BRB No. 05-0407 BLA

CLIFFORD BAILEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
DOMINION COAL CORPORATION	)	DATE ISSUED:_____
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Order Denying Employer's Request for Summary Judgment and Granting Claimant's Request to Withdraw of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Ronald E. Gilbertson (Bell, Boyd & Lloyd PLLC), Washington, D.C., for employer.

Helen H. Cox (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, 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.

Before: DOLDER, Chief Administrative Appeals Judge, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Order Denying Employer's Request for Summary Judgment and Granting Claimant's Request to Withdraw (04-BLA-6768) of Administrative Law Judge Linda S. Chapman, on 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).

Claimant filed the instant application for benefits on January 29, 2004.[1] Director's Exhibit 2. The Department of Labor provided claimant with a pulmonary evaluation conducted by Dr. Forehand, and employer had claimant examined by Dr. Castle. Employer's Brief at 3. On June 1, 2004, claimant requested withdrawal of his claim. Claimant stated:

> It is our intention to withdraw the application of the above claimant at this time because of test results of the doctor we selected. We believe the doctor he selected was fair. It is impossible to win his claim because he does not meet the disability standards. This results in great cost and time to the claimant and to the Department of Labor to continue a case that we feel we cannot win at this time.

Director's Exhibit 19. On June 7, 2004, the district director issued a Proposed Decision and Order Withdrawal of Claim. The district director determined that withdrawal was in the best interest of claimant and granted claimant's request to withdraw the claim. The district director noted that, pursuant to 20 C.F.R. §725.306(b), the claim is consequently considered not to have been filed, Director's Exhibit 20, and he returned employer's medical evidence, Director's Exhibits 21, 22. By letter dated June 23, 2004, employer stated that it could not accept the June 7, 2004 Proposed Decision and Order, and requested that the district director either revise the Proposed Decision and Order to an Order of Abandonment, or forward the case to the Office of Administrative Law Judges. Director's Exhibit 23. On September 9, 2004, the case was forwarded to the Office of Administrative Law Judges. Director's Exhibit 25. Before a hearing was held, employer filed Employer's Motion to Cancel Hearing and for Summary Judgment Regarding the District Director's Decision Granting Claimant's Motion to Withdraw Claim.

On January 5, 2005, the administrative law judge issued her Order Denying Employer's Request for Summary Judgment and Granting Claimant's Request to Withdraw, which is the subject of the instant appeal. The administrative law judge noted the procedural background of this case. The administrative law judge found that it is in the best interests of claimant that he be allowed to withdraw his claim and she stated:

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[1] Claimant previously filed an application for benefits on January 29, 2001. Exhibit 1. In connection with that claim, the Department of Labor provided claimant with a pulmonary evaluation conducted by Dr. Forehand, and employer had claimant examined by Dr. Castle. Employer's Brief at 2. At claimant's request, Employer's Exhibit 2, the district director issued a Proposed Decision and Order Withdrawal of Claim where he found that withdrawal of the claim was in claimant's best interest, and he allowed claimant's withdrawal. The district director noted this claim is considered not to have been filed pursuant to 20 C.F.R. §725.306(b).

> Clearly, the Employer feels that it would be in his best interests to deny the Claimant's request, as the Employer believes that this would automatically result in the inclusion of the Employer's medical evidence in the record in a future claim. But the regulations clearly call for consideration of the best interests of the Claimant, not the Employer. I find that it is not in the Claimant's best interests to force him to prosecute a claim he has decided he cannot win.

Order at 3. The administrative law judge also determined that it would not be appropriate to find that claimant had abandoned his claim, as none of the conditions for finding abandonment of a claim, set out in 20 C.F.R. §725.409, were present. Order at 3. Because the administrative law judge found that withdrawal is in the best interests of claimant, she granted claimant's request to withdraw his claim and determined that there was no further claim before her. Therefore, the administrative law judge declined to rule on employer's request to order the automatic inclusion of evidence already developed by employer into the record in any future claim, without counting against employer's evidentiary limitations. *Id.*

On appeal, employer asserts that the administrative law judge erred by allowing withdrawal of the claim and by failing to order that the medical evidence developed in the withdrawn claim be included in the record of any future claim. Claimant has not responded to this appeal. The Director, Office of Workers' Compensation Programs (the Director), responds, stating that the only issue is whether the administrative law judge properly granted claimant's request for withdrawal. The Director asserts that the administrative law judge's analysis is correct and that she reasonably granted claimant's request for withdrawal. The Director also maintains that the administrative law judge properly declined to issue any ruling regarding the inclusion of evidence in future claims.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer argues that the administrative law judge erred by allowing claimant's request for withdrawal of the claim, and contends that the right to withdraw is not unlimited. Employer notes that it has paid to have claimant examined twice, thereby developing evidence that will not be included in the record, because of claimant's request for withdrawal. Employer asserts that this is a "waste of employer's financial resources and will hamper employer's ability to defend itself in any future claim." Employer's Brief at 6. Employer asserts that, contrary to the administrative law judge's determination, 20 C.F.R. §725.306(a)(2) allows for the consideration of the effects of

withdrawal on parties other than claimant. Employer notes that while the regulation specifically requires consideration of whether withdrawal is in the best interests of claimant, it does not prohibit consideration of employer's interests.

The Director responds, contending that the administrative law judge properly limited her inquiry to claimant's best interests because claimant requested withdrawal prior to an effective decision. The Director urges the Board to reject employer's challenges to the administrative law judge's decision to allow claimant's request for withdrawal. The Director asserts that Section 725.306(a)(2) requires consideration of claimant's interests, not employer's interests. The Director also identifies Board decisions in which the Board has addressed the protection of employer's interests when a claimant requests withdrawal of a claim. *See Clevenger v. Mary Helen Coal Co.*, 22 BLR 1-193 (2002); *Lester v. Peabody Coal Co.*, 22 BLR 1-183 (2002)(*en banc*).

After consideration of the administrative law judge's findings, the arguments raised on appeal, and the evidence of record, we hold that the administrative law judge's findings are supported by substantial evidence. The administrative law judge reviewed the status of the claim and noted claimant's statement that he did not wish to incur the expense of pursuing his claim, which claimant conceded he could not win. She reasonably analyzed claimant's request for withdrawal of his claim within the context of the regulation and properly considered whether withdrawal is in the best interests of claimant. 20 C.F.R. §725.306(a)(2). We reject employer's assertion that the administrative law judge erred by failing to consider whether allowing claimant's request for withdrawal is in employer's best interests. The regulation does not require that employer's interests be considered. *See* 20 C.F.R. §725.306. Moreover, employer has not shown a clear and specific basis for denial of claimant's request for withdrawal in this case. We therefore affirm the administrative law judge's decision to grant claimant's request for withdrawal of his claim.

Employer also asserts that the administrative law judge erred in not mandating that the evidence already developed by employer in this case be included in the record in any future claims. Employer argues that absent an order mandating the inclusion of this medical evidence in the future administrative record, it cannot rely on the evidence from Drs. Forehand and Castle in any future claim "because doing so under the Department of Labor's interpretation would exceed the two exam limit of Section 725.414(a)(3)(i)." Employer's Brief at 7. Employer further contends that it "cannot even allow this relevant evidence to be considered in future exams by Drs. Forehand and Castle, because doing so would risk the exclusion of their opinions under 20 C.F.R. §725.456(d)," Employer's Brief at 7, because it must know what is in the record and what is not in the record prior to arranging for a new examination. Otherwise, employer asserts "employer risks showing the new examining physician too much relevant evidence. This procedure unfairly deprives the employer of its right to raise a full and proper defense," and violates

employer's due process rights and the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a). Employer's Brief at 7-8. Employer also argues that while Section 725.306 allows the withdrawn claim to be considered not to have been filed, it does not state that the "evidence is withdrawn or considered not to have been filed, or as having 'never existed.'" *Id*. at 12. Employer asserts that the evidence from any withdrawn claim must be included in the administrative or agency record. *Id*. at 13.

The Director contends that the administrative law judge reasonably declined to rule on employer's request that the evidence developed in the withdrawn claim be automatically included the record of any future claim.

In addressing this issue, the administrative law judge stated:

> As I have found that it is in the Claimant's best interests that he be allowed to withdraw his claim, there is no further issue before me. It is not appropriate for this Court to direct the inclusion or exclusion of any evidence in a future claim which may or may not be filed. Although the Employer argues that the Director "has taken the position that none of the medical evidence developed in the withdrawn claim under Section 725.306 will be automatically included in the record in any subsequent claim," my review of the director's exhibits shows that the Director has not taken any position at all on this issue. Indeed, the Director has included the evidence developed in connection with the withdrawn claim in the Director's exhibits transmitted pursuant to Section 725.421, including the reports by Dr. Forehand and Dr. Castle. Whether Dr. Castle's report will be counted as part of the Employer's evidentiary submission is an issue that is properly decided if and when the Claimant files a new claim, and by the adjudicating officer that considers that claim.

Order at 3. The administrative law judge therefore concluded:

> As there is no claim before me, I decline to rule on the Employer's request that the evidence developed in connection with the withdrawn claim automatically be included in the record of any subsequent claim, without counting against the Employer's evidentiary limitations.

Id. at 3.

In view of our affirmance of the administrative law judge's decision to grant claimant's request for withdrawal of his claim, this claim, as the administrative law judge found, is considered not to have been filed, and thus, there is no further issue present. 20 C.F.R. §725.306(b); *see* Order at 3. We therefore affirm the administrative law judge's decision not to rule on employer's request to order the automatic inclusion of evidence already developed by employer into the record in any future claim. We likewise decline to address employer's arguments in this regard on appeal. If claimant files a future claim, any required evidentiary rulings will be made by the adjudicating officer assigned to that case.

Accordingly, we affirm the administrative law judge's Order Denying Employer's Request for Summary Judgment and Granting Claimant's Request to Withdraw.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge