



In the Matter of:

**WEBSTER WILLIAMS, JR.,
COMPLAINANT,**

v.

**GRAND TRUNK WESTERN
RAILROAD COMPANY,**

RESPONDENT.

**ARB CASE NOS. 14-092
15-008**

ALJ CASE NO. 2013-FRS-033

DATE: DEC - 8 2016

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

ERRATUM

On December 5, 2016, the Administrative Review Board (ARB) issued a Decision and Order affirming the Administrative Law Judge's Final Decision and Order and the Corrected Supplemental Decision and Order Awarding Attorney's Fees. The docket number included in the caption, ARB No. 14-047, was incorrect. Accordingly, we reissue the decision with the corrected docket number, ARB No. 14-092. In all other respects, the Decision and Order of Remand remains the same.

FOR THE ADMINISTRATIVE REVIEW BOARD:



**Janet R. Dunlop
General Counsel**

Note: Questions regarding any case pending before the Board should be directed to the Board.
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BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Robert B. Thompson, Esq. and Robert E. Harrington, III, Esq.; *Harrington, Thompson, Acker & Harrington, Ltd., P.C.*; Chicago, Illinois

For the Respondent:

Holly M. Robbins, Esq. and Joseph D. Weiner, Esq.; *Little Mendelson, P.C.*; Minneapolis, Minnesota

Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*; E. Cooper Brown, *Administrative Appeals Judge*; and Joanne Royce, *Administrative Appeals Judge*

FINAL DECISION AND ORDER

On March 1, 2012, Complainant Webster Williams, Jr., filed a complaint with the United States Department of Labor's Occupational Safety and Health Administration (OSHA) alleging that Respondent Grand Trunk Western Railroad Co. (Grand Trunk) had retaliated against him in violation of the whistleblower protection provisions of the Federal Railroad Safety Act of 1982 (FRSA)¹ and its implementing regulations.² OSHA found that Williams did not engage in protected activity that contributed to the alleged adverse actions. Williams requested review of OSHA's determination before a Department of Labor Administrative Law Judge (ALJ). On

¹ 49 U.S.C.A. § 20109 (Thomson Reuters 2007 & Supp. 2016).

² 29 C.F.R. Part 1982 (2016).

August 11, 2014, the ALJ issued a Final Decision and Order (D. & O.) finding that Complainant established that Respondent retaliated against him in violation of the FRSA and awarded expungement of any reference related to the charges and disciplinary action, reinstatement to his former position, back wages, compensatory damages, and a reasonable attorney's fee. Subsequently, the ALJ issued a Corrected Supplemental Decision and Order Awarding Attorney's Fees awarding Complainant's counsel a fee in the amount of \$105,768.00 and costs of \$5,456.01 to be paid by Respondent. Grand Trunk filed petitions for review of both decisions with the Administrative Review Board (the Board or ARB).

BACKGROUND³

Williams had been employed by Grand Trunk since 1994 and has worked as a locomotive engineer since 1995. Since birth, Williams suffered from anxiety, migraine headaches, and depression. Dr. John Bernick has treated Williams for these conditions since 2005 and in that year he began prescribing Xanax to help treat Williams's conditions. At approximately the same time, Williams began applying for leave under the Family and Medical Leave Act (FMLA), which Respondent approved.⁴ In November and December 2011, Williams was off work a number of times and either called in sick or took FMLA leave. In late December, Respondent provided Williams with a Notice of Investigation for failing to work on a regular basis between November 28 and December 29. Williams provided documentation from his treating physician, who reported that he was absent due to his ongoing conditions. Respondent conducted a disciplinary investigation on January 13, 2012. Again, Williams provided documentation that he was absent pursuant to his physician's treatment plan and that his condition interfered with his job duties. On January 24, 2012, Respondent fired Williams for failing to work on a regular basis. Williams returned to work for Grand Trunk in August 2012.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to this Board to issue final agency decisions in FRSA cases.⁵ We review the ALJ's factual findings to determine whether they are supported by substantial evidence.⁶ The ARB reviews the ALJ's conclusions of law de novo.⁷

³ As the ALJ did not appear to make any explicit findings of fact, our description of the facts is based on a recitation of relevant uncontested evidence in the record.

⁴ 29 U.S.C. §§ 2601-2654.

⁵ Secretary's Order No. 02-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,378 (Nov. 16, 2012); 29 C.F.R. § 1982.110(a).

⁶ 29 C.F.R. § 1982.110.

⁷ *Kruse v. Norfolk S. Ry. Co.*, ARB No. 12-081, ALJ No. 2011-FRS- 022, slip op. at 3 (ARB Jan. 28, 2014).

DISCUSSION

The FRSA provides that a railroad carrier “may not discharge . . . or in any other way discriminate against an employee if such discrimination is due, in whole or in part, to the employee’s lawful, good faith act” involving one of various statutorily protected activities.⁸ The protected activities include “notify[ing], or attempt[ing] to notify, the railroad carrier . . . of a work-related personal injury or work-related illness of an employee.”⁹ The FRSA further provides: “A railroad carrier or person covered under this section may not discipline, or threaten discipline to, an employee for . . . following orders or a treatment plan of a treating physician.”¹⁰ For purposes of subsection (c), “[t]he 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 “An employee who alleges discharge, discipline, or other discrimination in violation of [section 20109](a) or (c) . . . may seek relief . . . with any petition or other request for relief under this section to be initiated by filing a complaint with the Secretary of Labor.”¹²

The ALJ applied the Board’s decision in *Bala v. Port Authority Trans-Hudson Corp.*, ARB No. 12-048, ALJ No. 2010-FRS-26 (ARB Sept. 27, 2013), and found that Williams was following a treatment plan for his non-work-related conditions from his treating physician, Dr. Bernick, when he was absent from work in November and December 2011. The ALJ found that Dr. Bernick knew of the physical requirements of Williams’s position as a locomotive engineer; the side effects of the medicine prescribed for Williams’s condition; and the symptoms of Williams’s anxiety, depression and migraines. The ALJ also found that Williams was a credible witness and was truly sick when he missed work in December 2011. Thus, the ALJ concluded that Williams was acting in good faith and following the orders or treatment plan of his treating physician when he marked off sick on several days in November and December, and thus was engaged in protected activity.¹³

⁸ 49 U.S.C.A. § 20109(a); 29 C.F.R. § 1982.102(b).

⁹ 49 U.S.C.A. § 20109(a)(4); see also 29 C.F.R. § 1982.102(b)(1)(iv).

¹⁰ 49 U.S.C.A. § 20109(c).

¹¹ *Id.*

¹² See 49 U.S.C.A. § 20901(d)(2), referencing 49 U.S.C.A. § 42121(b)(2)(B).

¹³ The ALJ also found that Williams’s protected activity was a contributing factor to Respondent’s adverse action as there would not have been an investigatory hearing and termination if Williams had not been absent while following Dr. Bernick’s treatment plan, and that Respondent has offered no evidence that it would have terminated Williams had he not followed the medical treatment plan of Dr. Bernick. D. & O. at 34. Respondent does not contest these findings on appeal.

We recognize that the United States Court of Appeals for the Third Circuit reversed and remanded the Board's decision in *Bala v. Port Authority Trans-Hudson Corp. v. Sec'y, U.S. Dep't of Labor*, 776 F.3d 157, 160 (3d Cir. 2015)(*PATH*). Specifically, the Third Circuit held that Section 20109(c)(2) applies only to treatment plans for on-duty injuries.¹⁴ While recognizing that the purpose of the FRSA is to promote safety in every area of railroad operations and reduce railroad-related accidents and incidents, the Third Circuit added a work-related limitation to the statute. We disagree with the Third Circuit's conclusion for the following reasons.

In *Bala*, the Board extensively reviewed Section 20109(c)(2)'s statutory language, legislative history, and congressional intent.¹⁵ Relying in part on the statutory construction principles the United States Supreme Court outlined in *Russello v. United States*,¹⁶ the Board held that the plain language of subsection (c)(2) protects railroad employees from discipline for following a physician's order for off-duty injuries.¹⁷ The Board also noted that the legislative history underscores this interpretation, and protecting employees from retaliation for following a treatment plan for a non-work related condition or injury addresses the broad concerns over railroad safety emphasized by Congress.¹⁸ Thus, the Board concluded that the express language set out in Sections 20109(c)(1) and (2), as well as the legislative history, makes it clear that Congress did not intend to foreclose protection from railroad workers who were following a physician's treatment plan for a non-work-related condition or injury.

Without giving the Board's interpretation of the statute *Chevron* deference,¹⁹ The Third Circuit held that subsection (c)(1) is a "substantive provision" while subsection (c)(2) is an "anti-retaliation provision." However, as the Board noted in its *Bala* decision, the structure of section 20109(c) in effect provides protection with two substantive provisions, the first for seeking medical treatment and the second for efforts to comply with the treatment plan. While Congress specifically limited the first provision to seeking medical treatment for work-related injuries, it did not do so for the second provision providing protection to employees for following a treatment plan. In rejecting the Board's interpretation of the subsection, the Third Circuit argues that Congress "would have written subsection (c)(2) differently if that were its intent," but proceeds to add qualifiers to the subsection that produce results counter to the intent of Congress

¹⁴ *Id.* at 166.

¹⁵ *Bala*, ARB No. 12-048.

¹⁶ *Russello v. United States*, 464 U.S. 16, 23 (1983).

¹⁷ *Bala*, slip op. at 5-9.

¹⁸ *Id.* slip op. at 9-12.

¹⁹ *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). *Chevron* applies only where "Congress has not directly addressed the precise question at issue" and the "statute is silent or ambiguous with respect to the specific issue" leaving the agency to fill the gap. *Tennessee v. FCC*, No. 15-3291 (6th Cir. Aug. 10, 2016).

as clearly reported in the legislative history.²⁰ Because there is no rule of intercourt stare decisis, federal agencies are not bound by the decision of a circuit court in litigation arising in other circuits.²¹ Thus, we decline to apply the holding in *PATH* to cases not arising in the Third Circuit.

In addition, we reject Grand Trunk's contention that Williams was not under a treatment plan and affirm the ALJ's finding that Dr. Bernick's treatment instructions were not just general advice, but amounted to a "treatment plan." The Board held in *Santiago v. Metro-North Commuter R.R. Co., Inc.*, ARB No. 10-147, ALJ No. 2009-FRS-011 (ARB July 25, 2012), that the term "treatment plan" is generally defined as the management and care of a patient to combat disease or injury and is "commonly used to include not only medical visits and medical treatment, but also physical therapy and daily medication, among other things."²² Dr. Bernick advised Williams that when he experienced symptoms from his anxiety, depression, and migraines that he should treat the symptoms, take the prescription medication Xanax, and not work. D. & O. at 31. The fact that Dr. Bernick's instructions were outlined on a FMLA leave form does not negate their identification as a treatment plan, but rather acts as evidence that Grand Trunk had notice of the plan because Dr. Bernick's recertification of the need for medical treatment of Williams's conditions did not substantially change through the repeated applications for FLMA.

We also affirm the ALJ's finding that Williams was a credible witness and was absent from work due to a good faith belief that it was unsafe to operate a locomotive given his condition and the medication prescribed. D. & O. at 32. This includes affirmance of the ALJ's finding that the fact that Williams did not see a psychiatrist after the second recommendation does not show lack of good faith, as it was reasonable under the circumstances. The ALJ believed Williams's assertion that he was sick on the days he called in. Moreover, as Complainant is not claiming adverse action in initiating the investigation, but only for the termination, the evidence supports the ALJ's finding that Respondent knew of the treatment plan at the time of termination, but fired him anyway.

With regard to the size of the ALJ's damages award, we reject Respondent's contention that the ALJ erred in failing to find that Williams did not mitigate his damages, and thus should not be entitled to an award of back wages. A complainant has a duty to exercise reasonable diligence to mitigate damages by searching for substantially equivalent work. However, it is the

²⁰ House Hearing (Oct. 25, 2007) at 3-4, 6-7, 10-11, 142, Supp. A; *See also* Federal Railroad Safety Improvement Act of 2007, House Report 110-336, 2007 U.S.C.C.A.N. 2146.

²¹ *See Brizendine v. Cotter & Co.*, 4 F.3d 457, 462 n.4 (7th Cir. 1993) (vacated on other grounds); *Spinner v. David Landau & Assoc., Inc.*, ARB Nos. 10-111, 10-115; ALJ No. 2010-SOX-029 (ARB May 31, 2012); *see generally* Samuel Estreicher & Richard Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 Yale L.J. 679, 735-41 (1989). *See also Nichols v. Bechtel Constr. Inc.*, No. 1987- ERA-044, slip op. at 6 (Sec'y Oct. 26, 1992), *aff'd sub nom. Bechtel Constr. Co. v. Sec'y of Labor*, 50 F.3d 926, 932 (11th Cir. 1995).

²² *Santiago*, ARB No. 10-147, slip op. at 6-7.

employer's burden to prove failure to mitigate.²³ Respondent submitted no evidence of available comparable jobs for the time in question and instead relies on Williams's testimony that he did not look for a job during this period. However, this is a mischaracterization of Williams's testimony as he stated that he was actively trying to be reinstated at Grand Trunk during this time and was successful in August 2012. In addition, we affirm the ALJ's award of \$5,000 for emotional damages as Williams presented credible testimony and medical evidence that amply support the ALJ's award for the mental distress Williams suffered after Respondent terminated his employment in January 2012.

On August 28, 2014, Williams filed a petition with the ALJ for fees and costs incurred before the ALJ, and Grand Trunk filed an opposition. After a review of the petition, the ALJ awarded Complainant's counsel an attorney's fee of \$105,768.00 and costs of \$5,456.01 for services rendered before the Office of Administrative Law Judges. On appeal, Grand Trunk contends that if the Board reverses the award of benefits, the fee award should also be vacated as Complainant would not be a prevailing party.²⁴ However, as we hold that Williams has been fully successful in the prosecution of his claim, we affirm the ALJ's award of an attorney's fee to be paid by Grand Trunk.²⁵ Moreover, as Grand Trunk has raised no specific objections to the ALJ's fee award, we affirm the amount awarded.

CONCLUSION

We reject Respondent's contention that the Third Circuit's opinion in *PATH* is controlling for the disposition of this case. Thus, we **AFFIRM** the ALJ's finding that Complainant established that Respondent retaliated against him in violation of the FRSA and **AFFIRM** the ALJ's award of back wages in the amount of \$41,655.26 plus interest, compensatory damages in the amount of \$5,000, and the attorney's fee of \$105,768.00 and costs of \$5,456.01 for work performed before the ALJ.

Furthermore, because the Board has determined that Respondent has violated the FRSA, Williams is also entitled to costs, including reasonable attorney's fees, incurred before the Board.²⁶ Williams's attorney shall have 30 days from receipt of this Final Decision and Order in which to file a fully supported attorney's fee petition with the Board, with simultaneous service

²³ *Dale v. Step 1 Stairworks, Inc.*, ARB No. 04-003, ALJ No. 2002-STA-030, slip op. at 7 (ARB Mar. 31, 2005).

²⁴ Respondent's Petition for Review, ARB 15-008 (Nov. 12, 2014).

²⁵ 49 U.S.C.A. § 20109(e); *see also* 29 C.F.R. §1982.105(a)(1); *Luder v. Cont'l Airlines, Inc.*, ARB No. 13-026, ALJ No. 2008-AIR-009, slip op. at 2 (ARB Jan. 7, 2015).

²⁶ 29 C.F.R. § 1982.110(d).

on opposing counsel. Thereafter, Respondent's counsel shall have 30 days from its receipt of the fee petition to file a response.

SO ORDERED.

[REDACTED]

JOANNE ROYCE
Administrative Appeals Judge

[REDACTED]

PAUL M. IGASAKI
Chief Administrative Appeals Judge

[REDACTED]

E. COOPER BROWN
Administrative Appeals Judge