

8.11 WITHDRAWAL OF CLAIM

8.11.1 Generally

Withdrawals of claims are not dealt with in the LHWCA, but are authorized by the regulations. See 20 C.F.R. § 702.225 (formerly § 702.216). The **Fifth Circuit** has held that the regulation applies only to the withdrawal of a claim, not to the situation where a claimant seeks to modify a claim with respect to dates or categories of disability. Pool Co. v. Cooper, 274 F.3d 173(5th Cir. 2001).

The regulation provides separate criteria for withdrawing a claim depending on whether a request is made before adjudication of a claim (determination made by OWCP) or after adjudication.

Before adjudication:

- (1) The claimant must file a written request stating the reasons with the district director;
- (2) The claimant must be alive at the time the request is filed;
- (3) The request must be approved as being for a proper purpose and in the claimant's best interest; and
- (4) The request must be filed on or before the date OWCP makes a determination on the claim.

After adjudication:

- (1) The conditions enumerated in numbers (1) through (3) above are applicable; and
- (2) There must be repayment of the amount of benefits previously paid because of the claim that is being withdrawn or it can be established to the satisfaction of OWCP that repayment of any such amount is assured.

Where a claimant expresses a desire not to pursue a claim, the claimant should file a Motion to Withdraw the Claim **without prejudice**. A withdrawal is without prejudice to the filing of another claim. 20 C.F.R. § 702.225(c). Henson v. Arcwel Corp. and Pacific Ship Repair & Fabrication, Inc., 27 BRBS 212, 216 n.8 (1993) (taking no action on a Motion to Withdraw does not make 20 C.F.R. § 702.225 inapplicable). Therefore, a claimant's letter cancelling the withdrawal could be interpreted as seeking reinstatement of the original claim or as filing another claim as permitted by 20 C.F.R. § 702.225(c).

In Ridley v. Surface Technologies Corp., 32 BRBS 211 (1998) (Order to Publish issued Aug. 28, 1998), the Board held that a request by a claimant that an ALJ remand a pending case to the district director because the claimant was “no longer pursuing a longshore claim for his injury of 3/7/96,” was not necessarily the equivalent of a motion to withdraw since it lacks clarity.

If a motion to withdraw is for a **"proper purpose"** and found to be in the **claimant's best interest**, it should be granted. The claim should not be dismissed. Lundy v. Atlantic Marine, 9 BRBS 391 (1978). In fact, a motion for dismissal of a claim should be treated as a motion/request for withdrawal. Graham v. Ingalls Shipbuilding/Litton Sys., 9 BRBS 155 (1978).

Neither the LHWCA nor the regulations specifically provide a procedure for the dismissal of a claim by either a district director or an administrative law judge. A Motion to Dismiss, filed by a claimant, should be treated as a Motion for Withdrawal. Graham v. Ingalls Shipbuilding/Litton Sys., 9 BRBS 155 (1978). (For other motions to dismiss, see Topic 19.3.2, infra.)

In Hargrove v. Strachan Shipping Co., 32 BRBS 11, aff'd on recon. 32 BRBS 224 (1998), Claimant sought withdrawal of his claim for benefits “after the parties seemingly reached an agreement as to the amount of compensation.” The ALJ denied the request upon concluding that “no settlement agreement was submitted for approval, and no compensation order was issued approving the settlement or adjudicating claimant’s claim.” Fourteen years later, Claimant sought additional compensation and medical benefits for disability arising out of the 1971 injury. The Board held that a “withdrawal request ... based on the exchange of a sum of money is not a valid purpose for withdrawal.” As a result, because the original claim had never been finally adjudicated, i.e., no settlement approved or withdrawal request granted, the Board held that the ALJ erred in “finding that he could not ‘reopen’ the claim ...”

Authority to Hear Motion to Withdraw

As with settlements, either the deputy commissioner (district director) or the administrative law judge may consider requests for withdrawal. Graham, 9 BRBS 155. Note, however, by its very terms, 20 C.F.R. § 702.225 relates only to proceedings before the deputy commissioner (district director). There is no express prohibition against either dismissal or approval of a request for withdrawal of a claim by an administrative law judge. Graham, 9 BRBS 155. The Board, in Graham, concluded that the administrative law judge has the power to approve requests for withdrawal of claims. The Board specifically stated that it no longer adheres to the view that only the deputy commissioner may approve requests for withdrawal of claims. 9 BRBS at 158 n.1.

The **Fifth Circuit** has adopted the holding in Graham granting the authority to the OALJ to consider motions for the withdrawal of a claim. Ingalls Shipbuilding, Inc. v. Director, OWCP [Boone II], 102 F.3d 1385, 1389 (**5th Cir.** 1996), withdrawing, 81 F.3d 561 (**5th Cir.** 1996), vacating and remanding, 28 BRBS 119 (1994) (Decision and Order on recon. en banc) (Brown, J.,

concurring). The court stated that once the district director transfers the case to the OALJ, “the ALJ is authorized to consider motions to withdraw following the transfer.” Id.

A claims examiner does not have the authority to act on a motion to withdraw. Henson v. Arcwel Corp. and Pacific Ship Repair & Fabricator, 27 BRBS 212, 216 n.7 (1993). See Norton v. National Steel & Shipbuilding Co., 27 BRBS 33, 41 (1993) (en banc), aff'g on recon. 25 BRBS 79 (1991); Mazzella v. United Terminals, Inc., 8 BRBS 755, aff'd 9 BRBS 191 (1978).

In Graham, the Board noted that Section 19(d) of the LHWCA requires that hearings be conducted in accordance with the provisions of 5 U.S.C. § 554 of the APA. Under 5 U.S.C. § 556(c), the authority of persons presiding at hearing under 5 U.S.C. § 554 is subject to the published rules of the agency. Therefore, it must be determined if the judge's action in allowing the withdrawal of a claim is contrary to the implementing regulations. By its very terms, 20 C.F.R. § 702.216 relates only to proceedings before the deputy commissioner (district director). There is no express prohibition, however, against the approval of a request for withdrawal of a claim by an ALJ.

The Board, in Graham, noted that prior to the 1972 Amendments, deputy commissioners were empowered to act on requests for withdrawal of claims under 20 C.F.R. § 31.7. No limitation was placed on the stage of proceedings at which this power could be exercised. The Board further noted that under amended Section 19(d), hearings under the LHWCA shall be conducted by hearing examiners (now judges) qualified under 5 U.S.C. § 3105 and:

All powers, duties and responsibilities vested by this chapter, on October 27, 1972, in the deputy commissioners with respect to such hearings shall be vested in such hearing examiners.

9 BRBS at 158.

The Board concluded that Congress intended administrative law judges to have the same authority at the formal hearing level as was vested in the deputy commissioners prior to the 1972 amendments. As the deputy commissioners were authorized to act on requests for withdrawal of claims even at the formal hearing level, administrative law judges now have that authority. Graham, 9 BRBS at 158.

It should also be kept in mind that an argument of judicial economy may be made for allowing the withdrawal of a claim already at the administrative law judge level to be withdrawn while before the ALJ.

The courts have clearly permitted withdrawal of claims filed pursuant to the LHWCA. Robertson v. Donovan, 219 F. Supp. 364 (E.D. La. 1963). See Wilkes v. Mississippi River Sand & Gravel Co., 202 F.2d 383 (6th Cir.), cert. denied, 346 U.S. 817 (1953).

20 C.F.R. § 702.225 focuses on the **claimant's right** to withdraw a claim. In Rodney v. Cooper/T. Smith Stevedoring Co., 26 BRBS 478 (ALJ) (1989) (ALJ allowed withdrawal of claim in the **Fifth Circuit**), the employer had argued that since a claim had been filed under the LHWCA, the employer had the right to proceed to hearing, notwithstanding the claimant's preference of another forum to determine Jones Act status. The employer further argued that 20 C.F.R. § 702.225 conflicts with Section 19(c) of the LHWCA and therefore statutory construction should be applied, with the LHWCA overriding the regulation. The employer cited several cases in support of this position.

*[ED NOTE: In Gautreaux v. Scurlock Marine, Inc., 107 F.3d 331 (5th Cir. 1997)(en banc), the **Fifth Circuit** reversed prior case law to hold that (1) seamen in Jones Act negligence cases are bound to a standard of ordinary care in the exercise of care for their own safety, not to a lesser duty of slight care, and (2) Jones Act employers are not held to a higher standard of care than that required under ordinary negligence. Whether this will cause fewer claimants to opt out of LHWCA coverage to pursue Jones Act claims in the **Fifth Circuit** remains to be seen.]*

In Atlantic & Gulf Stevedores v. Donovan, 274 F.2d 794, on reh'g, 279 F.2d 75 (5th Cir. 1960), the **Fifth Circuit** noted that even if it is not inherent in the LHWCA itself that every agency shall proceed with reasonable dispatch to conclude any matter presented to it, the APA, which controls the LHWCA, establishes this point.

On rehearing, however, the **Fifth Circuit** held that since a claim was filed, an "interested party" under Section 19(c) of the LHWCA had the right to apply for a hearing, and upon such application being made, the deputy commissioner (district director) was under a duty to order a hearing upon the claim in the regular course of the administration of that office. The **Fifth Circuit** reserved ruling with respect to the deputy commissioner being under a duty to conduct a hearing under Section 14(h) of the LHWCA, upon application of an interested party, and noted that this should be reserved for a case where it is properly presented by the facts.

In Employers Liability Assurance Corp. v. Donovan, 279 F.2d 76 (5th Cir.), cert. denied, 364 U.S. 884 (1960), the **Fifth Circuit** found that where a claim has been filed, Section 19(c) of the LHWCA is applicable and contains a mandatory requirement that the deputy commissioner shall order a hearing upon the application of any interested party.

In Black v. Bethlehem Steel Corp., 16 BRBS 138 (1984), the Board found that the LHWCA does not provide for a "protective filing" and that once a claim has been filed, Section 19(c) requires an investigation, and if requested by an interested party, a hearing. The Board concluded that a claim, once filed, must proceed to resolution.

As the ALJ noted in Rodney, 26 BRBS 471 (ALJ), however, these cases are distinguishable on their facts and did not prevent the judge from allowing the withdrawal of a claim as provided for in the regulations.

[ED. NOTE: Rodney was ultimately settled while on appeal.]

In Cradle v. Ingalls Shipbuilding, Inc., 27 BRBS 248 (1993) and Boone v. Ingalls Shipbuilding, Inc., 28 BRBS 119 (1994)(Decision and Order on recon. en banc) (Brown, J., concurring) the employer argued that the District Director's order allowing withdrawal of the claims without prejudice was improper and that the district director should have either allowed the withdrawals with prejudice to the filing of subsequent claims or transferred the cases to the Office of Administrative Law Judges for hearings. (The district director had granted the claimant's request to withdraw claims without prejudice to the filing of subsequent claims, subject to the time limitation provisions of Section 13 of the LHWCA.) The Board, in Cradle and Boone, found the withdrawals without prejudice to be proper since the employer would not be adversely affected or aggrieved unless or until new claims are filed.

The debate over who has the authority to approve a motion for withdrawal of a claim was eventually resolved by the **Fifth Circuit** in Ingalls Shipbuilding, Inc. v. Director, OWCP [Boone II], 102 F.3d 1385, 1389 (**5th Cir.** 1996). The court held that the district director had a duty to transfer the case to the OALJ upon the parties request. Boone II, 102 F.3d at 1389. Furthermore, the **Fifth Circuit** found that “to allow the withdrawal of a claim in a situation such as the one before us denies the party requesting the hearing its procedural rights under the LHWCA.” Id. Thus the district director’s actions would have seriously prejudiced the employer’s rights.

If a request for withdrawal is approved, such withdrawal is without prejudice to the filing of a later claim within the time limits of the LHWCA. See 20 C.F.R. § 702.255(c).

If a request for withdrawal is disapproved by either the deputy commissioner or administrative law judge, the parties have the option of proceeding with the claim or immediately appealing the disapproval to the Board. Graham, 9 BRBS 155. An administrative law judge does not have the power to review a deputy commissioner's denial of a request for withdrawal of a claim. Palmer v. Equitable Equip. Co., 2 BRBS 221 (1975). Therefore, before considering a request for withdrawal of a claim, the judge should ask the claimant whether a request for withdrawal of the claim was previously denied by a deputy commissioner. If it had been, review must be sought from the Board.

"Best Interest" and "Proper Purpose"

A withdrawal of a claim may be approved only if it is determined that the withdrawal is both in the claimant's best interest and for a proper purpose. Langley v. Kellers' Peoria Harbor Fleeting, 27 BRBS 140 (1993); see 20 C.F.R. § 702.225(a)(3). A claimant’s decision to withdraw his longshore claim because he chooses to pursue a claim under state law is, **as a matter of law**, a proper purpose for withdrawing a longshore claim. Stevens v. Matson Terminals, 32 BRBS 198 (1998).

The Board has held that the closing of the administrative file by the deputy commissioner did not constitute a withdrawal. Scruggs v. Savannah Mach. & Foundry, 10 BRBS 699 (1979) (Decision and Order on Reconsideration). The Board has also held that an exchange of writing between the claimant and the deputy commissioner did not constitute a withdrawal because no proper findings were made pursuant to the regulatory criteria. Matthews v. Mid-States Stevedoring Corp., 11 BRBS 139 (1979). Moreover, the Board has held that a finding that withdrawal was in the claimant's best interests without a determination that the withdrawal was for a proper purpose is insufficient. Jennings v. Lockheed Shipbuilding & Constr. Co., 9 BRBS 212 (1978).

The Board has held that a claim cannot be withdrawn for a sum of money because such a withdrawal is not for a proper purpose. Gutierrez v. Metropolitan Stevedore Co., 18 BRBS 62 (1986); Rodman v. Bethlehem Steel Corp., 16 BRBS 123 (1984); Rodriguez v. California Stevedore & Ballast Co., 16 BRBS 371 (1984); Jennings, 9 BRBS 212; Graham, 9 BRBS 155.

Where the claimant seeks to withdraw his compensation claim in exchange for a sum of money, he must follow the Section 8(i) settlement procedures. Gutierrez, 18 BRBS 62; Rodriguez, 16 BRBS 371. The adjudicator must treat requests for withdrawal in exchange for a sum of money as a request for approval of a settlement under Section 8(i). Jennings, 9 BRBS 212.

In Rodriguez, the Board held that, although all the technical requirements for withdrawal or settlement of an old claim were not met, the claim could not be reopened and litigated years after the parties believed the claim to be closed. 16 BRBS at 374. Cf. Intercounty Constr. Corp. v. Walter, 422 U.S. 1, 2 BRBS 3 (1975) (where a final award was never entered, the claim remained open and pending); Bowen v. Alaska Interstate Co., 12 BRBS 577 (1980) (absent approved and valid Section 8(i) settlement, withdrawal of claim, or formal award, claim remains open).

Ancillary issues remaining after a withdrawal of claim is granted

In Langley, at the administrative law judge level, the employer requested a hearing on its request for Section 8(f) relief even though the judge allowed the claimant's motion to withdraw so that the claimant could pursue a state workers' compensation action. The judge determined that, absent a pending claim for compensation by the claimant, he lacked jurisdiction to consider the employer's request for Section 8(f) relief.

The Director, as the administrator of the Special Fund, conceded that the employer is entitled to a hearing on its request of relief pursuant to Section 8(f). The Board deferred to the Director's position and remanded for a hearing on the employer's request for Section 8(f) relief. Langley, 27 BRBS at 145.

JED. NOTE: *The Director's position is based on the premise that the employer remains obligated to pay benefits under the LHWCA even after the claimant has elected to pursue his claim under state rather than federal law and that the compensation paid by the employer, although technically paid pursuant to the state compensation act, is included in the Section 44(c) calculation of the total*

payments made under the LHWCA by the employer. Langley at 144. Thus, since the amount paid by the employer in compensation under the state compensation act directly affects the amount that the employer is assessed under Section 44(c), the Director contends that the employer is entitled to a hearing on its request for Section 8(f) relief regardless of whether the claimant has withdrawn his claim for benefits under the LHWCA. There is a strong dissenting opinion filed by Judge Brown on this issue.]

8.11.2 Dismissal of Claim
(See Topic 19.3.2, *infra.*)