UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 142

Docket No. SF-0353-09-0549-I-1

Phan V. Tram,

Appellant,

v.

United States Postal Service,

Agency.

July 16, 2010

Juan Lamas, Pasadena, California, for the appellant.

Parin Patel, 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 employed by the agency as a Mail Processing Clerk. Initial Appeal File (IAF), Tab 1 at 3. She is not entitled to veterans' preference. *Id.* In 1998, she suffered an on-the-job injury that the Department of Labor accepted as a compensable injury. IAF, Tab 7 at 59-61. Effective April 29, 2006, the appellant was assigned to a limited duty assignment. *Id.* at 22. She was subsequently assigned, in March 2007, to a modified position manually casing letter mail. *Id.* at 21.

¶3 In 2009, the agency initiated a National Reassessment Process (NRP) 2 Pilot Program. *Id.* at 12, 16. Under that pilot program, teams of management members in selected districts reviewed the medical restrictions of limited duty employees and determined whether operationally necessary tasks existed that matched those restrictions. *See id.* at 16. On April 9, 2009, the agency informed the appellant that it had been unable to identify any operationally necessary tasks within her medical restrictions, and that she should therefore not report for duty. *Id.* at 12. The agency informed the appellant of her options for using leave and seeking compensation from the Department of Labor. *Id.* The agency also provided a worksheet showing that it searched for operationally necessary tasks within the appellant's medical restrictions and within her regular tour and current facility, both within and outside her craft. *Id.* at 13.

¶4 The appellant filed the present restoration appeal on May 8, 2009. IAF, Tab 1. In her appeal, the appellant claimed that the agency had discriminated against her on the basis of disability. IAF, Tab 1 at 3. The agency moved to dismiss the appeal for lack of jurisdiction, arguing that the appellant failed to make a nonfrivolous allegation that her request for restoration was denied or that any such denial was arbitrary and capricious. IAF, Tab 7 at 7-9. The agency also moved to consolidate the present appeal with seven other pending appeals involving employees from the same facility and tour. IAF, Tab 9. However, the

administrative judge denied the motion to consolidate, finding that consolidation would not expedite processing of the appeal.* IAF, Tab 10.

¶5 Although the appellant initially requested a hearing, IAF, Tab 1 at 2, she subsequently withdrew her hearing request on June 6, 2009, IAF, Tab 8. Therefore, the administrative judge decided the case without a hearing on September 2, 2009. IAF, Tab 22. After setting forth the elements required to establish jurisdiction over a restoration claim as a partially recovered employee, the administrative judge found that the appellant failed to make a nonfrivolous allegation that the denial of her restoration request was arbitrary and capricious. *Id.* at 6-11. 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. Petition for Review File (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

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* The agency has not challenged the denial of its motion to consolidate on petition for review.

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 agree with the administrative judge that the appellant has met the first three elements of the jurisdictional test. *See* IAF, Tab 22 at 7-8. Further, we find that the appellant's arguments on review provide no basis to disturb the administrative judge's findings with respect to the fourth element. 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 6 at 3-5; *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 6 at 3-5.

¶9 Nevertheless, even though 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 (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). "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).

¶10 In this case, the agency's documentary submissions show that its job search encompassed installations in the Sierra Coastal District within 50 miles of the appellant's facility. IAF, Tab 15 at 10. Because the agency apparently 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 (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 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).

¶11 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.

Interplay with the Rehabilitation Act

¶12 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. IAF, Tab 1 at 3; *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.*

¶13 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 3; *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

¶14 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.