UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 144

Docket No. SF-0353-09-0540-I-1

Teresa Marquez,

Appellant,

v.

United States Postal Service,

Agency.

July 16, 2010

Morris N. Thompson, Valley Village, California, for the appellant.

Jason Marsh, 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-04 Mailhandler at the Los Angeles Bulk Mail Center (LABMC). Initial Appeal File (IAF), Tab 1 at 1; Tab 7, Subtab 4I. She suffered an injury, i.e., lumbosacral strain, on December 30, 2006, which the Office of Workers' Compensation Programs determined to be compensable. *Id.*, Tab 7, Subtab 4K; Tab 20, Subtab B at 5-6. The appellant's condition was permanent and stationary as of November 5, 2007. *Id.*, Tab 20, Subtab B at 7. She has a 10-pound lifting limitation, cannot stand or walk for more than 45 minutes per hour/six hours per day, and has restrictions on bending, twisting, squatting and climbing. *Id.; see also id.*, Tab 16 at 14; Tab 20, Subtab B at 9. Following her injury, the appellant had a series of limited duty[1] assignments, the last of which she accepted on January 15, 2009. *Id.*, Tab 7, Subtab 4H; Tab 20 at 2 and Subtab D at 14-15. The most recent assignment entailed traying letters, rewrapping packages, sorting missent mail, and "housekeeping sorting EEO." *Id.*, Tab 7, Subtab 4H; Tab 20, Subtab D at 14-15.

¶3 On April 9, 2009, the agency issued a letter to the appellant in which it informed her that there were no operationally necessary tasks within her medical restrictions on her tour of duty at her facility. IAF, Tab 1 at 8; Tab 7, Subtab 4B. The letter stated that the appellant should leave work and not return until she was informed that such tasks had become available. *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. IAF, Tab 4, Subtab 4F; Tab 16, Exhibit (Exh.) 4 at 1. In

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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).

an effort culminating on August 5, 2009, the agency looked for work within the appellant's restrictions on other tours and in other crafts at the LABMC and in other facilities within a 50-mile radius in the Los Angeles District. *Id.*, Tab 16 at 4, ¶ 15 and Exh. 3. The agency, however, did not succeed in its efforts to find appropriate work for the appellant. *Id.* This restoration appeal followed, in which the appellant also alleges discrimination based on disability, race, sex and national origin. IAF, Tab 1 at 5; Tab 18 at 9.

¶4 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, that she did not establish Board jurisdiction over her restoration appeal. IAF, Tab 22 at 6-7. The initial decision did not address the pendent discrimination claim because of the finding that there was no Board jurisdiction over the denial of restoration. *Id.* at 7.

¶5 The appellant filed a petition for review (PFR) in which she asserts that the administrative judge erred in limiting the case to the agency's April 9, 2009 action and not considering her claim that the agency denied her restoration by denying her both a bid position and training in 2007. PFR File, Tab 1 at 5. The appellant also describes mailhandler and clerk duties at the LABMC that she asserts are operationally necessary tasks that she could perform, including the work she was doing on limited duty when sent home. PFR File, Tab 3 at 1-4. The agency responded in opposition to the PFR. *Id.*, Tab 5.[2]

ANALYSIS

¶6 As a threshold matter, we find that appellant's statement about alleged operationally necessary tasks submitted on PFR is not new and material evidence, i.e., evidence that despite due diligence was not available when the record in the

[2] The agency also filed an untimely supplement to its response, which was not considered but which would not have affected the outcome of this appeal.

appeal closed below. *See* 5 C.F.R. § 1201.115(d). Furthermore, the administrative judge correctly addressed only the agency's April 9, 2009 action placing the appellant off work, which was the action appealed. *See* IAF, Tab 1 at 2.[3] Mere disagreement with the administrative judge's findings does not warrant full review of the record by the Board. *Weaver v. Department of the Navy*, 2 M.S.P.R. 129, 133-34 (1980), *review denied*, 669 F.2d 613 (9th Cir. 1982) (per curiam). Therefore, the appellant's PFR does not meet the Board's criteria for granting review, and it is denied.

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

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[3] We note that the administrative judge informed the appellant in a teleconference and written order prior to her final submission on jurisdiction that the issue in the case was the agency's April 9, 2009 action and that she could file a separate appeal on other agency actions. IAF, Tab 18 at 3, n.1.

establish Board jurisdiction over her restoration claim as a partially recovered employee,[4] 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). IAF, Tab 22 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. We find that the administrative judge was correct in his holdings with regard to the first three jurisdictional critieria. However, regarding the final criterion, the administrative judge did not address the agency's obligation to search the entire local commuting area, even if it is beyond the district boundaries.

¶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

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[4] 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 4-5; *see Kravitz v. Department of the Navy*, 104 M.S.P.R. 483, ¶ 5 (2007); 5 C.F.R. § 353.301(c)-(d).

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). "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). 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 LAMBC but only within the Los Angeles District. IAF, Tab 16 at 4, ¶ 15 and Exh. 3. 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, including the Los Angeles and Santa Ana 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 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).

¶12 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).

Discrimination Claims

¶13 Because the Board has jurisdiction to consider the merits of the restoration appeal, the administrative judge must also adjudicate the appellant's discrimination claims. *See* 5 U.S.C. § 7702(a)(1); *Barrett*, 107 M.S.P.R. 688, ¶ 8. With regard to her disability discrimination claim, 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. *Sanchez*, 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 scope of the agency's 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. 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.