ANISE FAY SWORD,

Grievant,

v. Docket No. 97-BEP-434

BUREAU OF EMPLOYMENT PROGRAMS,
WORKERS' COMPENSATION DIVISION,

and

WEST VIRGINIA DEPARTMENT OF ADMINISTRATION,
DIVISION OF PERSONNEL,

Respondents.

D E C I S I O N

Anise Fay Sword (Grievant) filed this grievance pursuant to W. Va. Code §§ 29-6A- 1, et seq., on July 29, 1997, alleging that she should have been properly classified by Respondent Division of Personnel (DOP) as a Deputy Claims Manager, rather than as a Claims Representative II. The grievance could not be resolved at Levels I or II, and Grievant appealed to Level III on September 9, 1997. After being advised that Respondent Bureau of Employment Programs (BEP) would not be able to conduct a Level III hearing within the time limits set forth in W. Va. Code § 29-6A-4(c), Grievant appealed to Level IV on October 2, 1997. Thereafter, DOP was joined as an indispensable party on November 7, 1997. This matter was set for hearing, and following a continuance for good cause shown, a hearing was conducted in this Grievance Board's office in Charleston, WestVirginia, on January 26, 1998. The parties waived closing arguments, and this matter became mature for decision at the conclusion of that hearing.

The following Findings of Fact pertinent to resolution of this grievance have been determined based upon a preponderance of the evidence presented at Level IV.

FINDINGS OF FACT

1. Grievant is employed by Respondent Bureau of Employment Programs (BEP) in the Occupational Pneumoconiosis Unit (OP Unit) of its Workers' Compensation Division.

2. Grievant was initially employed by BEP's predecessor Bureau of Employment Security in 1976. From approximately June 1990 to June 1997, Grievant was classified as a Medical Claims Analyst II. See G Exs T & C.

3. Victoria Smoot is the supervisor in charge of the OP Unit, and serves as Grievant's immediate supervisor.

4. Effective April 1, 1996, the West Virginia Division of Personnel (DOP) established new job classifications in BEP, including Claims Representative II in Pay Grade 9, and Deputy Claims Manager in Pay Grade 11. See G Exs R, C, & S; R Ex 2.

5. On June 4, 1997, Grievant was notified that her position as a Medical Claims Analyst II was being reallocated to a Claims Representative II, a lateral classification change which did not change her salary. G Ex C.

6. Grievant appealed her classification to DOP on June 30, 1997. G Ex D. DOP Director Edison Casto denied her appeal on July 25, 1997. G Ex E. Grievant then filed this grievance.

7. Grievant's primary duties involve processing payments for claims which have been previously approved by other personnel, and processing requests to reopenpreviously adjudicated claims. Much of this work is accomplished using a computer and involves verifying certain personal information relating to the claimant, as well as cross- checking for such data as current overpayments, garnishments, child support orders, and wage history. See R Ex 1.

8. Since September 1996, Grievant has served as the Acting Supervisor in the OP Unit during the absence of Ms. Smoot. See G Exs J, K, L, N, & O. While serving as Acting Supervisor filling in for Ms. Smoot, Grievant is responsible for supervising 1 Data Entry Operator II, 1 Office Assistant II, 1 Office Assistant III, 5 Claims Representative II's, 4 Deputy Claims Managers, and up to 7 temporary employees. See G Ex T. In her capacity as Acting Supervisor, Grievant has taken certain disciplinary actions as appropriate. See G Exs J, K & L.

9. The duties performed by other personnel in the OP Unit who were classified as Deputy Claims Managers involved processing different aspects of OP claims from those processed by Grievant, and generally tended to involve more complex work than the claims duties performed by Grievant.

10. DOP initially proposed reallocating Grievant's position from Medical Claims Analyst II to Claims Representative I. BEP disagreed with that proposal in correspondence from Workers' Compensation Executive Director Ed Burdette to DOP Assistant Director Lowell Basford dated May 5, 1997, which included the following pertinent comments:

> **Ms. Sword's duties involve making permanent partial disability award payments, interpreting impairment assessed by the OP Board, review of prior claims to assure there is no overlapping coverage dates and she participates in the Child Advocate Office claims deductions. Ms. Sword also enters orders dismissing claims and must exercise judgment when dismissing claims for the missing of exams at the OP Board meetings.**
>
> **We did not include this material in the original re-classification form; however, Ms. Sword has been named back-up supervisor and performs tracking of production, signs leave slips and performs other supervisory duties.**

11. Effective January 1, 1998, Grievant was competitively promoted to a vacant Deputy Claims Manager position. G Ex A. See G Ex T.

12. DOP does not assign classifications based upon duties that involve serving as an "acting supervisor" as such duties are considered occasional, temporary, and not class-controlling.

13. DOP did not perform a desk audit of Grievant's position based upon its determination that no audit was required.

Classification Specifications at Issue

The relevant portions of the classification specifications for the Claims Represen tative II and Deputy Claims Manager positions at issue in this case are reproduced herein as follows:

CLAIMS REPRESENTATIVE II

Nature of Work: Under general supervision, reviews, evaluates, and processes an assigned caseload of Workers['] Compensation claims. Responsible for a caseload involving lost time claims with less than one hundred and four weeks of indemnity benefits. Caseload will include hearing loss, and occupational disease (e.g., repetitive motion, carpal tunnel, chemical exposure, dermatitis, etc.) and claims requiring surgery. Performs related duties as required.

Distinguishing Characteristics: The Claims Representative II is distinguished from the Claims Representative I by the responsibility of claims assigned. Claims Representative II is responsible for a caseload involving lost time claims with less than one hundred and four weeks of indemnity benefits. Caseload includes hearing loss, and occupational disease (e. g., repetitive motion, carpal tunnel, chemical exposure, dermatitis, etc.) and claims requiring surgery.

Examples of Work

Analyzes assigned new claims and reopening applications; determines applicability of coverage and chargeability.

Contacts claimants, employers, physicians, witnesses, and others to gather and verify information; secures salary information and determines compensation rate.

Determines claim compensability.

Identifies claims needing vocational rehabilitation for referral to rehabilitation specialists and monitors progress of rehabilitation services rendered within assigned authority.

Identifies subrogation opportunities; initiates recovery procedures.

Requests treatment plans from physicians and other clinical providers; reviews and develops a case management plan under general supervision.

Reviews requests for treatment, diagnostic studies, change of physicians, surgery, payment of medical expenses and payment of indemnity benefits.

Evaluates hearing loss claims and determines employer allocation/chargeability; evaluates audiograms and determines impairment rating based on current accepted guidelines.

Consults with medical management nurse on complex medical issues.

Requests independent medical examinations; reviews treatment plans in relation to established treatment guidelines.

Explains basis for and results of decisions and appeal rights to physicians, attorneys, government officials, other clinical providers and other interested parties.

Reviews requests for settlement to determine that related payments are made in accordance with agency policies and procedures.

Works with injured worker, physician and employer to identify return to work opportunities through modified alternate job duties or trial return to work.

Assists attorneys in litigated claims.

R Ex 2.

DEPUTY CLAIMS MANAGER

Nature of Work: Under limited supervision, reviews, investigates, evaluates, and processes an assigned caseload of Workers Compensation claims. Responsible for a caseload involving claims of indemnity benefits with one hundred and four weeks or more lost time, including fatalities, catastrophic and permanent total disability claims. May assume supervisory duties in the absence of District Claims Manager. Performs related duties as required.

Distinguishing Characteristics: The Deputy Claims Manager is distinguished from the Claims Representative II by the responsibility of claims assigned. The Deputy Claims Manager performs under limited supervision and is responsible for a caseload involving lost time claims of indemnity benefits with one hundred and four weeks or more lost time,including fatalities, catastrophic and permanent total disability claims. May assume supervisory duties in the absence of District Claims Manager.

Examples of Work

Analyzes assigned new claims and reopening applications; determines applicability of coverage and chargeability.

Requests investigation activities such as recorded statements, activity checks and surveillance.

Conducts special reviews on fatal, catastrophic and permanent total disability claims.

Contacts claimants, employers, physicians, witnesses, and other agents to gather and verify information; secures salary information and determines appropriate compensation rate.

Determines claim validity and compensability.

Monitors ongoing eligibility for permanent total disability claims in

accordance with applicable statute.

Identifies claims needing vocational rehabilitation for referral to rehabilitation specialists and monitors progress of rehabilitation services rendered within assigned authority.

Identifies subrogation opportunities, initiates and procures recovery.

Requests treatment plans from treating physicians and other clinical providers.

Develops a case management plan under limited supervision.

Determines medical necessity of requests for treatment, diagnostic studies, change of treating physicians, major surgery, payment of medical expenses and payment of objectively substantiated indemnity benefits within their assigned authority.

Determines need for home and vehicular modification and prosthetic devices.

Assumes management of claim which subsequently involve major surgery.

Evaluates statutory requirements for hearing loss and determines employer chargeability/allocation.

Evaluates audiograms and determines impairment rating based on current accepted guidelines.

Consults with medical management nurse and HCAP on complex medical issues.

Initiates and specifies independent medical examination criteria.

Analyzes independent medical examination reports and reviews treatment plans in relating to established treatment guidelines.

Explains legal basis for and results of decisions and appeal rights to physicians, attorneys, government officials, other clinical providers and other interested parties.

Reviews requests for settlement to determine that related payments are made in accordance with agency policies and procedures under limited supervision.

Works with injured worker, treating physician and employer to identify opportunities and initiate return to work through modified alternate job duties or trial return to work.

Formulates and issues legal orders citing findings of fact and conclusions of law.

Assists attorneys in litigated claims.

Reviews and acts upon Administrative Law Judges, Appeal Board and State Supreme Court decisions under limited supervision.

Provides guidance and technical advice regarding claim management techniques to team members in lower job classifications as needed.

Maintains active claim diaries and file notes.

Reviews and applies West Virginia law and current Workers Compensation Division guidelines in determining appropriateness of reopening requests.

Stays current in claims management principles and techniques and West Virginia law via continuing education.

G Ex R.

DISCUSSION

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving each element of her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd., 156 C.S.R. 1 § 4.19 (1996); Payne v. W. Va. Dept. of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A-6. More particularly, in order for a grievant to prevail upon a claim of misclassification, she must prove by a preponderance of the evidence that her duties for the relevant period more closely matched another cited Personnel classification specification than that under which she is currently assigned. See generally, Hayes v. W. Va. Dept. of Natural Resources, Docket No. NR-88-038 (Mar. 28, 1989). Personnel specifications are to be read in "pyramid fashion," i.e., from top to bottom, with the different sections to be considered as going from the more general/more critical to the more specific/less critical, Captain v. W. Va. Div. of Health, Docket No. 90-H-471 (Apr. 4, 1991); for these purposes, the "Nature of Work" section of a classification specification is generally its most critical section. Atchison v. W. Va. Div. of Health, Docket No. 90-H-444 (Apr. 22, 1991). See generally, Dollison v. W. Va. Dept. of Employment Security, Docket No. 89-ES-101 (Nov. 3, 1989). The key to the analysis is to ascertain whether Grievant'scurrent classification constitutes the "best fit" for her required duties. Simmons v. W. Va. Dept. of Health & Human Resources, Docket No. 90-H-433 (Mar. 28, 1991). The predominant duties of the position in question are class-controlling. Broaddus v. W. Va. Div. of Human Serv., Docket Nos. 89-DHS-606, 607, 609 (Aug. 31, 1990). Finally, Personnel's interpretation and explanation of the classification specifications at issue should be given great weight unless clearly erroneous. W. Va. Dept. of Health v. Blankenship, 189 W.

Va. 342, 431 S.E.2d 681 (1993).

The West Virginia Supreme Court of Appeals' holding in Blankenship, supra, presents employees challenging their current classification with a substantial obstacle to overcome in attempting to establish that they are currently misclassified. In this case, a preponderance of the evidence supports DOP's conclusion that Grievant's predominant duties are more consistent with the Claims Representative II classification than the Deputy Claims Manager classification. Although Grievant performs some of the duties included in the Deputy Claims Manager classification specification, these duties do not predominate Grievant's normal working day.

Mr. Basford, in interpreting the classification specification for Deputy Claims Manager, noted that classification is distinguished from Claims Representative II by the responsibility of claims assigned. Grievant's supervisor, Ms. Smoot, acknowledged that the claims assigned to those employees in the OP Unit previously classified as Deputy Claims Managers required such employees to exercise more discretion and judgment in processing controverted claims than the processing actions taken by Grievant. She explained that the claims Grievant processed as a Claims Representative II tended to involve uncontroverted matters, such as voluntary withdrawal notices from claimants, orclaimants who simply failed to appear as required to pursue their claims. (See footnote 1) **Ms. Smoot's testimony regarding the respective duties performed by Grievant and the OP Unit employees classified as Deputy Claims Managers tended to support Mr. Basford's conclusion that, according to the position descriptions provided to DOP, the other employees perform duties requiring a higher level of analysis and independent judgment.**

As for Grievant's interim responsibilities as Acting Supervisor from time to time, DOP noted that such duties were not considered as class-controlling when classifying employees. While it may appear incongruous that Grievant is assigned occasional responsibility to supervise personnel in her unit who are in a higher pay grade, including Deputy Claims Managers, such an anomaly does not render her misclassified. Further, even through the classification specification specifically states that a Deputy Claims Manager "[m]ay assume supervisory duties in the absence of District Claims Manager," Grievant's exercise of those duties on an as-needed basis does not render her misclassified as a Claims Representative II.

See Dooley v. W. Va. Dept. of Health and Human Resources, Docket No. 90-H-498 (Mar. 19, 1991); Broaddus v. W. Va. Div. of Human Serv., Docket No. 89-DHS-606, 607, 609 (Aug. 31, 1990). Accordingly, DOP's interpretation and application of its classification specifications under its Administrative Rule was not shown to be clearly erroneous in the circumstances presented. See Blankenship, supra. Consistent with the foregoing discussion, the following conclusions of law are made in this matter.

CONCLUSIONS OF LAW

1. In a grievance which does not involve a disciplinary matter, the grievant has the burden of proving each element of her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Payne v. W. Va. Dept. of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A-6.

2. Grievant has not proven by a preponderance of the evidence that the classifica tion of Deputy Claims Manager constitutes the "best fit" for the duties she was performing prior to her promotion to a vacant Deputy Claims Manager position. See Simmons v. W. Va. Dept. of Health and Human Resources, Docket No. 90-H-433 (Mar. 28, 1991).

3. Although Grievant performed some duties that were outside her previous classification as a Claims Representative II, that does not render her misclassified for the relevant time period involved in this grievance. See Ashley v. W. Va. Dept. of Health & Human Resources, Docket No. 94-HHR-070 (June 2, 1995); Dooley v. W. Va. Dept. of Health and Human Resources, Docket No. 90-H-498 (Mar. 19, 1991).

4. Personnel's interpretations of the classification specifications for the positions of Claims Representative II and Deputy Claims Manager, as they apply to the duties being performed by Grievant, are not clearly erroneous and, therefore, should be accorded great weight. W. Va. Dept. of Health v. Blankenship, 189 W. Va. 342, 431 S.E.2d 681 (1993). 5. Grievant's job duties while serving in her previous position, as demonstrated by a preponderance of the evidence, best fit within the classification specification for Claims Representative II.

Accordingly, the grievance is DENIED.

Any party may appeal this decision to the circuit court of the county in which the

grievance occurred and such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 29-6A-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

LEWIS G. BREWER

ADMINISTRATIVE LAW JUDGE

Dated: March 19, 1998

Footnote: 1

Grievant did not introduce position descriptions for any of the other employees in the OP Unit classified as Deputy Claims Managers to support her claim that her duties during the relevant time frame were substantially similar to their duties.