

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 92-N-870 (OES) (Consolidated for all purposes with Civil Action No. 96-N-343)

JESSE (JESUS) MONTEZ, et al.,

Plaintiffs,

v.

BILL OWENS, et al.,

Defendants.

Claim Number: 02-856 (formerly X-068)

Category: II

Claimant: Edgar Allen Stitzel, #89250

Address of Claimant: CCF, P.O. Box 600, Canon City, CO 81215-0600

FINAL ORDER OF SPECIAL MASTER

THIS MATTER comes before the Special Master on the claim of Claimant Edgar Allen Stitzel. The Special Master has reviewed the claim and all documents filed by both sides. This Order shall constitute the final action of the Special Master on this specific claim.

I. BACKGROUND

This litigation was commenced in 1992 against then-Governor Roy Romer and various officials of the Colorado Department of Corrections (CDOC). The case was brought under the Americans with Disabilities Act, *42 U.S.C. §12101*, and Rehabilitation Act, *29 U.S.C. §794*. During the summer of 2003, the parties began the process of trying to reach a settlement of all issues. The Court was advised that a settlement had been reached between members of the class and Defendants. Judge Nottingham set the case for a fairness hearing.

On August 27, 2003, the Remedial Plan (a.k.a. Settlement Agreement) was presented to Judge Nottingham. After consideration of objections that had been filed by various individuals, Judge Nottingham determined that the Remedial Plan should be approved. That approval established the class and did not provide for an opt-out provision for class members. The Remedial Plan also created a mechanism for

individual inmates, former inmates or their representatives to file claims seeking damages or other remedies available in court.

Section XXXII of the Remedial Plan provided the following basis for the filing of claims for damages and/or for other relief. This section states, in part, as follows:

Claim forms will then be sent to the Special Master. The Special Master shall then determine which of the following five categories of damages shall apply to each class member:

- I. General inconvenience or nominal damages;
- II. Damages due to loss of good time, earned time, access to programs or services that have not resulted in physical injury;
- III. Damages due to actual non-severe physical injuries or non-nominal emotional injuries (such as the fear of death);
- IV. Damages due to severe physical injuries; and
- V. Damages due to death.

Only one of the above categories may be applied to each class member. For instance, a class member with both inconvenience damages and non-severe physical injuries will be designated as Category III. *Remedial Plan, pp. 28-9.*

Pursuant to this provision, Claimant filed his claim and requested that the Special Master award appropriate damages for relief.

Section III of the Remedial Plan provides the following definitions:

III. DEFINITIONS

A. COVERED DISABILITIES

The persons covered by this Plan are individuals with mobility, hearing, and vision impairments and inmates with diabetes.

B. QUALIFIED INMATE

Inmate with a permanent disability/impairment which substantially limits his or her ability to perform a major life activity.

C. PERMANENT DISABILITY/IMPAIRMENT

A condition which is not expected to improve within six months.

On November 23, 2004, Judges Nottingham and Kane issued an Order that set forth the criteria that must be utilized in adjudicating a claim. They stated, in part, as follows:

2. The Special Masters shall evaluate individual damage claims submitted in this case by considering the following questions:

1. Is the claimant a disabled individual who is a member of the class?
2. Was the claimant otherwise qualified to participate in the programs or receive the benefits or services offered by DOC?
3. Was the claimant discriminated against by DOC because of his or her disability? (e.g., were accommodations requested and denied because of the disability?)
4. Did this conduct cause the claimant harm and if so, what is an appropriate remedy?

This Order controls the adjudication of all claims and must be followed by the Special Masters. A claimant must establish by a preponderance of the evidence each of the above four criteria.

II. FINDINGS OF FACT

Being duly advised, the Special Master makes the following Findings of Fact:

1. Claimant Stitzel submitted a claim which was assigned claim number 02-856. The claim is premised on an alleged permanent vision disability.
2. Claimant's claim was assigned to Category II pursuant to the Remedial Plan as set forth above.
3. Neither Claimant Stitzel's claim nor the record reflects when Claimant first entered CDOC custody. Likewise, the record does not identify each of the institutions in which Claimant has been housed. It appears, however, that during all or part of the time that he has been in CDOC custody, Claimant has been housed at the Colorado State Penitentiary (CSP) and the Centennial Correctional Facility (CCF).
4. Claimant asserts that he has a permanent vision disability. He describes his vision problem as follows: "I see light flashes at the corners of my eyes and I get severe headaches. I also have bouts of blurred vision where all I can see are blurred images." *Supplemental Form for Claimants Who Have Vision Impairments*. Claimant states that his vision problems commenced after September 11, 2003, when he suffered heat stroke from being locked in a hot and steamy shower for 45 minutes by CDOC personnel. Claimant asserts that other than routine eye examinations, he has never received any medical treatment for his vision problems.

5. Claimant makes a number of other allegations relating to CDOC staff. For example, he contends that CDOC staff has illegally intercepted his mail and has falsely stated that a civil suit filed by Claimant in Fremont County, Colorado was dismissed. He further contends that he has been threatened with personal harm by CDOC personnel. Also, Claimant asserts that he was provided with a form that required him to waive all of his legal rights in order to receive any accommodation for his alleged disability.

6. No records have been submitted to the Special Master by Claimant or by Defendants relating to Claimant's alleged vision problems.

III. CONCLUSIONS OF LAW

1. The legal standards applicable to this claim are derived from three sources: (a) the Remedial Plan; (b) the Rehabilitation Act, 29 U.S.C. § 794 *et seq.*, and (c) the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 *et seq.*

2. The first issue before the Special Master is whether Claimant is a disabled individual who is a member of the class. Under the Rehabilitation Act and the ADA, the term "disability" means "(1) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (2) a record of such an impairment; or (3) being regarded as having such an impairment." 42 U.S.C. § 12102(2); 29 U.S.C. 29 U.S.C. § 794(d); 29 U.S.C. § 705(9)(B). The term "substantially limits" refers to disabilities that make an individual unable to perform a major life activity that the average person in the general population can perform; or that significantly restricts an individual as to the condition, manner or duration under which he or she can perform a major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity. 29 C.F.R. § 1630.2(j)(1). "Major life activities" include functions "such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working." 29 C.F.R. § 1630.2(h)(2)(i).

The Remedial Plan limits the class of persons who might otherwise have a disability under the Rehabilitation Act and the ADA to those with mobility, hearing, vision disabilities, and those with disabilities due to diabetes. *Remedial Plan* ¶ III(A). Additionally, the Remedial Plan limits participation to inmates with permanent physical disabilities/impairments. *Remedial Plan* ¶ III(B). A permanent disability/impairment is a condition which is not expected to improve within six months. *Remedial Plan* ¶ III(C). As discussed in Section I above, the Remedial Plan further limits permanent mobility, hearing, vision, and diabetes disability/impairment to those that conform to the criteria of Section V, paragraph A of the Plan.

Based on the criteria established by the Rehabilitation Act, the ADA, and the Remedial Plan, a claimant is a disabled individual who is a member of the class if, while an inmate in a facility under the control of the CDOC, he or she (a) had a permanent

physical mobility, hearing, or vision impairment, as defined in the Remedial Plan, or was a diabetic; and (b) this condition substantially limited one or more of his or her major life activities.

3. The Special Master finds and concludes that Claimant has not sustained his burden of establishing by a preponderance of the evidence that he has a permanent vision impairment that substantially limits his ability to engage in one or more major life activities. The United States Supreme Court has noted that the term “substantial” must “be interpreted strictly to create a demanding standard for qualifying as disabled. *Toyota Motor Mfg., Ky. Inc. v. Williams*, 534 U.S. 184 (2002). Claimants must prove the limitations caused by their impairments are substantial in terms of their own experience. *Albertson’s Inc. v. Kirkingburg*, 527 U.S. 555 (1999). While the information provided by Claimant indicates that he has some difficulties with periodic episodes of blurred vision, and that he sees flashes in the corners of eyes, no evidence is presented as to how these conditions impact Claimant’s ability to engage in major life activities.

4. Even if Claimant Stitzel is deemed to have a permanent vision impairment that substantially limits one or more major life activities, the Special Master finds and concludes that Claimant has failed to establish that he suffered any discrimination because of his alleged disability which is cognizable under the Remedial Plan. By Claimant’s own concession, his vision problems arose in September of 2003. The Remedial Plan was signed on August 27, 2003. Although the Remedial Plan fails expressly to address the issue of damage claims that might arise after its execution date, there is nothing in the Remedial Plan that would suggest that paragraph XXXII thereof, authorizing the recovery of damages and establishing claims procedures was intended to apply to claims for damages that had not yet arisen. The Special Master finds and concludes that the damages that may be awarded under the Remedial Plan are limited to those resulting from violations of the ADA cognizable under the Remedial Plan and occurring prior to August 27, 2003. While post-August 27, 2003 discrimination may be taken into account, there must be a showing that Claimant did in fact suffer discrimination through a failure to accommodate his disability prior to the execution of the Remedial Plan.

5. Additionally, Claimant asserts that he was discriminated against by CDOC because he has not been provided with proper medical treatment for his vision problems. Allegations of lack of proper medical diagnosis or treatment are not cognizable under Title II of the ADA or the Rehabilitation Act. *See Fitzgerald v. Corrections Corp. of America*, 403 F.3d 1134 (10th Cir. 2005). *See also Kiman v. New Hampshire Dept. of Corrections*, 451 F.3d 274 (1st Cir. 2006); *Burger v. Bloomberg*, 418 F.3d 882 (8th Cir. 2005); *Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1289 (11th Cir. 2005); *United States v. University Hospital*, 729 F.2d 144 (2nd Cir. 1984). They must be pursued in a separate legal action under 42 U.S.C. § 1983.

6. Finally, Claimant’s complaints regarding interception of mail, falsification of a dismissal of his state lawsuit, threats by CDOC personnel and the impropriety of the CDOC disability accommodation form are not cognizable by the Special Master under

the Remedial Plan or under the November 23, 2004 Order entered by Judge Kane and Judge Nottingham identifying the specific issues that may be addressed by the Special Master.

Because Claimant Stitzel has failed to demonstrate that he has a permanent vision impairment that substantially limits his ability to engage in one or more major life activities, and because Claimant has failed to show any discrimination or failure to accommodate his alleged disability that occurred prior to August 27, 2003, his claim must be denied.

IV. ORDER

IT IS ORDERED that, based upon the foregoing Findings of Fact and Conclusions of Law, Judgment be entered in favor of Defendants and against Claimant dismissing Claimant Stitzel's Claim with prejudice; and

IT IS FURTHER ORDERED that Claimant and Defendants are advised that they may file an objection to this Final Order of Special Master pursuant to Federal Rule of Civil Procedure 53(g)(2), but said objection must be filed **on or before November 11, 2006** with the Clerk of the United States District Court at the following address:

901 19th Street
Denver, CO 80294.

SIGNED this 11th day of September, 2006.

BY THE COURT:

/s/ Bruce D. Pringle

Bruce D. Pringle,
Special Master

CERTIFICATE OF MAILING

I hereby certify that I have mailed a copy of the foregoing FINAL ORDER OF SPECIAL MASTER this 11th day of September, 2006 to the following:

Mr. Edgar Allen Stitzel, #89250
CCF
P.O. Box 600
Canon City, CO 81215-0600

Mr. James X. Quinn
Mr. Jess A. Dance
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/s/ Susan L. Carter

Susan L. Carter