UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 3263/October 28, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16509

In the Matter of EDWARD M. DASPIN, a/k/a "EDWARD (ED) MICHAEL," LUIGI AGOSTINI, and LAWRENCE R. LUX	ORDER

Respondent Edward M. Daspin has filed a number of motions that are currently pending before me for disposition.[1] As is discussed below, Daspin's motions are DENIED.

Background

In June 2015, the administrative law judge previously assigned to this proceeding indefinitely postponed the hearing as to Daspin based on evidence that he suffers from a serious medical condition. *Edward M. Daspin*, Admin. Proc. Rulings Release No. 2810, 2015 SEC LEXIS 2387 (June 15, 2015). Specifically, Daspin's treating physician, who is board certified in internal medicine, stated that Daspin "[redacted]" while being deposed by the Division of Enforcement and could possibly suffer serious health consequences if required to participate in a hearing in this matter. Declaration (May 11, 2015) at 1-4, 10. In a submission filed July 31, 2015, he also opined that it would take months of consultations to determine an appropriate treatment plan for Daspin and a year before he could say whether Daspin could handle the stress associated with participating in a hearing.

After the matter was reassigned to me, I issued an order lifting the postponement based on my determination that under Rules of Practice 161 and 360, I lacked the authority to indefinitely continue this matter. *See Edward M. Daspin*, Admin. Proc. Rulings Release No. 3041, 2015 SEC LEXIS 3348, at *4-8 (Aug. 14, 2015). I scheduled the hearing to begin on January 4, 2016. *Id.* at *8. After Daspin's counsel withdrew, effective September 28, 2015, Daspin attempted to submit a number of motions by e-mail and additional medical evidence.

[1] Daspin purported to file one of his motions on behalf of Respondent Luigi Agostini. Because Daspin in not an attorney, he may not file pleadings on behalf of Agostini. *See* 17 C.F.R. § 201.102(a), (b); *see also Iannaccone v. Law*, 142 F.3d 553, 558 (2d Cir. 1998). Because I am denying Daspin's motion, Agostini suffers no prejudice from this fact.

Among Daspin's motions are motions requesting dismissal of this proceeding or, alternatively, reconsideration of the August 14 scheduling order, a continuance, and my withdrawal from the proceeding. Because Daspin had not filed his motions in compliance with the Commission's Rules of Practice, I issued an order in which I directed his attention to those rules. *See Edward M. Daspin*, Admin. Proc. Rulings Release No. 3202, 2015 SEC LEXIS 4103 (Oct. 6, 2015). Moreover, I specifically ordered Daspin to stop:

> sending this Office e-mails unless he is doing so in response to a direct inquiry or request from this Office or is merely providing courtesy copies of documents properly filed with the Office of the Secretary, consistent with the Rules of Practice.

Id. at *3. Although I allowed that Daspin could "e-mail[] if he is genuinely seeking to clarify orders I have issued," I added that "[f]uture attempts by e-mail to argue about or contest orders will not be considered." *Id*. I gave the Division of Enforcement five business days to respond to Daspin's motion. *Id.* at *4.

The Division timely filed a response, together with supporting evidence. The Division's response includes a letter from a Dr. Stanley J. Schneller, M.D., who has been a professor of cardiology at Columbia University since 1985. Schneller Letter at 1. Dr. Schneller does not agree with Daspin's physician's assessment of Daspin's condition or his treatment plan. *Id*. at 2, 6, 10, 11. Dr. Schneller states the Daspin's physician has "misrepresented the key findings" of a test conducted in September, which showed the opposite of what Daspin's physician reported. *Id*. at 6; *see id*. at 7 (noting the report of another doctor). According to Dr. Schneller, Daspin's physician also incorrectly interpreted another test. *Id*. at 10. Dr. Schneller finds unfounded Daspin's physician's assertion that Daspin [redacted] while being deposed during the Division's investigation of Daspin, *id*. at 2, 10, and opines that the claim that Daspin's condition would "preclude[] his participation in [this] proceeding . . . is not medically valid," *id*. at 11, 12 (describing the opinion as "medically insupportable"); *see id*. at 9 (noting the lack of evidence to support Daspin's physician's conclusion). Dr. Schneller notes that two other specialists agreed that Daspin's condition could be treated [redacted]. *Id*. at 2, 7, 8.

Dr. Schneller states there is no basis for Daspin's physician's statement that it will be some time before one can know whether Daspin can handle the stress of a hearing. Schneller Letter at 11. Instead, Dr. Schneller opines that that Daspin's condition is treatable, his risk of harm is low, and he can live a "normal life." *Id*. Dr. Schneller concludes that Daspin's physician has supplied "misleading statements [and] unfounded opinions and describe[d] a peculiar approach to [Daspin's] complaints that is outside standard medical care." *Id*. at 10; *see id*. at 11 ("[t]he disparity between the . . . risks of which [Daspin's physician] repeatedly warns . . . is in striking contrast to the leisurely pace with which he has addressed" Daspin's condition), 12 (stating that Daspin's physician's "medical behavior and expressed opinions are outside standard medical care").

Two days after the Division submitted its response, the Commission accepted the offer of settlement submitted by Respondent Lawrence R. Lux. *See Edward M. Daspin*, Securities Act Release No. 9963, 2015 SEC LEXIS 4287 (Oct. 16, 2015). The Commission entered factual

findings, determined that Lux violated provisions of the Securities Act and the Exchange Act, and imposed sanctions. *Id*. at *2-13. In doing so, the Commission stated that its findings "are not binding on any other person or entity in this or any other proceeding." *Id*. at *2 n.1.

Despite my October 6, 2015 Order, Daspin e-mailed this Office on the day after his reply to the Division's opposition was due and asked for an extension of time to file his reply. In conjunction with this and other e-mails, Daspin purported to explain that he wished to obtain a letter from his physician responding to Dr. Schneller's letter and to rebut the Commission's findings regarding Lux.

Two days after the deadline for filing a reply, Daspin submitted a letter from his physician. Daspin's physician says that he did not claim Daspin [redacted] during his deposition. Instead, he claims that he only opined that Daspin [redacted] during his deposition. Rebuttal Letter at 1. *But see* Declaration (May 11, 2015) at 4 (stating that Daspin "[redacted]" while being deposed by the Division); Rebuttal Letter at 5 ("He did on that day [redacted]"). He opines that Dr. Schneller's letter reflects a "cavalier" attitude and a "slanted view" and suggests that Dr. Schneller is "play[ing] Russian roulette with" Daspin. *Id*. at 2, 3. Daspin's physician stands by his earlier statements and asserts that they are supported by his own observations. *Id*. at 3-4. He discounts Dr. Schneller's opinion because Dr. Schneller has not observed Daspin. *Id*. at 5. But even if Dr. Schneller had observed Daspin, that observation would purportedly "make no difference," because according to Daspin's physician, his twenty-four years as Daspin's doctor "give [him] special insight." *Id*. at 5. Daspin's physician thus suggests that he is "the only medical doctor" qualified to say whether Daspin will be harmed, and that "there are currently no medical solutions known" for Daspin's condition. *Id*. at 6; *see id*. at 5.

Discussion

I have considered Daspin's physician's letter. Because I previously ordered Daspin not to submit substantive materials by e-mail unless he complies with the Commission's service rules, however, I will not consider the balance of Daspin's improperly submitted materials and, except to address Daspin's confusion as to two issues, they will not be addressed here.

1. Daspin's constitutional arguments are meritless.

Daspin asserts that this proceeding should be dismissed because the method of appointing the Commission's administrative law judges violates Article II of the Constitution. Mot. at 2-3. The Commission, however, has rejected this argument. *See Timbervest, LLC*, Investment Advisers Act of 1940 Release No. 4197, 2015 SEC LEXIS 3854, at *92-104 (Sept. 17, 2015). Daspin also claims that this proceeding violates his rights under the Seventh Amendment. Mot. at 3 n.1. He is mistaken. *Harding Advisory LLC*, Securities Act Release No. 9561, 2014 SEC LEXIS 938, at *35 n.46 (Mar. 14, 2014) (relying on *Atlas Roofing Co. v. OSHRC*, 430 U.S. 442, 450 (1977)).

Without further explanation, Daspin alleges in a footnote that these proceedings violate an unnamed provision of the Constitution because (1) the rules of evidence and civil procedure

do not apply, (2) he is "rushed to prepare . . . for trial mere months after obtaining a mammoth investigative file," and (3) his first appeal is to the Commission, which authorized the proceeding "in the first place." Mot. at 3 n.1. Precedent does not support Daspin's arguments.

"[N]othing in the due process clause precludes the use of hearsay evidence in administrative proceedings." *Toribio-Chavez v. Holder*, 611 F.3d 57, 66 (1st Cir. 2010); *see Richardson v. Perales*, 402 U.S. 389, 407-09 (1971). Nor is there any authority—and Daspin cites none—that supports the proposition that the Constitution requires the use of the rules of civil procedure in administrative proceedings. To the extent Daspin claims an equal protection violation because the rules of civil procedure and rules of evidence apply in district court but not in administrative proceedings, he fares no better. *See Timbervest, LLC*, 2015 SEC LEXIS 3854, at *113-18.

The claim that Daspin is "rushed to prepare" is essentially a challenge to the timeline set forth in Rule 360. *See* 17 C.F.R. § 201.360(a)(2). Assuming Daspin is raising a due process challenge, the Commission has rejected such challenges to the Rule 360 timeline. *See Gregory M. Dearlove*, Exchange Act Release No. 57244, 2008 SEC LEXIS 223, at *136-44 (Jan. 31, 2008). The fact that Daspin must first appeal to the Commission before seeking review before a court of appeals likewise does not amount to a constitutional violation. *The Stuart-James Co.*, Exchange Act Release No. 28810, 1991 SEC LEXIS 168, at *5 (Jan. 23, 1991); *see Withrow v. Larkin*, 421 U.S. 35, 47-55 (1975).

Daspin argues that, in light of his medical condition, requiring him to participate in a hearing starting January 4, 2016, would violate his right to due process. Mot. at 11-12. The Commission, however, has ordered that an initial decision issue within 300 days. *See* Order Instituting Proceedings at 15. I have already determined that I lack the authority to continue this matter indefinitely. *Edward M. Daspin*, 2015 SEC LEXIS 3348, at *4-8. Dr. Schneller's letter and Daspin's physician's rebuttal alternatively support the decision to hold the hearing in this matter as scheduled.[2]

[2] By explaining that Daspin's condition is treatable and that Daspin's physician has misrepresented information and rendered medically insupportable opinions, Dr. Schneller has undermined Daspin's physician's assertions. Given his expertise, the comparative clarity with which his analysis is expressed, the fact that he is less reliant on medical jargon, and his comparative lack of defensiveness, I rely on Dr. Schneller's assessment over that of Daspin's physician. Moreover, Daspin's physician's rebuttal does not help Daspin.

Dr. Schneller states that Daspin's physician's opinions "are uninfluenced by the data." Schneller Letter at 12. Daspin's physician demonstrates this point, saying that even if Dr. Schneller had observed Daspin, that observation "would make no difference," because Daspin's physician is the "only" doctor qualified to opine about Daspin's condition. Rebuttal Letter at 6. Daspin's physician's suggestion that only he is qualified to say whether Daspin is healthy evidences a superiority bias that undercuts his credibility and findings.

Daspin must therefore pursue this line of argument, if at all, before the Commission.[3] *See* 17 C.F.R. § 201.400(c).

2. Daspin's motion for my withdrawal is denied.

Daspin argues that I am biased and should therefore recuse myself. Mot. at 15-16. Daspin's argument is baseless.

For support, Daspin first relies on the fact of my order lifting the indefinite postponement and scheduling a hearing. Mot. at 15-16. But administrative law judges are presumed to be unbiased, *Schweiker v. McClure*, 456 U.S. 188, 195 (1982), *Timbervest, LLC*, 2015 SEC LEXIS 3854, at *84, and Daspin bears the burden of overcoming that presumption, *Schweiker*, 456 U.S. at 196. Because an adverse ruling is "'almost never'" evidence of bias,[4] the fact of my prior ruling does not overcome the presumption stated in *Schweiker*.[5] This aspect of Daspin's argument is thus meritless. *See McLaughlin*, 869 F.2d at 1047 (finding "frivolous" the "argument that [an] administrative law judge should have disqualified himself for bias because he ruled against [a litigant] on certain . . . matters").

By e-mail sent before my October 6, 2015 order, Daspin submitted two letters labeled "motion for a continuance" and "dismissal continuance motion." The former letter appears to be a cover letter forwarding the latter, which appears to serve as a declaration. In them, Daspin relies on an article published in the Wall Street Journal.[6] *See* Jean Eaglesham, SEC Wins with In-House Judges, *The Wall Street Journal* (May 6, 2015); *see also* Mot. at 3 n.1. The article reported that a former Commission administrative law judge alleged that the Commission's chief administrative law judge had attempted—apparently between 1995 and 2007—to pressure her to rule in the Division's favor. The article also alleged that since 2010, the Division has a higher rate of success when it brings cases administratively as compared to when it brings cases in district court.

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[3] For the same reasons, I also reject Daspin's argument that I acted arbitrarily by lifting the indefinite postponement of Daspin's hearing. *See* Mot. at 13.

[4] *Timbervest, LLC*, 2015 SEC LEXIS 3854, at *84 (quoting *Liteky v. United States*, 510 U.S. 540, 555 (1994)); *McLaughlin v. Union Oil Co. of California*, 869 F.2d 1039, 1047 (7th Cir. 1989).

[5] *Cf. Louisiana Ass'n of Indep. Producers & Royalty Owners v. FERC*, 958 F.2d 1101, 1119 (D.C. Cir. 1992) ("Although [the] presumption" that "administrative officials . . . [are] capable of judging a particular controversy fairly . . . can be rebutted, the evidence submitted must be far more compelling than a pattern of adverse but nonetheless justified discretionary decisions.").

[6] In his second letter, Daspin appears to ask that I direct the Division to pursue its case against him in district court, rather than administratively. *See* Letter at 4. The Commission has not given its administrative law judges the authority to issue such an order.

Perhaps Daspin thinks that where there's smoke, there must be fire. *See* Mot. at 3 n.1 ("Improper bias is also readily apparent."). That sort of logic is insufficient to overcome the presumption that administrative law judges are unbiased. *See Schweiker*, 456 U.S. at 195-96; *Timbervest*, 2015 SEC LEXIS 3854, at *84. But even if it were, Daspin cannot prevail. First, outside of the article on which Daspin relies, I have never witnessed nor heard of any discussion in this Office remotely similar to that alleged in the article. In other words, no one has attempted to influence me to rule in the Division's favor in general or in any case in particular. Even assuming the conversation alleged in the article occurred, it would have occurred years, if not decades, before I was appointed. It therefore has no connection to this proceeding. Second, a recent examination suggests that comparing the Division's alleged success rate in administrative proceedings to that in district courts is more complicated than it might otherwise appear. *See* Urska Velikonja, Reporting Agency Performance: Behind the SEC's Enforcement Statistics, 101 Cornell L. Rev. (forthcoming 2016) at 55-56, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2654427.

3. Daspin's remaining arguments likewise lack merit.

On various grounds, Daspin attacks my August 14, 2015 order directing that the hearing in this matter will begin on January 4, 2016. He asserts that the order violates the law of the case doctrine. Mot. at 13. Under the law of the case doctrine, adjudicators typically decline to reopen already decided matters.[7] Even when it applies, however, the doctrine is discretionary and does not limit an adjudicator's power to reopen a previously decided issue. *Messinger v.* Anderson, 225 U.S. 436, 444 (1912). As the Division states, the doctrine does not bar an administrative law judge, after reassignment, from reconsidering a previous interlocutory ruling. *See* Opp. at 11 (quoting *In re United States*, 733 F.2d 10, 13 (2d Cir. 1984)). My order, setting a hearing in this matter, was therefore not contrary to the law of the case doctrine.

Daspin argues that I should ask the Commission's chief administrative law judge to ask the Commission for an extension of the 300-day deadline. Mot. at 13-14. As support for this argument, Daspin relies on two instances in which the Commission granted extension requests. *Id*. at 14. Daspin's argument constitutes a request that I reconsider my order scheduling the hearing in this matter. *See Edward M. Daspin*, 2015 SEC LEXIS 3348, at *4-8. In that order, I rejected the suggestion I should seek an extension before holding a hearing in this matter. *Id*. Even assuming that I should consider a motion for reconsideration submitted over seven weeks after my scheduling order, the fact that the Commission has exercised its authority in other circumstances to extend a 300-day deadline does not address the basis for my decision in this case. Because Daspin has not addressed the basis on which I issued the scheduling order, I decline to reconsider that order.

Daspin says he wants to rebut the findings the Commission entered regarding Lux. In its order, the Commission specifically provided that its findings "are not binding on any other

[7] *See Safir v. Dole*, 718 F.2d 475, 481 n.3 (D.C. Cir. 1983); *In re Multi-Piece Rim Prods. Liab. Litig*., 653 F.2d 671, 678 (D.C. Cir. 1981); *see also Christianson v. Colt Indus. Operating Corp*., 486 U.S. 800, 817 (1988) ("A court has the power to revisit prior decisions of its own or of a coordinate court in any circumstance").

person or entity in this or any other proceeding." *Edward M. Daspin*, 2015 SEC LEXIS 4287, at *2 n.1. There is therefore no need for Daspin to rebut the Commission's findings. They are not binding as to anyone but Lux and I will not rely on them in the course of issuing the Initial Decision in this matter. Instead, I will rely on the evidence presented during the hearing.

Daspin also appears to seek permission to retain new counsel to represent him in this matter. Daspin does need permission to retain new counsel. He is entitled to be represented by any attorney who meets the requirements in Rule 102(b). *See* 17 C.F.R. § 201.102(b).

4. Daspin's certification request is denied.

Daspin argues that if I deny his motions, I should certify my order for interlocutory review. Mot. at 16; *see* 17 C.F.R. § 201.400(c) (governing certification to the Commission). For two reasons, Daspin's request is denied. First, he has not attempted to show how the requirements of Rule 400 have been met. Second, if he is instead seeking certification of a previous order, his request is untimely. *See* 17 C.F.R. § 201.400(c)(2).

If Daspin wishes to seek certification of this order, he may do so within five days of the issuance of this order. 17 C.F.R. § 201.400(c)(2). He should be aware that an administrative law judge may not certify a ruling to the Commission unless: "(i) [t]he ruling involves a controlling question of law as to which there is substantial ground for difference of opinion; and (ii) [a]n immediate review of the order may materially advance the completion of the proceeding." *Id*.

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James E. Grimes
Administrative Law Judge