BRB No. 02-0193 BLA

SHERMAN F. LESTER, JR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	
	)	DATE ISSUED:
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER *En Banc*

Appeal of the Order Dismissing Claim and Canceling Hearing of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

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

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 Order Dismissing Claim and Canceling Hearing (01-BLA-0731) of Administrative Law Judge Richard A. Morgan approving the withdrawal of claimant's second 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] The procedural history of this case is as follows. Claimant's original claim for benefits, filed on May 15, 1995, was abandoned after its denial by the district director on February 28, 1996, for failure to establish total disability due to pneumoconiosis. Claimant filed the present claim for benefits on March 24, 1998. In a Decision and Order issued on October 11, 2000, the administrative law judge credited claimant with at least twelve years of qualifying coal mine employment, and found that new evidence submitted after the denial of the original claim was insufficient to establish total disability due to pneumoconiosis, and thus insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). Accordingly, benefits were denied.

Claimant appealed the denial to the Board by letter dated October 24, 2000, and attached a medical report from Dr. Gaziano dated February 9, 2000, which was not included in the record before the administrative law judge. In an Order dated December 18, 2000, the Board construed claimant's correspondence as a request for modification pursuant to 20 C.F.R. §725.310 (2000), and thus dismissed the appeal and remanded the case to the district director for modification proceedings. After the case was forwarded to the Office of Administrative Law Judges for a formal hearing, claimant filed a motion to withdraw his claim pursuant to 20 C.F.R. §725.306, upon the advice of his counsel that withdrawal was in

[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. All citations to the regulations, unless otherwise noted, refer to the amended regulations.

claimant's best interests. In an Order issued on October 25, 2001, the administrative law judge approved withdrawal of the claim over employer's objection, and cancelled the hearing.

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 Director, Office of Workers' Compensation Programs (the Director), initially filed a motion to dismiss the appeal on the grounds 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 Board, by Order dated May 7, 2002, granted claimant's motion for joinder in the Director's motion to dismiss the appeal, denied claimant's motion to hold the briefing schedule in abeyance, and scheduled oral argument in this case. The Director subsequently withdrew his motion to dismiss, conceding that employer has standing to appeal and that the case is ripe for review, and agreeing with employer's position that the administrative law judge lacked authority under Section 725.306 to approve withdrawal of this claim. Claimant responds, urging the Board to dismiss employer's appeal for lack of standing, and arguing that Section 725.306 is both valid and properly applied by the administrative law judge.[2]

The Board's scope of review is defined by statute. If the administrative law judge's

[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.

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).

Turning first to the issue of standing, employer asserts that it is a party "adversely affected or aggrieved" by the administrative law judge's order allowing withdrawal of the claim, and, as such, employer has standing to bring this appeal, consistent with the requirements of 20 C.F.R. §802.201(a)(1). Claimant, however, maintains that employer suffers no present harm from the order of withdrawal because its immediate impact is to relieve employer from liability for benefits and the added expense of defending the claim; additionally, any future harm which might result from withdrawal of the claim is speculative and therefore not ripe for review.[3] Claimant also argues that prudential considerations further limit the exercise of the Board's jurisdiction over employer's appeal,[4] as employer lacks standing to argue what is in claimant's best interests, *see Warth v. Seldin*, 422 U.S. 490 (1975); and employer is not within the zone of interests that the Department of Labor sought to protect in promulgating Section 725.306(a)(2). *See Jonida Trucking, Inc. v. Hunt*, 124 F.3d 739, 21 BLR 2-203 (6th Cir. 1997). Claimant thus asserts that this appeal must be dismissed for lack of standing.[5]

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[3]Ripeness for review turns on "the fitness of the issues for judicial decision" and "the hardship to the parties of withholding court consideration," *Abbott Labs v. Gardner*, 387 U.S. 136, 149 (1967), with the central concern being whether the case involves uncertain or contingent future events that may not occur as anticipated, or at all, s*ee Texas v. United States*, 523 U.S. 296, 298 (1998), since "[c]ourts should decide only existing, substantial controversies, not hypothetical questions or possibilities...." *City Communications, Inc. v. City of Detroit*, 888 F.2d 1081, 1089 (6th Cir. 1989); *see also Hodel v. Virginia Surface Min. and Reclamation Ass'n, Inc.*, 452 U.S. 264 (1981).

[4]Claimant notes that the three prudential limits on standing which ordinarily counsel against the exercise of Article III jurisdiction in federal courts are as follows: (1) alleging a generalized grievance not particular to the party; (2) asserting the legal rights and interests of a third party; and (3) claiming an injury outside the zone of interests of the statute providing the cause of action. *See Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982); *Allstate Ins. Co. v. Thrifty Rent-A-Car Sys., Inc.*, 249 F.3d 450 (6th Cir. 2001).

[5]Claimant notes that in order to establish standing under the "case or controversy" requirement of Article III of the United States Constitution, (1) a plaintiff must have suffered some actual or threatened injury due to the alleged illegal conduct (the "injury in fact element"); (2) the injury must be fairly traceable to the challenged action (the "causation

element"); and (3) there must be substantial likelihood that the relief requested will redress or prevent the plaintiff's injury (the "redressability element"). *Grendell v. Ohio Supreme Court*, 252 F.3d 828 (6th Cir. 2001). As a rule, a plaintiff must have a personal stake in the outcome of the controversy to satisfy Article III jurisdiction, *see Warth v. Seldin*, 422 U.S. 490 (1975), and must show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant. *See Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91 (1979). When a plaintiff asserts standing based on a threatened injury, he must show that the threatened injury is so imminent as to be "certainly impending;" thus the alleged injury cannot be "conjectural" or "hypothetical." *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990). In the present case, claimant maintains that employer has not satisfied the "injury in fact" element, as employer has suffered no present harm from withdrawal of the claim and any future harm is too speculative to confer standing.

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*, 422 U.S. at 499. 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 Hunt, supra*. However, provided that employer can demonstrate that withdrawal of the claim results 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), employer may assert its own constitutional and statutory rights, *see Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 332 (1980); *Chesapeake B&M, Inc. v. Harford County, MD*, 58 F.3d 1005 (4th Cir. 1995); *Ingalls Shipbuilding, Inc. v. Director, OWCP [Boone]*, 102 F.3d 1385, 31 BRBS 1 (CRT) (5th Cir. 1996); *Int'l Bd of Elec. Workers v. ICC*, 862 F.2d 330, 334 (D.C. Cir. 1988); *Aetna Casualty & Surety Co. v. Cunningham*, 224 F.2d 478 (5th Cir. 1955); and employer may pursue its 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).

Because a withdrawn claim is considered not to have been filed, *see* 20 C.F.R. §725.306(b), withdrawal of the instant duplicate claim would result in a destruction of the record associated therewith, and a nullification of the October 11, 2000 Decision and Order denying benefits. Consequently, although employer suffers no present economic harm upon withdrawal of the claim, employer is adversely affected thereupon by its loss of vested litigation rights, including various due process rights and defenses; the right to introduce all of the evidence filed in connection with this duplicate claim into the record of a subsequent claim, *see* 20 C.F.R.§§725.414, 725.456; and the advantages flowing from the administrative law judge's prior favorable decision. *See Friends of the Earth, Inc. v. Laidlaw Environmental Serv.*, 528 U.S. 167 (2000); *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871 (1990); *Dept. of Defense, Office of Dep. Schools v. FLRA*, 879 F.2d 1220 (4th Cir. 1989); *Boone*, *supra*. The immediate loss of employer's rights upon withdrawal of the claim, which can be redressed by reversing the order approving withdrawal, renders employer's appeal ripe for review. *Boone, supra*; *see Grendell v. Ohio Supreme Court*, 252 F.3d 828 (6th Cir. 2001). We therefore hold that employer has standing to pursue this appeal before the Board.

Employer next maintains that claims filed under the Act are subject to the usual constraints of the doctrine of *res judicata*, *see Pittston Coal Group v. Sebben*, 488 U.S. 105, 12 BLR 2-89 (1988), and that the administrative law judge lacked authority to approve the withdrawal of a duplicate claim, such as this, which has already been adjudicated and denied on the merits. 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.[6] *See Grover v. Eli Lilly & Co.*, 33 F.3d 716 (6th Cir. 1994); *Villegas v. Princeton Farms, Inc.*, 893 F.2d 919 (7th Cir. 1990); *Piedmont Interstate Fair Ass'n v. Bean*, 209 F.2d 942 (4th Cir. 1954); *Western Union Telegraph Co. v. Dismang*, 106 F.2d 362 (10th Cir. 1939). Claimant counters that the plain language of Section 725.306 allows him to withdraw the instant claim upon satisfaction of the regulatory conditions, and argues that there is no finality under the Act comparable to the finality achieved in normal civil actions, because the regulatory scheme under the Act allows claimants to file unlimited requests for modification and a limitless number of claims. The Director agrees with employer that the administrative law judge was not authorized to withdraw the claim under the facts of this case, and maintains that, where the other conditions are satisfied, a claim may be withdrawn under Section 725.306 at any time before a decision issued by an adjudication officer becomes effective.

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

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[6]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 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).

> (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:
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> (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;
> (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 duplicate claim was pending, the Director asserts that once a decision on the merits issued by an adjudication officer becomes effective,[7] *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 issuance of a decision on the merits, the provisions authorizing withdrawals would have been included or at least cross-referenced in Subpart F, where provisions authorizing

[7]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).

dismissals for cause are located.[8] *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 subsequent claim, no benefits may be paid for any period prior to the date upon which the order denying the prior claim became final.

[8]While the withdrawal of a claim under Section 725.306 may be likened to a dismissal without prejudice under Fed.R.Civ.P. 41(a)(2), in that a withdrawn claim is considered not to have been filed, the dismissal of a claim for cause under 20 C.F.R. §725.456 has the same effect as a decision and order disposing of the claim on its merits.

The Director maintains that the date on which 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.[9] 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 the case for the administrative law judge to adjudicate claimant's request for modification of the denial of benefits on his duplicate claim.

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

Accordingly, the administrative law judge's Order Dismissing Claim and Canceling Hearing is vacated, and this case is remanded for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

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