

BRB No. 03-0490 BLA

RANDALL I. BENSINGER)	
)	
Claimant-Respondent)	
)	
v.)	
)	
LEHIGH COAL & NAVIGATION CO.)	
)	
and)	DATE ISSUED: 01/30/2004
)	
INTERNATIONAL BUSINESS &)	
MERCANTILE REASSURANCE CO.)	
)	
Employer/Carrier-)	
Petitioners)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Order Granting Claimant's Request to Withdraw the Claim of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

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

Tab R. Turano (Greenberg Traurig, LLP), Washington, D.C., for employer.

Timothy S. Williams (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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Order (2003-BLA-05359) of Administrative Law Judge Robert D. Kaplan granting 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 is as follows: Claimant's original claim for benefits, filed on June 26, 1973, was denied by the district director on July 9, 1980, for failure to establish the existence of totally disabling pneumoconiosis arising out of coal mine employment. Director's Exhibit 1. Claimant took no further action until he filed the present claim for benefits on December 14, 2001. Director's Exhibit 3. The district director denied the claim on October 18, 2002, and claimant requested a hearing on October 22, 2002. Director's Exhibits 26, 27. The case was forwarded to the Office of Administrative Law Judges for a formal hearing, which was scheduled for June 25, 2003. On March 7, 2003, however, claimant filed a motion to withdraw his claim pursuant to 20 C.F.R. §725.306. Accordingly, in an Order issued on March 24, 2003, the administrative law judge approved withdrawal of the claim over employer's objections.

On appeal, employer contends that the administrative law judge erred in granting withdrawal of the claim pursuant to Section 725.306. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the administrative law judge's Order granting withdrawal. Claimant responds stating that he agrees with the Director's response brief and concurs that the administrative law judge correctly applied the applicable regulatory criteria in granting withdrawal of this claim.

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'Keefe 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 if withdrawal of this claim were permitted and the record associated with it were destroyed, and that claimant would unfairly benefit if the slate were wiped clean. Employer's Brief at 9. Employer asserts that it would be adversely affected by its loss of vested litigation rights, such as the right to

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

introduce all of the evidence developed in connection with this claim into the record of a subsequent claim, *see* 20 C.F.R. §§725.414, 725.456, and the advantages flowing from the district director's favorable decision. Employer's Brief at 8-10. Employer also maintains that, consistent with the Board's holdings 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*), employer's interests are relevant and must be considered by the administrative law judge in determining whether withdrawal is appropriate pursuant to Section 725.306. Employer's Brief at 5-8. Employer additionally asserts that if the order of withdrawal is affirmed, the Board must order the administrative law judge to make the withdrawal conditional so as to protect employer's rights, *i.e.*, by ordering that the evidence developed in connection with this claim be made a part of any new claim filed by claimant, and not permitting the Department of Labor to treat this filing as if it never existed. Employer's arguments are without merit.

In *Lester* and *Clevenger*, 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.² *Lester*, 22 BLR at 1-191; *Clevenger*, 22 BLR at 1-200. 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. §§725.419, 725.479, 725.502(a)(2); *Lester*, 22 BLR at 1-190; *Clevenger*, 22 BLR at 1-199.

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 Section 725.306 were applicable and the administrative law judge was authorized to approve withdrawal of the claim, consistent with *Lester* and *Clevenger*. Although employer argues that case law interpreting Rule 41(a), an analogous rule under the Federal Rules of Civil Procedure, holds that federal courts must consider the extent to which the case has progressed, the effort and expense incurred by the defendant in preparing for trial, and whether dismissal prejudices a defendant's rights, the administrative law judge properly determined that under the applicable regulation herein, he was only required to consider whether withdrawal of the claim was in the best interests of the claimant. Order at 2; *see* 20 C.F.R. §725.306. We reject employer's assertion that the Board must direct the administrative law judge to make the order of withdrawal conditional, as it is inconsistent with the regulatory scheme. Further,

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.

the Director correctly notes that 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, 725.465.

Employer also argues that a letter dated March 24, 2003 by claimant's counsel canceled claimant's request to withdraw the claim.³ We disagree. 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, in this case, the administrative law judge issued his Order granting claimant's request to withdraw the claim on March 24, 2003, the same date as counsel's letter, and there is no evidence in the record to suggest that the administrative law judge received counsel's letter prior to approving withdrawal of the claim. Because the administrative law judge granted claimant's motion to withdraw the claim, he lacked authority to take action on any subsequent motion presented to him, as the claim no longer existed. *See* 20 C.F.R. §§725.306(b), 725.307.

As substantial evidence supports the administrative law judge's finding that the requirements of Section 725.306 were met, we affirm his Order granting withdrawal of the claim.

³The letter submitted by claimant's counsel stated that "[i]f it will bring this matter to a conclusion, the claimant is willing to request a withdrawal solely of his hearing request letting the prior District Director's Decision stand, as well as the evidence of record at that time."

Accordingly, the administrative law judge's Order Granting Claimant's Request to Withdraw the Claim is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge