U.S. Department of Labor

Administrative Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

In the Matter of:

DAVID McCARTY,

COMPLAINANT,

v.

UNION PACIFIC RAILROAD COMPANY,

RESPONDENT.

ARB CASE NO. 2018-0016

ALJ CASE NO. 2016-FRS-00066

DATE: September 23, 2020

Appearances:

For the Complainant:
Joseph L. Bauer, Jr., Esq.; *The Bauer Law Firm, LLC*; Saint Louis, Missouri

For the Respondent:
Ryan D. Wilkins, Esq. and Torry N. Garland, Esq.; *Union Pacific Railroad*; Omaha, Nebraska

BEFORE: Thomas H. Burrell, Heather C. Leslie, and Randel K. Johnson, *Administrative Appeals Judges*

DECISION AND ORDER

This case arises under the employee protection provisions of the Federal Rail Safety Act of 1982 (FRSA).[1] David McCarty (Complainant) filed a complaint with the United States Department of Labor's Occupational Safety and Health Administration (OSHA) alleging that Union Pacific Railroad Company (Respondent)

[1] 49 U.S.C. § 20109 (2008), as implemented by federal regulations at 29 C.F.R. Part 1982 (2019) and 29 C.F.R. Part 18, Subpart A (2019).

violated the FRSA by not permitting him to return to his position of a CDCET (Centralized Dispatching Center Electronic Technician) in retaliation for activity protected by the FRSA. OSHA determined that Complainant did not engage in a protected activity and that he was not blacklisted. Complainant objected and requested a hearing before an Administrative Law Judge (ALJ), who ruled in favor of the Respondent. For the following reasons, we affirm the ALJ's order.

BACKGROUND[2]

Complainant was a CDCET for Respondent in Omaha, Nebraska. Complainant's job duties included installing and maintaining signal control systems. In this position, Complainant was assigned to direct others at various locations over the entire Union Pacific System in analyzing, locating and pinpointing signal facility problems as well as to direct, advise, and assist others on the use and understanding of electronic signal equipment and basic signal systems.

In the fall of 2014, Complainant took a medical leave of absence for sinus surgery. While on leave, Complainant also sought psychiatric treatment with Dr. Michael Egger to treat symptoms of anxiety and panic disorders. Throughout this treatment, Dr. Egger prescribed a variety of different therapeutic drugs before finalizing a treatment plan that worked best for Complainant to manage his psychiatric condition: Klonopin, a benzodiazepine.

Under Respondent's fitness for duty standards, its Health and Medical Services (HMS) developed a restricted prescription drug policy (Drug and Alcohol Policy) prohibiting the use of benzodiazepines, including Klonopin, by all employees who perform tasks involving critical decision-making. The Drug and Alcohol Policy has been applied since 2011 and was published online in 2015.

On October 9, 2014, Dr. Egger's office sent Respondent a medical progress report informing it that Complainant had been prescribed Klonopin. On October 14, 2014, Respondent sent a letter to Dr. Egger's office advising that Complainant would be unable to perform safety critical tasks while under the influence of benzodiazepines. On March 18, 2015, Dr. Egger sent Respondent a letter releasing Complainant to full duty work and expressing his belief that Complainant could safely perform his job while under the influence of Klonopin.

On March 28, 2015, HMS issued a letter clearing Complainant to return to work but imposing permanent restrictions prohibiting him from performing any tasks involving critical decision-making while under the influence of Klonopin. On that same date, HMS sent Complainant's department a Restriction Review Form,

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[2] This background follows the ALJ's Decision and Order and undisputed facts. In reciting these background facts, we make no findings of fact.

asking his managers whether the new restrictions could be reasonably accommodated. Three supervisors signed off that his restrictions could not be reasonably accommodated because critical decision-making is an essential function of the CDCET position. On August 7, 2015, HMS notified Complainant that it could not accommodate his medical restrictions and referred him to Disability Management. In July of 2015, Dr. Egger sent Respondent another letter expressing his belief that Complainant could return to work with full duties. HMS affirmed its initial determination. Complainant filed a complaint with OSHA alleging retaliation. OSHA found Complainant did not engage in a protected activity and that he was not blacklisted. After an informal evidentiary hearing, the ALJ assigned to the case dismissed McCarty's claim under FRSA's safe-harbor exception. This appeal follows.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to the Administrative Review Board (ARB or Board) to review ALJ decisions in cases arising under the FRSA and to issue agency decisions in these matters.[3] The ARB will affirm the ALJ's factual findings if supported by substantial evidence but reviews all conclusions of law de novo.[4] As the United States Supreme Court has recently noted, "[t]he threshold for such evidentiary sufficiency is not high."[5] Substantial evidence is "'more than a mere scintilla.' It means—and means only—'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'"[6] We generally defer to an ALJ's credibility findings unless they are "inherently incredible or patently unreasonable."[7]

With regard to the Board's review of conclusions of law, the Administrative Procedure Act provides, at 5 U.S.C. § 557(b) (1976), that "[o]n appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision."[8]

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[3] Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board (Secretary's discretionary review of ARB decisions)), 85 Fed. Reg. 13,186 (Mar. 6, 2020); see 29 C.F.R. § 1982.110(a).

[4] *Austin v. BNSF Ry. Co.*, ARB No. 2017-0024, ALJ No. 2016-FRS-00013, slip op. at 7 (ARB Mar. 11, 2019).

[5] *Biestek v. Berryhill*, 139 S. Ct. 1148, 1154 (2019).

[6] *Id.* (citing and quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

[7] *Mizusawa v. United Parcel Serv.*, ARB No. 2011-0009, ALJ No. 2010-AIR-00011, slip op. at 3 (ARB June 15, 2012).

[8] *Hamilton v. CSX Transp., Inc.*, ARB No. 2012-0022, ALJ No. 2010-AIR-00025, slip op. at 2 (ARB Apr. 30, 2013) (citations omitted).

DISCUSSION

The FRSA prohibits a railroad carrier engaged in interstate or foreign commerce from discharging, demoting, suspending, reprimanding, or in any other way discriminating against an employee if such discrimination is due, in whole or in part, to the employee's lawful, good-faith protected activity.[9] The FRSA also prohibits employers from interfering with prompt medical first-aid in (c)(1) and protects employees following the medical plan of a treating physician in (c)(2).[10]

To prevail under a whistleblower burden-shifting framework, an FRSA complainant must establish by a preponderance of the evidence that: (1) he engaged in a protected activity, as statutorily defined; (2) he suffered an unfavorable personnel action; and (3) the protected activity was a contributing factor, in whole or in part, to the unfavorable personnel action. If a complainant meets this burden of proof, the employer may avoid liability only if it proves by clear and convincing evidence that it would have taken the same unfavorable personnel action absent the complainant's protected activity.[11]

1. The ALJ did not Err in Applying the Preponderance of the Evidence Standard to Section 20109(c)(2)'s Safe-Harbor Exception

In this matter, Respondent prohibited Complainant from returning to his position as a CDCET because Complainant failed Respondent's fitness for duty

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[9] 49 U.S.C. § 20109(a).

[10] 49 U.S.C. § 20109(c):

> (1) Prohibition.--A railroad carrier or person covered under this section may not deny, delay, or interfere with the medical or first aid treatment of an employee who is injured during the course of employment. If transportation to a hospital is requested by an employee who is injured during the course of employment, the railroad shall promptly arrange to have the injured employee transported to the nearest hospital where the employee can receive safe and appropriate medical care.
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> (2) Discipline.--A railroad carrier or person covered under this section may not discipline, or threaten discipline to, an employee for requesting medical or first aid treatment, or for following orders or a treatment plan of a treating physician, except that a railroad carrier's refusal to permit an employee to return to work following medical treatment shall not be considered a violation of this section if the refusal is pursuant to Federal Railroad Administration medical standards for fitness of duty or, if there are no pertinent Federal Railroad Administration standards, a carrier's medical standards for fitness for duty. For purposes of this paragraph, the term "discipline" means to bring charges against a person in a disciplinary proceeding, suspend, terminate, place on probation, or make note of reprimand on an employee's record.

[11] 49 U.S.C. § 20109(d)(2)(A)(i), incorporating the burdens found in 49 U.S.C. § 42121(b)(2)(B)(i)(2000).

standards. Section 20109(c)(2) expressly carves out a "safe-harbor exception" for some unfavorable employment actions and provides that the employer does not violate the Act when it refuses to permit an employee to return to work following medical treatment if the refusal occurs pursuant to Federal Railroad Administration (FRA), or the carrier's, medical standards for fitness of duty.[12]

The FRSA incorporates the procedures found in the whistleblower protection section of AIR-21.[13] Under whistleblower burden shifting, the complainant proves that protected activity was a contributing factor in the adverse action. To avoid liability, the respondent proves by clear and convincing evidence that it would have taken the adverse action in the absence of protected activity. The ARB has applied the burden-shifting framework to claims arising under Section 20109(c), while recognizing that (c) does not necessarily fit the standard whistleblowing format.[14]

The Second Circuit in *Metro-North Commuter R.R. Co. v. U.S. Dep't of Labor* also recognized the difficulty of applying the burden-shifting framework to a (c)(1) medical interference claim, going so far as to note that it was "nonsense.[15] The Second Circuit distinguished a (c)(2) claim (following a physician's treatment plan) from the difficulties of a (c)(1) claim. Whistleblower burden shifting can be rationally applied to a complainant's claim arising under (c)(2). For example, a complainant's following the medical treatment of a treating physician could constitute the protected activity. Similarly, an employer's failure to reinstate the employee could constitute an adverse action. The task of applying the whistleblower burden-shifting framework to claims arising under (c)(2) becomes more feasible when there are other forms of protected activity such as reporting an injury or other reasons for the adverse action such as poor performance or illegal activity. The burden-shifting framework can be applied relative to those other activities. The ARB in *Rudolph v. Nat'l R.R. Passenger Corp.*, for example, applied the burden-shifting framework to a claim involving (c)(2) and the safe-harbor exception, but that case involved multiple protected activities.[16]

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[12] *See Ledure v. BNSF Ry. Co.*, ARB No. 2013-044, ALJ No. 2012-FRS-00020 (ARB June 2, 2015).

[13] 49 U.S.C. § 20109(d)(2)(A) ("Any [enforcement] action [under the substantive prohibitions on retaliation for whistleblowing] shall be governed under the rules and procedures set forth in [the AIR-21 whistleblower protection provision].").

[14] *See Wevers v. Montana Rail Link, Inc.*, ARB No. 2016-0088, ALJ No. 2014-FRS-00062 (June 17, 2019); *Santiago v. Metro-North Commuter R.R. Co., Inc.*, ARB No. 2010-0147, ALJ No. 2009-FRS-00011 (ARB July 25, 2012).

[15] *Metro-North Commuter R.R. Co. v. U. S. Dep't of Labor*, 886 F.3d 97, 106-108 (2d Cir. 2018).

[16] *See Rudolph v. Nat'l R.R. Passenger Corp. (Amtrak)*, ARB No. 2011-0037, ALJ No. 2009-FRS-00015 (March 29, 2013).

But with a simple form of safe-harbor exception involving an employee's report of medical condition and the employer's application of a fitness of duty restriction under (c)(2) because of that medical condition, the burden-shifting framework is, as the Second Circuit recognized for (c)(1) claims, nonsense. In this case, the report of the medication is Respondent's stated reason why it applied the fitness for duty restriction. Neither the contributing factor standard nor the employer's affirmative defense can be applied in any coherent fashion.

Accordingly, we conclude that the ALJ did not err in not applying the whistleblower framework and clear and convincing burden of proof to Section 20109(c)(2)'s safe-harbor exception. In *Ledure*, we stated the "employer bears the burden of persuasion that the [safe harbor has] been met. Those elements include establishing the relevant standards for fitness for duty and how the employee has failed to meet them."[17] Because we do not apply the whistleblower framework to the safe-harbor exception, the burden of persuasion remains at the default preponderance of the evidence.[18]

2. The ALJ's Finding that Respondent Proved that it is Entitled to the Safe-Harbor Exception is Supported by Substantial Evidence

Complainant argues that the ALJ erred in its interpretation of 49 U.S.C. § 20109(c)(2) and erroneously applied Respondent's fitness for duty standards instead of the existing FRA standards. Complainant argues that Section 20109(c)(2)'s plain text does not permit reliance upon the carrier's medical standards unless there are no pertinent FRA standards. We disagree.

Under FRA standards, no regulated employee may use controlled substances at any time, whether on duty or off duty, except as permitted by 49 C.F.R. § 219.103. Complainant contends Section 219.103(a) does not prohibit the use of a controlled substances when prescribed by a medical provider. However, Section 219.103(b) states, "[t]his subpart does not restrict any discretion available to the railroad to require that employees notify the railroad of therapeutic drug use or obtain prior approval for such use." Although pertinent FRA standards exist, the regulations allow railroads to place more stringent standards than the ones placed by the FRA, and no regulations forbid railroads from creating and enforcing its own fitness for duty standards. Railroads have a duty to prevent violations of the above regulations and must exercise due diligence to ensure compliance with Sections 219.101 and 219.102.[19] The "railroad's alcohol and/or drug use education, prevention, identification, intervention, and rehabilitation programs and policies

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17 *Ledure*, ARB 2013-0044, slip op at 7.

18 *Herman & MacLean v. Huddleston*, 459 U.S. 375, 389–390 (1983).

19 49 C.F.R. §§ 219.105(a)-(b).

must be designed and implemented in such a way that they do not circumvent or otherwise undermine the requirements, standards, and policies of this part."[20] Respondent's restricted drug policy furthers the goals of the FRSA by imposing more stringent safety standards than required.[21] Railroad carriers must have some flexibility in maintaining safe working conditions for employees and the public, and this includes flexibility in fitness for duty restrictions.

Alternatively, Complainant contends Respondent's Drug and Alcohol Policy was not in written form at the time he was not permitted to return to work as a CDCET, and a railroad's medical standards must be in written form and promulgated to its employees before they are to be considered "medical standards for fitness of duty" under Section 20109(c)(2). There is no cited authority requiring that Respondent's policy be in writing or published in order to be in effect. Also, substantial evidence supports the ALJ's analysis that the employer had a policy in place at the time in question. The uncontested testimony of Respondent's Chief Medical Officer and registered nurse supports the finding that although Respondent did not publish its restricted prescription drug list publicly until 2015, the policy has been used and applied the same way since at least 2011, and its medical rules have been in place since at least 1997.[22] Dr. Egger also acknowledged Respondent's policy prohibiting benzodiazepines for safety-critical positions was adopted in the past five to ten years. Additionally, there is no evidence to support Complainant's assertions that Respondent had previously made exceptions to its policy for other safety-critical employees.

Complainant has failed to persuade us that Respondent violated the statute by restricting him from working on safety-critical tasks while under the influence of a benzodiazepine. Respondent is allowed to impose more stringent fitness for duty standards than those imposed by the FRA. We conclude that the ALJ did not err in applying Respondent's Drug and Alcohol Policy. The substantial evidence supports the ALJ's findings that Respondent had relevant fitness for duty standards in place at the time Complainant was not permitted to return to work and that Complainant failed to meet Respondent's Drug and Alcohol Policy while under the influence of Klonopin. Accordingly, we affirm the ALJ's finding that Respondent is relieved from liability under the safe-harbor exception.

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[20] 49 C.F.R. § 219.105(c).

[21] 49 C.F.R. § 219.101(c) ("(c) Railroad rules. Nothing in this section restricts a railroad from imposing an absolute prohibition on the presence of alcohol or any drug in the body fluids of persons in its employ, whether in furtherance of the purpose of this part or for other purposes.").

[22] D. & O. at 5-6.

CONCLUSION

Since Employer demonstrated that it is entitled to Section 20109(c)(2)'s safe-harbor exception, we **AFFIRM** the ALJ's denial of relief.

SO ORDERED.