U.S. Department of Labor

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

In the Matter of:

TERRELL JOHNSON,

COMPLAINANT,

v.

UNION PACIFIC RAILROAD CO.,

RESPONDENT.

ARB CASE NO. 2021-0041

ALJ CASE NO. 2019-FRS-00005

DATE: January 25, 2022

Appearances:

For the Complainant:
Joseph M. Miller, Esq.; *Davis, Saunders & Miller, PLC*; Mandeville, Louisiana

For the Respondent:
Sierra M. Poulson, Esq. and Jeffery J. Devashrayee, Esq.; *Union Pacific Railroad Co.*; Omaha, Nebraska

Before: Thomas H. Burrell, Randel K. Johnson, and Stephen M. Godek, *Administrative Appeals Judges*

DECISION AND ORDER

PER CURIAM. This case arises under the whistleblower protection provisions of the Federal Railroad Safety Act of 1982 (FRSA).[1] Complainant Terrell Johnson filed a complaint with the United States Department of Labor's Occupational Safety and Health Administration (OSHA) alleging that Respondent Union Pacific Railroad Company violated the FRSA by not permitting him to return to work after his physician cleared him. On June 8, 2021, an Administrative Law Judge (ALJ) issued a Decision and Order (D. & O.) dismissing the complaint. We affirm.

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[1] 49 U.S.C. § 20109 (2008), as implemented by 29 C.F.R. Part 1982 (2020) and 29 C.F.R. Part 18, Subpart A (2021).

BACKGROUND

Terrell Johnson was hired to work as a trackman welder for Respondent in November 2011. On April 14, 2015, he sustained work-related injuries to his neck, cervical spine, lumbar spine, lower back, right shoulder, and right elbow while working on a railroad track. On May 7, 2015, he reported his injury to Respondent in a Report of Personal Injury or Illness.[2]

As a result of his injuries, Johnson sought recovery under the provisions of the Federal Employers' Liability Act (FELA) for physical pain and suffering, past and future; mental pain and suffering, past and future; permanent disability; loss of employment of life; past lost wages; future lost earning capacity and fringe benefits; unpaid past medical expenses; and future life care needs and medical expenses of life expectancy.[3]

On December 12, 2016, the FELA trial commenced in federal district court in Monroe, Louisiana. During the trial, Johnson's attorney asserted that Johnson's injuries were permanent and he was no longer capable of performing his job duties.[4] In addition, Dr. Donald Dietze, Johnson's treating physician, testified that he did not recommend Johnson perform his usual work activities even if he underwent additional surgery, and that a realistic expectation of Johnson's work capacity would range from sedentary to medium.[5] On December 15, 2016, the jury returned a verdict in Johnson's favor and awarded him $1,227,739 in damages, of which $832,739.00 was designated for his future lost earning capacity and fringe benefits.[6] Respondent satisfied a reduced judgment of $993,121.60.[7]

Johnson continued to receive medical treatment and, in October 2017, expressed an interest in returning to work. In December 2017, he underwent a physical examination with a Logistics Health Incorporated examiner, who recommended that he return to work with no restrictions. Additionally, on January 5, 2018, Dr. Dietze also cleared Johnson to return to work without restrictions.[8]

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2 D. & O. at 8, Complainant's Exhibit (CX) 2.

3 D. & O. at 8-9, Respondent's Exhibit (RX) 2.

4 D. & O. at 9, RX 4 at 5.

5 D. & O. at 9, RX 6 at 3-6.

6 D. & O. at 9, RX 10.

7 D. & O. at 9, RX 11, Hearing Transcript (Tr.) at 76, 95.

8 D. & O. at 9-10.

On February 6, 2018, Mr. Scott Niswonger, Johnson's union representative, contacted Ms. Katherine Novak in Respondent's Labor Relations Department regarding Johnson's next steps to return to work. On February 7, 2018, Ms. Novak responded that, based on testimony in the FELA proceeding, Johnson was "estopped from returning to service." Johnson was never discharged in a disciplinary proceeding or otherwise formally terminated and remained on the roster.[9]

On May 16, 2018, Johnson filed a complaint with OSHA. On September 26, 2018, OSHA denied the complaint based on judicial estoppel.

On October 10, 2018, Johnson appealed to the Office of Administrative Law Judges (OALJ). Johnson alleged that he engaged in protected activity pursuant to 49 U.S.C. § 20109(c)(2) when he requested to return to work based on his physician's clearance.

On June 8, 2021, the ALJ dismissed the complaint. The ALJ determined that a request to return to work is not protected activity. However, the ALJ found that Johnson did engage in protected activity when he reported his injury and elaborated upon it during the FELA trial.[10] In addition, the ALJ found that, although Johnson was never formally disciplined or fired, Respondent's refusal to allow him to return to work effectively terminated his employment.

However, the ALJ determined that Johnson's protected activity was not a contributing factor to his adverse employment action. The ALJ found the parties stipulated that "Complainant was estopped from returning to work based on representations made during his FELA trial that he could never be able to physically perform the duties of his job."[11] In addition, the ALJ found that Respondent's reasoning does not indicate any animus toward Johnson reporting an injury or elaborating on it during the FELA trial. Rather, the ALJ determined that, "[i]t is the change in Complainant's position about his disability, rather than his report of a work injury, that bore causal relationship to Respondent's refusal to let Complainant return to work."[12]

In the alternative, the ALJ found that Respondent demonstrated by clear and convincing evidence that it would have taken the same adverse action regardless of Johnson's protected activity, and thus Respondent met its burden of rebuttal.

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9 D. & O. at 12; Tr. at 35, 51, 56, 93.

10 D. & O. at 27.

11 D. & O. at 3, 28-29; ALJ Exhibit (ALJX) 2.

12 D. & O. at 29.

On June 11, 2021, Johnson petitioned the Board for review of the ALJ's D. & O. Both parties filed briefs.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Board the authority to issue agency decisions under the FRSA as amended.[13] The Board will affirm the ALJ's factual findings if supported by substantial evidence but reviews all conclusions of law de novo.[14] Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[15]

DISCUSSION

The FRSA prohibits a railroad carrier engaged in interstate commerce or its officers or employees from retaliating against an employee because the employee engaged in a protected activity identified under the Act's whistleblower statute, including providing information regarding a violation of railroad safety regulations to a person with supervisory authority over the employee.[16] To prevail on an FRSA retaliation complaint, complainants must prove by preponderance of the evidence that: 1) they engaged in protected activity; 2) their employer took an adverse employment action against them; and 3) the protected activity was a contributing factor in the unfavorable personnel action.[17] A "contributing factor" is "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision."[18] If the complainant successfully proves that the protected conduct was a contributing factor, the employer may avoid liability by proving by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected activity.[19]

On appeal, Johnson alleges the ALJ erred in concluding that his request to return to work was not protected activity. However, as the ARB has held in the

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[13] 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. 13186 (Mar. 6, 2020).

[14] 29 C.F.R. § 1982.110(b); *Austin v. BNSF Ry. Co.*, ARB No. 2017-0024, ALJ No. 2016-FRS-00013, slip op. at 7 (ARB Mar. 11, 2019).

[15] *McCarty v. Union Pac. R.R. Co.*, ARB No. 2018-0016, ALJ No. 2016-FRS-00066, slip op. at 3 (ARB Sept. 23, 2020).

[16] 49 U.S.C. § 20109(a).

[17] *Fricka v. Nat'l R.R. Passenger Corp.*, ARB No. 2014-0047, ALJ No. 2013-FRS-00035, slip op. at 5 (ARB Nov. 24, 2015) (citing 49 U.S.C. § 42121(b)(2)(B)(iii)).

[18] *Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 158 (3d Cir. 2013).

[19] *Id*. at 159 (citing 49 U.S.C. § 42121(b)(2)(B)(iv)).

past, requests to return to work are not protected activity.[20] Assuming arguendo the ALJ was correct that Johnson engaged in protected activity by reporting his injury and elaborating on it during the FELA trial, Johnson's complaint fails as he has not established all the elements necessary to prevail on an FRSA retaliation complaint.

We agree with the ALJ's findings that, although Respondent effectively terminated his employment by refusing to allow Johnson to return to work, Johnson's protected activity was not a contributing factor. As the ALJ found, the record here is devoid of direct or circumstantial evidence that either Johnson's reporting an injury or elaborating on it during the trial played any role in Respondent's refusal to permit him to return to work. The parties stipulated that Johnson was not allowed to return to work because he was estopped from doing so based on his representation of permanent disability at the FELA trial.[21] As the ALJ found, Respondent's reasoning does not indicate an animus toward Johnson's reporting an injury or elaborating on it during trial. Instead, as the ALJ correctly concluded, it was Johnson's change in his position regarding his disability, rather than reporting or elaborating on his injury, that led to Respondent's refusal to allow him to return to work. Thus, substantial evidence supports the ALJ's finding that Complainant failed to prove that his protected activity contributed to Respondent's refusal to allow his return to work.

Accordingly, we hold that Johnson has not demonstrated that he engaged in a protected activity that was a contributing factor to an adverse action.

CONCLUSION

Therefore, we **AFFIRM** the ALJ's Decision & Order and **DISMISS** Johnson's complaint.[22]

SO ORDERED.

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[20] *See Rudolph v. Nat'l R.R. Passenger Corp.*, ARB Nos. 2014-0053, -0056, ALJ No. 2009-FRS-00015, slip. op. at 16-18 (ARB Apr. 5, 2016).

[21] D. & O. at 3, 28; ALJX 2. Although the ALJ ultimately found that collateral estoppel did not apply in this case, D. & O. at 30-31, as a legal matter, this finding does not change the analysis regarding the fact that the Respondent relied on the parties' stipulation, along with other factors, and not protected conduct, in determining its course of action.

[22] In any appeal of this Decision and Order that may be filed with the Courts of Appeals, we note that the appropriately named party is the Secretary, Department of Labor (not the Administrative Review Board (ARB)).

Judge Thomas H. Burrell, concurring.

I concur in the panel's decision that protected activity was not a contributing factor in Respondent's decision not to return Complainant to work. I write separately to note that I have difficulty with the ALJ's treating the Respondent's decision as an adverse action prohibited by the FRSA. For purposes of FRSA's anti-retaliation provision, Complainant's decision to sue the employer under FELA—successfully obtaining a large award for physical pain and suffering, past and future; mental pain and suffering, past and future; permanent disability; loss of employment of life; past lost wages; future lost earning capacity and fringe benefits; unpaid past medical expenses; and future life care needs and medical expenses of life expectancy—seems to constitute a constructive resignation of his employment with Respondent. *Bean v. Wisconsin Bell, Inc.*, 366 F.3d 451, 453–54 (7th Cir. 2004) ("'Constructive' here performs its usual function in the law of indicating that something will for reasons of policy be treated as if it were something else.").