UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

94 MSPR 518

MARY MARSHALL-CARTER,
Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,
Agency.

DOCKET NUMBER
AT-0752-02-0202-I-1

DATE: September 29, 2003

Ron Hutchens, Grantville, Georgia, for the appellant.

James Mantia, Esquire, Bay Pines, Florida, for the agency.

BEFORE

Susanne T. Marshall, Chairman
Neil A. G. McPhie, Member

OPINION AND ORDER

¶1 The agency petitions for review of the September 13, 2002 initial decision that reversed the agency's action removing the appellant from the federal service for physical inability to perform the full range of duties of her position. For the reasons set forth below, we GRANT the agency's petition, REVERSE the initial decision, and AFFIRM the agency's action.

BACKGROUND

¶2 The appellant was a Health Technician, GS-0640-06, at the agency's North Florida/Southern Georgia Veterans Health System in Gainesville, Florida. Initial

Appeal File (IAF), Tab 3, Subtab 12. On September 18, 2001, the appellant presented the agency with a note from her physician dated August 13, 2001, which indicated that the appellant was unable to wear any type of head gear while at work due to headaches and a head injury. IAF, Tab 3, Subtab 20. As part of her assigned duties, the appellant was required to wear a helmet while assisting in certain "clean air" cases involving orthopedic surgery. IAF, Tab 5, Subtab H. Upon receiving the appellant's medical documentation, the agency temporarily detailed the appellant to administrative duties which did not require the appellant to wear the helmet. IAF, Tab 3, Subtab 19. However, the agency advised the appellant that it was necessary to acquire medical documentation that addressed whether the appellant was able to perform her duties without compromising her medical condition and what, if any, reasonable accommodations could be made for the appellant's condition. *Id*.

¶3 The agency requested that the appellant provide a physician's statement that addressed these concerns no later than October 5, 2001. *Id*. The appellant refused to acknowledge receipt of the agency's request, *id*., but on October 1, 2001, she provided the agency with a note from her physician, Dr. Klein, dated September 21, 2001, which indicated that the appellant had "ligamentous instability of her neck," that the condition was probably permanent, and that it appeared that she could not perform duties in the operating room which involved stress on the neck, including wearing headgear. IAF, Tab 3, Subtab 18.

¶4 By letter dated October 5, 2001, the agency informed the appellant that because she was unable to wear headgear indefinitely, was unable to rotate to all operating rooms/service, was unable to "take call," and was unable to work "off tour" assignments, she would be detailed effective October 9, 2001, to a temporary position in the Acquisitions and Materiel Management Service. IAF, Tab 3, Subtab 16. Again, the appellant refused to acknowledge receipt of the agency's notice regarding her detail, but she provided a note from Dr. Klein dated October 5, 2001, which indicated that the appellant "can wear devices on her

head other than her headgear, which is heavy, during her job." IAF, Tab 3, Subtab 15.

¶5 In response to Dr. Klein's note, Pat Poore, an agency human resources specialist, prepared a letter for Dr. Klein which stated that the agency was willing to purchase other types of sterile operating room headgear and asked Dr. Klein to provide an assessment of the amount of weight of any headgear that the appellant would be able to tolerate. IAF, Tab 3, Subtab 14. However, the agency never sent this letter to Dr. Klein because the appellant refused to sign a release which would have authorized Dr. Klein to release information from the appellant's medical records to the agency. IAF, Tab 3, Subtab 14.

¶6 On October 23, 2001, Roberto Mejia, the chief of the agency's Human Resources Management Service, directed Faye Martin, a supervisory human resource specialist, to research what positions might be available throughout the North Florida/Southern Georgia Veterans Health System within the appellant's medical restrictions. IAF, Tab 3, Subtab 13c. Mejia noted that, if the appellant were to remain employed in the system, she might have to accept a position that did not require headgear or place a strain upon her neck, and he noted, "This would likely also include positions, [sic] which require lifting." *Id*. Martin identified several vacant positions, but she noted that she needed to know what the appellant's physical limitations were regarding lifting, bending, squatting, pushing, pulling, etc. IAF, Tab 3, Subtab 13b. The agency did not acquire the information concerning the appellant's physical limitations, and, on November 5, 2001, the agency proposed the appellant's removal based on her inability to wear the headgear required in "clean air" cases. IAF, Tab 3, Subtab 12. The appellant's union steward filed a written response to the agency's proposal on behalf of the appellant. IAF, Tab 3, Subtab 10.

¶7 On November 20, 2001, the appellant provided her supervisor with a note from Dr. Klein dated October 23, 2001, which indicated that Dr. Klein had cleared the appellant "for full duty in her previous job as an OR technician. She

can wear whatever headgear she needs to wear at this time." IAF, Tab 3, Subtab 9. However, when the appellant was next assigned to the "clean air" operating room, she told her supervisor that she was unable to wear the headgear, and, after being examined by Dr. Klein on November 29, 2001, she presented another note from Dr. Klein which indicated that the appellant was unable to wear the required headgear. IAF, Tab 3, Subtabs 6, 7. The appellant also filed a formal request for reasonable accommodation claiming that she was fully capable of performing surgical specialties in several areas other than the "clean air" orthopedic cases. IAF, Tab 3, Subtab 5.

¶8 On December 4, 2001, the agency issued its decision to remove the appellant from her position as a Health Technician effective December 15, 2001, noting that the appellant did not qualify as a disabled employee because the work restrictions imposed by the appellant's physician did not rise to the level of impairing a major life function. IAF, Tab 3, Subtab 4. The appellant filed a timely appeal with the Board's Atlanta Regional Office on January 4, 2002. IAF, Tab 1. In her prehearing submissions, the appellant claimed reprisal for engaging in protected union activity as an affirmative defense. IAF, Tab 5. Following a hearing, the administrative judge issued an initial decision in which he found that the agency established by preponderant evidence that the appellant was unable to perform the duties of her position, and he found that the appellant failed to establish her reprisal claim. IAF, Tab 18, Initial Decision (ID) at 6, 8. However, the administrative judge found that in addition to proving that the appellant was unable to perform the duties of her position, the agency was also required to prove that it had no vacant positions for which the appellant was qualified and to which she could be assigned in lieu of removal. ID at 4, 6, citing *Trammell v. Department of Veterans Affairs*, 60 M.S.P.R. 79, 90 (1993). The administrative judge stated that the agency had identified several GS-5 Nursing Assistant positions for which the appellant appeared qualified, but he noted that Martin testified that she had questions about the appellant's physical capability to

perform the duties of these positions because they all required the ability to move patients and to lift 45 pounds. ID at 7. The administrative judge noted, however, that the lifting requirements of the GS-5 positions were similar to duties listed in the position description for the appellant's Health Technician position, and he stated that the agency never determined that the appellant was not capable of performing in positions for which she otherwise appeared to be qualified. ID at 8. The administrative judge also found that the deciding official, Dr. Elwood J. Headley, based his decision on incorrect information he received from Poore concerning the appellant's unwillingness to submit to a medical examination or to otherwise provide medical information. ID at 8-9. Based on these findings, the administrative judge concluded that the agency was unable to prove that it could not reassign the appellant to a vacant position for which she was qualified, and he reversed the agency's removal action. ID at 9. However, because the appellant was unable to perform the duties of her former GS-6 position, and it was uncertain whether the appellant was physically capable of performing the duties of the GS-5 positions for which she was apparently qualified, the administrative judge did not order interim relief. ID at 10.

¶9 The agency has filed a petition for review in which it argues that the administrative judge erred in reversing the appellant's removal. Petition for Review File (PFRF), Tab 1. The appellant did not file a response to the agency's petition, but she did file a request that the Board provide her with interim relief. PFRF, Tab 4.

ANALYSIS

¶10 In order to establish a charge of physical inability to perform, an agency is required to prove a nexus between the employee's medical condition and observed deficiencies in her performance or conduct, or a high probability, given the nature of the work involved, that her condition may result in injury to herself or others. *See Yates v. U.S. Postal Service*, 70 M.S.P.R. 172, 176 (1996). In

finding that the agency established that the appellant was unable to perform the duties of her assigned position, the administrative judge cited the testimony of head nurse, Julie M. Renfrew, who described the surgical schedule at the hospital where the appellant worked. ID at 4-5. Renfrew testified that the surgical staff was rotated through overlapping shifts for coverage of seven to nine operating rooms on a daily basis, and that technicians, such as the appellant, could be called upon to perform duties in any of the operating rooms, including rooms dedicated to orthopedic cases which could require the staff to wear the helmet the appellant was physically incapable of wearing. ID at 4-5. Renfrew also testified that technicians must be able to wear the helmets when they are "on call" in the event that they are called in to the hospital to assist in an emergency orthopedic surgery that would require "clean air" procedures. ID at 5. The administrative judge also noted that the requirement for the use of the helmet was contained in the appellant's position description and was a matter of hospital policy. ID at 5 n.1. The administrative judge also noted that, although the appellant requested that the agency accommodate her medical restriction by exempting her from "clean air" cases, Renfrew testified that such an arrangement was not feasible because the appellant would be unable to take her turn "on call" and disruption of the scheduling pattern would cause serious personnel and morale problems. ID at 5. Based on this evidence, the administrative judge found that the duty restriction imposed by Dr. Klein, which provided that the appellant was unable to wear the headgear required in "clean air" cases, was inconsistent with the safe and efficient performance of the core duties of the appellant's position as an operating room technologist, and he therefore concluded that the agency had shown by a preponderance of the evidence that the appellant was unable to perform the duties of her position. ID at 6.

¶11 The appellant has not contested the administrative judge's conclusion that she was unable to perform the full range of duties of her position, and we discern no basis for overturning the administrative judge's findings in this regard.

Accordingly, we find that the agency established a nexus between the appellant's medical condition and observed deficiencies in the appellant's performance or conduct, namely, her inability to perform her duties in cases requiring "clean air" procedures, and affirm the administrative judge's conclusion that the agency established that the appellant was physically unable to perform the duties of her position.

¶12 However, to the extent that the administrative judge stated that the agency was also required to prove that it could not reassign the appellant to a vacant position for which she was qualified in order to sustain its charge, we disagree. The case which the administrative judge cited as support for this proposition, *Trammell v. Department of Veterans Affairs*, 60 M.S.P.R. 79 (1993), involved an appellant who raised the affirmative defense of disability discrimination. Although the Board stated in *Trammell* that it found that the appellant's removal was appropriate and promoted the efficiency of the service because the appellant could not perform the essential functions of her position with or without reasonable accommodation and the agency had no vacant positions to which it could assign her, *Trammell*, 60 M.S.P.R. at 90, the Board did not state that the agency was required to establish that there were no vacant positions to which it could reassign the appellant in order to sustain the charge of physical inability to perform. Instead, the Board in *Trammell* considered the agency's ability to reassign the appellant only when adjudicating the appellant's claim of disability discrimination, an affirmative defense which the appellant has the burden of raising and proving. *Trammell*, 60 M.S.P.R. at 84-88; *see* 5 C.F.R. § 1201.56(a)(2)(iii) (the appellant has the burden of proof, by a preponderance of the evidence, with respect to affirmative defenses). In *Jackson v. U.S. Postal Service*, 79 M.S.P.R. 46, 53 (1998), the Board described the appellant's burden of proof with respect to the affirmative defense of disability discrimination:

> In a disability discrimination case where the appellant seeks some form of accommodation, her prima facie case consists of a showing

> that she is a disabled person, and that the action appealed was based on her disability, and, to the extent possible, she must articulate a reasonable accommodation under which she believes she could perform the essential duties of her position or of a vacant funded position to which she could be reassigned.

Although the Board noted that the agency had an obligation under 5 C.F.R. § 1614.203(g) to identify vacant funded positions in the same commuting area, at or below the employee's current grade or level, to which a disabled employee could be reassigned, it stated that an agency's failure to meet this obligation "does not relieve the appellant of her burden of ultimately showing, before the Board, that such positions existed and were available." *Jackson*, 79 M.S.P.R. at 54.

¶13 In this case, the appellant did not raise disability discrimination as an affirmative defense. Therefore, whether the agency was able to reasonably accommodate the appellant's medical condition by reassigning her to a vacant position for which she was qualified was not at issue in this appeal, at least with respect to the agency's burden of proving its charge. Therefore, upon finding that the agency established that the appellant's medical condition prevented her from being able to safely and efficiently perform the core duties of her position, the administrative judge should have sustained the agency's charge and found that the agency's action was taken for such cause as will promote the efficiency of the service. *See Woodhouse v. U.S. Postal Service*, 29 M.S.P.R. 98, 100 (1985) (where an appellant was unable to perform the duties of his position because of a physical disability, the Board found that the appellant's removal promoted the efficiency of the service because a clear and direct relationship existed between the grounds for the action and the appellant's ability to accomplish his duties satisfactorily); *Owens v. Department of the Air Force*, 8 M.S.P.R. 580, 583-84 (1981).

¶14 If the evidence had established that the appellant was capable of performing the duties of a vacant lower-graded position to which she could have

been reassigned, the administrative judge could have properly considered this fact in determining whether the agency-imposed penalty of removal, as opposed to reassignment to a position within the appellant's medical restrictions, fell within the tolerable limits of reasonableness. *See Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 306 (1981) (in determining the appropriateness of a penalty, the Board considers, *inter alia*, the adequacy and effectiveness of alternative sanctions); *see also Brown v. Department of the Air Force*, 10 M.S.P.R. 411, 414 (1982) (in affirming an appellant's reduction in grade to a less strenuous position based on a charge of physical inability to perform, the Board noted that the agency properly considered the appellant's limitations and determined that the appellant met the physical requirements of the lower-graded position to which the agency reassigned him). However, the evidence of record indicates that the appellant did not cooperate in the agency's attempts to determine the extent of her physical limitations. For example, as set forth in the background section, the appellant failed to acknowledge the agency's request for medical documentation concerning her condition, and she refused to sign a release which would have authorized Dr. Klein to release medical information concerning the appellant to the agency regarding the extent of the appellant's physical limitations. *See* ¶¶ 3-5, *supra*. In light of the appellant's apparent unwillingness to cooperate with the agency in its attempts to determine the extent of her physical limitations, we do not find that the agency abused its discretion when considering the reasonableness of the penalty by failing to consider reassignment to positions for which the appellant may not have been physically qualified as an alternative to removal. Accordingly, we find that, despite the appellant's length of service,[1] the

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[1] The agency's narrative response to the appellant's appeal indicated that the appellant's was employed as a Health Technician with the agency beginning on or about April 4, 1999. IAF, Tab 3, Subtab 1. However, the appellant's response to the proposed removal indicated that the appellant had "over ten years of faithful service." IAF, Tab 3, Subtab 10.

penalty of removal did not exceed the tolerable limits of reasonableness in this case. *Cf. Jackson*, 79 M.S.P.R. at 54 (the Board sustained a removal based on physical inability to perform where the appellant failed to identify any vacant funded position at or below her grade level the duties of which she could perform). Because we have determined that the agency sustained its charge, established that its actions was taken for such cause as will promote the efficiency of the service, and established the reasonableness of the penalty imposed, we REVERSE the initial decision and AFFIRM the agency action.[2]

ORDER

¶15 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

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[2] Because we find that the appellant is not entitled to any relief in this case, we find that the administrative judge did not abuse his discretion in denying interim relief. *See Davis v. Department of Justice*, 61 M.S.P.R. 92, 95-96 (although the administrative judge has the discretion under 5 U.S.C. § 7701(b)(2)(A)(i) to determine whether the granting of interim relief is appropriate in a particular appeal, the exercise of this discretion is subject to the Board's review), *aff'd*, 43 F.3d 1485 (Fed. Cir. 1994) (Table). Accordingly, to the extent that the appellant's request that the Board order interim relief might be construed as a cross petition for review challenging the administrative judge's denial of interim relief, it is hereby denied. *See* 5 C.F.R. § 1201.115.

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law as well as review the Board's regulations and other related material at our web site, http://www.mspb.gov.

FOR THE BOARD:

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Bentley M. Roberts, Jr.
Clerk of the Board

Washington, D.C.