

BRB No. 05-0671 BLA

ORMAN C. HARRIS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
DOMINION COAL CORPORATION	)	
	)	DATE ISSUED: 03/28/2006
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS’	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Order Canceling Hearing and Granting Summary Judgment for Claimant of Stephen L. Purcell, Administrative Law Judge, United States Department of Labor.

Ronald E. Gilbertson (Bell, Boyd & Lloyd PLLC), Washington, D.C., for employer.

Michelle S. Gerdano (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, 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 Canceling Hearing and Granting Summary Judgment for Claimant (05-BLA-5386) of Administrative Law Judge Stephen L. Purcell, 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). Claimant filed the instant

application for benefits on March 15, 2004.<sup>1</sup> In a letter dated September 1, 2004, claimant requested withdrawal of his claim. Claimant stated:

It is our intention to withdraw the application of the above claimant (sic) at this time because of test results of the doctor we selected. We believe the doctor was fair. It is impossible to win his claim because he does not meet the disability standards. This results in great cost and time to the claimant and to the Department of Labor to continue a case that we feel we cannot win at this time.

Director's Exhibit 22. On September 13, 2004, the district director determined that withdrawal was in the best interest of claimant and he granted claimant's request to withdraw the claim. Director's Exhibit 23. In the district director's Order, he stated that claimant's application for benefits is withdrawn and that pursuant to 20 C.F.R. §725.306(b), the claim is considered not to have been filed. Director's Exhibit 23. By letter dated October 1, 2004, employer disagreed with the decision to allow withdrawal of the claim, in particular because of the Department of Labor's interpretation of Section 725.306, which would result in the exclusion of the evidence developed as part of this withdrawn claim. Employer indicated that it would not object to the denial of the claim by reason of abandonment pursuant to 20 C.F.R. §725.409, and it requested a formal hearing. Director's Exhibit 24. The case was forwarded to the Office of Administrative Law Judges on December 21, 2004. Director's Exhibit 27. Before a hearing was held, employer filed Employer's Motion to Cancel Hearing and for Summary Judgment Regarding the District Director's Decision granting Claimant's Motion to Withdraw Claim. Claimant responded, urging the administrative law judge to deny employer's motion.

On April 20, 2005, the administrative law judge issued his Order Canceling Hearing and Granting Summary Judgment for Claimant, which is the subject of the instant appeal. The administrative law judge noted the procedural background of this case and granted claimant's request to withdraw his claim. The administrative law judge declined to address the merits of employer's request that the administrative law judge

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<sup>1</sup> Claimant previously filed several applications for benefits. The administrative law judge noted that the record does not contain a disposition of claimant's March 5, 1981 application. Decision and Order at 1. However, the record does contain a letter from the claims examiner to claimant dated July 17, 1981, indicating that the claim was denied based on abandonment. Director's Exhibit 2. Claimant's August 1, 1996 claim was denied by Administrative Law Judge Edward J. Murty, Jr., in a Decision and Order denying benefits issued on June 22, 1998. Director's Exhibit 2. Claimant's July 30, 1999 claim was denied by the district director on December 14, 1999. Director's Exhibit 3.

order the inclusion of evidence into the record of any future claim. The administrative law judge therefore denied employer's motion for summary judgment, and granted claimant's cross-motion for summary judgment.

Employer appeals, challenging the administrative law judge's decision to grant claimant's request to withdraw his claim, as well as the administrative law judge's decision not to order the inclusion of evidence developed in conjunction with this claim into the record of any future claims. The Director, Office of Workers' Compensation Programs, responds, urging affirmance of the administrative law judge's Order. Claimant has not participated in this appeal.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 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).

Employer asserts that the administrative law judge erred by allowing withdrawal of the claim without considering the effects of withdrawal on employer. Employer specifically asserts that the administrative law judge erred by failing to address the prejudice to employer or its due process rights resulting from the exclusion of evidence developed in this claim.

The administrative law judge found that it is in the best interest of claimant that he be allowed to withdraw his claim and he stated:

Although Employer suggests that consideration must also be given to whether withdrawal will affect its rights, the *only* provision in the regulation which implicates the rights of the responsible operator is the requirement that any benefits paid with respect to the claim be repaid.

Decision and Order at 4.

The Board has recently considered the same arguments now raised by employer, in *Bailey v. Dominion Coal Corp.*, BLR , BRB No. 05-0407 BLA (Dec. 19, 2005). In *Bailey*, the Board rejected employer's argument that the administrative law judge erred by failing to consider employer's best interests because the regulation does not require that employer's best interests be considered. 20 C.F.R. §725.306. *See Bailey*, slip op. at 4. Further, in this case, as in *Bailey*, employer has not shown a clear and specific basis for denial of claimant's request for withdrawal. Consequently, we affirm the

administrative law judge's decision to grant claimant's request for withdrawal of his claim.

Employer also asserts that the administrative law judge erred in not mandating that the evidence already developed in this case be included in the record in any future claims. Employer argues that while Section 725.306(b) allows claimant only to withdraw his claim, "it does not allow claimant to withdraw relevant medical evidence developed before the agency." Employer's Brief at 13 (emphasis in the original). Employer contends that it cannot rely on the evidence now in the record because "doing so under the Department of Labor's interpretation would exceed the two exam limit of Section 725.414(a)(3)(i)." Employer's Brief at 9. Employer further asserts that it "cannot even allow this relevant evidence now in the record to be considered in conjunction with a future exam conducted by any physician, because doing so would risk the exclusion of their opinions under 20 C.F.R. §725.456(d)," *id.*, because it must know what is in the record and what is not in the record prior to arranging for a new examination. Otherwise, employer asserts, it "risks showing the new examining physician too much relevant evidence. This procedure unfairly deprives the employer of its right to raise a full and proper defense." Employer's Brief at 9. Employer maintains that exclusion of this evidence violates the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a). Employer also contends that 20 C.F.R. §725.421(b)(4) mandates that relevant evidence from any examinations conducted pursuant to 20 C.F.R. §725.406 be included in the agency record. Employer continues "if Section 725.406 evidence must be considered part of the agency record, then logically so too must all evidence submitted by any party in response to that evidence be admitted." Employer's Brief at 16.

In considering employer's assertion that certain evidence must be admitted in any future claims, the administrative law judge determined that:

to the extent Employer is now attempting to raise issues regarding whether certain evidence may be admitted in a proceeding which may or may not arise, such issues are not ripe since no such case presently exists.

Decision and Order at 5.

The Board also considered these arguments by employer in *Bailey*. In *Bailey*, the Board affirmed the administrative law judge's decision not to rule on employer's request to order the automatic inclusion of evidence into the record of any future claim because once withdrawal of the claim is granted, the claim is considered not to have been filed, 20 C.F.R. §725.306(b), and there is no further issue present. Similarly in *Bailey*, the Board declined to address employer's arguments in this regard on appeal, and stated any

required evidentiary rulings would be made by the adjudicating officer when considering any future claim filed by claimant. *Bailey*, slip op. at 6.

Consequently, we hold that the administrative law judge did not err by not ruling on employer's request to order inclusion of the evidence already developed into the record of any future claim. Because we affirm the administrative law judge's decision to grant claimant's request for withdrawal of his claim, there is no further issue present. Thus, we 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. *See Bailey*, slip op. at 6.

Accordingly, we affirm the administrative law judge's Order Canceling Hearing and Granting Summary Judgment for Claimant.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge