

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

2010 MSPB 143

Docket No. SF-0353-09-0556-I-1

**Thien T. Le,
Appellant,**

v.

**United States Postal Service,
Agency.**

July 16, 2010

Thien T. Le, Rancho Cucamonga, California, pro se.

Carla Ceballos, 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 PS-07 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 21, Subtab 4L. He was on limited duty¹ since October 2001. IAF, Tab 21, Subtabs 4M, 4N; Tab 25, Exhibit (Exh.) D. His medical condition was bilateral de Quervain's tenosynovitis,² which the Office of Workers' Compensation Programs determined to be compensable. *Id.*, Tab 25, Exh. B. The appellant's condition was permanent and stationary as of April 2002. *Id.*, Exh. C. He had a 10-pound lifting restriction and limitations on pushing, pulling, reaching and fine manipulation (including keyboarding). IAF, Tab 21, Subtab 4M.

¶3 On April 14, 2009, the agency issued the appellant a letter in which it informed him that there were no operationally necessary tasks within his medical restrictions on his tour of duty at his facility. IAF, Tab 1; Tab 10 at 33. 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 job offers to limited duty employees who have reached maximum medical improvement. *Id.*; Tab 21, Subtab 4A. Over the next approximately 6 weeks, the agency looked for work within the appellant's restrictions. The agency searched on other tours in other

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 We note that this is a condition in which the sheath of the tendons on the thumb side of the wrist becomes inflamed or swollen, restricting movement and causing pain when turning the wrist or grasping. <http://www.mayoclinic.com/health/de-quervains-tenosynovitis/DS00692>.

crafts at the Pasadena P&DC and then at other facilities within a 50-mile radius in the Sierra Coastal District. *Id.*, Tab 10 at 27-32; Tab 21, Subtabs 4A, 4B. The agency, however, did not succeed in its efforts to find appropriate work for the appellant. *Id.*

¶4 The appellant filed an appeal, asserting that the agency violated his rights to restoration after a compensable injury. IAF, Tab 1. The appellant argued that the agency's action was arbitrary and capricious because the agency should not have applied an "operationally necessary" criterion in determining whether it could provide work within his restrictions. *Id.*, Tab 6 at 5. He cited a 2002 arbitration decision in which the agency argued and the arbitrator found that the limited duty assignment in that case was created not because of the agency's operational needs but rather its obligation to provide work to an employee injured on the job. *Id.*, Tab 6 at 4-5; Tab 25 at 4-6. Initially, the appellant also alleged disability discrimination. *Id.*, Tab 1; Tab 19 at 4. However, he later withdrew that claim. *Id.*, Tab 22.

¶5 The administrative judge issued an initial decision holding that the appellant failed to make a nonfrivolous allegation that the agency's action was arbitrary and capricious, and therefore did not establish Board jurisdiction over his restoration appeal. IAF, Tab 27 at 6-8. The appellant filed a petition for review (PFR) in which he reiterates his reliance on the 2002 arbitration decision. PFR File, Tab 1. The appellant also submits documents regarding the decision of the agency's District Reasonable Accommodation Committee (DRAC) to deny his request for reasonable accommodation. *Id.*

ANALYSIS

¶6 As a threshold matter, we find that the documents submitted by the appellant on PFR regarding his reasonable accommodation request do not constitute new and material evidence under [5 C.F.R. §1201.115\(d\)](#). The appellant submitted a copy of the July 24, 2009 DRAC decision denying his reasonable

accommodation request. PFR File, Tab 1. The decision, however, was provided by the close of record below, and its submission was noted in the initial decision. IAF, Tab 26; Tab 27 at 4. It is therefore not new evidence, i.e., evidence that despite due diligence was not available when the record closed. [5 C.F.R. § 1201.115\(d\)\(1\)](#). The appellant has also submitted a copy of an August 10, 2009 letter from the agency's District Manager of Human Resources affirming the DRAC decision. PFR File, Tab 1. The letter, while new, is not material evidence, because it would not "warrant an outcome different from that of the initial decision."³ *Boyd-Casey v. Department of Veterans Affairs*, [62 M.S.P.R. 530](#), 532 (1994); *see also Russo v. Veterans Administration*, [3 M.S.P.R. 345](#), 349 (1980).

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).

³ The appellant does not state that he is again raising his discrimination claim, which he withdrew after the administrative judge's close of record order, or assert that the administrative judge erred in not addressing this claim. Therefore, we find that he has waived adjudication of the claim. *See Sosa v. Department of Defense*, [102 M.S.P.R. 252](#), ¶ 3 n.1 (2006).

¶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 his restoration claim as a partially recovered employee,⁴ the appellant must make a nonfrivolous allegation 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\(c\)](#). 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). IAF, Tab 27 at 5-6. However, he held that the appellant did not satisfy the fourth criterion by making a nonfrivolous allegation that the agency's action was arbitrary and capricious. *Id.* at 6-7. With regard to the arbitration decision cited by the appellant, the administrative judge held that the Board was not required to give deference to an arbitration decision involving other employees. *Id.* We find the determination by the administrative judge regarding the arbitration decision was sound. The decision cited by the appellant addressed whether a limited duty assignment provided to a partially

⁴ The appellant's medical condition is permanent and stationary, and therefore he 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 his restoration rights under the test applicable to a partially recovered employee. *Id.* at 4-5; see *Kravitz v. Department of the Navy*, [104 M.S.P.R. 483](#), ¶ 5 (2007); 5 C.F.R. § 353.301(c)-(d).

recovered letter carrier in Phoenix, Arizona, was subject to bidding under the collective bargaining agreement. IAF, Tab 25, Exh. G at 10-11, 20. 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, while the cited decision finds that the limited duty position in that case was uniquely created for the injured employee, it does not specifically find that the tasks performed were not operationally necessary. IAF, Tab 25, Exh. G at 20-21. The Board has found that, pursuant to a Postal Service Employee and Labor Relations Manual, limited duty or rehabilitation assignments “are dependent on the extent to which adequate ‘work’ exists within the employees’ work limitation tolerances.” *Ancheta v. Office of Personnel Management*, [95 M.S.P.R. 343](#), ¶ 11 (2003); *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 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); *see also Sanchez*, 2010 MSPB 121, ¶ 13. 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 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 10 at 27-33; Tab 21, Subtabs 4A, 4B. Moreover, in its final jurisdictional response, the agency stated that “at this point of the NRP, a search is not being conducted in other districts that may have installations within local commuting distance” *Id.*, Tab 23 at 5. 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*, 2010 MSPB 121, ¶¶ 14-15. Therefore, although the appellant’s evidence and argument are insufficient to show that the agency’s discontinuation of his limited duty position was an arbitrary and capricious denial of restoration, the agency’s 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). Accordingly, we find that all four of the criteria

to establish Board jurisdiction over this restoration appeal have been met, 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 the 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).

ORDER

¶12 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:

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