

BRB No. 05-0384 BLA

LARRY J. KEENE)	
)	
Claimant-Respondent)	
)	
v.)	
)	
DOMINION COAL COMPANY)	DATE ISSUED: 09/30/2005
)	
Employer-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order - Summary Judgment: Approval of Withdrawal of Claim Cancellation of Hearing of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe, Williams & Rutherford), Norton, Virginia, for claimant.

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

Rita A. Roppolo (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 Decision and Order Summary Judgment: Approval of Withdrawal of Claim Cancellation of Hearing (05-BLA-5019) of Administrative Law

Judge Richard T. Stansell-Gamm 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). The pertinent procedural history of this case is as follows. Claimant filed a claim for benefits on December 16, 2003. Director's Exhibit 2. On April 29, 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 27. After employer submitted additional medical evidence, claimant filed a written request to withdraw his claim. Director's Exhibit 33. On June 1, 2004, the district director issued a Proposed Decision and Order Withdrawal of Claim, finding that withdrawal of the claim was in the best interest of claimant. Director's Exhibit 34. Employer objected to the approval of claimant's request to withdraw his claim, Director's Exhibit 37, and the case was referred to the Office of Administrative Law Judges for a hearing.

Before the scheduled hearing, employer moved for summary judgment on the withdrawal issue, and claimant responded, urging the administrative law judge to uphold the district director's decision. On January 3, 2005, the administrative law judge approved the withdrawal of the claim over employer's objections.

On appeal, employer contends that the administrative law judge erred in granting withdrawal of the claim pursuant to 20 C.F.R. §725.306. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance. Claimant also responds, urging affirmance. Employer has filed a reply brief reiterating its contentions.

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, 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 into the Act by 30 U.S.C. §932(a); *O'Keefe 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. Employer's Brief at 5. Employer asserts that it would be adversely affected by being 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 5-8. 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 5-8. Employer additionally asserts that if the order of withdrawal is affirmed, the Board must order the administrative law judge to

make the withdrawal conditional so as to protect employer's rights, *i.e.*, by ordering that the evidence developed in connection with this claim be made a part of any new claim filed by claimant, and prohibiting the Department of Labor from treating this filing as if it had never existed. Employer's Brief at 10-15. 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 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.

In the case at bar, the administrative law judge correctly found that no decision on the merits had been issued. On April 29, 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 27 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 27 at 2. Rather than submit additional evidence, claimant opted to withdraw his claim. Director's Exhibit 33. 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*.

Contrary to employer's contention, 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. 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 Decision and Order - Summary Judgment: Approval of Withdrawal of Claim Cancellation of Hearing is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge