BRB No. 03-0122 BLA

WILLIE C. ROBBINS, JR. Claimant-Respondent v. BOSSCO INCORPORATED and OLD REPUBLIC INSURANCE COMPANY Employer/Carrier- Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-In-Interest	)	DATE ISSUED: 09/25/2003

DECISION and ORDER

Appeal of the Order of Withdrawal of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

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

Jeffrey S. Goldberg (Howard M. Radzely, Acting Solicitor of Labor; Donald S. Shire, 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: SMITH, McGRANERY, and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Order of Withdrawal (2002-BLA-05164) of Administrative Law Judge Jeffrey Tureck granting 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).[1] The pertinent procedural history of this case is as follows. Claimant filed an application for benefits on February 1, 2001. Director's Exhibit 3. On February 7, 2001, the district director notified employer that it had been identified as the potentially responsible operator in the claim, Director's Exhibit 17, and employer subsequently controverted its liability. Director's Exhibits 18, 20. On October 2, 2001, after obtaining a complete pulmonary evaluation of claimant, Director's Exhibits 8-12, 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 28. No additional medical evidence was submitted, and on February 20, 2002, the district director issued a Proposed Decision and Order denying benefits. Director's Exhibit 30. On February 25, 2002, claimant filed a written request to withdraw his claim. Director's Exhibit 31. On March 8, 2002, the district director issued a Proposed Decision and Order granting withdrawal of the claim. Director's Exhibit 32. On April 2, 2002, employer informed the district director that it had not received a copy of claimant=s request to withdraw, and objected to withdrawal. Director's Exhibit 33. Employer requested a hearing. *Id*. In an Order of Withdrawal issued on September 10, 2002, the administrative law judge found that employer=s objections were without merit and that the requirements of 20 C.F.R. '725.306 were met. Accordingly, the administrative law judge granted withdrawal of the claim.

On appeal, employer contends that the administrative law judge erred in granting withdrawal of the claim pursuant to Section 725.306. The Director, Office of Workers= Compensation Programs (the Director), responds, urging affirmance of the administrative law judge=s order granting withdrawal. Employer has filed a reply brief reiterating its contentions. 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 supported by substantial evidence, is rational, and is in accordance with law. 33 U.S.C. '921(b)(3), as incorporated into the Act by 30 U.S.C. '932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

[1] 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.

Employer contends that, because a withdrawn claim is considered not to have been filed, *see* 20 C.F.R. ' 725.306(b), employer will be unduly prejudiced if withdrawal of this claim is permitted and the existing record is nullified. Employer asserts that it will be adversely affected by its loss of vested litigation rights, such as the right to introduce the evidence developed in connection with this claim into the record of a subsequent claim, *see* 20 C.F.R. ' ' 725.414, 725.456, and the advantages flowing from the district director=s decision that claimant is not entitled to benefits. Employer also contends that the administrative law judge misapplied *Lester v. Peabody Coal Co.*, 22 BLR 1-183 (2002)(*en banc*), and *Clevenger v. Mary Helen Coal Co.*, 22 BLR 1-193 (2002), because he failed to consider employer=s interests in determining whether withdrawal was appropriate pursuant to Section 725.306. Employer=s contentions lack merit.

By its terms, Section 725.306 does not require the district director or an administrative law judge to consider the interests of any party other than those of the claimant when evaluating a request for withdrawal, nor does the text of the regulation 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:
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> > (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 Athe 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 Aup 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 district director issued a Proposed Decision and Order denying benefits on February 20, 2002. Director's Exhibit 30. The applicable regulation provides that a district director=s proposed decision and order becomes effective thirty days after the date of its issuance, unless a party requests a revision or a hearing. 20 C.F.R. '725.419(a),(d). Claimant filed a written request for withdrawal on February 25, 2002, Director's Exhibit 31, less than thirty days after the issuance of the district director=s Proposed Decision and Order. Because claimant requested withdrawal before the decision on the merits issued by the district director became effective, 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*.

Contrary to employer=s specific arguments, employer=s litigation rights did not vest with the mere issuance of the district director=s Proposed Decision and Order denying benefits. *See Lester*, 22 BLR at 1-191 (The effective date of a decision on the merits Amarks the point beyond which allowing withdrawal would be unfair to opposing parties.@); 20 C.F.R. '725.419(a),(d). Additionally, neither *Lester* nor *Clevenger* held that an administrative law judge must weigh employer=s interests against those of claimant in deciding whether to grant withdrawal under Section 725.306. Finally, employer has demonstrated no present harm from the administrative law judge=s Order of Withdrawal; 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 Withdrawal 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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PETER A. GABAUER, JR.
Administrative Appeals Judge