UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2009 MSPB 201

Docket No. NY-0752-09-0004-I-1

Ashley A.H. Yusuf,

Appellant,

v.

United States Postal Service,

Agency.

October 8, 2009

Ashley A.H. Yusuf, Charlotte, North Carolina, pro se.

Kenneth A. Levine, Esquire, New York, New York, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman

OPINION AND ORDER

¶1 The appellant has petitioned for review of an initial decision that dismissed his alleged constructive suspension appeal for lack of jurisdiction. For the reasons set forth below, we DENY the appellant's petition for review because it does not meet the criteria for review set forth at 5 C.F.R. § 1201.115(d), REOPEN the appeal on our own motion under 5 C.F.R. § 1201.118, VACATE the initial decision, and REMAND the appeal for a jurisdictional hearing.

BACKGROUND

¶2 The appellant is a Mail Processing Clerk at the agency's Morgan Processing and Distribution Center in Brooklyn, New York. Initial Appeal File

(IAF), Tab 8, Subtab 4H. Since at least 1998, he has been working in a limited duty capacity because of an Office of Workers' Compensation Programs compensable injury. *Id.*, Subtab 4L. According to the terms of his limited duty job offer, his medical restrictions are "No lifting, pushing, pulling over five (5) pounds," and "No prolong[ed] walking or standing." *Id.*

¶3 On or about September 13, 2008, the agency presented the appellant with an Offer of Modified Assignment (Limited Duty) [hereinafter September offer], dated August 20, 2008. IAF, Tab 8, Subtab 4I, Tab 9, Exhibit C1. The September offer changed the appellant's duty hours to midnight to 8:30 a.m. *Id.* It also indicated that the physical requirements of the position included, inter alia, "Lifting & carrying under 10 lbs" for "5 min/hrs." *Id.* The appellant refused the September offer and continued reporting for duty at his regular starting time. IAF, Tab 9, Exhibit C1.

¶4 What happened next is disputed, but the appellant alleges that he reported for work on September 13, 2008, at his regular reporting time at 11:00 p.m, but was unable to clock in for duty because his timecard was missing from the rack. IAF, Tab 9 at 6. When he asked a supervisor about his status, the supervisor allegedly replied, "What are you doing here? You didn't sign the [September offer], so you can't work! I'm calling Postal Police!!" *Id.* When the Postal Police arrived, the appellant was allegedly handcuffed and escorted off the work floor. *Id.* at 7. The agency allegedly confiscated his identification badge and electronic key, and the Manager of Distribution Operations allegedly told the appellant to leave the facility and not return. *Id.* The appellant has not returned to work.

¶5 On September 27, 2008, the appellant filed this appeal. IAF, Tab 1. He asserted that he is entitled to veterans' preference and requested a hearing, *id.* at 1-2, but the basis for his appeal was unclear.

¶6 By letter dated October 16, 2008, the agency reassigned the appellant to the "JAF Life Work Planning Center" in New York, New York, effective October 27,

2008. IAF, Tab 8, Subtab 4C. By letter dated October 18, 2008, the agency informed the appellant that he had been continuously absent from work since September 14, 2008, and ordered him to either report for work on his next scheduled work day or submit satisfactory evidence to substantiate his absence. *Id.*, Subtab 4B. The appellant did not report for duty at either location, and he did not submit any evidence in support of his absence.

¶7 The appellant submitted a pleading dated October 24, 2008, to the administrative judge in which he contended that he had received the letter reassigning him to the JAF Life Work Planning Center, but was unable to accept the reassignment because he had been evicted from his residence. IAF, Tab 7.

¶8 On November 5, 2008, the agency submitted its case file, stated that it "appears that the [a]ppellant is an 'employee' as defined by 5 U.S.C. § 7511(a)(1)," and moved to dismiss the appeal on the basis that the appellant voluntarily initiated his absence from work and had not shown that he was constructively suspended. IAF Tab 8 at 10, 14-16. In response, the appellant alleged that the agency initiated his absence when it took his badge and key, sent him home, and told him not to return. IAF, Tab 9 at 6-7. He further alleged that he could not accept the September offer because its physical requirements exceeded his established medical restrictions. IAF, Tab 11 at 6.

¶9 After the parties filed their prehearing submissions, IAF, Tabs 10, 11, the administrative judge issued a notice in which she stated that it appeared that the Board lacks jurisdiction over the appeal and, therefore, she cancelled the scheduled hearing. IAF, Tab 13. The administrative judge then issued a notice in which she informed the appellant that he has the burden of establishing the Board's adverse action jurisdiction over his appeal, and she informed him of what he must show to prove by preponderant evidence that he was subjected to a constructive suspension for more than fourteen days. IAF, Tab 14. In response to the administrative judge's notice, the appellant again alleged that the September offer was inappropriate because its physical requirements exceeded his

medical restrictions, and that the agency initiated his absence by sending him home on September 14, 2008. IAF, Tab 18 at 2-3.

¶10 In an initial decision issued on the written record, the administrative judge dismissed the appeal for lack of adverse action jurisdiction. Initial Decision (I.D.) at 1, 5. The administrative judge found that the appellant failed to prove by preponderant evidence that the agency initiated his absence from work. I.D. at 4-5. She concluded, therefore, that the appellant failed to show that he was subjected to a constructive suspension for more than fourteen days. *Id.*

¶11 The appellant petitions for review of the initial decision and submits copies of documents that are already in the record below. Petition for Review (PFR) File, Tab 1. The agency responds in opposition to the petition for review. PFR File, Tab 3.

ANALYSIS

¶12 The appellant's petition for review does not establish that new and material evidence is available that, despite due diligence, was not available when the record closed, or that the decision of the administrative judge is based on an erroneous interpretation of statute or regulation. Thus, the appellant's petition for review fails to meet the criteria for review under 5 C.F.R. § 1201.115(d), and we therefore deny it. *See Tedesco v. Department of the Air Force*, 90 M.S.P.R. 367, ¶ 6 (2001). Nevertheless, we reopen this appeal to address the issue of whether the appellant received adequate notice of what he must allege to establish his entitlement to a jurisdictional hearing. *See id.*, ¶ 7.

¶13 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); *see* 5 U.S.C. § 7701(a)(1). An employee's absence for more than fourteen days that results in a loss of pay may be a constructive suspension appealable under 5 U.S.C. §§ 7512(2) and 7513(d). *Slocum v. U.S. Postal Service*, 107 M.S.P.R. 129, ¶ 10

(2007); *Boudousquie v. Department of the Air Force*, 102 M.S.P.R. 397, ¶ 5 (2006); *Reed v. U.S. Postal Service*, 99 M.S.P.R. 453, ¶ 3 (2005), *aff'd*, 198 F. App'x 966 (Fed. Cir. 2006). Constructive suspension claims generally arise in two situations: (1) When an agency places an employee on enforced leave pending an inquiry into his ability to perform; or (2) when an employee who is absent from work for medical reasons asks to return to work with altered duties, and the agency denies the request. *Slocum*, 107 M.S.P.R. 129, ¶ 10; *Hamiel v. U.S. Postal Service*, 104 M.S.P.R. 497, ¶ 4 (2007). The dispositive issue in determining whether a constructive suspension occurred is who initiated the absence. *Slocum*, 107 M.S.P.R. 129, ¶ 10; *Mills v. U.S. Postal Service*, 106 M.S.P.R. 441, ¶ 6 (2007). If the appellant voluntarily initiated the absence, then it is not a constructive suspension. *Slocum*, 107 M.S.P.R. 129, ¶ 10; *Reed*, 99 M.S.P.R. 453, ¶ 3; *Baker v. U.S. Postal Service*, 71 M.S.P.R. 680, 691-92 (1996). An appellant who asserts a constructive suspension claim bears the burden of establishing that his absence was involuntary. *Reed*, 99 M.S.P.R. 453, ¶ 3.

¶14 Notwithstanding the appellant's assertions, and even though he had requested a hearing, IAF, Tab 1 at 2, the administrative judge dismissed the appeal for lack of jurisdiction without providing the appellant with explicit information concerning what was required to establish his entitlement to a jurisdictional hearing. *See Hahn v. U.S. Postal Service*, 86 M.S.P.R. 139, ¶ 7 (2000). Before an administrative judge may dismiss an appeal for lack of jurisdiction without holding a hearing, she must place the appellant on notice of what he must show or allege to establish jurisdiction or to obtain a jurisdictional hearing. *Burgess v. Merit Systems Protection Board*, 758 F.2d 641, 643-44 (Fed. Cir. 1985); *Hamiel*, 104 M.S.P.R. 497, ¶ 5.

¶15 Here, without holding a hearing, the administrative judge found that the Board lacks jurisdiction over the appeal because the appellant failed to prove by preponderant evidence that he was affected by a constructive suspension. I.D.

at 4-5. However, to obtain a jurisdictional hearing, the appellant need not prove jurisdiction by preponderant evidence; he need only make a nonfrivolous allegation of jurisdiction. *See Deida v. Department of the Navy*, 110 M.S.P.R. 408, ¶ 15 (2009) (citing *Garcia v. Department of Homeland Security*, 437 F.3d 1322, 1344 (Fed. Cir. 2006) (en banc)). A nonfrivolous allegation of Board jurisdiction is an allegation of fact which, if proven, could establish a prima facie case that the Board has jurisdiction over an appeal. *Tedesco*, 90 M.S.P.R. 367, ¶ 9. An appellant who makes a nonfrivolous allegation of Board jurisdiction is entitled to a jurisdictional hearing if the jurisdictional issue cannot be decided based on the documentary evidence of record. *Id*. To the extent that the agency's evidence constitutes mere factual contradiction of the appellant's nonfrivolous allegations, the Board may not weigh the evidence and resolve the conflicting assertions without affording the appellant a hearing, and the agency's evidence may not be dispositive. *Id.*; *Ferdon v. U.S. Postal Service*, 60 M.S.P.R. 325, 329 (1994). We find that the administrative judge erred by failing to address the threshold issue of the appellant's entitlement to a jurisdictional hearing.

¶16 Further, the administrative judge's jurisdictional notice contained the same error, as it informed the appellant how to prove Board jurisdiction by preponderant evidence but not how to obtain a jurisdictional hearing by making a nonfrivolous allegation of jurisdiction. IAF, Tab 14. Additionally, neither the agency's submissions nor the initial decision set forth the requirements for establishing a jurisdictional hearing. *See Clavin v. U.S. Postal Service*, 99 M.S.P.R. 619, ¶ 9 (2005).

¶17 Although the appellant's pro se pleadings are repetitive and confusing, we find that he has made a nonfrivolous allegation that he was subjected to a constructive suspension for more than fourteen days. *See Melnick v. Department of Housing & Urban Development*, 42 M.S.P.R. 93, 97 (1989) (pro se pleadings are to be liberally construed), *aff'd*, 899 F.2d 1228 (Fed. Cir. 1990) (Table). He alleged that the agency offered him reassignment to a position whose physical

requirements exceeded his medical restrictions and, when he refused to accept the offer, the agency took his identification and keys, sent him home, and instructed him not to return to work until he was prepared to accept its offer. IAF, Tab 9 at 6-7, Tab 11 at 6. The record contains some evidence that tends to support the appellant's allegation that the physical requirements of the September offer exceeded his medical restrictions. IAF, Tab 8, Subtab 4I, Tab 9, Exhibit C1. He has also submitted written statements from two coworkers that, if found to be authentic, accurate, and credible, tend to corroborate at least some of the appellant's claims concerning his removal from the agency facility on September 14, 2008. IAF, Tab 9, Exhibits A, B. Indeed, the agency's evidence tends to support the appellant's allegations that the agency took his identification and keys and sent him home because he would not accept the September offer. IAF, Tab 8, Subtab 4G. Thus, the appellant's assertions were more than mere pro forma allegations. *See Hamiel*, 104 M.S.P.R. 497, ¶ 7.

¶18 The administrative judge found that the appellant failed to prove his assertions. I.D. at 4-5. In making this finding, however, the administrative judge improperly failed to consider whether the appellant's allegations were nonfrivolous and whether he is entitled to a jurisdictional hearing, and she impermissibly considered the agency's contrary evidence and allegations. *Id.*; IAF, Tab 8, Subtabs 4F, 4G; *see Hahn*, 86 M.S.P.R. 139, ¶ 8; *Ferdon*, 60 M.S.P.R. at 329. Because the appellant has made a nonfrivolous allegation of Board jurisdiction, he is entitled to the hearing he requested. *See Hamiel*, 104 M.S.P.R. 497, ¶ 7.

¶19 Finally, we note that it is not clear whether the appellant may be attempting to raise claims that the September offer and the October 16, 2008 reassignment constituted violations of his restoration rights under 5 C.F.R. part 353. Although the administrative judge informed the appellant below of his right to file a new appeal if he believed his restoration rights were violated, IAF, Tab 19, it does not appear that the appellant has done so, yet he continues to make allegations on

review concerning the propriety of the September offer and the October 16, 2008 reassignment. PFR File, Tab 1 at 7-9. Therefore, on remand, the administrative judge shall ascertain whether the appellant wishes to pursue either or both of these matters and, if so, she shall docket a restoration appeal for adjudication.

ORDER

¶20 Accordingly, we REMAND this appeal to the New York Field Office for a jurisdictional hearing and further adjudication consistent with this Opinion and Order.

FOR THE BOARD:

_____

William D. Spencer
Clerk of the Board
Washington, D.C.