UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 140

Docket No. SF-0353-09-0542-I-1

Sabrina M. Beatty,

Appellant,

v.

United States Postal Service,

Agency.

July 16, 2010

Sabrina M. Beatty, Los Angeles, 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 the 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 PS-06 Mail Processing Clerk at the Pasadena, California, Processing and Distribution Center (P&DC), which is in the agency's Sierra Coastal District. Initial Appeal File (IAF), Tab 1; Tab 9 at 53. She incurred injuries in 2002, i.e., "cervical, right arm and right trapezius strains," that the Office of Workers' Compensation Programs determined to be compensable. *Id.*, Tab 6, Subtab N; Tab 9 at 55. The appellant's condition was permanent and stationary as of January 2006. *Id.*, Tab 17, Exhibit (Exh.) C at 4. On July 17, 2008, the appellant accepted a limited duty assignment that entailed limitations of lifting no more than 15 pounds, no repetitive twisting of neck or casing of mail, and no reaching above the right shoulder or downward. *Id.*, Tab 9 at 57.

¶3 On April 10, 2009, the agency issued the appellant a letter in which it informed her that there was no operationally necessary work available within her medical restrictions during her tour of duty at her facility. IAF, Tab 6, Subtab I at 2. The letter further stated that the appellant should leave work and not return until further notice. *Id.* The agency stated that it was taking this action pursuant to its National Reassessment Process (NRP) 2 Pilot Program. *Id.* The NRP is an initiative to provide updated and operationally necessary tasks to limited duty employees who have reached maximum medical improvement. IAF, Tab 17, Exh. Y at 1. Over the next approximately 7 weeks, the agency looked for work within the appellant's medical restrictions. The agency looked on other tours in other crafts at the Pasadena P&DC, and then at other facilities within a 50-mile radius in the Sierra Coastal District. The agency did not succeed in this effort. *Id.*, Tab 9 at 61-63; Tab 17, Exh. Y at 1-2; Tab 18 at 22-26.

¶4 The appellant filed an appeal, asserting that the agency violated her right to restoration to duty after a compensable injury and discriminated against her based on a disability. *Id.*, Tab 1. She argued that the agency's action was an arbitrary and capricious denial of restoration, because the agency should not have applied

an "operationally necessary" criterion in determining whether it could provide work within her restrictions. *Id.*, Tab 6 at 4-5; Tab 8 at 2; Tab 17 at 7.

¶5 The administrative judge issued an initial decision holding that the appellant did not make a nonfrivolous allegation that the agency's action was arbitrary and capricious, and, therefore, she did not establish jurisdiction over her restoration appeal. IAF, Tab 20, Initial Decision (ID) at 7. The initial decision did not address the pendent disability discrimination claim because of the finding that there was no Board jurisdiction over the denial of restoration. ID at 7-8.

¶6 The appellant filed a petition for review (PFR), but failed to offer any evidence or argument in support of her request. PFR File, Tab 1. The agency did not respond to the PFR.

ANALYSIS

Denial of Restoration

¶7 The Federal Employees' Compensation Act and its implementing 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).

¶8 "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,* the 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). Discontinuation of a limited duty position may constitute a denial of restoration for purposes of Board jurisdiction under 5 C.F.R. part 353. *Brehmer v. U.S. Postal Service*, 106 M.S.P.R. 463, ¶ 9 (2007).

¶9 The administrative judge held that the appellant made nonfrivolous allegations as to criteria (1) through (3) above but not (4). The administrative judge rejected the appellant's contention that the agency's action was arbitrary and capricious because it lacked the authority to review tasks performed on limited duty assignments and to determine whether the tasks continued to be operationally necessary. ID at 6. The administrative judge stated that the appellant had not cited any law, rule, regulation or collective bargaining provision that would prohibit the agency from conducting the NRP and had not refuted the agency's evidence that it experienced a large reduction in workload due to market factors. *Id.* We find the determination by the administrative judge was sound insofar as he held that the agency has authority to determine if tasks are operationally necessary. In *Ancheta v. Office of Personnel Management*,

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* The appellant's medical condition is permanent and stationary, and therefore she is "physically disqualified" as defined under 5 C.F.R. § 353.102. However, because more than 1 year has passed since the appellant was first eligible for workers' compensation, the administrative judge correctly analyzed her restoration rights under the test applicable to a partially recovered employee. ID at 4; *see Kravitz v. Department of the Navy*, 104 M.S.P.R. 483, ¶ 5 (2007); 5 C.F.R. § 353.301(c), (d).

95 M.S.P.R. 343, ¶ 11 (2003), the Board stated that the agency's Employee and Labor Relations Manual provides that a limited duty assignment is "determined based on whether adequate 'work' or 'duties' are available" within the employee's restrictions, craft and current facility and that the employee is assigned to a different facility "only if there is not adequate work within the employee's work limitation tolerances" at her own worksite. That is, "limited duty or rehabilitation assignments of current employees are dependent on the extent to which adequate 'work' exists within the employees' work limitation tolerances." *Id.*; *see also Okleson v. U.S. Postal Service*, 90 M.S.P.R. 415, ¶ 11 (2001) (duties assigned to those in a limited duty capacity "often do not constitute an actual position, but are made up of work available that meets the employee's restrictions").

¶10 As previously stated, the restoration regulations provide that an agency must make every effort to restore an individual who has partially recovered from a compensable injury and who is able to return to limited duty in the local commuting area. 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 the employee for any such vacancies. *See Sapp v. U.S. Postal Service*, 73 M.S.P.R. 189, 193-94 (1997). 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 (2009); *Urena v. U.S. Postal Service*, 113 M.S.P.R. 6, ¶ 13 (2009).

¶11 "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. A determination as to 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).

¶12 In this case, the agency's documentary submissions show that its job search encompassed installations within 50 miles of the Pasadena P&DC but only within the Sierra Coastal District. IAF, Tab 6, Subtab I at 2; Tab 9 at 61-63; Tab 17, Exh. Y at 1-2; Tab 18 at 22-26. The Board has recently found that the arbitrary and capricious criterion is met where the agency's search for available work was limited to the Sierra Coastal District, although the commuting area may include part or all of other districts. *Sanchez v. U.S. Postal Service*, 2010 MSPB 121, ¶ 14. Therefore, although the appellant's evidence and argument are insufficient to show that the agency's discontinuation of her limited duty position was an arbitrary and capricious denial of restoration, the agency's documentary submissions, which show that it searched only within a single district, render the appellant's allegation nonfrivolous. *Id.; 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). We therefore find that the appellant has met the criteria to establish Board jurisdiction over this restoration appeal, and the appeal must be remanded for adjudication on the merits. *See Barrett v. U.S. Postal Service*, 107 M.S.P.R. 688, ¶ 8 (2008). On remand, the administrative judge shall provide an opportunity for further development of the record (including discovery by the parties) regarding the scope of the local commuting area and whether work within the appellant's restrictions was available in that area. *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).

Disability Discrimination

¶13 Because the Board has jurisdiction to consider the merits of the restoration appeal, the administrative judge must also adjudicate the appellant's disability discrimination claim. *See* 5 U.S.C. § 7702(a)(1); *Barrett*, 107 M.S.P.R. 688, ¶ 8. As discussed in *Sanchez*, the reassignment obligation under the Rehabilitation Act of 1973, which mandates reasonable accommodation for persons with disabilities, is not necessarily confined geographically to the local commuting area. 2010 MSPB 121, ¶ 18. Under the restoration regulation at 5 C.F.R. § 353.301(d), however, an agency's responsibility in the restoration context is limited to the local commuting area. *Id*.

¶14 We make no determination as to the agency's particular reassignment obligation under the Rehabilitation Act in this case. Rather, the administrative judge should address this issue on remand in the context of the appellant's disability discrimination claim. *See* IAF, Tab 1 at 4; *cf. Sapp v. U.S. Postal Service*, 82 M.S.P.R. 411, ¶¶ 13-15 (1999) (finding that the appellant's restoration rights and right to reassignment under disability discrimination law are not synonymous and require separate adjudication) (clarifying *Sapp*, 73 M.S.P.R. at 194-95). The administrative judge should take into consideration the results of the interactive process required to determine an appropriate accommodation. *See Paris v. Department of the Treasury*, 104 M.S.P.R. 331, ¶ 17 (2006); 29 C.F.R. § 1630.2(o)(3); *see also Equal Employment Opportunity Commission Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act* (2002) at 6. "Both parties . . . have an obligation to assist in the search for an appropriate accommodation, and both have an obligation to act in good faith in doing so." *Collins v. U.S. Postal Service*, 100 M.S.P.R. 332, ¶ 11 (2005) (citing *Taylor v. Phoenixville School District*, 184 F.3d 296, 312 (3d Cir. 1999)).

ORDER

¶15 Accordingly, we reverse the initial decision and remand the appeal to the Western Regional Office 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.