BRB No. 01-0884 BLA

DONALD CLEVENGER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MARY HELEN COAL COMPANY	)	
	)	DATE ISSUED:
and	)	
	)	
AMERICAN BUSINESS AND MERCANTILE INSURANCE MUTUAL, INCORPORATED	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER *En Banc*

Appeal of the Decision and Order Approving Withdrawal of Claim of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Donald Clevenger, Pikeville, Kentucky, *pro se*.

Mark E. Solomons with W. William Prochot (Greenberg Traurig, LLP), Washington, D.C., for employer and carrier.

Jennifer U. Toth (Eugene Scalia, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Stephen A. Sanders, Prestonsburg, Kentucky, for Appalachian Citizens Law

Center, Inc., as *amicus curiae*, in support of claimant.

Sandra M. Fogel (Culley & Wissore), Carbondale, Illinois, as *amicus curiae*, in support of claimant.

William H. Howe and Mary Lou Smith (Howe, Anderson & Steyer, P.C.), Washington, D.C., for Association of Bituminous Contractors, Inc., as *amicus curiae*, in support of employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH, McGRANERY, HALL, and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (1999-BLA-888) of Administrative Law Judge Daniel J. Roketenetz approving the withdrawal of a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act).[1] This case has a lengthy procedural history. In a Decision and Order issued on March 9, 1989, Administrative Law Judge Bernard J. Gilday credited claimant with seventeen and three-quarters years of qualifying coal mine employment, and adjudicated this claim, filed on October 21, 1986, pursuant to the provisions at 20 C.F.R. Part 718. Judge Gilday found that the evidence of record was insufficient to establish either the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) (2000), or total respiratory disability pursuant to 20 C.F.R. §718.204(c)(1)-(4) (2000). Accordingly, benefits were denied.

Following the Board's affirmance of the denial of benefits, *see Clevenger v. Mary Helen Coal Co.*, BRB No. 89-1133 BLA (Jun. 27, 1991)(unpub.), claimant sought modification pursuant to 20 C.F.R. §725.310 (2000), which was denied by Judge Gilday on November 5, 1992. Subsequent requests for modification were denied by the district director on March 4, 1994, and by Administrative Law Judge Michael P. Lesniak on September 19,

[1]The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726 (2001). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

1996, for failure to establish either a mistake in a determination of fact or a change in conditions. The Board affirmed Judge Lesniak's decision, *see Clevenger v. Mary Helen Coal Co.*, BRB No. 97-0120 BLA (Sep. 25, 1997)(unpub.), and denied claimant's request for reconsideration by Order issued on November 18, 1997.

After claimant again sought modification and the case was forwarded to the Office of Administrative Law Judges, claimant waived his right to a hearing and requested a decision on the documentary record. On September 15, 1999, Judge Roketenetz (the administrative law judge) issued an Order for claimant to show cause why employer's motion for summary decision should not be granted, as claimant had alleged no mistake in a determination of fact and had submitted no new evidence in support of modification of Judge Lesniak's denial of benefits. When claimant did not file a timely response, the administrative law judge cancelled the hearing and dismissed the claim by reason of abandonment.

On appeal, the Board vacated the administrative law judge's order dismissing the claim and remanded this case for the administrative law judge to consider claimant's request for modification in a manner consistent with *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994), in which the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, held that a claimant is not required to plead a specific ground as the basis for a request for modification, and that he need not submit new evidence with such a request; rather, any mistake of fact may be corrected, including the ultimate fact of entitlement. *See Clevenger v. Mary Helen Coal Co.*, BRB No. 00-0220 BLA (Dec. 19, 2000)(unpub.).

On remand, claimant filed a motion to withdraw his claim without prejudice pursuant to 20 C.F.R. §725.306, on the ground that it would be in his best interests to file a new claim under the amended regulations at 20 C.F.R. Part 718. The administrative law judge agreed that withdrawal was in claimant's best interests, and approved withdrawal of the claim, over employer's objection, by order issued on July 10, 2001.

In the present appeal, employer urges reversal of the order allowing withdrawal, contending that the administrative law judge lacked authority under Section 725.306 to approve withdrawal of a claim, such as this, which had already been adjudicated and denied. In the alternative, employer maintains that if the administrative law judge correctly interpreted the provisions at Section 725.306, the regulation is invalid. The Board, by Order dated May 7, 2002, scheduled oral argument in this case. Claimant, without the assistance of counsel, responded in a letter dated May 15, 2002, that he could not participate in the scheduled oral argument herein, but still wished to withdraw his original claim in order to pursue his new claim for benefits under the amended regulations. The Director, Office of Workers' Compensation Programs (the Director), initially filed a motion to dismiss the appeal on the ground that employer lacked standing to assert claimant's interests and that

employer was not presently harmed by withdrawal of the claim. Employer opposed the motion, arguing that withdrawal of the claim resulted in employer's immediate loss of rights, which conferred standing on employer and rendered the appeal ripe for review. The Director subsequently withdrew his motion to dismiss, conceded that employer had standing to appeal and that the case was ripe for review, and agreed with employer's position that the administrative law judge lacked authority under Section 725.306 to approve withdrawal of this claim.[2]

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Initially, we hold that employer has standing to pursue this appeal before the Board because, consistent with the requirements of 20 C.F.R. §802.201, employer is a party "adversely affected or aggrieved" by the administrative law judge's order allowing withdrawal of the claim. *See* 20 C.F.R. §802.201(a)(1). It is well settled that a party "must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth v. Seldin*, 422 U.S. 490, 499 (1975). Employer thus lacks standing to challenge the administrative law judge's finding that withdrawal of the claim is in claimant's best interests pursuant to Section 725.306(a)(2). *See Jonida Trucking, Inc. v. Hunt*, 124 F.3d 739, 21 BLR 2-203 (6th Cir. 1997). Employer, however, may pursue its own

[2]On June 27, 2002, the Board held oral argument in this case in Cincinnati, Ohio. Judge Smith was not present at the oral argument, but has reviewed the transcript and thus will participate in this decision. The issues for oral argument were whether employer has standing to appeal the administrative law judge's order allowing claimant to withdraw his claim; whether the administrative law judge properly interpreted the provisions at 20 C.F.R. §725.306 to authorize the withdrawal of a claim which previously has been adjudicated on the merits; and, assuming *arguendo*, that the administrative law judge's interpretation of Section 725.306 was proper, whether the regulation is valid.

legal rights and interests under the Act in its capacity as a party within the zone of interests regulated by the underlying statute herein, *see generally Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150 (1970), provided that employer demonstrates that withdrawal of the claim will result in present harm to employer. *See generally Texas v. United States*, 523 U.S. 296 (1988); *City Communications, Inc. v. City of Detroit*, 888 F.2d 1081 (6th Cir. 1989).

Because a withdrawn claim is considered not to have been filed, *see* 20 C.F.R. §725.306(b), withdrawal of the instant claim would result in a nullification of the existing record herein. Consequently, although employer suffers no present economic harm upon withdrawal of the claim, employer is adversely affected thereupon by its loss of various due process rights and defenses; the right to introduce all of the existing evidence of record into the record of another claim, *see generally* 20 C.F.R. §§725.414, 725.456, and the advantages flowing from the prior favorable decisions. *See Dept. of Defense, Office of Dep. Schools v. FLRA*, 879 F.2d 1220 (4th Cir. 1989); *Ingalls Shipbuilding, Inc. v. Director, OWCP [Boone]*, 102 F.3d 1385, 31 BRBS 1 (CRT) (5th Cir. 1996). The immediate loss of employer's rights upon withdrawal of the claim, which can be redressed by the relief requested, renders employer's appeal ripe for review. *Boone, supra; see Grendell v. Ohio Supreme Court*, 252 F.3d 828 (6th Cir. 2001).

Employer and the Director next maintain that the administrative law judge lacked authority to approve the withdrawal of a claim, such as this, which has already been adjudicated and denied on the merits. In this case of first impression, employer notes that there is no explicit statutory authority for such a withdrawal without prejudice, and argues that the administrative law judge's interpretation of Section 725.306 is inconsistent with both the regulatory scheme under the Act, and case law which interprets Rule 41(a)(2), an analogous rule under the Federal Rules of Civil Procedure, as barring the dismissal of a claim without prejudice after it has been fully litigated.[3] *See Grover v. Eli Lilly & Co.*, 33 F.3d 716

[3]Rule 41(a) of the Federal Rules of Civil Procedure provides:

> **Voluntary Dismissal: Effect Thereof**.
> (1) *By Plaintiff; By Stipulation.*
> Subject to the provisions of Rule 23(e), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an

(6th Cir. 1994); *Villegas v. Princeton Farms, Inc.*, 893 F.2d 919 (7th Cir. 1990); *Western Union Telegraph Co. v. Dismang*, 106 F.2d 362 (10th Cir. 1939). Employer's and the Director's arguments have merit.

The administrative law judge approved claimant's request for withdrawal upon finding that all conditions therefor were satisfied under Section 725.306 which provides:

> (a) A claimant or an individual authorized to execute a claim on a claimant's behalf or on behalf of claimant's estate under §725.305, may withdraw a previously filed claim provided that:
>
> (1) He or she files a written request with the appropriate adjudication officer indicating the reasons for seeking withdrawal of the claim;
>
> (2) The appropriate adjudication officer approves the request for withdrawal on the grounds that it is in the best interests of the claimant or his or her estate, and;

> action based on or including the same claim.
>
> (2) *By Order of Court.*
>
> Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon the defendant of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

Fed.R.Civ.P.41(a).

(3) Any payments made to the claimant in accordance with §725.522 are reimbursed.

(b) When a claim has been withdrawn under paragraph (a) of this section, the claim will be considered not to have been filed.

20 C.F.R. §725.306. The regulations further clarify that "adjudication officers" are district directors and administrative law judges authorized by the Secretary of Labor to accept evidence and decide claims. *See* 20 C.F.R. §725.350. Although the administrative law judge herein was the "adjudication officer" before whom claimant's request for modification of the denial of his claim was pending, the Director asserts that once a decision on the merits issued by an adjudication officer becomes effective,[4] *see* 20 C.F.R. §§725.419, 725.479, 725.502, there no longer exists an "appropriate" adjudication officer authorized to approve a withdrawal request under Section 725.306. We agree with the Director's interpretation.

The text of Section 725.306 does not address the precise point at which an adjudication officer loses authority to approve withdrawal; however, in looking to the overall structure of the regulations, we note that this regulation is contained within Subpart C, which governs the filing of claims, rather than Subpart F, which governs hearings. This positioning lends support to employer's argument that, if withdrawal had been contemplated as a remedy after a decision on the merits became effective, the provisions authorizing withdrawals would have been included or at least cross-referenced in Subpart F, where provisions authorizing dismissals for cause are located. *See* 20 C.F.R. §§725.465, 725.466. Moreover, other regulations would be undermined or rendered superfluous if the administrative law judge's interpretation of Section 725.306 were given effect. *See generally Wellmore Coal Corp. v. Stiltner*, 81 F.3d 490, 20 BLR 2-211 (4th Cir. 1996). For example, the administrative law judge's interpretation would impermissibly invalidate all prior judgments of higher tribunals, contrary to statutory authority, *see Youghiogheny & Ohio Coal Co. v. Milliken*, 200 F.3d 942, 22 BLR 2-46 (6th Cir. 1999); it would render time limits for the submission of evidence meaningless, *see* 20 C.F.R. §725.456; it would nullify any prior exclusions of evidence, contrary to the provisions at 20 C.F.R. §725.309(d)(1); and it cannot be reconciled with Section 725.309(d)(5), which provides that in any case in which benefits are awarded on a

[4]A district director's proposed decision and order is effective 30 days after the date of issuance unless a party requests a revision or a hearing, while an administrative law judge's decision and order on the merits of a claim is effective on the date it is filed in the office of the district director. *See* 20 C.F.R. §§725.419, 725.479, 725.502(a)(2).

subsequent claim, no benefits may be paid for any period prior to the date upon which the order denying the prior claim became final.

The Director maintains that the date a decision on the merits becomes effective is a practical point for terminating authority to allow withdrawal because it is readily identifiable and marks the point beyond which allowing withdrawal would be unfair to opposing parties. At that point, claimant has lost his case and there is no compelling reason to allow him to avoid the consequences of that defeat; claimant may instead appeal the denial, seek modification within a year pursuant to Section 725.310, or thereafter file a subsequent claim under Section 725.309. We agree that the Director's interpretation of Section 725.306 is reasonable and consistent with the regulatory scheme, as well as with the law interpreting Fed.R.Civ.P.41(a)(2). Further, the Director's interpretation preserves the integrity of the black lung adjudicatory system by providing a mechanism for removing premature claims from the system without disturbing valid claim decisions made as the result of the adversarial process, *see generally Betty B Coal Co. v. Director, OWCP [Stanley]*, 194 F.3d 491, 22 BLR 2-1 (4th Cir. 1999); and it balances a claimant's interest in forgoing further pointless litigation on a premature claim with an employer's interest in maintaining the advantages gained by successfully defending the claim. Consequently, we hold that the provisions at Section 725.306 are applicable only up until such time as a decision on the merits issued by an adjudication officer becomes effective.[5] Inasmuch as the administrative law judge was not authorized to approve withdrawal of the claim under the facts of this case, we reverse the administrative law judge's order allowing withdrawal pursuant to Section 725.306, and remand this case for his adjudication of claimant's request for modification of Judge Lesniak's denial of benefits.

Accordingly, the administrative law judge's Decision and Order Approving Withdrawal of Claim is vacated, and this case is remanded for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

[5]In view of our interpretation of 20 C.F.R. §725.306, we decline to address employer's contention that the regulation is invalid.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge