

BRB No. 08-0651 BLA

E.G.)	
(Widow of G.G.))	
)	
Claimant-Respondent)	
)	
v.)	DATE ISSUED: 05/22/2009
)	
BEVINS ENERGY, INCORPORATED)	
)	
Employer-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Order Granting Withdrawal and the Order Denying Reconsideration Request of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Dennis James Keenan (Hinkle & Keenan P.S.C.), South Williamson, Kentucky, for claimant.

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

Michelle S. Gerdano (Carol A. DeDeo, Deputy Solicitor; Rae Ellen Frank James, 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, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Order Granting Withdrawal and the Order Denying Reconsideration Request (07-BLA-5993) of Administrative Law Judge Daniel F. Solomon rendered 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, the widow of the deceased miner, filed this claim for survivor's benefits on October 3, 2006. Director's Exhibit 2. The district director denied benefits on May 29, 2007, based on claimant's failure to establish that the miner's death was due to pneumoconiosis. Director's Exhibit 31 at 4. Claimant timely requested a hearing on June 26, 2007. Director's Exhibit 33. The case was forwarded to the Office of Administrative Law Judges for a hearing, which was scheduled for April 9, 2008. Director's Exhibit 35 at 4.

Employer moved for summary judgment on January 8, 2008.¹ Claimant opposed the motion for summary judgment, and, while employer's motion was still pending, on March 6, 2008, claimant filed a motion to withdraw her claim for survivor's benefits pursuant to 20 C.F.R. §725.306.² In an order issued on March 17, 2008, the

¹ Employer's motion is not contained in the record. On appeal, employer states that it moved for summary judgment based on principles of res judicata and collateral estoppel, arguing that claimant's entitlement was precluded because it was finally determined in the miner's unsuccessful claim for lifetime benefits that he did not have pneumoconiosis, and no autopsy evidence was submitted in the survivor's claim. Employer's Brief at 3-4.

² Section 725.306 provides that:

(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.

administrative law judge approved withdrawal of the claim, finding that withdrawal was in claimant's best interests, and noting that he had been advised that employer had no objection. Employer moved for reconsideration on March 17, 2008, objecting to the withdrawal of the claim. By Order dated May 19, 2008, the administrative law judge denied reconsideration.

On appeal, employer contends that the administrative law judge erred in granting withdrawal of the claim without considering employer's interests.³ Employer further argues that the Board must order that the district director's decision and the medical evidence developed in the withdrawn claim remain as part of the record. Claimant responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), responds, stating that the only issue in this case is whether the administrative law judge properly granted claimant's withdrawal request. The Director asserts that the administrative law judge properly granted claimant's request for withdrawal, and that therefore, the claim is considered not to have been filed. Thus, the Director urges the Board to reject employer's request to order that the evidence be preserved. He further notes that any party remains free to submit that evidence in a future claim, subject to the limitations of 20 C.F.R. §725.414, and that employer is free to raise any issue it believes to be relevant, such as issue preclusion, at that time. Employer has filed a reply brief reiterating its contentions.

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.⁴ 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).

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 unfairly prejudiced if withdrawal of this

20 C.F.R. §725.306.

³ Specifically, employer argues that case law interpreting Rule 41(a), an analogous rule under the Federal Rules of Civil Procedure, holds that, before granting a voluntary dismissal, 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. Employer's Brief at 7-8.

⁴ The record indicates that the miner's coal mine employment was in Kentucky. Director's Exhibits 3, 7. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

claim were permitted and the record associated with it were destroyed, and it asserts that, because claimant's claim is barred by principles of collateral estoppel, no future claim should even be permitted. Employer's Brief at 7, 9-11; Reply at 2. Employer asserts that it would be adversely affected by being prevented from introducing all of the evidence developed in connection with this claim into the record of a future claim, *see* 20 C.F.R. §§725.414, 725.456, and by the loss of the advantages flowing from the district director's favorable decision. Employer's Brief at 11-12. Employer maintains that its interests are relevant and must be considered by the administrative law judge in determining whether withdrawal is appropriate. Employer's Brief at 7-8. Employer also asserts that if the order of withdrawal is affirmed, the Board must order that the district director's decision denying benefits and the medical evidence remain part of the record and be preserved for any future litigation. Employer's Brief at 11-12.

Upon review of the administrative law judge's orders, the arguments raised on appeal, and the evidence of record, we agree with the Director that the only issue presented is whether the administrative law judge properly granted claimant's withdrawal request. We conclude that substantial evidence supports the administrative law judge's findings and that he properly granted withdrawal.

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*), 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, becomes effective. *Lester*, 22 BLR at 191; *Clevenger*, 22 BLR at 1-200. The applicable regulations 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. *See* 20 C.F.R. §§725.419(a),(d);725.502(a)(2).

In this case, claimant requested a hearing within thirty days of the issuance of the district director's proposed Decision and Order, which, therefore, did not become effective. *See* 20 C.F.R. §725.419(d). Since claimant timely sought withdrawal of her claim before any adjudication on the merits became effective, the provisions of Section 725.306 were applicable and the administrative law judge was authorized to approve withdrawal of her claim, consistent with *Lester* and *Clevenger*. The administrative law judge reasonably analyzed claimant's request for withdrawal of the claim within the context of the regulation and properly considered whether withdrawal was in the best interests of claimant. *See* 20 C.F.R. §725.306(a)(2). We reject employer's argument that under the facts and circumstances of this case the administrative law judge erred by granting withdrawal. Contrary to employer's contention, Section 725.306 "does not require that employer's interests be considered." *Bailey v. Dominion Coal Corp.*, 23 BLR 1-87, 1-90 (2005). The administrative law judge acted within his authority to grant

withdrawal under Section 725.306, and substantial evidence supports his finding that the requirements of Section 725.306 were met. Consequently, we affirm the administrative law judge's order granting withdrawal of the claim pursuant to Section 725.306.

In view of our affirmance of the administrative law judge's decision to grant claimant's request for withdrawal of her claim, this claim must "be considered not to have been filed." 20 C.F.R. §725.306(b). Thus, "no further issue is present" for our decision. *Bailey*, 23 BLR at 1-91. Therefore, we decline to address employer's remaining arguments on appeal. If claimant files a future claim, any required evidentiary or procedural rulings will be made by the adjudication officer assigned to that case. *Id.*

Accordingly, the administrative law judge's Order Granting Withdrawal and Order Denying Reconsideration Request are affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge