U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

In the Matter of:

RORY BLAKE,

COMPLAINANT,

v.

MAST DRUG COMPANY, INC.,

RESPONDENT.

ARB CASE NO. 13-020

ALJ CASE NO. 2012-ACA-002

DATE: SEP 25 2013

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Rory Blake, *pro se*, Raleigh, North Carolina

Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*; Luis A. Corchado, *Administrative Appeals Judge*; and Lisa Wilson Edwards, *Administrative Appeals Judge*. Judge Corchado concurred.

ORDER DENYING MOTION FOR RECONSIDERATION

On October 5, 2012, a Department of Labor Administrative Law Judge (ALJ) issued a Decision and Order Dismissing Complaint (D. & O) in this case arising under the employee protection provisions of the Affordable Care Act.[1] The ALJ found that Complainant Rory Blake's complaint failed to raise a genuine issue of material fact because the section of the Act that Blake alleged Respondent Mast Drug violated did not apply to the Respondent and the provisions of the Act upon which Blake relied were not effective when the Respondent terminated his employment, so the Respondent could not have violated those provisions.[2]

---

[1] 29 U.S.C.A. § 218c (Thomson/Reuters Supp. 2012) (ACA).

[2] The ALJ found:

> [The ACA] provides protection for covered employees who report any violation of the Act or who object to or refuse to

The ALJ's D. & O. included the following notice of appeal rights:

> NOTICE: Review of this Decision and Order is by the Administrative Review Board pursuant to ¶ 5.c.(48) of Secretary's Order 01-2010, Delegation of Authority and Responsibility to the Administrative Review Board, 75 Fed. Reg. 3924 (Jan. 25, 2010) (effective Jan. 15, 2010). Regulations, however, have not yet been promulgated by the Department of Labor detailing the process for review by the Administrative Review Board of decisions by Administrative Law Judges under Section 1558 of the Affordable Care Act of 2010, codified at section 18C of the Fair Labor Standards Act, 29 U.S.C. 218C. Accordingly, this Decision and Order and the administrative file in this matter will be forwarded for review by the Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210. Since procedural regulations have not yet been promulgated, it is suggested that any party wishing to appeal this Decision and Order should also formally submit a Petition for Review with the Administrative Review Board.[3]

Blake did not file a Petition for Review as the ALJ suggested. Upon receiving a copy of the D. & O., the ARB issued an Order on November 29, 2012, notifying the parties that as the Department of Labor had not yet enacted regulations governing the procedures to be followed to obtain Board review of decisions under the ACA, if a party wished the Board to review the ALJ's D. & O., the party must file a petition for review with the Board no later than ten business days from the date of the Order, requesting the

---

> participate in an action reasonably believed to be a violation of the Act or other law. Section 3310 of the Act prohibits the wasteful distribution of outpatient prescription drugs to long-term care facilities under Medicare prescription drug plans by prescription drug plan ("PDP") sponsors. This prohibition on excessive prescription drug distribution applies to Medicare plan years beginning on or after January 1, 2012.

D. & O. at 1 (citations omitted). Blake alleged that his employment was terminated because he complained that Mast Pharmacy violated ACA section 3310. The ALJ found that section 3310 did not apply to Mast Pharmacy because it was not a prescription drug plan sponsor and because section 3310 did not become effective until after the events of which Blake complained. Therefore, the ALJ concluded, "Given that Complainant has failed to properly allege a violation of any provision of the Act, the [employee] protections of [the ACA] are unavailable to him." *Id.* at 3.

[3] D. & O. at 3.

Board to review the D. & O. The Order further informed the parties that the petition for review must specifically identify the findings, conclusions, or orders to which the party objects, and that the Board will ordinarily consider any objection not specifically listed as waived by the party. Finally, the Order stated that if the Board received one or more petitions for review, the Board would establish a schedule for submitting briefs, but if the Board did not receive any petitions for review within the ten business-day period, the Board would issue an order closing the case, and the ALJ's D. & O. would become the Secretary of Labor's final order.

The Board did not receive any petitions for review in response to the order, so on December 17, 2012, it issued a Notice of Case Closing as it indicated it would do in its November 29th Order. Blake did not retrieve this Notice (sent certified mail) from the Postal Service after an attempt to deliver it was unsuccessful. On December 20, 2012, Blake wrote a letter to the Board stating that he had not timely received the November 29th Order because it had been addressed to Roy rather than Rory Blake, however he did not dispute that the Notice was timely delivered to his address of record.

Six months later, on June 28, 2013, Blake wrote to the Board attaching a copy of the envelope in which the Board had sent its November 29th Order bearing notations from the Postal Service recording its attempts to deliver the letter and inquiring why he had not heard anything from the Board. The Board responded to this letter, enclosing copies of the Board's November 29th Order and December 17th Notice.

On August 19, 2013, the Board received a letter from Blake in which he requested reconsideration of the Board's Notice of Case Closing. He stated that through no "fault of his own" the Board's November 29th Order was addressed to an address at which his son is living and that because the certified letter containing the Order was addressed to Roy Blake instead of Rory Blake, his son "did not pay attention to the notice of attempted delivery" because "[h]e assumed that because whoever sent the letter did not take time to spell my name correctly, it must not be important."

DISCUSSION

The ARB is authorized to reconsider a decision upon the filing of a motion for reconsideration within a reasonable time of the date on which the Board issued the decision. The ARB generally applies a four-part test to determine whether the movant has demonstrated: (1) material differences in fact or law from that presented to a court of which the moving party could not have known through reasonable diligence, (ii) new material facts that occurred after the court's decision, (iii) a change in law after the court's decision, and (iv) failure to consider material facts presented to the court before its decision.[4] Although Blake's December 20, 2012 letter was not originally recognized

[4] *Toland v. FirstFleet, Inc.*, ARB No. 09-091, ALJ No. 2009-STA-011 (ARB Mar. 8, 2011); *Henrich v. Ecolab, Inc.*, ARB No. 05-030, ALJ No. 2004-SOX-051 (ARB May 30, 2007); *Getman v. Southwest Secs., Inc.*, ARB No. 04-059, ALJ No. 2003-SOX-008 (ARB Mar. 7, 2006). Although these are the criteria most often cited as providing a basis for

as a Motion for Reconsideration, in conjunction with the August 19th filing, and construing the filing liberally given Blake's pro se status, we consider Blake to have filed a timely Motion for Reconsideration.

Blake has not specifically cited to any of the grounds that the Board has recognized as sufficient to establish a basis for reconsideration. He states that through no fault of his own, the Board's November 29th Order was sent to a house where his son is living, but the Board used the address on the ALJ's service sheet – the only address of record that the Board had. A party litigating before a tribunal has an obligation to update his contact information. The ALJ informed Blake that he would forward the case to the ARB, so Blake should have expected some form of communication from the Board, but he failed to provide it with a current address. Further, if Blake had heeded the ALJ's advice and filed a petition for review any time between October 5th and December 13th, the Board's Order would have been unnecessary. Blake has not explained why he failed to file a petition for review as the ALJ suggested.

That the certified envelope containing the Order was addressed to Roy rather than Rory and Blake's son concluded that it was therefore not important to pay attention to the notice of attempted delivery, provides no sufficient basis for re-opening an otherwise final decision of the Secretary, given that the only address the Board had for Blake was the one at which his son was residing.

Further, after failing to retrieve the Board's December 17th notice from the Postal Service, Blake waited six months from December 2012 until June 2013 to again contact the Board, thus failing to demonstrate due diligence.

---

reconsideration, the Board has also recognized that reconsideration may be appropriate to correct manifest errors of law or fact upon which the judgment is based or to prevent manifest injustice. *OFCCP v. Florida Hospital of Orlando*, ARB No.11-011, ALJ No.2009-OFC-002, slip op. at 5 (ARB July 22, 2013)(Order Granting Motion for Reconsideration).

Accordingly, we find that Blake's motion for reconsideration fails to demonstrate any sufficient ground for reconsideration, and accordingly, we **DENY** it.

SO ORDERED.

PAUL M. IGASAKI
Chief Administrative Appeals Judge

LISA WILSON EDWARDS
Administrative Appeals Judge

Judge Luis A. Corchado, concurring:

I concur with the denial of Blake's motion for reconsideration but only because of Blake's inaction for six months after the Board's dismissal order of December 17, 2012. I find it significant that no regulations existed when the ALJ dismissed Blake's complaint on October 5, 2012, which prevented the ALJ from providing a deadline for Blake's petition for review. Only the Board's order of November 29, 2012 set a deadline for a petition for review, a ten-day deadline expiring on December 13, 2012. The order was sent only by certified mail and admittedly misspelled Blake's first name as "Roy" instead of "Rory" as the addressee. The first two attempts to deliver the certified letter failed. It is undisputed that, for perplexing reasons, Blake picked up the Board's November 29th order at the post office no earlier than December 18, 2012. Consequently, the deadline for filing a petition for review had passed only a few days before Blake first picked up the Board's November 29th order. On December 20, 2012, Blake filed with the Board an objection to the ALJ's order.

Putting aside the confusion over the deadline, Blake does not explain why he did not pick up the Board's December 17, 2012 order that notified him of the Board's dismissal. The Board mailed the December 17, 2012 dismissal order to the same address as the November 29th order, in the same manner and with the same misspelling. At no time in December 2012 did Blake inform the Board of a new address. Having picked up the Board's November 29th order on or about December 18, 2012, Blake should have been attuned to the significance of letters from the Board. Yet, Blake allowed more than six months pass before writing to the Board to inquire about the status of his case. He provided no excuse for this delay, much less a justifiable excuse. Therefore, I concur that he has failed to provide a sufficient basis to reconsider the dismissal of his case.

LUIS A. CORCHADO
Administrative Appeals Judge