UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 126

Docket No. SF-0353-09-0560-I-1

Lydia T. Chang,

Appellant,

v.

United States Postal Service,

Agency.

July 1, 2010

Lydia T. Chang, El Monte, California, pro se.

Afshin Miraly, 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 an initial decision that dismissed her 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 PS-06 Mail Processing Clerk at the agency's Pasadena, California Processing and Distribution Center in its Sierra Coastal District. Initial Appeal File (IAF), Tab 1 at 1, Tab 6 at 53, Tab 7 at 18. She sustained an on-the-job injury in 1995; as of 1998, her condition was considered to be permanent and stationary; and she was placed in a limited duty[1] position with restrictions on all of her physical activities except sitting. IAF, Tab 6 at 54-56, Tab 7 at 13-16. On April 9, 2009, the agency informed her that, following guidelines established by the National Reassessment Process (NRP) Pilot Program, it had conducted a search for operationally necessary tasks within her tour and facility that met her medical restrictions. It stated that it was unable to identify any such tasks, directed her to take leave, and instructed her not to report back for duty unless contacted. IAF, Tab 1, Tab 7 at 21.

¶3 On May 8, 2009, the appellant filed an appeal requesting reinstatement to her position. IAF, Tab 1. The administrative judge informed the appellant of the standard for establishing Board jurisdiction over a restoration claim as a partially recovered employee and ordered her to establish jurisdiction. IAF, Tab 2 at 2. The agency moved to dismiss the appeal for lack of jurisdiction. IAF, Tab 6 at 8-11. It also submitted evidence that, in addition to searching within the appellant's facility, it had conducted a work search for the appellant outside her facility within a 50-mile radius of the plant.[2] *Id.* at 57-60. The appellant

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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 agency also moved to consolidate the appeal with those filed by seven other employees who worked in the same facility on the same tour as the appellant. IAF, Tab 9. The appellant opposed the agency's motion, IAF, Tab 10, and the administrative judge denied the motion, IAF, Tab 15. The agency has not challenged that ruling on petition for review.

responded that the denial of her request for restoration was arbitrary and capricious. IAF, Tab 7 at 4. Both parties submitted additional evidence and argument. IAF, Tabs 7-8, 16-17. In her last submission, the appellant enclosed a July 15, 2009 letter from the agency informing her that it had expanded its search for operationally necessary tasks meeting her medical restrictions "outside of [her] regular schedule within [her] facility and throughout the Local Commuting Area (LCA) within the District boundaries." It stated that, based on its search, it was unable to identify any available operationally necessary tasks within her medical restrictions. *Id.*, Tab 17 at 31.

¶4 Although the appellant had initially requested a hearing, IAF, Tab 1 at 2, and claimed that the agency had violated the Rehabilitation Act, *id.* at 3, she subsequently withdrew both her hearing request and her discrimination claim on July 20, 2009, IAF, Tab 12. The administrative judge therefore decided the case on the written record on August 18, 2009. IAF, Tab 18. After setting forth the standard for establishing jurisdiction over a restoration claim as a partially recovered employee, *id.* at 3,[3] the administrative judge dismissed the appeal for lack of jurisdiction, *id.* at 1, 6. The administrative judge assumed without deciding that the appellant had made nonfrivolous allegations that she met the first three criteria for establishing jurisdiction over her restoration claim. The administrative judge found, however, that the appellant failed to make a

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[3] It appears that the appellant is actually a physically disqualified individual because she cannot perform her prior duties and her limitations are permanent. *See* 5 C.F.R. § 353.102. However, as the administrative judge recognized in her Order and Summary of Close of Record Conference, a physically disqualified person has the same limited right to restoration as a partially recovered employee after 1 year of receiving compensation. IAF, Tab 15 at 2; *see Kravitz v. Department of the Navy*, 104 M.S.P.R. 483, ¶ 5 (2007); 5 C.F.R. § 353.301(c), (d). Thus, any error by the administrative judge in identifying the appellant in the initial decision as a partially recovered employee, as opposed to a physically disqualified individual, did not prejudice the appellant's substantive rights. Accordingly, it provides no basis for reversing the initial decision. *See Panter v. Department of the Air Force*, 22 M.S.P.R. 281, 282 (1984).

nonfrivolous allegation that she met the fourth criterion, that is, that the agency's decision to terminate her restoration to duty, and therefore to effectively deny her restoration, was "arbitrary and capricious." *Id.* at 3. The administrative judge reasoned that the appellant had not explicitly argued that specific work, or a modified position, existed that she could perform within a vacant bid or residual position. *Id.* at 3-5.

¶5 The appellant has filed a timely petition for review of the initial decision, arguing that the agency acted arbitrarily and capriciously and that the administrative judge failed to consider a 2002 arbitration decision. PFR File, Tab 1. The agency has not responded to the petition for review.

ANALYSIS

Denial of Restoration

¶6 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).

¶7 "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 make a nonfrivolous allegation that: (1) She was absent from her position due to a compensable injury; (2) she 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 her; (3) the agency denied her 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).

¶8 We find that the appellant's arguments on review provide no basis to disturb the administrative judge's findings. The appellant argues that the administrative judge erred in finding inapplicable an arbitration decision addressing whether limited duty assignments provided to a partially recovered letter carrier in Phoenix, Arizona, were subject to bidding under the collective bargaining agreement. PFR File, Tab 1 at 3; IAF, Tab 7 at 4; *In re Arbitration between U.S. Postal Service and American Postal Workers Union*, Case No. E90C-4E-C 95076238 at 1-2 (2002) (Das, Arb.). The cited decision, which involves a different issue and different employee, does not compel a finding in favor of the appellant herein. *See Horner v. Schuck*, 843 F.2d 1368, 1378 (Fed. Cir. 1988) (the Board is not required to defer to an arbitration decision involving other employees or other union contracts); *Romano v. U.S. Postal Service*, 49 M.S.P.R. 319, 324 n.6 (1991). Moreover, the decision states only that the agency is not required to allow other employees to bid for a position created to accommodate a compensably injured employee when that position would not otherwise exist. *American Postal Workers Union* at 18-23. It does not address the standards that the agency must use in deciding whether to create such a position, as the appellant argues. *Id.*; PFR File, Tab 1 at 3; IAF, Tab 7 at 4. Accordingly, we deny the petition for review for failure to meet the Board's review criteria under 5 C.F.R. § 1201.115(d). We reopen the appeal on the Board's own motion under 5 C.F.R. § 1201.118, however, in order to consider

whether the appellant has established jurisdiction over her restoration claim as a partially recovered employee.

¶9 We find that the appellant made nonfrivolous allegations satisfying the first three jurisdictional criteria. IAF, Tab 7 at 1-2. The appellant's allegations in this regard are supported by the record evidence. *Id.*, Exhibits 3, 9; *see Brehmer v. U.S. Postal Service*, 106 M.S.P.R. 463, ¶ 9 (2007) (discontinuation of a limited duty position may constitute a denial of restoration for purposes of Board jurisdiction under 5 C.F.R. part 353). Thus, 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).

¶10 Although the appellant's documentary submissions themselves are insufficient to satisfy the fourth jurisdictional criterion, the agency's documentary submissions are sufficient to render nonfrivolous the appellant's allegation that the denial of restoration was arbitrary and capricious. *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). The Office of Personnel Management's 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). As discussed in *Sanchez v. U.S. Postal Service*, the reassignment obligation under the Rehabilitation Act of 1973, which mandates reasonable accommodation for persons with disabilities, is not necessarily limited geographically to the local commuting area. 2010 MSPB 121, ¶ 18. Under 5 C.F.R. § 353.301(d), however, an agency's responsibility in the restoration context is limited to the local commuting area. *Id.* 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 Sapp v. U.S. Postal Service*, 73 M.S.P.R. 189, 193-94 (1997). "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 reassignment).

¶11 In this case, the agency's documentary submissions show that its job search was limited to installations within a single district. IAF, Tab 17 at 31. Because the agency limited its search to a single district, whether it searched the entire commuting area remains an unanswered question of material fact. *See Sanchez*, 2010 MSPB 121, ¶ 14. Evidence that the agency failed to search the 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; *Urena v. U.S. Postal Service*, 113 M.S.P.R. 6, ¶ 13. We therefore find that the appellant has met all of the criteria to establish Board jurisdiction over her restoration appeal, which entitles her to adjudication on the merits. *See Barrett v. U.S. Postal Service*, 107 M.S.P.R. 688, ¶ 8 (2008).

¶12 In the initial decision, the administrative judge did not address the agency's obligation to consider the entire commuting area. Therefore, the record closed

without exploring whether the local commuting area encompassed areas outside the Sierra Coastal District. 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 Sanchez*, 2010 MSPB 121, ¶ 15.

ORDER

¶13 Accordingly, we REMAND the appeal for further adjudication consistent with this Opinion and Order.

FOR THE BOARD:

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