

BRB No. 03-0336 BLA

STEPHEN A. BEHUN, JR.)	
)	
Claimant-Respondent)	
)	
v.)	
)	
LEHIGH COAL & NAVIGATION)	DATE ISSUED: 01/30/2004
COMPANY)	
)	
and)	
)	
INTERNATIONAL BUSINESS &)	
MERCANTILE REASSURANCE COMPANY)	
)	
Employer/Carrier-)	
Petitioners)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	DECISION AND ORDER
)	and ORDER ON CLAIMANT'S
Party-in-Interest)	MOTION TO REMAND

Appeal of the Order Granting Motion to Withdraw of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

Helen M. Koschoff, Wilburton, Pennsylvania, for claimant.

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

Helen H. Cox (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.

PER CURIAM:

Employer appeals the Order Granting Motion to Withdraw (2002-BLA-5003) of Administrative Law Judge Janice K. Bullard 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).¹ The pertinent procedural history of this case is as follows. Claimant filed a claim for benefits on November 2, 2001. Director's Exhibit 2. On November 6, 2001, the district director notified employer that it had been identified as the potentially responsible operator in the claim, Director's Exhibit 19, and employer subsequently controverted its liability. Director's Exhibit 20. On March 13, 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 23. After additional medical evidence was submitted, the district director issued a Proposed Decision and Order on June 17, 2002, finding that claimant failed to establish any element of entitlement and denying benefits. Director's Exhibit 30.

On June 28, 2002, claimant requested a formal hearing, Director's Exhibit 31, and on September 24, 2002, the case was forwarded to the Office of Administrative Law Judges. Director's Exhibit 36. The case was subsequently assigned to Judge Bullard and was scheduled for hearing on February 11, 2003. On December 13, 2002, claimant filed a written request to withdraw his claim and cancel the hearing, and on December 19, 2002, the administrative law judge issued an Order directing employer and the Director, Office of Workers' Compensation Programs (the Director), to show cause, if any, why claimant's motion should not be granted. Employer responded on December 30, 2002, objecting to withdrawal of the claim, to which claimant's counsel replied on January 4, 2003 in support of claimant's position, alternatively requesting an Order of dismissal. In her Order issued on January 6, 2003, 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 Section 725.306. Claimant and the Director respond,

¹The 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 726 (2002). As the instant claim was filed thereafter, all citations to the regulations refer to the amended regulations.

urging affirmance of the administrative law judge's Order granting withdrawal. While this case was pending on appeal, claimant also filed a motion to remand the case to the district director in order to pursue modification, to which employer responded in opposition.

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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer acknowledges that the administrative law judge was authorized to approve withdrawal under the facts of this case, consistent with the Board's holding in *Lester v. Peabody Coal Co.*, 22 BLR 1-183 (2002)(*en banc*), and *Clevenger v. Mary Helen Coal Co.*, 22 BLR 1-193 (2002) (*en banc*), that the provisions at Section 725.306 are applicable up until such time as a decision on the merits, issued by an adjudication officer, becomes effective.² *Lester*, 22 BLR at 1-191; *Clevenger*, 22 BLR at 1-200. Employer contends, however, that the administrative law judge erred in granting withdrawal over employer's objections that it would result in prejudice to employer and benefit to claimant. Employer asserts that instead, the administrative law judge should have addressed and granted claimant's counsel's request to dismiss the claim, which employer did not contest.³ Employer also maintains that counsel's motion to dismiss either rendered the district director's denial of the claim effective or canceled claimant's motion for withdrawal. Employer's arguments are without merit.

The regulations explicitly provide 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, 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). Since claimant requested a hearing within thirty days after issuance of the district director's proposed decision and order, the district director's judgment did not

²An 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.

³Contrary to employer's arguments, the administrative law judge was not authorized to dismiss the claim pursuant to 20 C.F.R. §725.466 without first issuing an order to show cause why the dismissal should not be granted, affording all parties a reasonable time to respond to such order, *see* 20 C.F.R. §725.465(c). The administrative law judge must then determine whether the conditions for dismissal are satisfied. *See* 20 C.F.R. §725.465.

become effective, and jurisdiction of this case transferred to the administrative law judge. Claimant timely sought withdrawal prior to the hearing and the administrative law judge's adjudication of the merits, and while a request for withdrawal may be canceled at any time prior to its approval by means of a written request by the claimant or his authorized representative, *see* 20 C.F.R. §725.307, claimant made no such request in this case. Rather, in response to employer's objections, claimant's counsel defended claimant's actions in seeking withdrawal; indicated claimant's continuing desire to cease pursuing his claim and counsel's desire to avoid the added cost and burden associated with two upcoming depositions scheduled by employer; proposed that the administrative law judge issue an Order of dismissal; and requested that a conference call be scheduled for an expeditious resolution. The administrative law judge then properly ruled on claimant's pending motion, and granted withdrawal of the claim upon finding that the conditions for withdrawal were satisfied under Section 725.306 and that, consistent with *Lester* and *Clevenger*, withdrawal under the facts of this case was not precluded. Order at 3-4. Consequently, claimant's request for dismissal pursuant to the provisions at 20 C.F.R. §725.465 was rendered moot.

Employer also contends that the administrative law judge erred in finding that employer failed to demonstrate how it would be prejudiced in future claims if withdrawal of this claim is allowed. Employer maintains that it expended considerable time and resources in defending the claim, and notes that case law interpreting Rule 41(a), an analogous rule under the Federal Rules of Civil Procedure, has held that dismissal without prejudice is precluded when a defendant has expended significant time, effort and expense developing the case or where there has been a ruling against a plaintiff. Employer further argues that since a withdrawn claim is considered not to have been filed, *see* 20 C.F.R. §725.306(b), the loss of the record associated with this claim will benefit only claimant because the evidence developed by the parties does not support entitlement. Employer asserts that, at a minimum, if withdrawal is allowed, the Board should mitigate the prejudice to employer by requiring that the evidence developed in this claim become a part of the record in any new claim filed by claimant.

Employer's arguments lack merit. Since the parties are bound only by the Act and its implementing regulations, the administrative law judge properly declined to apply the precedent interpreting Rule 41(a) as urged by employer because she found that it was inconsistent with the regulatory scheme herein, which permits withdrawal of a claim up until such time as a decision on the merits becomes effective. Order at 4; *Lester*, 22 BLR at 1-191; *Clevenger*, 22 BLR at 1-200. Further, employer has demonstrated no present harm from the order of withdrawal; rather, its immediate impact is to relieve employer from liability for benefits and the added expense of defending the claim, and any future harm which might result from withdrawal of the claim is speculative. Additionally, the Director correctly notes that the Board lacks authority to direct that the evidence developed in this claim be admitted into the record of any subsequent claim, but that employer is free to submit this evidence for

inclusion in a new claim record, subject to the evidentiary limitations in the regulations or 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 findings pursuant to Section 725.306, we affirm her Order granting withdrawal of the claim, which renders moot claimant's motion to remand this case to the district director for modification procedures.

Accordingly, the administrative law judge's Order Granting Motion to Withdraw is affirmed, and claimant's motion to remand is denied.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge