

BRB No. 05-0528 BLA

ROBERT D. BROWN )  
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 Claimant-Respondent )  
 )  
 v. )  
 )  
 JEWELL RESOURCES CORPORATION ) DATE ISSUED: 11/15/2005  
 )  
 and )  
 )  
 SUN COAL COMPANY, INCORPORATED )  
 )  
 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 Remand and Denial of Employer's Motion for Summary Judgment of William S. Colwell, Administrative Law Judge, United States Department of Labor.

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

Rita A. Roppolo (Howard M. Radzely, Solicitor of Labor; Alan 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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Order of Remand and Denial of Employer's Motion for Summary Judgment (05-BLA-5266) of Administrative Law Judge William S. Colwell approving 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). The pertinent procedural history of this case is as follows: Claimant's initial claim for benefits, filed on March 29, 1999, was denied on March 14, 2000. Director's Exhibit 17. Claimant filed a second claim on July 16, 2001, but subsequently withdrew it. Director's Exhibit 17; 20 C.F.R. §725.306. Claimant filed his current claim on October 16, 2003. Director's Exhibit 1. On March 17, 2004, 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 15.

Rather than develop additional evidence, claimant filed a written request to withdraw his claim because "he does not meet the disability standards." Director's Exhibit 33. On April 7, 2004, the district director issued a Proposed Decision and Order Withdrawal of Claim, finding that withdrawal of the claim was in claimant's best interests. Director's Exhibit 21; 20 C.F.R. §725.306. Employer objected to the approval of claimant's request to withdraw his claim unless the evidence developed in the claim was preserved and made part of the record in any future claims. Director's Exhibit 21. Consequently, the case was referred to the Office of Administrative Law Judges for a hearing. Director's Exhibits 22, 24.

Before the scheduled hearing, employer moved for summary judgment on the withdrawal issue, arguing that employer would be prejudiced unless the administrative law judge ordered that evidence from the withdrawn claim be included in the record of any future claims. On February 28, 2005, the administrative law judge ruled that the prerequisites for granting withdrawal under Section 725.306 were met and that therefore the district director had properly granted withdrawal of the claim. The administrative law judge found that employer lacked standing to challenge the district director's grant of withdrawal. Additionally, the administrative law judge noted that under Section 725.306, he was only required to consider whether withdrawal of the claim was in claimant's best interests, and he observed that conditioning withdrawal on the inclusion of the evidence in the record of any new claim conflicted with the provision that a withdrawn claim is "considered not to have been filed." 20 C.F.R. §725.306(b). Further, the administrative law judge noted that employer could submit the evidence from the withdrawn claim into the record of any new claim, subject to the evidentiary limitations of 20 C.F.R. §725.414, or upon a showing of good cause under 20 C.F.R. §725.456. Finally, the administrative law judge found that the evidentiary concerns raised by employer were not ripe for resolution. Accordingly, the administrative law judge denied employer's motion for

summary judgment, remanded the case to the district director to complete processing of the claim withdrawal, and cancelled the hearing.

On appeal, employer contends that the administrative law judge erred in upholding the district director's grant of withdrawal of the claim pursuant to 20 C.F.R. §725.306. Claimant has not filed a response brief in this appeal. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the administrative law judge's decision.

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).

Initially, employer contends that the administrative law judge erred in finding that it lacked standing to challenge the district director's approval of claimant's request to withdraw the claim. Employer's Brief at 6-8. The Director agrees that the administrative law judge erred in finding that employer lacked standing to appeal the withdrawal order. Director's Brief at 2. Although an employer lacks standing to challenge a finding that withdrawal of a claim is in claimant's best interests, the employer has standing to pursue its own legal rights and interests, to the extent it can demonstrate that granting withdrawal results in present harm to those interests. *Lester v. Peabody Coal Co.*, 22 BLR 1-183, 1-187-88 (2002)(*en banc*); *Clevenger v. Mary Helen Coal Co.*, 22 BLR 1-193, 1-197-98 (2002)(*en banc*). Consequently, the administrative law judge erred to the extent he stated that, as a general matter, employer lacked standing to challenge the district director's withdrawal order.

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 this claim were permitted and the record associated with it were destroyed. Employer's Brief at 10-13. Employer asserts that it would be adversely affected by permitting claimant to withdraw his claim because employer would be prevented from introducing 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, Employer's Brief at 10-13. Employer also maintains that consistent with Section 725.306, employer's interests are relevant and must be considered by the administrative law judge in determining whether withdrawal is appropriate. Employer's Brief at 12-13. Employer additionally requests that the Board rule as a matter of law that withdrawal must be conditional on protecting employer's rights by ordering that the evidence developed in connection with this claim be made a part of any new claim filed by claimant. Employer's Brief at 14-19. Employer's arguments are without merit.

By its terms, Section 725.306 does not address the precise point at which the district director or an administrative law judge loses authority to grant withdrawal. Rather, the regulation 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.

20 C.F.R. §725.306.

In *Lester* and *Clevenger*, the Board deferred to the Director's interpretation that "the date on which 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." *Lester*, 22 BLR at 191; *Clevenger*, 22 BLR at 1-200. The Board held that the Director's interpretation of Section 725.306 was reasonable because:

[it] 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 as the result of the adversarial process, [citation omitted]; and it balances a claimant's interest in foregoing 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 191; *Clevenger*, 22 BLR at 1-200. Accordingly, the Board held that the provisions of Section 725.306 are applicable "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.

In the case at bar, the administrative law judge correctly found that no decision on the merits had been issued. On March 17, 2004, the district director issued a schedule for the submission of additional evidence which, by its terms, was not a decision on the merits but was a preliminary conclusion that “claimant would not be entitled to benefits if we issued a decision at this time . . . .” Director’s Exhibit 15 at 1; 20 C.F.R. §725.410(a)(2)(requiring that the schedule contain a “preliminary analysis of the medical evidence”). The schedule informed the parties that a Proposed Decision and Order either awarding or denying benefits would not be issued until after the submission of additional evidence and the completion of further processing. Director’s Exhibit 15 at 2. Rather than submit additional evidence, claimant timely opted to withdraw his claim. Director’s Exhibit 18. Because claimant filed a written request for withdrawal before a decision on the merits was issued, the provisions at Section 725.306 were applicable and the administrative law judge was authorized to grant withdrawal of the claim, consistent with *Lester* and *Clevenger*.

As discussed above, neither *Lester* nor *Clevenger* held that an administrative law judge must weigh employer’s interests in deciding whether to grant withdrawal under Section 725.306. Additionally, because a withdrawn claim must be “considered not to have been filed,” 20 C.F.R. §725.306(b), we decline to hold as a matter of law that the grant of withdrawal must be conditional upon preserving the withdrawn claim evidence for automatic inclusion in the record of any new claim filed. If employer so chooses, it may submit the evidence developed in this claim for admission in any new claim record, subject to the limitations of Sections 725.414 and 725.456(b)(1). Furthermore, employer has demonstrated no present harm from the administrative law judge’s decision to approve claimant’s request for withdrawal of his claim; rather, its immediate impact is to relieve employer from liability for benefits and the added expense of defending the claim. Employer’s description of future harm which may result from withdrawal of the claim is speculative.

In sum, the administrative law judge acted within his authority to grant withdrawal under Section 725.306, *see Lester*, 22 BLR at 191; *Clevenger*, 22 BLR at 1-200, and substantial evidence supports his finding that the requirements of Section 725.306 were met. Consequently, we reject employer’s allegations of error and 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 Remand and Denial of Employer's Motion for Summary Judgment is affirmed.

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge