Regular Arbitration Panel

In the Matter of Arbitration	)	
	)	
between	)	Grievant: C. Lamson
	)	
United States Postal Service	)	Post Office: Tampa, Florida
	)	
and	)	Case No:
	)	H98C-1H-C00245483
American Postal Workers Union	)	100600RA-01

Before: Robert B. Hoffman, Arbitrator

Appearances:

For the Postal Service: Gerald E. Keegan

For the Union: Pat Davis-Weeks

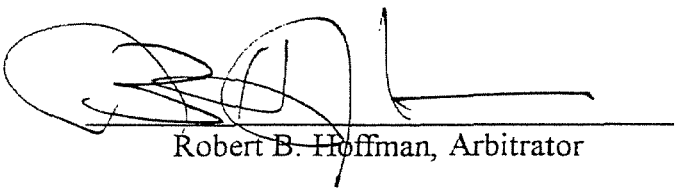
Place of Hearing: Tampa, FL

Date of Hearing: October 22, 2002

Date of Award: October 25, 2002

Summary

The stated purpose for requiring medical documentation in ELM 513.362 is to prove incapacity for work relating to an absence over three days. Using this rule to require documentation, when management has already accepted FMLA certification for serious health condition showing incapacity for the absence, is improper. The documentation was not being requested to prove fitness to return to work. The grievance is sustained.



Robert B. Hoffman, Arbitrator

Opinion and Award

Issues:

Did management violate the National Agreement when it required the grievant to submit medical documentation for an FMLA absence in excess of three days? If so, what is the remedy?

Facts:

The grievant is a SPBS operator at the Tampa, Florida P&DC. On May 12, 1999, her physician completed and signed an APWU form called "Certification by Employee's Health Care Provide for Employee's Serious Illness – FMLA." Directly below this title is the following instruction: "This form is to be completed by employee's Health Care Provider when employee is requesting FMLA and medical documentation is required pursuant to 512.41, 513.36 and 515.5 of the ELM. Form PS 3971 must be completed by employee." The form requires a "description of serious health condition."

The grievant's health care provider described a "lifetime" serious health condition that began in 1993. She suffered from a chronic disease involving "muscuilo-skeletal pain" that would require her to be off work intermittently, "usually monthly (although erratic and unpredictable), lasts 4-14 days." Her doctor certified that she was able to perform the functions of her job. On November 15, 1999, this physician signed a script requesting the "FMLA letter" be continued until November 2000.

During a four-day period in September 2000 the grievant requested, on a daily basis before her begin time on tour 1, absences covered by FMLA. She first called in on September 26 (for September 27) and requested FMLA sick leave for herself. The following day she made the same request during her call-in to the attendance clerk. For day three the grievant requested "FSWOP" during her call almost four hours before her start time.

For the fourth day, the "attendance control call-in sheet" shows that the grievant requested FMLA sick leave and that documentation was requested. The grievant testified that she actually requested FSWOP again because she closely manages her LWOP and sick leave in light of her medical condition, which causes the intermittent absences. She related that she had "FMLA on file." The supervisor who took the call stated that that documentation did not matter, she would still be required to bring in documentation for an absence in excess of three days. She signed two 3971's that reflect sick leave FMLA for the first 16 hours and SWOP

FMLA for the remaining 16 hours. The box for "pending documentation" is checked on both forms.

Upon the grievant's return to work she provided documentation from a doctor at an osteoporosis clinic. The signed script stated: "This pt suffers from Fibromyaleia and has recently had a flare up of her condition. Due to this she was unable to return to work from 9/27 through 10/1/00." In her grievance she maintains that management already had documentation for this absence. It had accepted her FMLA certification in the past, and as such, additional documentation cannot be required.

Positions:

The Union maintains that the grievant had pre-approved FMLA leave for her serious health condition at the time of the calls in September 2000. Management has never questioned her coverage. The documentation specifically stated that she could be absent anywhere from four to 14 days for her condition. The document that management required was no different than what management already had on file for her. It referred to the same condition. Contrary to management's position that ELM 513.362 requires documentation, there is no showing that the documentation was needed for the protection of the Service, one of the requirements for documentation under 513.361. There is nothing in this record to establish that the grievant had a pattern of absences associated with days off that would warrant this rule being applied. Documentation is proper after three days to require documentation if she had taken sick leave without any FMLA coverage. If the rule is applicable here, there is compliance with the second part of 513.362 -- "other acceptable evidence of incapacity for work." Her FMLA certification would meet that requirement.

Management's reliance on FMLA regulation 825.310 (b) is misplaced, according to the Union. This rule involves a return to work certification where medical clearance is required. It does not involve intermittent leave, when an employee is absent off and on for a condition. The grievant did not have one of the seven categories of conditions under the ELM that requires documentation for return to duty after 21 days.

Management contends that an employee absent for more than three days has no choice. ELM 513.362 in no uncertain terms states that "employees are required to submit" documentation. FMLA regulations recognize this law does not supercede a parties' collective bargaining agreement. Section 825.310 (b) provides that "if State or local law or the terms of a collective bargaining agreement govern an employee's return to work, these provisions shall

be applied. . . . " This means that the grievant's return to work is governed by this ELM provision inasmuch as the ELM is covered by Article 19. The Union claim that the documentation is already on file is not the same as a requirement "to submit" documentation. The wording clearly means that a new document must be submitted. Documentation can only be submitted after something happens.

Management further argues that FMLA documentation certifies a covered condition and what absences could occur. But it does not give the employee protection from documentation required by the ELM. The Union argument that management has purposefully applied this rule to control FMLA usage is belied by the fact that this rule has been in existence for many years before the advent of FMLA.

Conclusions:

At issue is the interaction between the FMLA and the Service's ELM regarding the need for medical documentation when employees are absent. On one hand the law provides that employees may obtain certification from a health care provider for absences caused by a serious health condition. This certification, according to DOL regulations, serves as documentation for a period or periods of "incapacity" including "recurring episodes of a single underlying condition." 19 CFR 825.114, 305, 306. The absences can take many different forms, such as permanent, partial or intermittent. Intermittent leaves may be covered as a serious health condition if they are described in the certification. 19 CFR 825.306.

Management's own medical documentation rules have been in place long before FMLA. There is documentation required for establishing an FMLA serious health condition under ELM 515.5. Here management contends that even though the grievant has a certification on file for incapacity, it has the absolute right under ELM 513.362 to require employees to submit documentation if they are absent in excess of three days. This rule provides:

> For absences in excess of 3 days, employees are required to submit medical documentation or other acceptable evidence of *incapacity for work.* (emphasis added)

To be clear, this is a rule requiring "medical documentation" or some "other acceptable evidence. The last three words state the purpose for this evidence – "incapacity to work." It is documentation that is clearly meant to be evidence that the employee did not have the capacity to work during the absence. It is not for the purpose of proving that the

employee is fit to return to work. The wording of the rule makes no mention of fitness or being able to return to work.[1] Nor is there any evidence that management sought to have this documentation so it could determine whether the grievant was fit to return to work.

Rather the purpose for this rule appears to be support for verifying that the absence was due to incapacity. Management makes no claim here that it sought documentation for any other purpose than what is stated in the rule. It is evident from the rule and those others found in 513.36 that this verification is used to determine the validity of paying sick leave. This is best seen in ELM 513.365. If no documentation is submitted pursuant to 513.362 management can change the absence to annual leave, LWOP or AWOL. The change is obviously from sick leave.

ELM 513.362 on its face thus requires no more or less than what this grievant already provided in her FMLA serious health condition certification from her physician. This certification unmistakably advises management of her incapacity to work during intermittent times in the four to 14 day range and the medical basis for this need. Significantly, it is evidence that management has had for over a year and that has been renewed by the grievant's doctor with a simple statement on a signed script that it be continued for a one-year period. There is no evidence that management ever questioned this evidence, or that it doubted the grievant's condition or her absences pursuant to this certification. The record suggests that management has not only accepted this as evidence of her incapacity, but the grievant has utilized this evidence for similar absences in the past, without being instructed to obtain "evidence of incapacity for work."

Moreover, the certification itself, as accepted by management, states explicitly that it is the medical documentation "required pursuant to . . . 513.36. . . ." As seen, this section is the ELM provision that contains 513.362, the same rule relied on by management to support its position that employees are required to submit new documentation, even if they have current FMLA certifications.

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[1] Management does not rely on ELM 515.56, a rule that appears in the ELM version in 2001, after this grievance was filed, relating to a return to work after an FMLA-covered absence, or 29CFR 825.310 concerning the circumstances an employer may require submission of medical documentation that the employee is able to return to work. (Also see footnote 2 infra.)

By requiring the grievant to obtain the same information it already has, management is in effect using ELM 513.362 as a means to recertify each absence that the grievant's health care provider has already certified for her continuing condition and treatment. Management wanted her doctor to again state that she was incapacitated during this four-day absence to comply with ELM 513.362. This is what her doctor eventually told management in a signed script. It is difficult to understand why this documentation is any different than what her doctor gave management in November 1999 to continue her certification for one year. It strongly suggests that management is seeking a recertification during the certification term. If not so directly, the effect is the same. Management is requiring the grievant to seek her doctor's advice about the same condition that is already a live certification.

Most noteworthy is that at the National level the parities have agreed that this type of documentation cannot occur. On April 15, 1998 Union President Burris and Vice President Labor Relations Potter for the Service agreed to some 41 questions and answers regarding FMLA. In this joint document, question and answer 31 is relevant. It provides:

Q. Is recertification required for each absence when a health care provider has certified that the employee is receiving continuing treatment?
A. Excluding pregnancy, chronic conditions, and permanent long-term conditions, recertification is not required for the duration of the treatment or period of incapacity specified by the health care provider, unless:

a. the employee requests an extension of the leave;
b. the circumstances have changed significantly from the original request;
c. the employer receives information that casts doubt on the continuing validity of the certification;
d. the absence is for a different condition or reason.

This agreement states no more than what the FMLA regulations require in 29 CFR 825.308. Although the parties did not refer directly to intermittent leaves, as the grievant was certified here, this regulation makes specific reference to such leaves in 825.308(b)(2). An employer cannot request recertification in less than the minimum time period for the certification unless one of the above conditions applies.

As seen, there is no evidence that any of these conditions apply to this grievant. Management never raised any objection to her absence that covers them. Still, it argues that the regulations allow it to enforce its own rules made pursuant to a collective bargaining

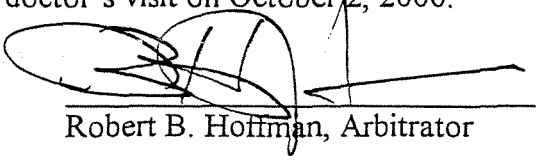
agreement.[2] One of the rules is the long used rule on requiring the submission of documentation for absences over three days. No reason is needed, management contends, unlike the preceding rule for documentation where the absence is less than three days. Simply put, the Service maintains that it does not have to give excuses for invoking this rule.

It is true that management does not have to give reasons for requiring medical documentation under ELM 513.362. It is a strict requirement for absences over three days. But to the extent that this rule imposes a requirement that is already met, its enforcement would be improper. ELM 513.362 is derived from a pre-FMLA period when there was no such document as an FMLA certification for pre-existing serious medical conditions that spelled out the duration of time needed for incapacity. The requirement for incapacity information before FMLA was a necessity; there was no other evidence on file for the absence showing any type of medical documentation. Clearly it made sense to have documentation that backed up the employee's sick claim for absences occurring over three days. It gave the appearance of an absence that was serious and thus needed proof to substantiate.

Where management requires medical documentation per a rule relating to incapacity for work, it would be improper to mandate that the employee document what has already been documented. This is not the intent of the FMLA regulations or the ELM rules cited above.[3]

Award:

Based on the above and the entire record, the grievance is sustained. The employee shall be made whole for any lost pay and reimbursed for her doctor's bill and any other reasonable expenses associated with her doctor's visit on October 2, 2000.



Robert B. Hoffman, Arbitrator

[2] But the regulation cited by management refers to those instances when a return to duty is the issue and documentation is sought. 19 CFR 825.310. The heading reads: ("Under what circumstances may an employer require that an employee submit a medical certification that the employee is able (or unable) to return to work ('i.e., a fitness-for-duty' report)?" Management relies on the provision that the terms of the parties' collective bargaining agreement "govern an employee's return to work." But as seen above, the return to work or fitness issue is not the issue regarding documentation. It is, by the terms of the rule invoked by management, the incapacity during the absence.

[3] Not to be overlooked are FMLA regulations that define documentation for incapacity to work due to a serious health condition. They provide that "only an employer's less stringent sick leave certification requirements may be imposed." 29 CFR 825.305(e) and 825.306(c)).