

BRB No. 05-0742 BLA

ALEXANDER S. FILOHOSKI)
)
 Claimant-Respondent)
)
 v.)
)
 READING ANTHRACITE COMPANY)
)
 and)
)
 INTERNATIONAL BUSINESS &)
 MERCANTILE REASSURANCE) DATE ISSUED: 04/28/2006
 COMPANY)
)
 Employer/Carrier-)
 Petitioners)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order Approving Withdrawal of Claim and the Order Denying Motion for Reconsideration of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

Helen M. Koschoff, Wilburton, Pennsylvania, for claimant.

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

Before: SMITH, HALL, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Approving Withdrawal of Claim and the Order Denying Motion for Reconsideration (05-BLA-0041) of Administrative Law Judge Paul H. Teitler on a claim for benefits 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 procedural history of this case is as follows. Claimant filed an application for benefits on June 6, 1986. After the case was scheduled for a hearing before an administrative law judge, claimant requested that his claim be withdrawn because he was still employed. On March 11, 1988, Administrative Law Judge Frank D. Marden issued an Order of Dismissal, wherein he dismissed claimant's claim for benefits. Director's Exhibit 39.

On September 5, 1990, claimant filed a new application for benefits. Director's Exhibit 1. On April 23, 1992, Administrative Law Judge Ainsworth H. Brown issued his Decision and Order – Denying Benefits. Director's Exhibit 68. On claimant's appeal to the Board, Judge Brown's Decision and Order was affirmed in part and vacated in part, and remanded for further consideration. *Filohoski v. Reading Anthracite Co.*, BRB No. 92-1260 BLA (Feb. 25, 1994)(unpub.); Director's Exhibit 77. On September 29, 1994, Judge Brown issued a Decision and Order Upon Remand from the Benefits Review Board Denying Benefits. Director's Exhibit 78. Claimant appealed, and on June 29, 1995, the Board issued its Decision and Order affirming Judge Brown's denial of benefits. *Filohoski v. Reading Anthracite Co.*, BRB No.95-0513 BLA (June 29, 1995)(unpub.); Director's Exhibit 89.

On April 8, 1996, claimant filed a Petition for Modification. Director's Exhibit 90. The district director denied modification, Director's Exhibit 101, and the case was returned to Judge Brown, who issued a Decision and Order Denying Benefits Upon Modification on September 11, 1998. Director's Exhibit 119. On claimant's appeal, the Board affirmed Judge Brown's denial of modification. *Filohoski v. Reading Anthracite Co.*, BRB No.98-1620 BLA (Sept. 20, 1999)(unpub.); Director's Exhibit 123.

On March 15, 2000, claimant filed a Petition for Modification. Director's Exhibit 124. The case was considered by Administrative Law Judge Robert D. Kaplan, who issued a Decision and Order Denying Benefits on December 7, 2001. Director's Exhibit 163. On claimant's appeal, the Board affirmed in part, and vacated in part, Judge Kaplan's Decision and Order. The Board remanded the case for further consideration. *Filohoski v. Reading Anthracite Co.*, BRB No.02-0282 BLA (Sept. 30, 2002)(unpub.); Director's Exhibit 172. On Employer's Request for Reconsideration, the Board denied the relief requested. *Filohoski v. Reading Anthracite Co.*, BRB No.02-0282 BLA (Apr. 30, 2003)(Decision and Order on Recon.)(unpub.)(Smith, J., concurring and dissenting); Director's Exhibit 174. Judge Kaplan issued a Decision and Order (Upon Remand by the Benefits Review Board) denying benefits on September 13, 2003. Director's Exhibit 180.

Claimant filed a Petition for Modification on August 5, 2004. Director's Exhibit 181. The district director denied benefits, Director's Exhibit 190, and the case was transferred to the Office of Administrative Law Judges, Director's Exhibit 197.

On May 9, 2005, claimant's counsel wrote a letter to Administrative Law Judge Paul H. Teitler (the administrative law judge), wherein she stated:

During a recent telephone call with Mr. Filohoski, he requested that I contact Your Honor to advise that he no longer wishes to pursue his Federal Black Lung Claim at this time. He therefore, requests that the hearing scheduled before Your Honor for June 29, 2005 at 10:30 a.m. be canceled and an Order be issued Granting his request to withdraw his request for a hearing.

Claimant's Letter of May 9, 2005. On May 11, 2005, the administrative law judge issued a Decision and Order Approving Withdrawal of Claim, wherein he noted claimant's counsel's "written request to withdraw this claim." Decision and Order at 1. The administrative law judge noted the regulatory requirements contained in 20 C.F.R. §725.306, and determined that it would be in the best interests of claimant to grant this request for withdrawal of the claim. Accordingly, he approved claimant's request for withdrawal. Employer filed a Motion for Reconsideration, which the administrative law judge found "to be without merit." Order Denying Motion for Reconsideration dated June 1, 2005. Accordingly, the administrative law judge denied employer's Motion for Reconsideration.

Employer now appeals to the Board. Employer asserts that the withdrawal of the claim must be reversed. Employer contends that the administrative law judge lacked the authority to authorize withdrawal of the claim. Further, employer asserts that claimant did not request a withdrawal of his claim, but rather, asked that the request for a hearing be withdrawn. The Director, Office of Workers' Compensation Programs, states that he will not submit a brief in this appeal. Claimant has not submitted a brief, however, claimant's counsel and employer's counsel have both signed a "Stipulation of Counsel."¹

¹ The Stipulation of Counsel, which is undated, was received by the Board on January 18, 2006, well after the parties submitted their briefs. The Stipulation of Counsel summarizes the procedural history of this case and states in part:

10. In withdrawing the hearing request, claimant was withdrawing his disagreement with the initial denial by the District Director of his modification claim issued November 4, 2005 and request that the hearing be cancelled. It is understood that the denial by the District

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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

After consideration of the administrative law judge's findings, the arguments raised on appeal, and the evidence of record, we hold that the administrative law judge erred in granting withdrawal of the claim. The Board has held that the provisions of Section 725.306, addressing the withdrawal of a claim, "are applicable only up until such time as a decision on the merits issued by an adjudication officer becomes effective." *Clevenger v. Mary Helen Coal Co.*, 22 BLR 1-193, 1-200 (2002). The regulations set out the criteria for determining when a decision becomes effective, stating that the administrative law judge shall serve the Decision and Order on all parties and the district director on the date of issuance, and that "Upon receipt by the DCMWC, the decision and order shall be considered to be filed in the office of the district director, and shall become effective on that date." 20 C.F.R. §725.478.

Director on the modification claim issued November 4, 2004, would remain in tact [sic].

11. In issuing an order providing for the withdrawal of a claim in its entirety and in denying the Motion for Reconsideration, the Administrative Law Judge, granted relief beyond the limited request.

12. Accordingly, the Orders of Administrative Law Judge Paul Teitler issued May 11, 2005, approving the withdrawal of the claim and June 1, 2005, denying Motion for Reconsideration may be vacated as granting relief not specifically requested by claimant and amended to provide for the withdrawal of the hearing request only, cancellation of the hearing and remand to the District Director.

Stipulation of Counsel at 2-3 (unpaginated). This Stipulation of Counsel is signed by Helen M. Koschoff, as attorney for claimant and by Frank L. Tamulonis, Jr., of Zimmerman, Lieberman & Tamulonis, as attorney for Reading Anthracite Company and International Business & Mercantile Reassurance Company. The record reflects that Mr. Tamulonis previously represented employer in this case. See Decision and Order Denying Benefits dated December 7, 2001 at Director's Exhibit 163.

The claim at issue was filed on September 5, 1990. Director's Exhibit 1. As noted *supra*, on April 23, 1992, Administrative Law Judge Ainsworth H. Brown issued his Decision and Order – Denying Benefits. The copy of this Decision and Order contained in the record file does not indicate when it was received by the district director. Director's Exhibit 68. However, the copy of the Board's Decision and Order dated February 25, 1994, wherein Judge Brown's Decision and Order was affirmed in part and vacated in part, is stamped as having been received by the district director on September 7, 1994. Because there has been a Decision and Order on the merits of the instant claim which has become effective, it was error for the administrative law judge to grant any request for withdrawal of this claim. *Clevenger*, 22 BLR at 1-200. Moreover, claimant's intent, as evidenced by his letter to the administrative law judge dated May 9, 2005, and by his response to employer's appeal in the form of a "Stipulation of the Parties," was to withdraw his request for a hearing. We therefore reverse the administrative law judge's decision ordering withdrawal of this claim.

Accordingly, we reverse the administrative law judge's Decision and Order Approving Withdrawal of Claim and the Order Denying Motion for Reconsideration, and remand the case to the administrative law judge for consideration of claimant's request for withdrawal of his request for a hearing, and for further proceedings consistent with the administrative law judge's determination thereunder.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge