

BRB No. 97-1362

KERRY RIDLEY)
)
 Claimant-Respondent) DATE ISSUED: June 10, 1998
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 v.)
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 SURFACE TECHNOLOGIES)
 CORPORATION)
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 and)
)
 AIG CLAIM SERVICES)
)
 Employer/Carrier-)
 Petitioners) DECISION and ORDER

Appeal of the Order of Remand and the Order Denying Motion for Reconsideration of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

Gregory E. Camden and Matthew H. Kraft (Rutter & Montagna, L.L.P.), Norfolk, Virginia, for claimant.

F. Nash Bilisoly and Kelly O. Stokes (Vandeventer, Black, Meredith & Martin, L.L.P.), Norfolk, Virginia, for employer/carrier.

Before: SMITH, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Order of Remand and the Order Denying Motion for Reconsideration (96-LHC-2121) of Administrative Law Judge Daniel A. Sarno, Jr., rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant filed a claim for benefits under the Act. On July 3, 1996, the district director transferred the case to the Office of Administrative Law Judges (OALJ), and a formal hearing was scheduled for June 5, 1997. On May 20, 1997, claimant sent a letter to the administrative law judge requesting that he remand the case to the district director because claimant "is no longer pursuing a Longshore claim for his injury of 3/7/96." On May 28, 1997, the administrative law judge issued an Order remanding the case. Not having received claimant's letter or knowing of the administrative law judge's decision, employer filed a Motion for Summary Decision with the administrative law judge on May 27, asserting that claimant did not satisfy the situs requirement. 33 U.S.C. §903(a). On May 29, 1997, upon receiving the Order of Remand, employer filed a Motion for Reconsideration. It asserted that it did not receive claimant's letter, that it did not have time to respond to claimant's motion and that it had a motion pending before the administrative law judge which could resolve the case. Therefore, employer asked the administrative law judge to retain jurisdiction and consider its motion, arguing that it has a right to a hearing on the issues.

On May 30, 1997, the administrative law judge issued an Order Rescinding Remand. He stated therein that he granted remand because he believed both parties wanted the case remanded; however, as that was not the case, he rescinded the order. On June 6, 1997, he denied employer's motion for summary decision, finding that the motion lacked supporting documentation and failed to show that there was no genuine issue of fact to be decided. On June 13, 1997, the administrative law judge issued a second Order granting remand, again based on claimant's May 20, 1997, letter. He stated that employer had not filed an objection to the request, so he found that "the claim is withdrawn without prejudice," and he remanded the case to the district director "for administrative closing."

Employer filed another motion for reconsideration, arguing that its first motion for reconsideration was its objection to the remand request, as is its second motion for reconsideration. Additionally, employer asserted that the parties were in the midst of discussions concerning the coverage issue when the administrative law judge issued his second remand order. Employer again argued that it has a right to a hearing on the merits and requested that the administrative law judge retain and decide the case. On June 18, 1997, the administrative law judge denied employer's motion for reconsideration, stating that he has the discretionary authority to remand a case if a withdrawal request is made prior to the date of the hearing. Employer appeals the administrative law judge's orders, and claimant responds, urging affirmance.

On appeal, employer contends the administrative law judge erred in remanding the case after it specifically objected to remand and requested a hearing. Employer asserts that it is entitled to a hearing once it has requested one, maintaining that one party's request for remand should not take precedence over another party's objection, as that would deprive one party of its right to a hearing. Finally, employer also asserts that, contrary to the administrative law judge's statement in his second remand order, claimant has not requested withdrawal of his claim. Rather, employer believes claimant seeks remand with the hope that, in time, the decision of the United States Court of Appeals for the Fourth Circuit in *Sidwell v. Express Container Services, Inc.*, 71 F.3d 1134, 29 BRBS 138 (CRT) (4th Cir. 1995), *cert. denied*, ___ U.S. ___, 116 S.Ct. 2570 (1996), will be overruled so that the law will become more favorable to him. Employer argues that claimant wants to wait rather than withdraw his claim and re-file at a later date because he will be barred by the statute of limitations if he does so. In response, claimant argues that, as he is not pursuing either disability or medical benefits presently, the claim is not ripe for adjudication.

It is well-established that an administrative law judge has the authority to consider motions of the parties before him, including motions for withdrawal of the claim. *Downs v. Ingalls Shipbuilding, Inc.*, 30 BRBS 99 (1996); *Langley v. Kellers' Peoria Harbor Fleeting*, 27 BRBS 140 (1993); *Graham v. Ingalls Shipbuilding/Litton Systems, Inc.*, 9 BRBS 155 (1978); 20 C.F.R. §§702.321-702.351. Prior to granting a motion to withdraw, the administrative law judge must find that the withdrawal is for a proper purpose and in the claimant's best interest. 20 C.F.R. §702.225; *Graham*, 9 BRBS at 159-160.

Although an administrative law judge may entertain a motion for withdrawal, employer contends that claimant has not filed a motion for withdrawal; rather, it argues, he merely seeks to have the claim remanded to the district director's office, remaining open until such time as the law becomes more favorable. Employer also argues that support for its position can be found in *Ingalls Shipbuilding, Inc. v. Director, OWCP [Boone]*, 102 F.3d 1385, 31 BRBS 1 (CRT) (5th Cir. 1996). In *Boone*, which concerned a district director's failure to perform her mandatory duty to transfer a claim to the OALJ upon a party's request for a hearing, the United States Court of Appeals for the Fifth Circuit held that such failure denied the employer of its procedural rights and that a proper transfer would have preserved the rights of both parties, as the administrative law judge is empowered to consider withdrawal requests. *Boone*, 102 F.3d at 1389, 31 BRBS at 3-4 (CRT). Employer asserts that, here, claimant did not request a withdrawal, and the administrative law judge's decision to remand the case to the district director for consideration of a non-existent motion deprives it of its day in court.

We agree with employer that the administrative law judge erred in considering claimant's motion as a motion for withdrawal. While claimant's motive is not ascertainable from the record, employer is correct in asserting that at no time did claimant unambiguously declare his intent to withdraw his claim. This is demonstrated by the absence of the word "withdraw" or the phrase "voluntarily dismiss" in favor of some variation of the phrase "no longer pursuing benefits." That the latter phrase lacks clarity is readily seen by the administrative law judge's dual interpretation of it: once as a motion to remand and once as a motion for withdrawal. Claimant's ambiguity continues even throughout his brief before the Board wherein he states numerous times that a claim no longer exists because he is not presently pursuing it. Nevertheless, he does not seek to withdraw the claim. If a claim has not been withdrawn, it remains pending until adjudicated. *Intercounty Construction Corp. v. Walter*, 422 U.S. 1, 2 BRBS 3 (1975); *Hargrove v. Strachan Shipping Co.*, 32 BRBS 11 (1998). While a claim remains pending, the administrative law judge may not remand the case to the district director absent the presentation of a new issue or new evidence, see 20 C.F.R. §702.336(a), especially where, as here, there are contested issues and employer objected to remand, requesting a hearing on at least one of those issues.¹ 33 U.S.C. §919(d); see *generally Sans v. Todd Shipyards Corp.*, 19 BRBS 24 (1986) (administrative law judge empowered to resolve any issue raised at hearing); *Black v. Bethlehem Steel Corp.*, 16 BRBS 139 (1984) (Act does not permit protective filings; once filed a claim must proceed to resolution). Therefore, we vacate the administrative law judge's orders granting withdrawal and remanding the case.

On remand, the administrative law judge must obtain clarification from claimant as to whether he seeks to withdraw his claim for compensation under the Act. If claimant does not seek withdrawal, then the administrative law judge must adjudicate the merits of the case, as employer requests. If, however, claimant does

¹Among other issues, employer seeks a determination on whether claimant's injury occurred on a covered situs pursuant to Section 3(a) of the Act. 33 U.S.C. §903(a).

wish to withdraw his claim, and the administrative law judge considers the motion, he must address it in light of the regulatory criteria.² 20 C.F.R. §702.225.

²Although the administrative law judge stated he granted withdrawal of this case, he did not discuss whether the withdrawal was for a proper purpose or was in claimant's best interests before he remanded the case to the district director for "administrative closing." 20 C.F.R. §702.225.

Accordingly, the administrative law judge's Orders are vacated, and the case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge