UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 125

Docket No. SF-0353-09-0609-I-1

Adelaido Vazquez,

Appellant,

v.

United States Postal Service,

Agency.

July 1, 2010

Kevin W. Wilson, Los Angeles, California, for the appellant.

Kris Ashman, Esquire, Long Beach, California, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The appellant has petitioned for review of the initial decision that dismissed his restoration appeal for lack of jurisdiction. For the reasons set forth below, we DENY the petition for failure to meet the Board's review criteria under 5 C.F.R. § 1201.115(d), REOPEN the appeal on the Board's own motion under 5 C.F.R. § 1201.118, REVERSE the initial decision, and REMAND the appeal for further adjudication consistent with this Opinion and Order.

BACKGROUND

¶2 The appellant is a non-preference eligible Mail Handler at the agency's Los Angeles Bulk Mail Center (LA BMC). Initial Appeal File (IAF), Tab 2 at 9, Tab 6 at 70. On March 12, 2000, the appellant suffered a compensable injury and thereafter began work in a series of limited duty assignments,[1] most recently in an assignment where he was required to perform various mail sorting, traying, and housekeeping functions. IAF, Tab 6 at 65-67.

¶3 In 2009, the Los Angeles District, of which the LA BMC is a part, began to participate in the National Reassessment Process (NRP) Pilot Program. IAF, Tab 7 at 6. Under the NRP, the supervisors and managers of employees performing limited duty review those employees' assignments to ensure that they are consistent with the employees' medical restrictions and contain only "operationally necessary tasks." IAF, Tab 6 at 52-53. If a limited duty assignment does not meet these criteria, the NRP prescribes procedures for identifying and offering alternative limited duty assignments that do meet the criteria. *Id*. at 53-56. If the supervisor or manager is unable to identify any operationally necessary tasks available within the employee's medical restrictions, the employee will be sent home until such work becomes available or his medical restrictions change. *Id*. at 54-55, 57. During the employee's absence, he will account for work hours through the use of approved leave, leave without pay, or a continuation of pay.[2] *Id*. at 55.

¶4 The appellant's supervisor, Supervisor of Distribution Operations Girtha Holliman, executed a declaration describing his review of the appellant's limited

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[1] In the U.S. Postal Service, "limited duty" refers to modified work provided to employees who have medical restrictions due to work-related injuries, whereas "light duty" refers to modified work provided to employees who have medical restrictions due to nonwork-related injuries. *Simonton v. U.S. Postal Service*, 85 M.S.P.R. 189, ¶ 8 (2000)

[2] The right to continuation of pay is governed by 20 C.F.R. part 10, subpart C.

duty assignment under the NRP. IAF, Tab 6 at 65-67, Tab 7 at 13-15. Mr. Holliman stated that the appellant's assignment did not meet the NRP's criteria because the appellant's medical restrictions limited him to performing only one operationally necessary task per hour. *Id*. at 14-15. He described the appellant's duties as "'make-work' assignments," and stated that "[e]ach of [his] functions were non-core functions, and were also performed by employees who hold bids in the various sections of the LA BMC." *Id*. at 14. Mr. Holliman determined, after reviewing all of the operationally necessary tasks available at the LA BMC, reviewing the appellant's medical restrictions, and consulting with the appellant, that he was unable to offer the appellant work within his medical restrictions. *Id*. at 14-15. Although the appellant requested an assignment as a forklift or equipment operator, Mr. Holliman determined that the appellant's medical restrictions would prevent him from bidding into such a position. *Id*. at 15. On April 8, 2009, Mr. Holliman issued the appellant a letter stating in relevant part that, because there was no operationally necessary work available for the appellant within his medical restrictions, the appellant must request leave and should not report again for duty unless he is informed that such work was available. IAF, Tab 6 at 49. The appellant followed Mr. Holliman's instructions and began a leave of absence. *Id*. at 46-48. During this absence, the agency directed the appellant to account for his work hours through the use of leave or continuation of pay. *Id*. at 49.

¶5 The appellant filed a Board appeal of the agency's action and requested a hearing. IAF, Tab 2 at 10. The administrative judge construed the appellant's claim as a restoration appeal, and issued an acknowledgment order informing the appellant of his jurisdictional burden and ordering him to file evidence and argument on the issue within 15 calendar days of the date of the order. IAF, Tab 3 at 2. The agency filed a motion to dismiss the appeal for lack of jurisdiction. IAF, Tab 7 at 4-12. The appellant did not respond to either the acknowledgment order or the agency's motion.

¶6 The administrative judge issued an initial decision dismissing the appeal for lack of jurisdiction. IAF, Tab 8, Initial Decision (ID) at 1, 5. He found that the appellant failed to make a nonfrivolous allegation that the agency's discontinuation of his limited duty assignment was an arbitrary and capricious denial of restoration. ID at 3-5. The administrative judge found it unnecessary to decide whether the appellant satisfied the other jurisdictional requirements for a restoration appeal. ID at 3.

¶7 The appellant filed a petition for review addressing the jurisdictional issue and providing supporting documentary evidence. Petition for Review File (PFR File), Tab 1. The agency filed a response, addressing the appellant's contentions and arguing that the petition for review should be denied for failure to meet the Board's review criteria. PFR File, Tab 3 at 4-10. The appellant filed a reply to the agency's response. *Id.*, Tab 4 at 2-4.

ANALYSIS

Denial of Restoration

¶8 Under 5 C.F.R. § 1201.115, the Board will not consider evidence submitted for the first time with the petition for review absent a showing that it was unavailable before the record was closed despite the party's due diligence. *Avansino v. U.S. Postal Service*, 3 M.S.P.R. 211, 214 (1980). Nor will the Board consider an argument raised for the first time in a petition for review absent a showing that it is based on new and material evidence not previously available despite the party's due diligence. *Banks v. Department of the Air Force*, 4 M.S.P.R. 268, 271 (1980). Although the appellant addresses the jurisdictional issue on review, he has not explained why he failed to do so below. Absent any such explanation, the Board declines to consider his late-filed evidence or late-

raised argument.[3] *See Hammond v. Department of Veterans Affairs*, 98 M.S.P.R. 359, ¶ 6 n.* (2005) (the Board declined to consider the appellant's jurisdictional allegation where he made the allegation for the first time on review without showing that it was based on previously unavailable evidence). Nevertheless, we find that, even in the absence of any evidence or argument from the appellant, the record contains sufficient evidence to warrant a finding of Board jurisdiction. *See Baldwin v. Department of Veterans Affairs*, 109 M.S.P.R. 392, ¶¶ 11, 32 (2008) (the Board may consider the agency's documentary submissions in finding that an appellant has made a nonfrivolous allegation of Board jurisdiction).

¶9 The Federal Employees' Compensation Act and its corresponding regulations at 5 C.F.R. part 353 provide that federal employees who suffer compensable injuries enjoy certain rights to be restored to their previous or comparable positions. 5 U.S.C. § 8151; *Walley v. Department of Veterans Affairs*, 279 F.3d 1010, 1015 (Fed. Cir. 2002); *Tat v. U.S. Postal Service*, 109 M.S.P.R. 562, ¶ 9 (2008). In the case of a partially recovered employee, i.e., one who cannot resume the full range of regular duties but has recovered sufficiently to return to part-time or light duty or to another position with less demanding physical requirements, an agency must make every effort to restore the individual to a position within his medical restrictions and within the local commuting area. *Delalat v. Department of the Air Force*, 103 M.S.P.R. 448, ¶ 17 (2006); 5 C.F.R. §§ 353.102, 353.301(d).

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[3] We also decline to consider the allegations of disability discrimination that the appellant raises for the first time on review. PFR File, Tab 1 at 4-5. The appellant's sole submission below contains no language that could be construed as raising a disability discrimination claim, IAF, Tab 2, and the appellant has not explained why he failed to raise the issue below. We cannot, therefore, find that the appellant's claim of disability discrimination was timely raised. *See Abatecola v. Veterans Administration*, 29 M.S.P.R. 601, 608, *aff'd*, 802 F.2d 471 (Fed. Cir. 1986) (Table); *Anderson v. Veterans Administration*, 3 M.S.P.R. 71, 74 (1980) (the Board will not consider an appellant's discrimination allegations made for the first time on review absent a showing that he was previously unaware of the basis for making them).

¶10 "An individual who is partially recovered from a compensable injury may appeal to the MSPB for a determination of whether the agency is acting arbitrarily and capriciously in denying restoration." 5 C.F.R. § 353.304(c). To establish Board jurisdiction over a restoration claim as a partially recovered employee, an appellant must allege facts that would show, if proven, that: (1) He was absent from his position due to a compensable injury; (2) he recovered sufficiently to return to duty on a part-time basis, or to return to work in a position with less demanding physical requirements than those previously required of him; (3) the agency denied his request for restoration; and (4) the agency's denial was "arbitrary and capricious." *Chen v. U.S. Postal Service*, 97 M.S.P.R. 527, ¶ 13 (2004); *see* 5 C.F.R. § 353.304(c).

¶11 In this case, the undisputed record evidence shows that the appellant was absent from his Mail Handler position due to a compensable injury. IAF, Tab 6 at 65-67. It also shows that the appellant recovered from that injury sufficiently to return to work in a position with less demanding physical requirements than those previously required of him. *Id*. The record evidence further shows that the appellant requested restoration within certain limitations, i.e., as a forklift or equipment operator, and the agency denied his request.[4] IAF, Tab 7 at 15. Thus, the record shows that the first three jurisdictional criteria for the appellant's restoration claim as a partially recovered employee are satisfied. *See Chen*, 97 M.S.P.R. 527, ¶ 13; 5 C.F.R. § 353.304(c).

¶12 Regarding the fourth jurisdictional criterion, we find that the agency's documentary submissions are sufficient to render non-frivolous the appellant's allegation that the denial of restoration was arbitrary and capricious. *See*

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[4] Even absent the appellant's affirmative request for restoration to a forklift or equipment operator position, the agency's discontinuation of his former limited duty position could constitute a denial of restoration for purposes of Board jurisdiction under 5 C.F.R. part 353. IAF, Tab 6 at 49; *see Brehmer v. U.S. Postal Service*, 106 M.S.P.R. 463, ¶ 9 (2007).

Baldwin, 109 M.S.P.R. 392, ¶¶ 11, 32 (the Board may consider the agency's documentary submissions in finding that an appellant has made a nonfrivolous allegation of Board jurisdiction). The Office of Personnel Management's (OPM) regulations provide:

> Agencies must make every effort to restore in the local commuting area, according to the circumstances in each case, an individual who has partially recovered from a compensable injury and who is able to return to limited duty. At a minimum, this would mean treating these employees substantially the same as other handicapped individuals under the Rehabilitation Act of 1973, as amended.

5 C.F.R. § 353.301(d). The Board has interpreted this regulation as requiring agencies to search within the local commuting area for vacant positions to which an agency can restore a partially recovered employee and to consider him for any such vacancies. *See Sanchez v. U.S. Postal Service*, 2010 MSPB 121, ¶ 12; *Sapp v. U.S. Postal Service*, 73 M.S.P.R. 189, 193-94 (1997).

¶13 "For restoration rights purposes, the local commuting area is the geographic area in which an individual lives and can reasonably be expected to travel back and forth daily to his usual duty station." *Hicks v. U.S. Postal Service*, 83 M.S.P.R. 599, ¶ 9 (1999). It includes any population center, or two or more neighboring ones, and the surrounding localities. *Sapp*, 73 M.S.P.R. at 193. The question of what constitutes a local commuting area is one of fact. The extent of a commuting area is ordinarily determined by factors such as common practice, the availability and cost of public transportation or the convenience and adequacy of highways, and the travel time required to go to and from work. *See Beardmore v. Department of Agriculture*, 761 F.2d 677, 678 (Fed. Cir. 1985) (defining "local commuting area" in the context of a reassignment); *see also Sanchez*, 2010 MSPB 121, ¶ 13.

¶14 In this case, all of the evidence shows that the agency searched for a suitable position for the appellant only at the LA BMC. IAF, Tab 6 at 49, 51, Tab 7 at 14-15. Unless the LA BMC is the only agency facility in the local

commuting area, the applicable regulation requires a more extensive search. *See* 5 C.F.R. § 353.301(d). Because the agency's search for available work was apparently limited to a single facility, it appears that the agency failed to search the entire local commuting area as required by OPM's regulation. *See* 5 C.F.R. § 353.301(d). Evidence that the agency failed to search the entire local commuting area as required by 5 C.F.R. § 353.301(d) constitutes a nonfrivolous allegation that the agency acted arbitrarily and capriciously in denying restoration. *See Barachina v. U.S. Postal Service*, 113 M.S.P.R. 12, ¶ 7 (2009); *Urena v. U.S. Postal Service*, 113 M.S.P.R. 6, ¶ 13 (2009). We therefore find that the appellant has met all of the criteria to establish Board jurisdiction over his restoration appeal, which entitles him to adjudication on the merits. *See Barrett v. U.S. Postal Service*, 107 M.S.P.R. 688, ¶ 8 (2008).

¶15 Although the documentary evidence suggests that the agency failed to search the entire local commuting area, the evidence in the record is insufficient for the Board to determine the extent of the local commuting area on review. Therefore, in the interest of justice, we reopen the record for further development on this issue, including the opportunity for further discovery by the parties. *See Sapp*, 73 M.S.P.R. at 193-94 (the Board remanded the appeal for further development of the record regarding what constituted the "local commuting area" and whether the agency's job search properly encompassed that area). On remand, the administrative judge shall afford the appellant his requested hearing. IAF, Tab 2 at 10; *see Barrett*, 107 M.S.P.R. 688, ¶ 8.

Interplay with the Rehabilitation Act

¶16 As discussed above, OPM's regulation at 5 C.F.R. § 353.301(d) requires an agency to make every effort to restore a partially recovered employee to limited duty within the local commuting area. *See also Urena*, 113 M.S.P.R. 6, ¶ 8. The regulation further provides that, at a minimum, this requires treating employees substantially the same as individuals protected under the Rehabilitation Act of 1973. 5 C.F.R. § 353.301(d). The relevant Rehabilitation Act standards are those

applied under the Americans with Disabilities Act (ADA), set forth at 29 C.F.R. part 1630. *Smith v. U.S. Postal Service*, 113 M.S.P.R. 1, ¶ 6 (2009); *Taylor v. Department of Homeland Security*, 107 M.S.P.R. 306, ¶ 8 (2007).[5]

¶17 An agency's obligation to provide reasonable accommodation to an individual with a disability under the Rehabilitation Act may include reassignment to a vacant position. 42 U.S.C. § 12111(9)(B); *Smith*, 113 M.S.P.R. 1, ¶ 6; *Taylor*, 107 M.S.P.R. 306, ¶ 8; 29 C.F.R. § 1630.2(o)(2)(ii). An appropriate reassignment would be a position for which an individual is qualified by skills, experience and education and which is equivalent in terms of pay, status or other relevant factors, such as benefits and geographical location. 29 C.F.R. part 1630 Appendix, § 1630.2(o); *Equal Employment Opportunity Commission* (*EEOC*) *Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act* (2002) (*"EEOC Enforcement Guidance"*) at 18-19.[6]

¶18 We are cognizant that, while geographical location is a consideration in determining an appropriate reassignment under the Rehabilitation Act, the reassignment obligation under the Act is not necessarily limited by the local

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[5] ADA standards were incorporated by reference into the Rehabilitation Act and are utilized in determining whether there has been a Rehabilitation Act violation. 29 U.S.C. § 791(g); *Pinegar v. Federal Election Commission*, 105 M.S.P.R. 677, ¶ 36 n.3 (2007); 29 C.F.R. § 1614.203(b). Thus, the Equal Employment Opportunity Commission's regulations under the Rehabilitation Act were superseded by the ADA regulations. *Collins v. U.S. Postal Service*, 100 M.S.P.R. 332, ¶¶ 7-8 (2005); 29 C.F.R. § 1614.203(b). These regulations provide, among other things, that an agency must attempt to accommodate a covered individual after an individualized assessment of his situation and participation in an interactive process. 29 C.F.R. § 1630.2(o). We note that the recent ADA Amendments Act of 2008 did not alter the substantive requirements for reasonable accommodation, including reassignment. Pub. L. No. 110-325, § 6(h), 122 Stat. 3553 (2008), codified at 42 U.S.C. § 12201(h).

[6] One can be reassigned to the next lower level position for which he is qualified if an equivalent position is not available. *Taylor*, 107 M.S.P.R. 306, ¶ 8; *EEOC Enforcement Guidance* at 19. The *EEOC Enforcement Guidance* is available at www.eeoc.gov/policy/docs/accommodation.html.

commuting area. 29 C.F.R. § 1630.2(o)(2)(ii). "Rather, the extent to which an employer must search for a vacant position will be an issue of undue hardship." *EEOC Enforcement Guidance* at 20, Q. 27; *see also EEOC Questions and Answers: Promoting Employment of Individuals with Disabilities in the Federal Workforce* (2008) at 18, Q. 24 ("Reassignment is not limited to the facility, commuting area, sub-component, . . . or type of work to which the individual with a disability is assigned at the time the need for accommodation arises.").[7]

¶19 The language in OPM's regulation at 5 C.F.R. § 353.301(d) is explicit, however, that an agency's restoration obligation is limited to the local commuting area. OPM's intent to provide restoration rights only in the local commuting area is also clear from its explanation for adding the limiting phrase in issuing the regulation. *See* 60 Fed. Reg. 45,650 (Sept. 1, 1995) ("[Section] 353.301(d) makes clear that partially recovered employees are entitled to restoration rights only in the local commuting area, not agencywide.").[8] Therefore, we find that 5 C.F.R. § 353.301(d) requires an agency to search for a restoration assignment for partially recovered employees only in the local commuting area and that its reference to the Rehabilitation Act means that in doing so, it undertakes substantially the same effort that it would exert under that Act when reassigning disabled employees within the local commuting area. By so reading the regulation, we have considered the text as a whole and given meaning to the entire text. *See Lengerich v. Department of the Interior*, 454 F.3d 1367, 1370 (Fed. Cir. 2006) ("[i]n interpreting a regulatory provision, we examine the text of

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[7] The *EEOC Questions and Answers* are available at http://www.eeoc.gov/federal/qanda-employment-with-disabilities.cfm.

[8] In addition, we note that at the time OPM issued this regulation, the Equal Employment Opportunity Commission's regulation at 29 C.F.R. § 1614.203(g) (1994) was in effect, which limited the reassignment obligation to a vacant funded position located in the same commuting area and serviced by the same appointment authority. The substantive provisions of 29 C.F.R. § 1614.203 were superseded by the ADA regulations in 2002. *See Collins*, 100 M.S.P.R. 332, ¶¶ 7-8; 29 C.F.R. § 1614.203(b).

the regulation as a whole."); *Phipps v. Department of Health & Human Services*, 767 F.2d 895, 897 (Fed. Cir. 1985) (examining "the true meaning and intent of the regulations read as a whole"); *compare* 5 C.F.R. § 353.301(a)-(c) (requiring agencies to consider individuals covered under those sections for placement agencywide) *with* 5 C.F.R. § 353.301(d) (requiring agencies to consider individuals covered under that section for placement within the local commuting area).

ORDER

¶20 Accordingly, we reverse the initial decision and remand the appeal to the Western Regional Office for further adjudication of the merits of the appeal consistent with this Opinion and Order.

FOR THE BOARD:

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