UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 172

Docket No. AT-3330-09-0887-I-1

Patricia C. White,

Appellant,

v.

United States Postal Service,

Agency.

August 23, 2010

Patricia C. White, Miami, Florida, pro se.

Barry D. Thorpe, Esquire, Pembroke Pines, Florida, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The appellant has filed a petition for review of the initial decision that dismissed her Veterans Employment Opportunities Act of 1998 (VEOA) appeal for failure to state a claim upon which relief can be granted. For the reasons set for the 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 a preference eligible Mail Processing Clerk for the agency with a service-connected disability rated at 30 percent or more. Initial Appeal File (IAF), Tab 6 at 10. The appellant sustained a compensable injury and began work in a limited duty assignment. IAF, Tab 1 at 24-25. In March 2009, the agency reassigned her to an "unassigned regular position." IAF, Tab 6 at 10. The agency later evaluated the appellant's assignment under its National Reassessment Process and apparently determined that it had no work within her restrictions. IAF, Tab 1 at 5, 24-25, 27. The appellant appealed the agency's action under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) and under the Office of Personnel Management's restoration regulations. *White v. U.S. Postal Service*, MSPB Docket No. AT-4324-09-0600-I-1; *White v. U.S. Postal Service*, MSPB Docket No. AT-0353-09-0965-I-1.

¶3 One of the appellant's submissions in her USERRA appeal appeared to raise a VEOA claim. The regional office docketed the submission separately as the instant VEOA appeal. IAF, Tab 1. In that submission, the appellant appeared to allege that the agency violated her veterans' preference rights by assigning work to non-preference eligible employees but not to her. *Id*. at 2-4.

¶4 The administrative judge issued a jurisdictional order, notifying the appellant of how to establish Board jurisdiction under VEOA and ordering her to file evidence and argument on the issue. IAF, Tab 3 at 1-7. The agency filed a submission in which it argued that the administrative judge should dismiss the appeal for failure to state a claim upon which relief can be granted. IAF, Tab 5 at 1-3. The appellant filed a response, identifying various agency actions that she alleged violated her veterans' preference rights. IAF, Tab 6 at 1-3.

¶5 Without holding a hearing, the administrative judge issued an initial decision dismissing the appeal for failure to state a claim upon which relief can be granted. IAF, Tab 7, Initial Decision (ID) at 1, 4. He found that, although the Board has jurisdiction over the appeal, the appellant was not entitled to veterans'

preference in the context of transferring between jobs within the agency. ID at 2-3.

¶6 The appellant has filed a petition for review, alleging that the agency improperly failed to reemploy or reinstate her. Petition for Review File (PFR File), Tab 1 at 3. The agency has filed a response, arguing that the initial decision was correctly decided and that the Board should deny the petition for review for failure to meet the Board's review criteria. PFR File, Tab 3 at 1-3.

ANALYSIS

¶7 The appellant's claims were not limited to the agency's alleged failure to offer her a reassignment. The appellant also alleged that the agency violated her veterans' preference rights in the context of a reduction in force, IAF, Tab 1 at 3, Tab 6 at 2, and an application for reemployment, PFR File, Tab 1 at 3; IAF, Tab 1 at 2, 4, Tab 6 at 2-3. Veterans' preference requirements may apply to these matters even when they do not involve the evaluation of entrance examinations. *See* 5 U.S.C. chapter 35, subchapter I; *Buckheit v. U.S. Postal Service*, 107 M.S.P.R. 52, ¶¶ 11-13 (2007); *Smith v. U.S. Postal Service*, 81 M.S.P.R. 92, ¶ 12 n.6 (1999); 5 C.F.R. part 302; 5 C.F.R. part 351. The administrative judge, however, failed to address these claims. *See Spithaler v. Office of Personnel Management*, 1 M.S.P.R. 587, 589 (1980) (an initial decision must identify all material issues of fact and law, summarize the evidence, resolve issues of credibility, and include the administrative judge's conclusions of law and his legal reasoning, as well as the authorities on which that reasoning rests). For the reasons explained below, the record on these issues is not sufficiently developed for the Board to make findings on them on review.

¶8 To establish Board jurisdiction over a VEOA claim brought under 5 U.S.C. § 3330a(a)(1)(A), an appellant must (1) show that she exhausted her administrative remedy with the Department of Labor (DOL) and (2) make nonfrivolous allegations that (a) she is a preference eligible within the meaning of

VEOA, (b) the action at issue took place on or after the October 30, 1998 enactment date of VEOA, and (c) the agency violated her rights under a statute or regulation relating to veterans' preference. 5 U.S.C. § 3330a; *Elliott v. Department of the Air Force*, 102 M.S.P.R. 364, ¶ 6 (2006).

¶9 We find that the appellant failed to establish Board jurisdiction over any of her VEOA claims because she did not show that she exhausted her administrative remedy with DOL with respect to the particular agency actions at issue. The only record evidence concerning the exhaustion requirement is a letter from DOL to the appellant, which the agency submitted as part of its response to the jurisdictional order. IAF, Tab 5 at 5. It is unclear, based on this letter alone, that the appellant raised with DOL any of the alleged agency actions that are the subject of this appeal; the letter merely discusses in general terms the appellant's allegations regarding the agency's alleged failure to accommodate her medical conditions and alleged threat to terminate her. *Id*. Because the appellant failed to show that she exhausted her remedy with DOL regarding the particular agency actions at issue in this appeal, she has failed to meet her jurisdictional burden. *See Becker v. Department of Veterans Affairs*, 112 M.S.P.R. 507, ¶ 6 (2009) (the Board will dismiss a VEOA appeal for lack of jurisdiction where the appellant fails to show that he exhausted his remedy with DOL); *see also Shaver v. Department of the Air Force*, 106 M.S.P.R. 601, ¶¶ 10-13 (2007) (VEOA authorizes the Board to consider whether an appellant's veterans' preference rights were violated by particular agency actions, but the appellant must raise each particular action with DOL before the Board's jurisdiction will attach with respect to that action); *cf. Ward v. Merit Systems Protection Board*, 981 F.2d 521, 526 (Fed. Cir. 1992) (to satisfy the exhaustion requirement in an individual right of action appeal, an appellant must inform the Office of Special Counsel of the precise ground of the charge of whistleblowing, giving the Office of Special Counsel a sufficient basis to pursue an investigation that might lead to corrective action). Unless an agency action is appealable to the Board under some other

law, rule, or regulation, VEOA does not permit the Board to consider alleged violations of veterans' preference rights that have not first been raised before DOL. *See* 5 U.S.C. § 3330a(d)(1), (e)(1). We therefore find that the administrative judge erred in finding that the appellant established VEOA jurisdiction over her appeal based on the existing record. *See* ID at 2.

¶*10* Although the appellant had an opportunity to address the jurisdictional issue below, IAF, Tab 3, under the particular circumstances of this case, we find that it would be inappropriate to dismiss the appeal for lack of jurisdiction based on the current record. The agency filed its response to the jurisdictional order before the appellant filed hers, and the agency's submission could be construed as conceding the jurisdictional issue. IAF, Tab 3 at 1, 6-7, Tab 5 at 1-2. Thus, it may not have been clear to this pro se appellant when she later filed her timely response that the jurisdictional issue remained unresolved. Nevertheless, the parties to an appeal may not stipulate to Board jurisdiction, *see Roche v. Department of Transportation*, 110 M.S.P.R. 286, ¶ 11 (2008), *aff'd*, 596 F.3d 1375 (Fed. Cir. 2010), and the agency's apparent concession of the issue may not be dispositive, *see Waldrop v. U.S. Postal Service*, 72 M.S.P.R. 12, 15 (1996) (the Board, as a limited-jurisdiction tribunal, must satisfy itself that it has authority to adjudicate the matter before it, and may raise the question of its own jurisdiction sua sponte at any time). The appellant had no reason to address the jurisdictional issue on review because the administrative judge found jurisdiction over her appeal. ID at 2.

¶*11* To the extent that the appellant failed to establish jurisdiction over her appeal, dismissal for failure to state a claim upon which relief can be granted was not a proper disposition. *See Goldberg v. Department of Homeland Security*, 99 M.S.P.R. 660, ¶ 10 (2005) (where the appellant failed to establish that she exhausted her administrate remedy with DOL, the proper disposition was dismissal for lack of jurisdiction – not dismissal for failure to state a claim); *Young v. Federal Mediation & Conciliation Service*, 93 M.S.P.R. 99, ¶ 5 (2002)

("An appeal *that is within the Board's jurisdiction* can be dismissed, without a hearing, for failure to state a claim upon which relief can [be] granted if the appellant cannot obtain effective relief before the Board even if his allegations are accepted as true.") (emphasis added), *aff'd*, 66 F. App'x 858 (Fed. Cir. 2003). Whether the appellant stated a claim upon which relief can be granted goes to the merits of her case, *Goldberg*, 99 M.S.P.R. 660, ¶ 10; *see Lackhouse v. Merit Systems Protection Board*, 773 F.2d 313, 316-17 (Fed. Cir. 1985), and the Board cannot assume for purposes of analysis that all jurisdictional requirements have been met and resolve a case on the merits, *Schmittling v. Department of the Army*, 219 F.3d 1332, 1336-37 (Fed. Cir. 2000); *Goldberg*, 99 M.S.P.R. 660, ¶ 10 n.2. If the appellant establishes jurisdiction over her appeal on remand, the administrative judge may revisit the issue of whether the appellant has stated a claim upon which relief can be granted. A dismissal for failure to state a claim upon which relief may be granted is based solely on the appellant's allegations, to the exclusion of any record evidence. *See Haasz v. Department of Veterans Affairs*, 108 M.S.P.R. 349, ¶ 8 (2008) ("Disposing of a claim in favor of a defending party, without an evidentiary hearing, and based on matters beyond the claimant's allegations is summary judgment, not dismissal for failing to state a claim upon which relief may be granted."); *Williamson v. U.S. Postal Service*, 106 M.S.P.R. 502, ¶ 9 n.* (2007) ("Because we are considering the documentary evidence, dismissal for failure to state [a] claim upon which relief may be granted would be inappropriate."); *Young*, 93 M.S.P.R. 99, ¶ 5 (a VEOA appeal should be dismissed for failure to state a claim only if "it appears beyond doubt that the appellant can prove no set of facts in support of his claim which would entitle him to relief").

¶12 The remainder of the appellant's claims are outside the scope of this VEOA appeal. Specifically, the Board lacks authority to consider the appellant's disability discrimination claim in the context of a VEOA appeal. PFR File, Tab 1 at 3; IAF, Tab 1 at 2, 4; *see Ruffin v. Department of the Treasury*, 89 M.S.P.R.

396, ¶ 12 (2001), and her restoration and USERRA claims have been docketed for consideration in separate appeals, IAF, Tab 1 at 2-3, Tab 6 at 2-3; *White*, MSPB Docket No. AT-4324-09-0600-I-1; *White*, MSPB Docket No. AT-0353-09-0965-I-1.

ORDER

¶13 Accordingly, we remand the appeal for further adjudication and a new initial decision consistent with this Opinion and Order. On remand, the administrative judge shall afford the appellant an additional opportunity to establish VEOA jurisdiction over her claims that the agency violated her veterans' preference rights in the context of a failure to reassign her, an application for reemployment, and a reduction in force. If the appellant establishes jurisdiction over these claims, the administrative judge shall adjudicate them on the merits. If the parties' submissions show that there is a genuine issue of material fact regarding the appellant's entitlement to relief under VEOA, the administrative judge shall hold a hearing on the appeal as requested by the appellant. *See Ruffin*, 89 M.S.P.R. 396, ¶ 9.

FOR THE BOARD:

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