

BRB No. 03-0828 BLA

DONALD R. ANDERSON)	
)	
Claimant-Respondent)	
)	
v.)	
)	
KIAH CREEK MINING COMPANY, INCORPORATED)	DATE ISSUED: 05/24/2004
)	
and)	
)	
OLD REPUBLIC INSURANCE COMPANY)	
)	
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 Dismissal/Withdrawal of Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

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

Helen H. Cox (Howard M. Radzely, 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 HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Order of Dismissal/Withdrawal (2003-BLA-5364) of Administrative Law Judge Pamela Lakes Wood 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 a claim for benefits on February 16, 2001. Director's Exhibit 2. On February 22, 2001, the district director notified employer that it had been identified as the potentially responsible operator in the claim, Director's Exhibit 16, and employer subsequently controverted its liability. Director's Exhibit 17, 19, 21. On December 5, 2001, 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 30. After additional medical evidence was submitted, the district director issued a Proposed Decision and Order on October 7, 2002, finding that claimant failed to establish any element of entitlement and denying benefits. Director's Exhibit 38.

On October 14, 2002, claimant requested a formal hearing, Director's Exhibit 39, and on January 22, 2003, the case was forwarded to the Office of Administrative Law Judges. Director's Exhibit 46. The case was subsequently assigned to Judge Woods and was scheduled for a hearing on August 27, 2003. On August 12, 2002, claimant filed a written request to withdraw his claim, to which employer filed objections on August 18, 2003; the Director, Office of Workers' Compensation Programs (the Director), did not object. In her Order issued on August 20, 2003, the administrative law judge found that employer's objections were without merit pursuant to 20 C.F.R. §725.306. Accordingly, the administrative law judge granted claimant's motion to withdraw the claim and cancelled the hearing.

On appeal, employer contends that the administrative law judge erred in approving withdrawal of the claim pursuant to Section 725.306. Claimant has not filed a response brief in this appeal. The Director responds, urging affirmance of the administrative law judge's Order granting withdrawal, to which employer replies in support of its position on appeal.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational,

¹The Department of Labor (DOL) 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). As the instant claim was filed thereafter, all citations to the regulations refer to the amended regulations.

and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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 unduly prejudiced if withdrawal of this claim were permitted and the record associated with it were destroyed, and that claimant would unfairly benefit if the slate were wiped clean. Employer asserts that it would be adversely affected by its loss of vested litigation rights, such as the right to introduce 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, and the advantages flowing from the district director's favorable decision. Employer also maintains that, consistent with the Board's holdings 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*), employer's interests are relevant and must be considered by the administrative law judge in determining whether withdrawal is appropriate pursuant to Section 725.306. Employer additionally asserts that if the order of withdrawal is affirmed, the Board must modify the administrative law judge's order to make the withdrawal conditional so as to protect employer's rights, *i.e.*, by ordering that the district director's proposed decision and the evidence developed in connection with this claim be preserved and made a part of any new claim filed by claimant, exempt from the provisions at Section 725.414. Employer's arguments are without merit.

In *Lester* and *Clevenger*, the Board held that the provisions at Section 725.306 are applicable only up until such time as a decision on the merits, issued by an adjudication officer, becomes effective.² *Lester*, 22 BLR at 1-191; *Clevenger*, 22 BLR at 1-200. The regulations clearly 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, and that an administrative law judge's decision and order on the merits of a claim is effective on the date it is filed in the office of the district director. *See* 20 C.F.R. §§725.419, 725.479, 725.502(a)(2); *Lester*, 22 BLR at 1-190; *Clevenger*, 22 BLR at 1-199.

In this case, since claimant requested a hearing within thirty days after issuance of the district director's proposed decision and order, and timely sought withdrawal of his claim before any adjudication on the merits became effective, the provisions at Section 725.306 were applicable and the administrative law judge was authorized to approve withdrawal of the claim, consistent with *Lester* and *Clevenger*. Although employer argues that case law interpreting Rule 41(a), an analogous rule under the Federal Rules of Civil Procedure, holds

²An adjudication officer is defined as a district director or administrative law judge who is authorized by the Secretary of Labor to accept evidence and decide claims, *see* 20 C.F.R. §725.350.

that when voluntary dismissal is sought, 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, under the applicable regulation herein, the administrative law judge was only required to consider whether withdrawal of the claim was in the best interests of the claimant. *See* 20 C.F.R. '725.306. We reject employer's assertion that the Board must modify the administrative law judge's order to make the withdrawal conditional upon preservation of the existing record for inclusion in the record of any new claim, as this would be inconsistent with the regulatory scheme, providing that a withdrawn claim ~~is~~ considered not to have been filed.@ 20 C.F.R. §725.306(b). Further, the Director correctly notes that employer is not precluded from submitting the evidence developed in this claim for inclusion in a new claim record, subject to the evidentiary limitations or with a showing of good cause for its inclusion. *See* 20 C.F.R. §725.414, 725.456. As substantial evidence supports the administrative law judge's finding that the requirements of Section 725.306 were met, we affirm her Order granting withdrawal of the claim.

Accordingly, the administrative law judge's Order of Dismissal/Withdrawal is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge