BRB No. 04-0823 BLA

BILLY FELTNER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WHITAKER COAL CORPORATION	)	DATE ISSUED: 04/27/2005
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Order of Dismissal of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

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

Jeffrey S. Goldberg (Howard M. Radzely, 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.

Before: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

Employer appeals the Order of Dismissal (2003-BLA-5707) of Administrative Law Judge Robert L. Hillyard granting 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] The pertinent procedural history of this case

[1] The Department of Labor (DOL) 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

is as follows. Claimant filed a claim for benefits on February 5, 2001.[2] Director's Exhibit 3. On February 21, 2001, the district director notified employer that it had been identified as the potentially responsible operator in the claim, Director's Exhibit 18, and employer subsequently controverted its liability. Director's Exhibit 19. On January 31, 2002, after obtaining a complete pulmonary evaluation of claimant, the district director issued a schedule for the submission of additional evidence, preliminarily concluding that claimant was not entitled to benefits and that employer was the responsible operator. Director's Exhibit 22. After additional medical evidence was submitted, the district director issued a Proposed Decision and Order on December 20, 2002, finding that claimant failed to establish total disability due to pneumoconiosis, a requisite element of entitlement, and denying benefits. Director's Exhibit 26.

On January 3, 2003, claimant requested a formal hearing, Director's Exhibit 27, and on April 11, 2003, the case was forwarded to the Office of Administrative Law Judges. Director's Exhibit 31. The case was subsequently assigned to Judge Hillyard and was scheduled for a hearing on August 3, 2004. On June 1, 2004, claimant filed a written request to withdraw his claim, to which employer filed objections on June 24, 2004; the Director, Office of Workers' Compensation Programs (the Director), did not respond. In his Order issued on June 30, 2004, the administrative law judge found that employer's objections were without merit pursuant to 20 C.F.R. §725.306. Accordingly, the administrative law judge granted claimant's motion to withdraw the claim and cancelled the hearing.

On appeal, employer contends that the administrative law judge erred in approving withdrawal of the claim pursuant to 20 C.F.R. §725.306. Claimant has not filed a response brief in this appeal. The Director responds, urging affirmance of the administrative law judge's Order granting withdrawal, to which employer replies in support of its position on appeal.

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

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726 (2002). As the instant claim was filed thereafter, all citations to the regulations refer to the amended regulations.

[2] This is claimant's second claim for benefits. Claimant's first application for benefits, filed on October 23, 1996, was denied by a district director on February 19, 1997. Director's Exhibit 1. Claimant took no further action on the claim, and it became finally denied.

may not be disturbed. 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).

Because a withdrawn claim is considered not to have been filed, *see* 20 C.F.R. §725.306(b), employer argues that it would be unduly prejudiced and deprived of its due process rights if withdrawal of this claim were permitted and the record associated with it were destroyed. Employer asserts that because in any future adjudication it cannot rely on new reports by its current physicians without providing all of the underlying information relied upon by those physicians, but cannot submit the underlying background evidence into the record without exceeding the evidentiary limitations at 20 C.F.R. §725.414, destruction of the record pursuant to 20 C.F.R. §725.306(b) will deprive employer of its due process right to raise a proper defense. *See* 20 C.F.R. §§725.414, 725.456. Employer asserts that destruction of the record is also inconsistent with the regulation at 20 C.F.R. §725.421(b)(4), which requires that all medical evidence submitted to the district director be placed in the record. Employer also contends that due process mandates that 20 C.F.R. §725.306 be construed so as to allow the consideration of employer's interests by the administrative law judge in determining whether withdrawal is appropriate. Employer additionally asserts that in order to preserve employer's due process rights, the Board should hold that the plain language of 20 C.F.R. §725.306 requires only that the claim itself be considered not to have been filed, and that the supporting evidence can remain in the file, admissible in any future adjudication as background evidence pursuant to 20 C.F.R. §725.414(a)(4). In the alternative, employer requests that the Board hold, as a matter of law, that the evidence associated with the withdrawn claim is admissible in any future adjudication under the "good cause" exception to the evidentiary limitations set forth at 20 C.F.R. §725.456(b)(1). Finally, employer requests that if the order of withdrawal is affirmed, consistent with *Clevenger v. Mary Helen Coal Co.*, 22 BLR 1-193 (2002)(*en banc*), and *Lester v. Peabody Coal Co.*, 22 BLR 1-183 (2002)(*en banc*), the Board modify the administrative law judge's order to clarify that only claimant's February 5, 2001 claim has been withdrawn. Employer's arguments are without merit.

In *Clevenger* and *Lester*, the Board held 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.[3] *Clevenger*, 22 BLR at 1-200 and *Lester*, 22 BLR at 1-191. The regulations clearly state that a district director's proposed decision and order is effective thirty days after the date of issuance unless a party requests a revision or a hearing, and that 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.

[3] An adjudication officer is defined as a district director or administrative law judge who is authorized by the Secretary of Labor to accept evidence and decide claims, *see* 20 C.F.R. §725.350.

§§725.419, 725.479, 725.502(a)(2); *Clevenger*, 22 BLR at 1-199; *Lester*, 22 BLR at 1-190.

In this case, since claimant requested a hearing within thirty days after issuance of the district director's proposed decision and order, and timely sought withdrawal of his claim before any adjudication on the merits became effective, the provisions at 20 C.F.R. §725.306 were applicable and the administrative law judge was authorized to approve withdrawal of the claim, consistent with *Clevenger* and *Lester*. Although employer argues that due process requires that an administrative law judge first consider whether dismissal prejudices a defendant's rights, under the applicable regulation herein, the administrative law judge was only required to consider whether withdrawal of the claim was in the best interests of the claimant. *See* 20 C.F.R. §725.306. We reject employer's assertion that the Board must hold as a matter of law that the existing record must be preserved and admitted into the record of any new claim, pursuant to either 20 C.F.R. §§725.414(a)(4) or 725.456(b)(1), as this would be inconsistent with the regulatory scheme, providing that a withdrawn claim "be considered not to have been filed." 20 C.F.R. §725.306(b). In addition, as the Director correctly notes, the admission of evidence is within the province of the administrative law judge, as fact finder, and employer is not precluded from submitting the evidence developed in this claim for inclusion in a new claim record, subject to the evidentiary limitations or with a showing of good cause for its inclusion. *See* 20 C.F.R. §§725.414, 725.456. As substantial evidence supports the administrative law judge's finding that the requirements of 20 C.F.R. §725.306 were met, we affirm his Order granting withdrawal of claimant's February 5, 2001 claim.

Accordingly, the administrative law judge's Order of Dismissal is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge