FILED
United States Court of Appeals
Tenth Circuit

September 26, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

GREGORY CHAMBERS,

Petitioner,

v.

UNITED STATES DEPARTMENT OF LABOR; BNSF RAILWAY COMPANY,

Respondents.

No. 21-9559
(Benefits No. 2019-0074)
(Benefits Review Board)

ORDER AND JUDGMENT*

Before **BACHARACH**, **EID**, and **ROSSMAN**, Circuit Judges.

Gregory Chambers challenges the Administrative Review Board's ("ARB") affirmance of an Administrative Law Judge's ("ALJ") decision to dismiss Chambers's wrongful-termination complaint against his former employer, BNSF Railway ("BNSF"). Substantial record evidence supports the ARB's holding that BNSF proved its affirmative defense and that the ALJ did not abuse his discretion in deciding to exclude irrelevant evidence that Chambers sought to introduce.

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* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

Additionally, Chambers forfeited his arguments against the ARB's denial of his motion for reconsideration. Thus, we deny the petition for review.

I.

Gregory Chambers held various positions providing train services for BNSF. In 2016, he reported an injury. While investigating the report, BNSF staff learned that, on his pre-employment medical questionnaire, Chambers falsely reported that he had neither suffered injuries causing him to miss work for an extended period nor filed an injury-related suit against an employer. This information was forwarded to General Manager Marc Stephens, and BNSF notified Chambers that it planned to hold an investigative hearing concerning the alleged dishonesty. Stephens, Hearing Officer Darren Hale, and Director of Employee Performance Stephanie Detlefsen reviewed the testimony and exhibits at a hearing. Neither Hale nor Detlefsen knew about the injury report before the hearing, but Stephens, as a member of Chambers's supervisory chain, would have been notified of the injury more than nine months before the hearing.

All three concluded that Chambers was dishonest in his employment application and recommended his dismissal. BNSF's Vice President of the Southern Region agreed. BNSF then dismissed Chambers for dishonesty in his pre-employment medical questionnaire in violation of BNSF's rules prohibiting dishonest conduct.

Chambers later filed a Federal Railroad Safety Act (the "FRSA") complaint with the Occupational Safety and Health Administration ("OSHA"). OSHA

dismissed his complaint. Chambers then sought review of OSHA's decision before an ALJ. During the hearing, Chambers attempted to introduce testimony in another matter from Derrick Cargill, BNSF's then-Director of Labor Relations, in which Cargill testified that BNSF rules do not apply to applications for employment. The ALJ excluded Cargill's testimony, agreeing with BNSF that it was irrelevant because it involved the application of "a different rule in a different case [with] a different fact scenario." App'x Vol. XIV at 3932–33.

Reviewing OSHA's decision pursuant to FRSA, the ALJ concluded that Chambers's report of the injury "played absolutely no part in the decision to terminate" him based, in part, on testimony from Stephens, Hale, and Detlefsen, and the ALJ's determination that they were "very credible witnesses." App'x Vol. XV at 4361. Although the ALJ found this sufficient to defeat Chambers's prima facie case, the ALJ went on to determine that BNSF had proved its affirmative defense by clear and convincing evidence and that it would have dismissed Chambers even in the absence of the injury report.

On appeal, the ARB addressed BNSF's defense—but not Chambers's prima facie case—and the ALJ's ruling on Cargill's testimony. The ARB affirmed both, finding that substantial evidence and the ALJ's credibility determinations supported the ALJ's findings with respect to BNSF's defense, and that the ALJ did not abuse his discretion in excluding Cargill's testimony. The ARB also denied Chambers's motion for reconsideration, holding that he had not presented any new evidence,

changes in the controlling law, or evidence that the ARB failed to consider. Chambers then petitioned for review.

II.

A.

"We review the [ARB's] decisions under the Administrative Procedure Act . . . ." *BNSF Ry. Co. v. U.S. Dep't of Lab.*, 816 F.3d 628, 637 (10th Cir. 2016). A "reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "unsupported by substantial evidence." 5 U.S.C. § 706. "In reviewing under the arbitrary-and-capricious standard, 'we must engage in a substantial inquiry.'" *BNSF Ry. Co.*, 816 F.3d at 638 (citation omitted). "Yet our scope of review is narrow." *Id.* (citation omitted). "We must decide 'whether the agency examined the relevant data and articulated a rational connection between the facts found and the decision made.'" *Id.* (citation omitted). "To satisfy the substantial-evidence standard, an agency need rely only on 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Id.* (citation omitted). "Ultimately, we review de novo the [ARB's] legal determinations, and we defer to the ARB's reasonable construction of applicable statutes." *Id.* Further, because our review is "very deferential" to the ARB, "a presumption of validity attaches to the agency action and the burden of proof rests with the parties who challenge it." *Id.* (cleaned up).

B.

Under the FRSA, "[a] railroad cannot discriminate against, suspend, or discharge an employee for notifying or attempting to notify the railroad about an on-the-job injury or medical treatment for that injury." *Id.* To pursue a claim under the FRSA, "an employee has the burden to establish a prima facie case, showing that the employee's protected activity 'was a contributing factor in the unfavorable personnel action alleged in the complaint.'" *Id.* (quoting 49 U.S.C. § 42121(b)(2)(B)(i)). "Upon an employee's doing so, the burden switches to the employer to demonstrate 'clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of [the employee's protected activity].'" *Id.* (alteration in original) (quoting 49 U.S.C. § 42121(b)(2)(B)(iv)). "The [ARB] defines a 'contributing factor' as 'any factor, which alone or in combination with other factors, tends to affect *in any way* the outcome of the decision.'" *Id.* (citation omitted).

C.

The ARB did not abuse its discretion by affirming the ALJ's finding that BNSF proved, by clear and convincing evidence, that it would have taken the same adverse action absent protected activity. BNSF had the burden of demonstrating by "clear and convincing evidence" that it would have fired Chambers even in the absence of the second injury report. *Id.* (quoting 49 U.S.C. § 42121(b)(2)(B)(iv)). And the ALJ and ARB each found that BNSF met its burden.

Indeed, the ALJ rendered twelve findings of fact in concluding that BNSF provided its affirmative defense. The ALJ also emphasized the credibility of the decision-makers' testimony. The ARB found that substantial evidence in the record supported these findings and specifically highlighted BNSF's consistent application of its policy prohibiting dishonesty, its legitimate interest in enforcing that policy, and the decision-makers' honest belief that Chambers falsified the answers on his pre-employment questionnaire. And as the ARB stated, "in accordance with [BNSF's] policies, BNSF consistently dismisse[d] employees found to be dishonest." App'x Vol. XV at 4496.

These findings evidence the formal, multi-layered nature of BNSF's investigation and its consistency with established policies. A "reasonable mind" would accept the findings "as adequate to support a conclusion" that BNSF would have fired Chambers absent receiving a second injury report. *BNSF Ry. Co.*, 816 F.3d at 638 (citation omitted). Thus, the substantial-evidence standard requires that we affirm the ARB's decision.

In response, Chambers wants this Court to reconsider the findings made by the ALJ and affirmed by the ARB. Among other things, he urges us to take another look at BNSF's policies and rules, BNSF's alleged actions against Chambers, BNSF's alleged procedural violations, and other "inferential evidence that [Chambers's] dismissal resulted from the . . . investigation of [his] injury report." Aplt. Br. at 49. Aside from those considerations, he criticizes the evidence the ARB relied on and argues that it does not amount to substantial evidence.

But Chambers's arguments can only go so far. Because we review under the substantial-evidence standard, "we will not reweigh the evidence or substitute our judgment" for that of the ARB. *Lax v. Astrue*, 489 F.3d 1080, 1084 (10th Cir. 2007) (citation omitted). The ARB already looked through the evidence that Chambers points to on appeal and made reasoned decisions based on that and other evidence. Because "more than a scintilla" of evidence supports *each* of the ARB's fact findings, we refuse to reach different conclusions from the evidence presented.[1] *Id.*

Among the several challenges, Chambers's best argument is that his dismissal was caused by his second injury report, not by the discovery of his dishonest answers. He reasons that no temporal proximity existed between the discovery of the dishonest answers and his dismissal, while temporal proximity did exist between his second injury report and the adverse action. But his argument fails because the ALJ found the exact opposite conclusion, and that conclusion is supported by substantial evidence. *See* App'x Vol. XV at 4362 ("Temporal proximity exists between the discovery of the dishonest answers and the adverse action. There is *no* temporal

[1] More specifically, substantial evidence supported the ALJ's findings regarding (1) BNSF's policies and rules prohibiting dishonesty and its legitimate interest in enforcement; (2) the testimony of the decision-makers and what they honestly believed about Chambers; (3) Chambers's discipline process; (4) the temporal proximity between Chambers's second injury report, the discovery of the dishonest answers, and his termination; (5) BNSF's explanation for dismissal; (6) BNSF's past dismissal of dishonest employees; (7) the 100% rate that an official has recommended to dismiss dishonest employees; (8) how dishonesty is a stand-alone dismissible violation; (9) how BNSF followed its collective bargaining agreement procedures; (10) how senior management approved Chambers's termination; (11) the upheld appeal by the Assistant Vice President of Labor Relations; and (12) BNSF's legitimate interest in honest prospective employees. *See* App'x Vol. XV at 4362–63.

proximity between the protected activity and the adverse action." (emphasis added)); *id.* at 4496.

Looking at the dates at issue here, substantial evidence supports the ALJ and ARB's conclusions. Chambers reported his workplace injury on September 11, 2016. *Id.* at 4358. And BNSF did not terminate his employment until June 20, 2017—"over nine months after his protected activity." *Id.* That time between the injury report and Chambers's termination suggests that no temporal proximity existed, and we will not "reweigh the evidence" to reach a different finding. *Lax*, 489 F.3d at 1084 (citation omitted).

Chambers also argues that the BNSF officials who fired him knew about his initial injury report. As a result, Chambers reasons that because BNSF did not fire him while knowing about his initial injury report, the real reason he was dismissed was due to his second injury report. But other facts—the substantial evidence that the ALJ relied on—suggest against finding an inference that the second injury report acted as a catalyst for Chambers's termination.

Two of the three BNSF officials who decided to dismiss Chambers had no knowledge of his injury report prior to the investigatory hearing. And although his supervisor learned about the injury report months before the hearing, the ALJ found the supervisor's testimony credible that his knowledge of the report played no role in his decision. "[E]specially in light of the special deference given to an ALJ's

credibility findings," *id.* at 1089, substantial evidence supports that the injury report played no part in the decision to terminate Chambers.[2]

III.

A.

We review an agency's decision to exclude evidence for abuse of discretion. *Gunderson v. U.S. Dep't of Lab.*, 601 F.3d 1013, 1021 (10th Cir. 2010). "[W]e afford considerable deference to the agency tribunal . . . includ[ing] the power to make reasonable, nonarbitrary decisions regarding the admission or exclusion of evidence." *Id.* We "may overturn the ALJ's decision only if the error in excluding evidence prejudicially affected a substantial right of a party." *Id.* (cleaned up). "An error is prejudicial only 'if it can be reasonably concluded that with . . . such evidence, there would have been a contrary result.'" *Id.* (citation omitted).

B.

The ALJ did not abuse his discretion in excluding Cargill's testimony. "ALJs [generally] have broad authority over their hearings," and the ALJ's exclusion of Cargill's testimony is well within that authority. *Id.* (alteration in original). The ALJ

[2] Chambers also argues that BNSF did not comply with a collective bargaining agreement ("CBA"). However, substantial evidence supports the ALJ's determination that BNSF complied with the CBA. *See supra* n.1. But even if these allegations were true—despite the ARB's affirmation of the ALJ's finding that BNSF complied with applicable CBA procedures—they both require further interpretation of the CBA, a point Chambers does not contest. To the extent that Chambers seeks relief for alleged CBA violations while petitioning for review, he cannot. Interpretive questions are "minor disputes" under the Railway Labor Act and can be resolved only through dispute resolution mechanisms. *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 253 (1994).

excluded Cargill's irrelevant testimony—which Chambers tried to offer to demonstrate BNSF's application of workplace rules—because it involved violations of a different workplace policy. Evidence showing an employer applied a rule in a certain manner in one circumstance is not necessarily relevant to how that employer applies a different rule in a dissimilar circumstance. Nor did the testimony's exclusion implicate any substantial right of Chambers's. Thus, we find no "prejudicial error" because we cannot reasonably conclude that there would have been a contrary result had Cargill testified about the irrelevant policy. 5 U.S.C. § 706; *see also Sanjuan v. IBP, Inc.*, 160 F.3d 1291, 1296 (10th Cir. 1998). Given the "considerable deference" we give to the ALJ, *Gunderson*, 601 F.3d at 1021, this reasonable, nonarbitrary conclusion was not an abuse of discretion.[3]

IV.

Finally, Chambers appeals the ARB's denial of his motion to reconsider, although he does not discuss it independently of the ARB's original decision in either his opening brief or reply brief. As such, he has forfeited any argument concerning the denial of his motion for reconsideration. *See, e.g.*, *Fulghum v. Embarq Corp.*, 785 F.3d 395, 410 (10th Cir. 2015); *Bronson v. Swensen*, 500 F.3d 1099, 1104 (10th

[3] Chambers also argues that the APA sets the evidentiary standard for the agency proceedings and that our application of that standard in *Sorenson v. National Transportation Safety Board*, 684 F.2d 683 (10th Cir. 1982), precludes excluding Cargill's testimony. His argument fails. First off, as both the APA and *Sorenson* recognize, the ALJ only had to exclude "irrelevant" evidence. 5 U.S.C. § 556(d); *see Sorenson*, 684 F.2d at 686. For the reasons already explained, the ALJ did just that. But even if Cargill's testimony was relevant, Chambers misreads the APA and *Sorenson*. While both direct ALJs to exclude irrelevant evidence, neither forecloses exclusion on other grounds. *See* 5 U.S.C. § 556(d); *Sorenson*, 684 F.2d at 686.

Cir. 2007) ("[T]he omission of an issue in an opening brief generally forfeits appellate consideration of that issue."). Because we agree with the ARB's original decision and Chambers does not otherwise challenge the denial of his motion for reconsideration, we will not analyze the denial any further.

V.

For these reasons, we deny the petition for review.

Entered for the Court

Allison H. Eid
Circuit Judge

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Christopher M. Wolpert
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September 26, 2023

To Counsel of Record

RE: 21-9559, Chambers v. Department of Labor, et al
Dist/Ag docket: 2019-0074

Dear Counsel/Appellant:

Enclosed is a copy of the order and judgment issued today in this matter. The court has entered judgment on the docket pursuant to Fed. R. App. P. Rule 36.

Pursuant to Fed. R. App. P. Rule 40(a)(1), any petition for rehearing must be filed within 14 days after entry of judgment. Please note, however, that if the appeal is a civil case in which the United States or its officer or agency is a party, any petition for rehearing must be filed within 45 days after entry of judgment. Parties should consult both the Federal Rules and local rules of this court with regard to applicable standards and requirements. In particular, petitions for rehearing may not exceed 3900 words or 15 pages in length, and no answer is permitted unless the court enters an order requiring a response. *See* Fed. R. App. P. Rules 35 and 40, and 10th Cir. R.35 and 40 for further information governing petitions for rehearing.

Please contact this office if you have questions.

Sincerely,

Christopher M. Wolpert
Clerk of Court

CMW/klp