

CBR 5/8/85

John McConnell 3/19/85 Pending
Removal - Attendance & Falsifying a
Claim for OWCP

AIRS #4707

C 798

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In the matter of
United States Postal Service
Baltimore, Maryland
and
American Postal Workers Union
Baltimore-Philbey Area Local
.....

1099/
Case # EIC-2D-D ~~1099~~
Chandler/Removal

A hearing on the above matter was held in Baltimore, Maryland, on February 13, 1985. Cecil F. Romine, National Business Agent was advocate for the Union. The Postal Service was represented by Thaddeus J. Beckett, Sr., Labor Relations Assistant. Others in attendance at the hearing were

For the Postal Service

Shih F. Lee
Willie G. Blutcher

Supervisor of Mails Tour 1
Supervisor of Mails

For the Union

Beverly Chandler
Catherine Studivant

Grievant
OWCP Advocate for the Union

Witnesses were questioned and documents submitted in evidence. Both the Union and the Postal Service filed post-hearing briefs.

The Issue

The issue in this case is unusual, having to do with the removal of an employee who was considered fully disabled as a result of an on-the-job injury being recalled to work, then removed for failure to meet attendance requirements of her job and falsifying a claim for COP. The issue may be stated as

Was there just cause for the removal of Evelyn Chandler for failure to meet attendance requirements and falsifying an OWCP claim? If not, what is the remedy?

The Facts

Evelyn Chandler was first employed by the Postal Service in 1970 in Cheyenne, Wyoming. She transferred to Dublin, Virginia, in 1975 and then to Ellicott City in 1978. She injured her back loading mail in 1979, as a result of which she was declared totally disabled and placed on Workers Compensation. Sometime later she moved to Tuscon, Arizona, where she continued to receive Workers' Compensation benefits. In 1981, in an attempt by the Postal Service to reduce the number of employees held on the roster as totally disabled and unemployable, Ms. Chandler was given the option of returning to the Baltimore area in a light work assignment in keeping with the nature of her disability, or run the risk of losing her benefits. She chose to return to work.

Her attendance was erratic and she was involved in an OWCP matter which led the Postal Service to charge Ms. Chandler with falsification of a CA-2A recurrence of injury form. As a consequence of her irregular attendance and the alleged falsification, plus an incident on August 15, 1983 when Beverly Chandler was accused of being absent from work without permission, the Postal Service issued Ms. Chandler a Notice of Removal on September 6, effective October 10, 1983, specifying the above three charges as the basis for the removal.

The removal was grieved at Step 2 on October 20, 1983. The Union contended that the absences were due to a recurrence of on-the-job injury and were all approved and, in addition, there is no evidence of any falsification of CA-2A. Upon denial, a Step 3 appeal was made and reply given on February 7, 1984. However, the Union alleges that a Step 3 reply was never received by the Union in this case nor in some 44 other cases. The reason for the Union's failure to receive the Step 3 replies was never fully explained by either party. However, the Union argued that the delay in receipt of the Step 3 reply was the cause of its not having filed for arbitration until January 3, 1985, far beyond the date when an appeal should have been filed under the contract.

Nevertheless, the Postal Service challenged the arbitration as untimely and asked that the case be dismissed.

The Issue of Arbitrability

The 3rd Step response to this grievance by the Postal Service was dated February 7, 1984 (Letter from Bland to Romine, Jt. Ex. #2) The Union asserts that it never received this response. Consequently, under the language of Article 15 Section 2 Step 3d which reads

The Union may appeal an adverse decision directly to arbitration at the Regional level within twenty-one (21) days after the receipt of the Employer's Step 3 decision....

therefore, the grievance must still be held timely. The Union presented evidence of controversy with respect to 44 cases for which it had filed for arbitration even though no Step 3 reply had been received. The Union cited several cases similar to Chandler's which had been arbitrated despite the delay. (Un. Ex. #1; Union Ex. #3) In short, there was a foul-up in communications with respect to Chandler's grievance, along with many others. The Union should not be held responsible for the foul-up. More important, Evelyn Chandler should not be denied arbitration of her removal.

The Postal Service argued that the Step 3 reply was sent to the Union on February 7, 1984, and the Union did not file for arbitration until January 3, 1985, far in excess of the 21 days allowed for filing under the contract. The Postal Service had available a Mr. Lambson who was not a party to the Step 3 hearing or the response. The Union did not deny that the Step 3 reply was typed up and sent. It does deny that the Step 3 response in the Chandler case, as well as in 44 other cases, was received by the Union.

Award on Arbitrability

There is no dispute that the Step 3 meeting on Ms. Chandler's grievance was held on January 4, 1984, between Mr. Bland for the Postal Service and Mr. Harper for the Union. The Union does not deny that Mr. Bland of the Postal

Service sent a letter stating the Step 3 decision. It does contend that it did not receive the Step 3 reply and hence could not properly file for arbitration.

There is no evidence whatever to show that the Union did or did not receive the Step 3 reply. The Postal Service presented no evidence to show that it was received. Technically the Union is correct. The Contract requires that the appeal to arbitration be made within 21 days after the receipt of the Employer's Step 3 decision. Hence, if the Step 3 decision was not received there could logically be no appeal. It is inconceivable to me, however, how the Union could lose track of 44 cases, including Ms. Chandler's removal case, and be unaware that Step 3 answers had not been received in timely fashion signalling the need for inquiry.

The Union must bear the burden of the delay in this case, but I am inclined to consider the matter arbitrable simply because the issue is removal for just cause. Both parties could be held seriously at fault if an employee was considered removed without a fair hearing on the merits of the issue.

Therefore, I find the case arbitrable.

Discussion of the Merits of the Grievance

The Notice of Removal issued to Ms. Chandler sets forth in detail three charges: 1) Unauthorized absence from your Work Assignment; 2) Failure to Meet the Requirements of your Position in the Area of Attendance due to Un-scheduled Absences; 3) Falsification of Forms CA-2A, Notice of Recurrence of Disability.

When Ms. Chandler was recalled to work she was assigned to the 2:30-11:00 pm. shift in the Rehab unit (Tour 3). The recall letter, dated August 19, 1981, stated

All assigned duties will be in strict compliance with medical work restrictions.

Although she had requested a day shift (Tour 2) job because of her medical problems

she actually was transferred to Tour 1 from 10:30 pm. to 7:00 am. which apparently increased her physical discomfort. Ms. Chandler complained about the difficulties of working on the night shift and her doctor wrote on August 3, 1983 to the Postal Service medical officer as follows: (Un. Ex. #7)

Since our last letter to you dated September 30, 1982, the above named patient has been seen in our office on 9 occasions. She has been treated for spasms of the muscles of her neck, recurring low back pain and strain. This office has also been recurrently informed about personality conflicts on the third shift as well as what our patient considers "harrassment". As you are also aware, limited duty forms have been completed by the undersigned because of the physical problems aggravated by the emotional distress. Patient has also required large amounts of muscle relaxants, anti-depressants, allergy suppressants, analgesics.

With respect to Charge #1 Unauthorized absence from assignment.

On August 15, 1983, about 3:30 am. Ms. Chandler requested $2\frac{1}{2}$ hours leave without pay to go home since she did not feel well. Her supervisor, Shih F. Lee, refused the leave. About 20 minutes later Ms. Chandler complained of pains in her chest. Since there was no medical service available in the Post Office on Sunday, Ms. Lee attempted to call an ambulance. In the meantime, Ms. Chandler disappeared from her working place. Despite paging and extensive search of the Post Office, including the ladies' rooms, Ms. Chandler was not located. About 4:20 am. Ms. Chandler returned to her post. Since this was the second time Ms. Lee had difficulty with Ms. Chandler regarding leave at the early hours of Monday morning, Ms. Lee charged Ms. Chandler with unauthorized absence from work assignment.

Charge 2. Failure to meet the requirements of position - unscheduled absences.

From March 7, 1983 through July 11, 1983, there were 17 occasions during which Ms. Chandler was absent or late due to being sick. For most of these she provided medical evidence. On three previous occasions Ms. Chandler had received a Letter of Warning, a brief one day suspension for being absent without permission, and a 7 day suspension for absence without permission. (February 8, March 4 and October 25, 1982, respectively)

Charge 3. Falsification of Forms CA-2a, Notice of Recurrence of Disability.

Ms. Chandler testified that on two or more occasions she requested Form CA-2a from her supervisors, in order to report recurrence of injury to her back which had been the original basis of her disability and Compensation claim in 1979. She stated that her supervisor never gave her the forms. Consequently, she consulted Catherine Studivant, a Union officer serving on special assignment handling Workers' Compensation cases. Ms. Studivant and Ms. Chandler went to the Washington, D.C. office of OWCP where they obtained the CA-2a forms. Ms. Chandler filled out the forms in the presence of the OWCP clerk, detailing two occasions of reinjury. (Jt. Ex. #4) The forms request the "signature of official superior" (at time of recurrence). Ms. Chandler, on the advice of Ms. Studivant and with the knowledge of the OWCP claims examiner, printed the name of her supervisor "M.R. Blutcher". Ms. Chandler's claim was not controverted by the post office.

Some time after this incident of filling out the CA-2as on February 2, 1983, the post office became aware that Mr. Blutcher had not signed the forms. The Inspection office was notified and an inspector interviewed Mr. Blutcher and Ms. Chandler and reported that Mr. Blutcher's signature had been forged by Ms. Chandler.

On the basis of these three charges, the Postal Service issued a Notice of Removal on September 6, 1983. Shortly thereafter, Ms. Chandler's doctor (Dr. Morton M. Krieger of Baltimore) wrote to the Postal Service outlining Ms. Chandler's condition. I include the full text of that letter

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789-6720
789-7100

October 5, 1983

MEDICAL DOCUMENTATION RELATING TO DISABILITY RETIREMENT

Re: Chandler, Beverly R.
DOB: 12/27/37
SS# 520-34-4180

1. Medical Conditions:

Musculoskeletal sprain/strain of the lumbar spine area, chronic and symptomatic. This condition originated on the job approximately FEB. 1978 and has been aggravated by further accidents and events on the job. There are no structural bony changes. Patient also has muscle strain of the cervical spine area with observable muscle spasm of trapezii muscles in the past couple of years. Lastly because of claimed discrimination on the job and harrassment and purported misunderstandings and environmental disadvantages (too cold in summer and too hot in winter), patient has not only made a poor adjustment to limited duties but has developed moderately severe anxiety neurosis associated with depressive features and occasionally bordering on paranoia. Treatments have been very conservative with more of an attempt at understanding her problems and writing letters to her Medical Doctor on the job. Medications have included muscle relaxants, analgesics, sleeping medication. She also has combination tranquilizer - antidepressant. Response to treatment has been less than satisfactory.

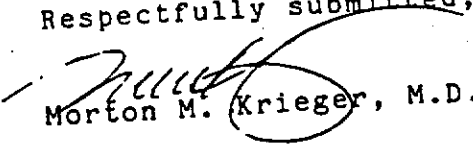
2. Positive findings on physical examination include resistance to motion of the cervical spine area, limitation of extension of the low back. She has a small inclusion cyst of the inner right foot. No muscle atrophy found. She has not had the benefit of psychological testing through this office.

RE: Chandler, Beverly
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3. The current clinical status is one of poor physical and emotional adjustment to her work and need for removal from her job which she cannot satisfactorily perform because of described circumstances. It is believed that there is a possibility of rehabilitation given the proper set of goals, elimination of more than light lifting and bending, etc.
4. Diagnoses:
1. Musculoskeletal sprain/strain of the lumbar spines with residua.
 2. Muscle strain of the cervical spines.
 3. Anxiety neurosis with depressive features and recurrent paranoia.
 4. Full recovery is not expected, however partial recovery might be possible again.
 5. Off the job, the patient is morose, depressed and anxious, and functions poorly socially. On the job she is unhappy, combative when irked, and in pain.
 6. Her medical condition with reference to her back has been aggravated and not well stabilized as is noted by her limping, her restriction of motion, and need for restrictions relating to bending, lifting, etc.
 7. It is unlikely that she will suffer sudden incapacitation.
 8. Emotional injury is strongly anticipated were Mrs. Chandler to remain in her present circumstances. This includes a strong consideration that she will become psychotic.
 9. The patient is absolutely unable to function in her present duties especially on a third shift and under circumstances and environment such as extremes of temperature which worsen the musculoskeletal system. At the present time her restrictions relate to bending and stooping, reaching, pushing or pulling, and lifting. Emotionally charged atmosphere also represents risk and needs to be avoided.

With her worsening emotional status and her unimproved aggravated physical status, the individual should not consider any of her present duties or any assignment in the Post Office where she is employed at the present time. Your cooperation is invited.

Respectfully submitted,


Morton M. Krieger, M.D.

MMK/pg
Enclosure

Award and Opinion

If this were simply a matter of Ms. Chandler's attendance, the Postal Service would be justified in Ms. Chandler's removal. She had been warned and suspended twice for poor attendance and absence without approval. It is unnecessary here to emphasize the importance of regular attendance in the principal mission of the Post Office. A record of unscheduled absences such as that of Ms. Chandler cannot be tolerated. It is also quite clear from the incident on August 15, 1983, when Ms. Chandler left her work position without permission and, in effect, hid herself from those looking for her, that Ms. Chandler's abnormal behavior disrupts the normal work routine and obstructs the work of the post office.

However, Ms. Chandler's irregular attendance and absence from her work without authorization must be judged in light of her physical and mental condition. Ms. Chandler was declared unable to work as a result of an on-the-job accident in 1979. She had been on full compensation until the Postal Service, in an effort to reduce compensation costs, offered her light work "in strict compliance with your medical work restrictions". (Un. Ex. #4) Ms. Chandler returned to work in Baltimore from Tuscon, Arizona, where she had been living, in September 1981. She was assigned to a Rehab unit but the later change from 2:30 pm. -11:00pm. shift to 10:30 pm. -7:00am. was not in accordance with work restrictions and caused emotional upset. Ms. Chandler's work problems appear to be directly related to her physical and mental conditions (see Dr. Krieger's letters of August 3, 1983 and October 5, 1983. Un. Exs. #5 and #7)

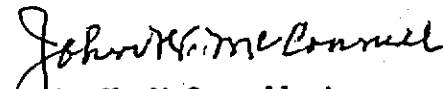
The charge of falsification of the CA-2a is excessive. The evidence indicates that Ms. Chandler printed in the name of MR. BLUTCHER (no attempt to insert his signature nor even to use his initials) at the suggestion of Ms. Studivant, the Union's own OWCP specialist and under the observation of an OWCP claims examiner. On the evidence presented, there is no basis for the charge of falsification.

The critical element in this case is whether or not Ms. Chandler is physically and emotionally able to perform her assigned duties in such a manner as to be employed by the Post Office. The record to date indicates that in the jobs assigned, Ms. Chandler did not give a satisfactory performance. There is a basic consideration, however. Is Ms. Chandler's inability to perform satisfactorily a result of her on-the-job injury and/or inappropriate job assignment? That is a question to be answered by the OWCP. The Postal Service has the right to terminate an employee who cannot perform assigned duties; however, where the inability to perform duties is presumed to be related to an on-the-job injury, the final determination of the employee's status must be made by the OWCP.

Award

The evidence does not support the charge of falsification on the CA-2a forms. Ms. Chandler's poor attendance record and unsatisfactory conduct on the job are sufficient to justify her removal. However, since the poor attendance and unsatisfactory performance may be related to Ms. Chandler's injury on the job, as her own physician states, the OWCP must rule on the disposition of Ms. Chandler's case, that is, whether in fact her job difficulties are or are not job related and if so, what her status should be. The question of back pay, if not decided by the OWCP must at least remain open until an OWCP ruling is made.

Respectfully submitted,


John W. McConnell
Arbitrator

March 19, 1985