings to an end. An ALJ is only required to first receive a motion for default before finding a party in default when the default is based on failure to file a timely answer. *See* 40 C.F.R. § 22.17(a); *see also In re Wu, supra*, at 12-13. Because a motion is not a prerequisite to a default order for a party's failure to file a prehearing exchange, any service issues relating to the Region's motion did not serve to diminish the ALJ's authority to issue the Default Order.

[19] To the contrary, as noted, the record reflects precisely the kind of inattention to filing deadlines and procedural requirements that are appropriately addressed through the entry of default.

appropriate in view of B & L's failure to provide any explanation that would excuse the conduct that gave rise to the default in the first instance, namely, the failure to comply with the ALJ's Prehearing Order.

So ordered.