UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 166

Docket No. SF-0353-09-0668-I-1

Muqtadir Mubdi,
Appellant,
v.
United States Postal Service,
Agency.

August 18, 2010

Vikki Shaw, Los Angeles, California, for the appellant.

Geraldine O. Rowe, 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 denied his request for restoration as a partially recovered employee. For the reasons set forth below, we GRANT the petition for review, VACATE 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 Handler at the Los Angeles Processing and Distribution Center (P&DC). Initial Appeal File (IAF),

Tab 17 at 4. He suffered a compensable injury in 2000. IAF, Tab 13 at 11-14. Effective September 10, 2008, the appellant accepted a limited duty assignment with duties within his medical restrictions. *Id.* at 16-18.

¶3 On May 5, 2009, the agency informed the appellant that in accordance with the second phase of its National Reassessment Process (NRP), it had searched for operationally necessary tasks meeting his medical restrictions within his regular hours of duty and his facility, but that it was unable to identify any such tasks. IAF, Tab 13 at 50. The agency directed the appellant to leave work for the remainder of the day, and informed him that his options were to apply for Continuation of Pay (if eligible), leave, or leave without pay-injured on duty. *Id.* The appellant applied for leave without pay-injured on duty for the remainder of his tour of duty on May 5, 2009, and for the period between May 6 and May 22, 2009, and the agency granted those requests. *Id.* at 54-55.

¶4 On June 5, 2009, the appellant filed a Board appeal alleging a denial of restoration. IAF, Tab 1 at 4. He requested a hearing. *Id.* at 3. He also claimed that the agency had discriminated against him on the basis of his disability. *Id.* at 5, 7. The administrative judge found that the appellant had made nonfrivolous allegations sufficient to establish Board jurisdiction over his restoration appeal. IAF, Tab 6. She therefore held the appellant's requested hearing.

¶5 After holding the hearing, the administrative judge issued an initial decision denying the appellant's request for corrective action. IAF, Tab 18. She found that the appellant was absent from work due to a compensable injury, that he had recovered sufficiently to return to work in a position with physical requirements less demanding than those of his regular position, and that the agency denied his request for restoration. *Id.* at 6. However, she found that the appellant was not entitled to corrective action because he did not establish that the agency acted arbitrarily or capriciously in denying restoration. *Id.* at 6-9. She further found that the appellant did not establish his affirmative defense of disability discrimination. *Id.* at 9-10.

¶6 The appellant has filed a timely petition for review of the initial decision. Petition for Review (PFR) File, Tab 1. He argues that the agency failed to search the entire commuting area for available work. *Id.* at 4. He also argues that the agency failed to accommodate his disability. *Id.* at 4-6. The agency has responded in opposition to the petition for review. PFR File, Tab 4.

Analysis

Restoration to Duty

¶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(b); *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.[1] *Delalat v. Department of the Air Force*, 103 M.S.P.R. 448, ¶ 17 (2006); 5 C.F.R. §§ 353.102, 353.301(d). "An individual who is partially recovered from a compensable injury may appeal to [the] MSPB for a

[1] An employee who is physically disqualified for the former position or equivalent because of a compensable injury has slightly different restoration rights. The nature of those rights depends on the length of time between the date eligibility for compensation begins and the date the employee is physically disqualified. If 1 year or less has passed, the physically disqualified employee has an agencywide right "to be placed in another position for which qualified that will provide the employee with the same status, and pay, or the nearest approximation thereof, consistent with the circumstances in each case." 5 C.F.R. § 353.301(c). If more than 1 year has passed, the physically disqualified employee "is entitled to the rights accorded individuals who fully or partially recover, as applicable." *Id.* There is no evidence that the appellant in the present case was physically disqualified for his position.

determination of whether the agency is acting arbitrarily and capriciously in denying restoration." 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).

¶8 To establish Board jurisdiction over a restoration claim as a partially recovered employee, 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). The appellant bears the burden of proving the merits of his restoration claim, i.e., all four of the above elements, by a preponderance of the evidence. *Smith v. U.S. Postal Service*, 113 M.S.P.R. 1, ¶¶ 5-6 (2009) (citing *Hardy v. U.S. Postal Service*, 104 M.S.P.R. 387, ¶ 17, *aff'd*, 250 F. App'x 332 (Fed. Cir. 2007)); *Chen*, 97 M.S.P.R. 527, ¶ 18.

¶9 As noted above, the administrative judge held that the appellant proved the first three criteria but not the fourth. IAF, Tab 18 at 6-9. We agree with the administrative judge regarding the first three criteria, but are remanding for additional evidence as to the fourth, i.e., whether the agency's action was arbitrary and capricious.

¶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); *see also Urena v. U.S. Postal Service*, 113 M.S.P.R. 6, ¶ 13 (2009) (evidence that the agency failed to search the commuting area as required by 5 C.F.R. § 353.301(d) rendered nonfrivolous the appellant's allegation that the agency acted arbitrarily and capriciously in denying restoration); *Barachina v. U.S. Postal Service*, 113 M.S.P.R. 12, ¶ 7 (2009) (same).

¶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). The question of what constitutes a local commuting area is one of fact. A determination as to the extent of a commuting area should take into account the totality of the circumstances, including 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).

¶12 The initial decision does not specifically address the agency's obligation to consider the entire local commuting area or define the local commuting area relevant in the appellant's restoration claim. Therefore, we are remanding the appeal for supplemental proceedings and issuance of a new initial decision. On remand, the administrative judge shall oversee further development of the record by the parties on this issue, including an opportunity for discovery by the parties and a supplemental hearing. *See Sanchez v. U.S. Postal Service*, 2010 M.S.P.B. 121, ¶ 15; *Sapp*, 73 M.S.P.R. at 193-94 (remanding the appeal for further development of the record on what constituted the local commuting area and whether the agency's job search properly encompassed that area).

Disability Discrimination

¶13 When an appellant raises a claim of disability discrimination in connection with an otherwise appealable action, the Board generally has jurisdiction to

decide both the discrimination issue and the appealable action. 5 U.S.C. § 7702(a)(1); *Hardy*, 104 M.S.P.R. 387, ¶ 29. In this case, however, the agency argued that the appellant's disability discrimination claim is covered under *McConnell v. Potter*, EEOC Hearing No. 520-2008-00053X (May 30, 2008), a class complaint pending before the Equal Employment Opportunity Commission (EEOC). IAF, Tab 5 at 7-9. Specifically, the agency argued that the appellant fits the definition of a *McConnell* class member,[2] the appellant cannot opt out of the class, and the appellant should therefore be deemed to have made a binding election to proceed with his claim through the equal employment opportunity (EEO) process rather than through the Board. *Id*.

¶14 We find the agency's argument unpersuasive because it presumes that *McConnell* is a mixed case, which it is not. *See Hay v. U.S. Postal Service*, 106 M.S.P.R. 151, ¶ 13 (2007) (an individual who claims prohibited discrimination in connection with an action otherwise appealable to the Board, i.e., a mixed case, may pursue his claim by initially filing an appeal with the Board or an EEO complaint with his employing agency, but not both); 29 C.F.R. § 1614.302(b) (same). Nothing in the EEOC's certification of the class complaint discusses denial of restoration or any other action that may be otherwise appealable to the Board. *McConnell v. Potter*, EEOC DOC 0720080054, 2010 WL 332083 (Jan. 14, 2010). Nor do the claims at issue in *McConnell*, as defined by the

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[2] The EEOC administrative judge recommended defining the *McConnell* class as "[a]ll permanent rehabilitation employees and limited duty employees at the Agency who have been subjected to the NRP from May 5, 2006 to the present, allegedly in violation of the Rehabilitation Act of 1973." *McConnell*, EEOC Hearing No. 520-2008-00053X at 23 (footnote omitted). (A copy of this notice is included in the record at IAF, Tab 5, Exhibit E.) During the pendency of the appellant's petition for review, the EEOC Office of Federal Operations issued a decision certifying the class as defined in the administrative judge's recommended decision. *McConnell v. Potter*, EEOC DOC 0720080054, 2010 WL 332083 at *9-*10 (Jan. 14, 2010); *see generally* 29 C.F.R. §§ 1614.204, .403-.405.

EEOC, encompass any such action.[3] *Id*. at *9. Furthermore, the EEOC is not processing *McConnell* as a mixed case. Upon certifying the *McConnell* class, the EEOC remanded the matter for a hearing before an administrative judge. *Id*. at *10. If *McConnell* were a mixed case, the EEOC would have remanded the matter for further proceedings before the agency without a hearing. *Compare* 29 C.F.R. § 1614.108(f) *with* 29 C.F.R. § 1614.302(d); *see also Throckmorton v. Norton*, EEOC DOC 01A03994, 2003 WL 21145345, *5 (May 6, 2003) (mixed case class complaints are processed the same as mixed case individual complaints). We therefore find that the appellant's alleged membership in the *McConnell* class does not divest the Board of jurisdiction over any aspect of his Board appeal. *Luna v. U.S. Postal Service*, 114 M.S.P.R. 273, ¶¶ 14-15 (2010); *see Coleman v. Department of the Treasury*, 22 M.S.P.R. 519, 520-21 (1984) (because the appellant's EEO complaint did not pertain to any action appealable to the Board, it was not a mixed case complaint sufficient to divest the Board of jurisdiction over the appeal under 5 U.S.C. § 7702(a)(2)). Because the Board has jurisdiction over the appellant's restoration claim, 5 U.S.C. § 7702(a)(1) requires that the administrative judge adjudicate the appellant's disability discrimination claim on remand.[4] *See Barrett v. U.S. Postal Service*, 107 M.S.P.R. 688, ¶ 8 (2008).

¶15 The initial decision analyzes the appellant's disability discrimination claim as a claim of disparate treatment. IAF, Tab 18 at 9-10. On petition for review, the appellant argues that the agency failed to accommodate his disability. PFR

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[3] The claims at issue in *McConnell* are: (1) The NRP fails to provide a reasonable accommodation; (2) the NRP wrongfully discloses medical information; (3) the NRP creates a hostile work environment; and (4) the NRP has an adverse impact on disabled employees. *McConnell*, 2010 WL 332083 at *9.

[4] Under mixed case procedures, the appellant will still have an opportunity to raise his discrimination claim before the EEOC after the Board issues its final decision in this appeal. 5 U.S.C. § 7702(b).

File, Tab 1 at 5-6. It is understandable that the administrative judge analyzed the appellant's claim as one of disparate treatment. In his initial appeal, the appellant identified other employees who received more favorable treatment. IAF, Tab 1 at 6-8. Indeed, the appellant used the phrase "disparate treatment" in his initial appeal. *Id.* at 8. However, we also find that the appellant's claim that the agency should have continued to provide work within his medical restrictions constitutes a claim that the agency failed to reasonably accommodate his disability. Therefore, on remand, the administrative judge shall consider the appellant's reasonable accommodation claim.

¶16 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.*

¶17 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. *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

¶18 Accordingly, we 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.