

BRB No. 03-0281 BLA

CHARLES M. CONLEY)
)
 Claimant-Respondent)
)
 v.)
)
 NATIONAL MINES CORPORATION)
)
 and)
)
 OLD REPUBLIC INSURANCE COMPANY)
)
 Employer/Carrier-)
 Petitioners)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-In-Interest)

DATE ISSUED: _____
11/21/2003

DECISION and ORDER

Appeal of the Order Granting Claimant's Motion to Withdraw of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Bobby S. Belcher, Jr. (Wolfe, Willams & Rutherford), Norton, Virginia, for claimant.

W. William Prochot (Greenberg Traurig LLP), Washington, D.C., for employer.

Jennifer U. Toth (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 HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Order Granting Claimant's Motion to Withdraw (2002-BLA-5276) of Administrative Law Judge Joseph E. Kane 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 March 8, 2001. Director's Exhibit 3. On March 19, 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. On September 26, 2001, after obtaining a complete pulmonary evaluation of claimant, Director's Exhibit 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 19. After the submission of additional medical evidence, on February 22, 2002, the district director issued a Proposed Decision and Order denying benefits. Director's Exhibit 23. The decision informed the parties that the Proposed Decision and Order denying benefits would become final thirty days after February 22, 2002, unless the parties requested revision of the Proposed Decision and Order or requested a hearing. Director's Exhibit 23 at 3.

Twenty-four days later, on March 18, 2002, claimant filed a written request to withdraw his claim. Director's Exhibit 24. Employer objected to the withdrawal request. Director's Exhibit 25. On March 29, 2002, the district director issued a Proposed Decision and Order granting withdrawal of the claim. Director's Exhibit 27. Employer requested a hearing, Director's Exhibit 28, which was scheduled for December 2, 2002. By letter to the administrative law judge dated July 1, 2002, claimant, by counsel, requested that the withdrawal issue be resolved without a formal hearing. Thereafter, employer filed a motion for summary decision and a request to cancel the hearing, alleging that there was no genuine issue of material fact regarding the procedural history of the claim or the inapplicability of the withdrawal provision at 20 C.F.R. §725.306. Motion for Summary Decision at 3, Oct. 31, 2002. Claimant responded, urging the administrative law judge to reject employer's objections to the withdrawal request. Brief on the Issue of Withdrawal, Nov. 18, 2002. The record contains no response to employer's motion from the Director, Office of Workers' Compensation Programs (the Director).

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.

In an order issued on December 5, 2002, the administrative law judge found that employer's objections to withdrawal were without merit and that the requirements of 20 C.F.R. §725.306 were met. The administrative law judge found that claimant filed his withdrawal request before the district director's Proposed Decision and Order denying benefits became effective. Consequently, the administrative law judge rejected employer's allegation that claimant's request for withdrawal was untimely. The administrative law judge found that claimant filed a written withdrawal request indicating his reasons for seeking withdrawal, and determined that withdrawal was in claimant's best interests. Accordingly, the administrative law judge granted withdrawal of the claim.

On appeal, employer contends that the administrative law judge lacked authority to grant withdrawal of the claim pursuant to Section 725.306 because the district director's Proposed Decision and Order denying benefits became effective thirty days after its issuance. Employer further asserts that the administrative law judge erred in granting withdrawal of the claim. Claimant and the Director respond, urging affirmance of the administrative law judge's order granting withdrawal. 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 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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 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 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.

Employer argues that the district director's Proposed Decision and Order of February 22, 2002 became effective, depriving the district director and the administrative law judge of authority under Section 725.306 to grant withdrawal. Employer relies on 20 C.F.R. §725.419, entitled "Response to proposed decision and order." This regulation provides that any party "may" request revision of a proposed decision and order or request a hearing within thirty days after the date of issuance of the proposed decision and order. 20 C.F.R. §725.419(a). The regulation provides further that "[a]ny response made . . . to a proposed decision and order shall specify the findings and conclusions with which the responding party disagrees . . ." 20 C.F.R. §725.419(b). The regulation specifies that "[i]f no response to a proposed decision and order is sent . . . within the period described in paragraph (a) . . . the proposed decision and order shall become a final decision and order, which is effective upon the expiration of the applicable 30-day period." 20 C.F.R. §725.419(d).

Based on Section 725.419, employer asserts that only a request for revision or a request for a hearing is a "response" that can prevent a proposed decision and order from taking effect thirty days after its issuance. Employer argues that claimant's withdrawal

request was not a “response” within the meaning of Section 725.419, because it was neither a request for revision nor a hearing request, and did not specify findings with which claimant disagrees. Therefore, employer argues, claimant’s request for withdrawal did not toll the thirty-day period following the February 22, 2002 proposed decision and order. Employer contends that the proposed decision and order became effective on March 24, 2002, before the district director acted on claimant’s request to withdraw. Employer thus concludes that the district director lacked authority to grant withdrawal on March 29, 2002, when he issued his proposed decision and order granting withdrawal.

Claimant and the Director respond that Section 725.419 does not limit a party to filing only a request for revision or a hearing request in response to a proposed decision and order. The Director contends specifically that Section 725.306 “provides independent authority governing the withdrawal of claims; its operation is not dependent on section 725.419.” Director’s Brief at 8. The Director reasons that “in the withdrawal context,” Section 725.419 merely “defines the effective date of the district director’s initial decision.” *Id.* So long as the withdrawal request is made within the thirty days before the proposed decision and order becomes effective, the Director regards the request as timely. Alternatively, the Director states that a written request for withdrawal pursuant to Section 725.306 is a “response” to a proposed decision and order within the meaning of Section 725.419(d) which, if made within thirty days of the date of the proposed decision and order, is timely and prevents the proposed decision and order from becoming effective. The Director contends that claimant responded to the proposed decision and order by filing his request to withdraw within the thirty-day period set by Section 725.419(a). Thus, the Director argues, the proposed decision and order did not become effective under Section 725.419(d). Accordingly, the Director concludes that under the rule of *Lester* and *Clevenger*, claimant’s withdrawal request was timely and the district director and administrative law judge were authorized to consider it under Section 725.306.

Both of the Director’s alternative interpretations of the regulations are reasonable, and we will therefore defer to them. *Cadle v. Director, OWCP*, 19 BLR 1-56, 1-62 (1994)(observing that the Director’s interpretation of the regulations merits “substantial deference”). By its terms, Section 725.419 does not address requests for withdrawal, which are provided for by Section 725.306. The Director reasonably explains that in the withdrawal context, the only relevant consideration under Section 725.419 is whether the request for withdrawal was made within the thirty-day period described by Section 725.419(a), during which a proposed decision and order is not yet effective. *Cadle*, 19 BLR at 1-62; *see Clevenger*, 22 BLR at 1-200 (holding that the effective date of a decision on the merits marks the point at which the authority to permit withdrawal terminates). We also agree with the Director’s alternative interpretation, that Section 725.419 does not exclude a withdrawal request from being considered a “response” to the proposed decision and order under Section 725.419(d), or from being deemed a request

for revision under Section 725.419(a). When withdrawal of a claim is granted, “the claim will be considered not to have been filed.” 20 C.F.R. §725.306(b); *Clevenger*, 22 BLR at 1-197 (explaining that a grant of withdrawal nullifies the record of the claim). Accordingly, a claimant’s request for withdrawal made within the thirty-day period of 725.419(a) is, in effect, a request that the proposed decision and order be considered a nullity. The language of Section 725.419 permits the Director’s interpretation that such a request is properly considered either a “response” to the proposed decision and order under Section 725.419(d), or a request for revision of the proposed decision and order under Section 725.419(a). *Cadle*, 19 BLR at 1-62. Contrary to employer’s suggestion, since a claimant’s request is that the proposed decision and order be deemed a nullity in its entirety, it is unnecessary for the withdrawal request to specify findings with which claimant disagrees. Bearing in mind that proceedings at the district director level are informal in nature, and that withdrawal under Section 725.306 is available “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, we defer to the Director’s reasonable interpretation of the regulations at issue herein. *Cadle*, 19 BLR at 1-62. Consequently, we reject employer’s contention that claimant’s request for withdrawal in this case was untimely.

In the case at bar, the district director issued a Proposed Decision and Order denying benefits on February 22, 2002. Director's Exhibit 23. Claimant filed a written request for withdrawal on March 18, 2002, Director's Exhibit 24, less than thirty days after the issuance of the district director’s Proposed Decision and Order. 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. 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 “marks the point beyond which allowing withdrawal would be unfair to opposing parties.”); 20 C.F.R. §725.419(a),(d). Additionally, employer has demonstrated no present harm from the administrative law judge’s order granting withdrawal.

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 Granting Claimant's Motion to Withdraw is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge