BRB No. 02-0691 BLA

FRANKLIN L. SELTZER	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
LEHIGH COAL & NAVIGATION COMPANY	)	
	)	DATE ISSUED:
and	)	
	)	
INTERNATIONAL BUS. & MERCANTILE REASSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Order of Dismissal Granting Withdrawal of Claim of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

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

Sarah M. Hurley (Howard M. Radzely, Acting 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 GABAUER, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Order of Dismissal (2002-BLA-5056) of Administrative Law Judge Gerald M. Tierney 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 is as follows. Claimant filed a claim for benefits on March 15, 2001. Director's Exhibit 1. On March 29, 2001, the district director notified employer that it had been identified as the potentially responsible operator in the claim, Director's Exhibit 17, and employer subsequently controverted its liability. Director's Exhibit 21. On October 4, 2001, 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 12. No additional medical evidence was submitted, and on December 10, 2001, the district director issued a Proposed Decision and Order denying benefits. Director's Exhibit 13. On January 3, 2002, claimant requested a formal hearing, Director's Exhibit 14, and on April 1, 2002, the case was forwarded to the Office of Administrative Law Judges. Director's Exhibit 26. On April 25, 2002, the administrative law judge scheduled the case for hearing on June 20, 2002. On June 7, 2002, claimant filed a written request to withdraw his claim, to which employer filed objections. In an Order issued on June 10, 2002, 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 approved withdrawal of the claim and cancelled the hearing.

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 has not participated in this 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 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.*,

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[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 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

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 the instant claim is permitted and the record associated with it is destroyed, and that claimant would unfairly benefit if a subsequent claim were treated as a first filing rather than as a modification request or duplicate claim. Employer asserts that it would be adversely affected by its loss of vested litigation rights, such as the right to 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 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 arguments are without merit.

Section 725.306 does not require an adjudication officer, 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, to consider the interests of any party other than the claimant when evaluating a request for withdrawal, nor does the text address the precise point at which an adjudication officer loses authority to approve withdrawal. Rather, the regulation provides that:

> (1) 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:
> (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.
> (2) 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. In *Lester* and *Clevenger*, the Board adopted the Director's interpretation of the regulation and 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. *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 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. The Board reasoned that this 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 at the conclusion of the adversarial process, and this interpretation 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. *Lester*, 22 BLR at 1-191; *Clevenger*, 22 BLR at 1-200. The Board further determined that the Director's interpretation was consistent 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,[2] as barring the dismissal of a claim

[2]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.

without prejudice after it has been fully litigated.[3] *Id*.

In the present case, since claimant requested a hearing within thirty days after issuance of the district director's proposed decision and order, and 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*

> (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).

[3]While employer additionally cites to case law addressing Fed.R.Civ.P. 41(a) which holds 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, *see* Employer's Brief at 4-5, the parties herein are bound only by the Act and its implementing regulations.

and *Clevenger*. Contrary to employer's arguments, employer's litigation rights did not vest, and although employer developed medical evidence subsequent to the issuance of the district director's proposed decision and order, this evidence was not submitted to the district director prior to his administrative denial of benefits and was never admitted into the record. 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.

Employer also argues that the administrative law judge erred in failing to determine whether withdrawal was in claimant's best interests pursuant to Section 725.306(a)(2). Such a determination, however, is implicit in the administrative law judge's granting of claimant's request for withdrawal, and employer lacks standing to argue what is in claimant's best interests, *see Warth v. Seldin*, 422 U.S. 490, 499 (1975); *Jonida Trucking, Inc. v. Hunt*, 124 F.3d 739, 21 BLR 2-203 (6th Cir. 1997). Further, we agree with the Director's argument that any error in the administrative law judge's failure to explicitly hold that withdrawal was in claimant's best interests is harmless, based on the record which reflects that the claim was prematurely filed. Consequently, we affirm the administrative law judge's Order granting withdrawal of the claim pursuant to Section 725.306.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge