

BRB No. 02-0621 BLA

JIMMY LEE DYE)
)
 Claimant-Respondent)
)
 v.)
)
 HARMAN MINING COMPANY,) DATE ISSUED:
 INCORPORATED)
)
 and)
)
 OLD REPUBLIC INSURANCE 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 Withdrawal and Order Denying Reconsideration of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

Jimmy Lee Dye, Maxie, Virginia, *pro se*.¹

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

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and GABAUER, Administrative Appeals Judges.

PER CURIAM:

¹ Ron Carson, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested on behalf of claimant that the Board review the administrative law judge's decision, but Mr. Carson is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

Employer appeals the Order of Withdrawal and Order Denying Reconsideration (01-BLA-0900) of Administrative Law Judge Jeffrey Tureck approving the withdrawal of claimant's duplicate claim² 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).³ The procedural history of this case is as follows. Claimant's original claim, filed on October 8, 1991, was administratively closed after being denied by the district director on March 18, 1992, based on claimant's failure to establish total disability due to pneumoconiosis. Claimant filed the present claim for benefits on March 24, 1998. Subsequent to the district director's denials of the present claim on August 3, 1998 and January 20, 1999, claimant filed a petition for modification and supporting evidence pursuant to 20 C.F.R. §725.310 (2000) on January 18, 2000. On July 12, 2000, the district director denied the modification request. Thereafter, claimant filed a second request for modification on June 21, 2001 accompanied by supporting evidence, which was similarly denied by the district director on July 10, 2001. Claimant requested a formal hearing on July 26, 2001 and accordingly, the claim was forwarded to the Office of Administrative Law Judges.

On January 11, 2002, shortly before the formal hearing scheduled for January 16, 2002, claimant filed a motion to withdraw the present claim pursuant to 20 C.F.R. §725.306. As a basis for this motion claimant's lay representative asserted that the medical evidence was insufficient to support the claim. In an Order issued on April 26, 2002, the administrative law judge found that, notwithstanding employer's failure to file a brief in opposition to the withdrawal, employer had no standing to object to the withdrawal and that no payments of compensation had been advanced to claimant. Accordingly, the administrative law judge approved withdrawal of the claim over employer's objection. The

² Claimant is Jimmy Lee Dye, who filed a duplicate application for benefits on March 24, 1998, which is pending in the instant case. Director's Exhibit 1.

³ The 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). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

administrative law judge denied employer's request for reconsideration on May 15, 2002.

On appeal, employer urges the Board to vacate the administrative law judge's Order and remand the case inasmuch as the administrative law judge failed to render an explicit determination as to whether he authorized claimant to withdraw the June 2001 modification request and/or the entire duplicate claim. In the alternative, employer maintains that if the administrative law judge permitted the withdrawal of the duplicate claim, this determination must be reversed because the Board recently held, in *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*), that Section 725.306 does not authorize an administrative law judge to grant the withdrawal of a claim that was previously adjudicated and denied. Claimant has not filed a response brief in this appeal. The Director, Office of Workers' Compensation Programs (the Director), as party-in-interest, responds, agreeing with employer that the administrative law judge lacked the authority under Section 725.306 to approve the withdrawal of the claim. The Director urges, therefore, that the Board reverse the administrative law judge's Order of Withdrawal and remand the case for adjudication of claimant's June 2001 request for modification of the district director's denial of benefits.

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 the applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer first argues that, in allowing claimant to withdraw his claim, the administrative law judge did not comply with his duty under the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), because he failed to clarify whether he was permitting withdrawal of claimant's June 2001 modification request or the March 1998 duplicate claim. In response, the Director, disagreeing with employer, contends that claimant, through his lay representative, specifically stated that he wished to withdraw his black lung claim and that, in the April 26, 2002 Order, the administrative law judge ordered that the claim be withdrawn.

In the Order of Withdrawal, the administrative law judge found that claimant "requested that this claim, initially filed on March 24, 1998, be withdrawn" and, after noting that employer objected to "the withdrawal of the entire claim (as opposed to the outstanding request for modification...)," ordered that the claim be withdrawn. Order of Withdrawal at 1. We, therefore, reject employer's argument that the administrative law judge did not explicitly state whether he authorized the withdrawal of the duplicate claim or the modification request inasmuch as the administrative law judge unequivocally ordered the

withdrawal of the claim.

Pursuant to Section 725.306,⁴ employer, citing *Clevenger* and *Lester*, maintains that

⁴ Section 725.306 provides:

(a) 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.

the administrative law judge lacked the authority to withdraw claimant's March 1998 claim because it was previously adjudicated on the merits and denied by the district director on January 20, 1999. The Director agrees with employer, asserting that the administrative law judge lacked the authority to approve the withdrawal of claimant's March 1998 claim inasmuch as the district director's January 1999 denial of that claim became effective thirty days later pursuant to Section 725.419, and, in light of *Clevenger* and *Lester*, an appropriate adjudication officer authorized to approve a withdrawal request no longer existed. We agree with employer and the Director.

The administrative law judge determined that the record supported claimant's belief that the evidence was insufficient to establish entitlement, that no compensation payments have been rendered to claimant, and that employer lacked standing to object to the withdrawal request. Accordingly, the administrative law judge ordered that the claim be withdrawn.

Subsequent to the administrative law judge's Order of Withdrawal and Order on Reconsideration in this case, the Board in *Clevenger* and *Lester* held that, as an initial matter, an employer has standing to object to a withdrawal request because, consistent with the requirements of 20 C.F.R. §802.201, employer is a party "adversely affected or aggrieved" by the administrative law judge's order allowing withdrawal of a claim because of employer's loss of various due process rights and defenses, its right to introduce all of the existing evidence of record into the record of another claim, and the advantages flowing to it from prior favorable decisions. Moreover, the Board held that the provisions of Section 725.306 are applicable only up until such time as a decision on the merits issued by an adjudication officer (*e.g.*, district directors, administrative law judges) becomes effective, *see* 20 C.F.R. §§725.419, 725.479, 725.502, after which, there no longer exists an appropriate adjudication officer authorized to approve a withdrawal request under Section 725.306. *Clevenger*, 22 BLR at 1-199-200; *Lester*, 22 BLR 1-190-191. In *Clevenger* and *Lester*, the Board agreed with the Director's argument that "the date a decision on the merits becomes effective is a practical point for terminating authority to allow withdrawal because it is readily identifiable and marks the point beyond which allowing withdrawal would be unfair to opposing parties," and consequently, "there is no compelling reason to allow [claimant] to avoid the consequences of that defeat; claimant may instead appeal the denial, seek modification within a year pursuant to Section 725.310, or thereafter file a subsequent claim under Section 725.309." *Clevenger*, 22 BLR at 1-200; *Lester*, 22 BLR 1-191.

20 C.F.R. §725.306.

Hence, in light of the Board's recent holdings in *Clevenger* and *Lester*, we reverse the administrative law judge's Order withdrawing the present claim since subsequent to the district director's January 1999 denial which became effective thirty days later, there was no longer an appropriate adjudication officer authorized to approve the withdrawal request under Section 725.306. *Clevenger, supra; Lester, supra*. Accordingly, we remand the case for the administrative law judge to adjudicate the merits of claimant's June 2001 modification request of the previously denied duplicate claim.

Accordingly, the Order of Withdrawal and Order Denying Reconsideration of the administrative law judge are reversed and the case is remanded for proceedings consistent with this decision.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge