

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

99 M.S.P.R. 619

JAMES CLAVIN,
Appellant,

DOCKET NUMBER
PH-3443-04-0201-I-1

v.

UNITED STATES POSTAL SERVICE,
Agency.

DATE: September 14, 2005

Ian Stuart, Esquire, Philadelphia, Pennsylvania, for the appellant.

Maureen Briody, Esquire, New York, New York, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Barbara J. Sapin, Member

OPINION AND ORDER

¶1 The appellant has filed a timely petition for review of an initial decision that dismissed the appeal of the denial of Office of Workers' Compensation Programs (OWCP) benefits for lack of jurisdiction and dismissed his claim under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) for failure to state a claim for which relief could be granted. For the reasons discussed below, we GRANT the petition for review, VACATE the initial decision, and REMAND the matters raised for further adjudication. *See* 5 C.F.R. § 1201.117.

BACKGROUND

¶2 The appellant filed an appeal with the Board that did not specifically identify the subject matter of the appeal. Along with his appeal form, he submitted an addendum, his military discharge documents, a hand-written list of “violations” dating back to approximately 1994, and a December 19, 2003 Office of Workers’ Compensation Programs (OWCP) decision denying his claim for compensation. Initial Appeal File (IAF), Tab 1. The administrative judge issued an acknowledgment order identifying the matter being appealed as the denial of OWCP benefits and ordering him to file evidence and argument to show that the appeal is within the Board’s jurisdiction. IAF, Tab 2. In response, the appellant asserted that the Board has jurisdiction under USERRA, based on a service-connected injury incurred in 1970 which was reinjured in a work-related event in 1985. IAF, Tab 4. The agency filed a motion to dismiss for lack of jurisdiction. IAF, Tab 5. The administrative judge issued an order on jurisdiction informing the appellant of certain of the requirements for a USERRA appeal and advising him to file evidence and argument to show that either he chose not to file a complaint with the Secretary of Labor or that he did so and procedures before the Secretary had been exhausted. IAF, Tab 6. The appellant responded that he had filed a complaint with the Department of Labor and received an adverse decision on or about December 19, 2003. IAF, Tab 7. The appellant filed another submission in response to the jurisdictional question, stating that the basis of his complaint is not solely disability discrimination and, that after his separation from active duty, the agency withheld pay and other benefits, and forced him to work beyond his limits, which he refused to do. IAF, Tab 8. The administrative judge issued an initial decision that dismissed the appeal for lack of jurisdiction and for failure to state a claim under USERRA. IAF, Tab 11.

¶3 On petition for review, the appellant asserts that, after his separation from active military duty, the agency denied him health benefits and pension or retirement benefits, denied seniority, discriminated against him on the basis of

disability by refusing to accommodate his limitations, and denied him employment. Petition for Review File (PFRF), Tab 1. The agency has timely responded. PFRF, Tab 3.

ANALYSIS

¶4 The Board's jurisdiction is not plenary; it is limited to those matters over which it has been given jurisdiction by law, rule, or regulation. *Maddox v. Merit Systems Protection Board*, 759 F.2d 9, 10 (Fed. Cir. 1985). The administrative judge correctly found that the Board lacks jurisdiction to review a denial of OWCP benefits. *Lee v. Department of Labor*, 76 M.S.P.R. 142, 146 (1997). With regard to the appellant's USERRA claim, however, we find that the appellant is entitled to another opportunity to clarify the basis for this appeal.

¶5 There are two types of cases that arise under USERRA: (i) Reemployment cases, in which the appellant claims that an agency has not met its obligations under 38 U.S.C. §§ 4312 - 4318 following the appellant's absence from civilian employment to perform uniformed service; and (ii) what have come to be known by the shorthand label as "discrimination" cases, in which the appellant claims that an agency has committed one of seven actions that are prohibited if motivated by one of nine enumerated reasons. 38 U.S.C. § 4311(a), (b).¹ The

¹ The following are the specific prohibitions in USERRA that collectively have come to be known by the catch-all term "discrimination":

(a) A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation.

(b) An employer may not discriminate in employment against or take any adverse employment action against any person because such person (1) has taken an action to enforce a protection afforded any person under this chapter, (2) has testified or otherwise made a statement in or in

Board’s jurisdiction over both reemployment cases and so-called “discrimination” cases is based on 38 U.S.C. § 4324(b), (c).

¶6 On the merits, reemployment cases and discrimination cases differ in two important ways. First, an individual’s rights under the reemployment provisions of USERRA, 38 U.S.C. §§ 4312 – 4318, do not depend on the motivation for an agency’s action (or inaction), whereas an essential element of a discrimination claim is that the contested agency decision was based on an improper motivation, 38 U.S.C. § 4311(a), (b). Second, in a reemployment case the agency bears the burden of proving that it met its statutory obligations, pursuant to 5 U.S.C. § 7701(c)(1)(B). See *DePascale v. Department of the Air Force*, 59 M.S.P.R. 186, 190 (1993); *Britton v. Department of Agriculture*, 23 M.S.P.R. 170, 172-73 (1984).² By contrast, in a discrimination case the appellant bears the burden of proof on the merits, and if that burden is met the agency may avoid relief by showing that it would have taken the same action even in the absence of the improper motivation. 38 U.S.C. § 4311(c); *Sheehan v. Department of the Navy*, 240 F.3d 1009, 1013 (Fed. Cir. 2001).

¶7 In the present case, the administrative judge’s order on jurisdiction referred only to USERRA’s prohibition on “discrimination.” IAF, Tab 6. In his response on jurisdiction below and in his petition for review, however, the appellant

connection with any proceeding under this chapter, (3) has assisted or otherwise participated in an investigation under this chapter, or (4) has exercised a right provided for in this chapter. The prohibition in this subsection shall apply with respect to a person regardless of whether that person has performed service in the uniformed services.

38 U.S.C. § 4311.

² The *DePascale* and *Britton* cases arose under pre-USERRA reemployment laws at 38 U.S.C. §§ 2021 – 2024 (1982 ed. & 1988 ed.) and were within the Board’s jurisdiction under OPM’s rules at 5 C.F.R. Part 353. In 1994 USERRA reenacted (with modification) the reemployment laws, 38 U.S.C. §§ 4312 – 4318; created a cause of action for “discrimination,” 38 U.S.C. § 4311; and made the Board’s jurisdiction over both reemployment and “discrimination” cases statutory, 38 U.S.C. § 4324(b), (c).

alleges that the agency violated his reemployment rights following separation from active-duty military service when he states that, after being discharged from active duty in 2002, he “returned to his place of employment to face a number of directly specific reemployment rights,” namely, “[d]enial of health benefits,” “[d]enial of seniority,” “[n]o credit for pension/retirement,” “[n]ot allowing [me] to work within my limitations,” and [d]enying . . . employment because of service-connected disability.” The appellant might also be attempting to raise a discrimination claim. *See* PFRF, Tab 1; IAF, Tab 8. The appellant was entitled to notice of the elements of USERRA jurisdiction and an opportunity to establish jurisdiction. *See Burgess v. Merit Systems Protection Board*, 758 F.2d 641, 643-44 (Fed. Cir. 1985). Since he did not receive such notice and opportunity, the appeal must be remanded.³

¶8 We also discern another possible basis for Board jurisdiction, which the administrative judge did not address. Although the appellant did not identify any agency action as the subject of his appeal on the appeal form, in his addendum he alleged that in 1985 he suffered a work-related injury and that he unsuccessfully sought accommodation for his limitations from the agency. In October 2003, according to the appellant --

³ We also clarify certain issues about which the appellant and his representative appear to be confused. First, when the administrative judge ordered the appellant to submit a statement indicating whether he chose to file his USERRA complaint directly with the Board or to seek the assistance of the Secretary of Labor as provided by 38 U.S.C. § 4322, the appellant responded that he filed a complaint with the Secretary and received an adverse decision on or about December 19, 2003. That decision, however, concerns his OWCP claim and is not a decision regarding the efforts of the Secretary with respect to a USERRA claim. On remand, the appellant should clarify whether he has sought the assistance of the Secretary in this matter. Also, as the administrative judge stated, USERRA does not provide the Board with jurisdiction over claims of disability discrimination. *Noble v. U.S. Postal Service*, 93 M.S.P.R. 693, ¶ 14 (2003). To the extent that the appellant is alleging that the agency discriminated against him because of his disability, the Board has no jurisdiction over that claim.

the agency asked the petitioner to go beyond his limitation and he refused so he was terminated because ‘they did not have work’ for him. This situation has persisted for more than 10 years and has subjected the petitioner to emotional harm and other damages. ... Petitioner filed a complaint with the U.S. Department of Labor but was denied on December 19, 2003 (Exhibit C). The petitioner requests that the Board grant his request to be transferred to a job that doesn’t exacerbate his injury and that reparations be made for the emotional harm and other damages he suffered, including attorney fees.

IAF, Tab 1. His hand-written supplement lists numerous “violations” that generally pertain to his work-related injury and his attempts to receive an accommodation like light duty. IAF, Tab 1, Subtab B. According to the OWCP decision, the appellant alleged that on October 30, 2003, his supervisor ordered him to leave the work site because there was no more work for him within his limitations. IAF, Tab 1, Subtab C. Arguably, the allegation in the addendum and the language of the OWCP decision could be read as allegations that the agency constructively suspended him. An employee’s absence for more than 14 days that results in a loss of pay may be a constructive suspension appealable to the Board under 5 U.S.C. §§ 7512(2) and 7513(d). Constructive suspension claims may arise in two situations. The first occurs when an agency places an employee on enforced leave pending an inquiry into his ability to perform. In that situation, the key question is whether the agency or the employee initiated the absence. The second situation arises when an employee who was absent from work for medical reasons requests to return to work with altered duties, and the agency denies the request. If the agency is obligated by policy, regulation, or contract to offer available light-duty work to the employee, his continued absence may constitute a suspension appealable to the Board if the agency fails to offer him available light-duty work. *Hardy v. U.S. Postal Service*, 94 M.S.P.R. 539, ¶ 12 (2003).

¶9 The appellant did not specifically describe the circumstances under which he left work in October 2003, or state that he was no longer working, when he

filed his appeal. Nevertheless, his allegations were sufficient to require the administrative judge to issue a notice informing him of the elements of a constructive suspension appeal. *See Burgess*, 758 F.2d at 643-44. The administrative judge's order on jurisdiction did not include notice regarding a constructive suspension appeal. IAF, Tab 6. Nor does the agency's motion to dismiss the appeal afford the appellant notice of the issue, or clarify whether he has been at work, although it includes in its summary of the appellant's allegations of fact that he alleged that he was terminated in October 2003. IAF, Tab 5. The appellant's response states that he was coerced to work beyond his limits and refused and that "[m]anagement has removed [him] from performing the functions that other injured employees perform." IAF, Tab 8. The appellant's allegations, while certainly lacking in specificity, were enough to require the administrative judge to advise him of what must be shown or alleged to establish jurisdiction over a constructive suspension action. *See Kapica v. U.S. Postal Service*, 95 M.S.P.R. 556, ¶ 8 (2004) (despite references in the parties' submissions to the appellant's absence from work, receipt of OWCP benefits and his seeking to return to work, the administrative judge did not put him on notice of the jurisdictional elements of a restoration claim). We find it necessary to remand this appeal to afford the appellant an opportunity to submit evidence and argument to show that the Board has jurisdiction over his appeal as a constructive suspension.

¶10 Because of her disposition of the appeal, the administrative judge did not determine whether it was timely filed. Although there is no time limit for filing an appeal under USERRA, *Tierney v. Department of Justice*, 89 M.S.P.R. 354, 356, ¶ 6 (2001), the timeliness of a constructive suspension appeal is at issue. If the administrative judge finds that the Board has jurisdiction over a constructive suspension, she must further determine whether such an appeal was timely filed.

ORDER

¶11 Accordingly, we REMAND this appeal for further adjudication. The administrative judge shall issue explicit notice of the elements of the two types of USERRA cases, and also explicit notice of the elements of a constructive suspension. She shall also notify the parties of the appellant's burden of proof to establish that a constructive suspension appeal was timely filed. After affording the parties an opportunity to submit evidence and argument in response to such notice, and affording the appellant a hearing if warranted, the administrative judge shall issue a new initial decision.

FOR THE BOARD:

Bentley M. Roberts, Jr.
Clerk of the Board

Washington, D.C.