

BRB No. 05-0771 BLA

LEO THACKER)
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 Claimant-Petitioner)
)
 v.)
)
 HELLIER FUEL COMPANY)
)
 and) DATE ISSUED: 06/29/2006
)
 OLD REPUBLIC INSURANCE COMPANY)
)
 Employer/Carrier-)
 Respondents)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Order and Order Denying Motion for Reconsideration of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

Stephen A. Sanders (Appalachian Citizens Law Center, Inc.), Prestonsburg, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Sarah M. Hurley (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, 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:

Claimant appeals the Order and Order Denying Motion for Reconsideration (04-BLA-5615) of Administrative Law Judge Janice K. Bullard dismissing claimant's request for a hearing 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). This case involves a subsequent claim filed on June 19, 2002. In a Proposed Decision and Order dated October 1, 2003, the district director denied benefits. On October 20, 2003, claimant requested a hearing before an administrative law judge. On January 14, 2004, claimant's claim was forwarded to the Office of Administrative Law Judges for a formal hearing. In a Notice of Hearing dated February 10, 2005, Administrative Law Judge Janice K. Bullard (the administrative law judge) notified the parties that the formal hearing was scheduled for May 11, 2005. However, on May 5, 2005, claimant filed a motion to withdraw his claim. Employer objected to claimant's withdrawal of his claim.¹

In an Order dated May 9, 2005, the administrative law judge acknowledged that claimant had satisfied all of the conditions for withdrawal of a claim set forth at 20 C.F.R. §725.306.² The administrative law judge, however, noted that employer asserted "prejudice in the loss of any evidence that would be required by the regulatory presumption that a withdrawn claim is deemed not to have been filed." The

¹In the event that the administrative law judge allowed claimant to withdraw his claim, employer requested that all of the medical evidence developed in the claim be incorporated into the record.

²Section 725.306 provides:

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.
- (b) 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.

administrative law judge, therefore, found it appropriate to dismiss claimant's request for a hearing rather than allow claimant to withdraw his claim.³ The administrative law judge subsequently denied claimant's motion for reconsideration. On appeal, claimant argues that the administrative law judge erred in denying his request to withdraw his claim.⁴ Employer responds in support of the administrative law judge's order dismissing claimant's request for a hearing. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, contending that, because claimant satisfied all of the requirements set forth at 20 C.F.R. §725.306, the administrative law judge erred in not allowing claimant to withdraw his claim. In a reply brief, employer reiterates its previous contentions.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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).

Claimant argues that the administrative law judge erred in not allowing claimant to withdraw his claim. Because no party challenges the administrative law judge's finding that claimant satisfied all of the requirements for the withdrawal of a claim set forth at 20 C.F.R. §725.306, this finding is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Section 725.306 does not address the precise point at which an adjudication officer loses authority to approve withdrawal of a claim. However, the Board has held that the provisions of Section 725.306 are applicable only up until such a time as a decision on the merits issued by an adjudication officer becomes effective. *See Clevenger v. Mary Helen Coal Co.*, 22 BLR 1-193 (2002) (*en banc*); *Lester v. Peabody Coal Co.*, 22 BLR 1-183 (2002) (*en banc*). In this case, the district director's Proposed Decision and Order denying benefits did not become effective because claimant requested a hearing within thirty days. *See* 20 C.F.R. §725.419(d). Consequently, the provisions set forth at 20 C.F.R. §725.306 were applicable and the administrative law judge was authorized to grant withdrawal of the claim.

³The administrative law judge noted that, upon the dismissal of claimant's request for a hearing, the district director's Proposed Decision and Order denying benefits would become effective and employer's evidence would be "preserved."

⁴Although claimant requested that his claim be withdrawn, claimant notes that he never requested that his claim be dismissed. Claimant's Brief at 5. Consequently, claimant argues that the administrative law judge exceeded her authority in dismissing claimant's request for a hearing. *Id.* at 5-6.

In this case, the administrative law judge's denial of claimant's request to withdraw his claim was not based upon claimant's failure to satisfy any of the requirements of 20 C.F.R. §725.366. Rather, the administrative law judge's refusal was based upon her concern that claimant's withdrawal of his claim could adversely affect employer's rights.⁵ Claimant and the Director contend that the administrative law judge erred in considering whether allowing claimant's request for withdrawal of his claim was in employer's best interests. We agree. 20 C.F.R. §725.306 does not require that an employer's interests be considered. *Bailey v. Dominion Coal Corp.*, BLR , BRB No. 05-0407 BLA (Dec. 19, 2005). Moreover, employer has not shown a clear and specific basis for denial of claimant's request for withdrawal in this case. We, therefore, hold that claimant is entitled to the withdrawal of his 2002 claim.⁶ Consequently, we vacate the administrative law judge's dismissal of claimant's request for a hearing and remand the case to the administrative law judge so that she can issue an Order granting claimant's request to withdraw his 2002 claim.

⁵ The administrative law judge explained that:

[T]he withdrawal of the claim could adversely affect the Employer "by its loss of vested litigation rights, including various due process rights and defenses; the right to introduce all of the evidence filed in connection with this....claim into the record of a subsequent claim; and the advantages flowing from the prior....favorable decision."

Order Denying Motion for Reconsideration at 1 (quoting *Clevenger v. Mary Helen Coal Co.*, 22 BLR 1-193, 1-198-99 (2002) (*en banc*)).

⁶Employer argues that, in the event that claimant is allowed to withdraw his 2002 claim, "it must be conditioned on the preservation of medical evidence developed in this claim and on the condition that this evidence be entered into the record in any subsequent filing notwithstanding the evidentiary limitations in [20 C.F.R. §725.414]." Employer's Response Brief at 10. In view of our holding that claimant is entitled to the withdrawal of his 2002 claim, this claim is considered not to have been filed and, therefore, there is no further issue present. 20 C.F.R. §725.306(b). Consequently, it is not necessary for the administrative law judge to rule on employer's request to order the automatic inclusion of evidence already developed by employer into the record in any future claim. *See Bailey v. Dominion Coal Corp.*, BLR , BRB No. 05-0407 BLA (Dec. 19, 2005). We also 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, the administrative law judge's Order and Order Denying Motion for Reconsideration are affirmed in part and vacated in part. The case is remanded to the administrative law judge for the limited purpose of issuing an Order granting claimant's request to withdraw his 2002 claim.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge