

BRB No. 03-0216 BLA

ELI WALLACE, JR. )  
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 Claimant-Respondent )  
 )  
 v. )  
 )  
 PEABODY COAL COMPANY )  
 )  
 Employer-Petitioner )  
 )  
 DIRECTOR, OFFICE OF WORKERS' )  
 COMPENSATION PROGRAMS, UNITED )  
 STATES DEPARTMENT OF LABOR )  
 )  
 Party-In-Interest )

DATE ISSUED: \_\_\_\_\_  
11/20/2003

DECISION and ORDER

Appeal of the Decision and Order Granting Claimant's Motion to Withdraw Claim of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

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

Michelle S. Gerdano (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: DOLDER, Chief Administrative Appeals Judge, SMITH and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Granting Claimant's Motion to Withdraw Claim (2002-BLA-5302) of Administrative Law Judge Richard A. Morgan 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).<sup>1</sup> The pertinent procedural history of this case is as follows. Claimant filed an application for benefits on January 29, 2001. Director's Exhibit 4. 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 23, and employer subsequently controverted its liability. Director's Exhibit 24. On November 1, 2001, after obtaining a complete pulmonary evaluation of claimant, Director's Exhibits 15-20, the district director issued a schedule for the submission of additional evidence, preliminarily concluding that claimant "would not be entitled to benefits if we issued a decision at this time," and that employer was the responsible operator. Director's Exhibit 21 at 1. The schedule gave the parties until December 31, 2001 to submit additional evidence. Director's Exhibit 21 at 2. On December 4, 2001, claimant filed a written request to withdraw his claim. Director's Exhibit 29. On December 10, 2001, the district director issued a Proposed Decision and Order granting withdrawal of the claim. Director's Exhibit 30. On December 31, 2001, employer objected to the district director's decision, arguing that granting withdrawal deprived employer of "its vested rights established throughout the proceeding of this claim." Director's Exhibit 34. On April 29, 2002, the district director informed employer of its right to appeal the withdrawal decision to the Office of Administrative Law Judges. Director's Exhibit 35. On May 13, 2002, employer requested a hearing, and argued that permitting withdrawal was "illegal and invalid" because it "deprive[d] the Employer of its vested rights established throughout the proceeding of this claim." Director's Exhibit 36. In a Decision and Order issued on November 6, 2002, the administrative law judge found that employer's objections were without merit and that the requirements of 20 C.F.R. §725.306 were met. Accordingly, the administrative law judge granted withdrawal of the claim.

On appeal, employer contends that the administrative law judge erred in granting withdrawal of the claim pursuant to Section 725.306. Employer further asserts that it was denied a full and fair hearing when the administrative law judge ruled on claimant's motion to withdraw without affording employer the opportunity to file a brief on the issue. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the administrative law judge's order granting withdrawal. Employer has filed a reply brief reiterating its contentions. Claimant has not participated in this appeal.

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,

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<sup>1</sup> 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.

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

Employer contends that, because a withdrawn claim is considered not to have been filed, *see* 20 C.F.R. §725.306(b), employer will be unduly prejudiced if withdrawal of this claim is permitted and the existing record is nullified. Employer asserts that it will be adversely affected by its loss of vested litigation rights, such as the right to introduce 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 decision that claimant is not entitled to benefits. Employer also contends that the administrative law judge misapplied *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*), because he failed to consider employer’s interests in determining whether withdrawal was appropriate pursuant to Section 725.306. Employer’s contentions lack merit.

By its terms, Section 725.306 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* and *Clevenger*, 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 November 1, 2001, 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 21 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 21 at 2. Rather than submit additional evidence, claimant opted to withdraw his claim. Director's Exhibit 29. 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 specific arguments, since there had as yet been no decision on the merits of the claim, the administrative law judge properly rejected employer's argument that granting withdrawal deprived employer of vested litigation rights. *Lester*, 22 BLR at 1-191. Additionally, employer has demonstrated no present harm from the administrative law judge's Decision and Order granting withdrawal.

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. The administrative law judge considered and properly rejected employer's objection to withdrawal. Employer's assertion that the administrative law judge erred by ruling on the motion to withdraw without the benefit of briefing lacks merit. *Betty B Coal Co. v. Director, OWCP [Stanley]*, 194 F.3d 491, 500-01, 22 BLR 2-1, 2-17 (4th Cir. 1999)(detecting no unfairness where a party had its day in court and the outcome was reliable). Consequently, we reject employer's allegations of error and affirm the

administrative law judge's Decision and Order granting withdrawal of the claim pursuant to Section 725.306.

Accordingly, the administrative law judge's Decision and Order Granting Claimant's Motion to Withdraw Claim is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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PETER A. GABAUER, JR.  
Administrative Appeals Judge