

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

**2010 MSPB 200**

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Docket No. PH-0353-09-0562-I-1

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**Margaret Ann Jordan,  
Appellant,**

**v.**

**United States Postal Service,  
Agency.**

September 30, 2010

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Richard Heavey, Esquire, Brookline, Massachusetts, for the appellant.

Michael R. Salvon, Esquire, Windsor, Connecticut, 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 restoration appeal for lack of jurisdiction. For the reasons set forth below, we GRANT the petition for review, REVERSE the initial decision, and REMAND the appeal for further adjudication consistent with this Opinion and Order.

**BACKGROUND**

¶2 The appellant is a non-preference eligible Information Clerk at the agency's Boston, Massachusetts General Mail Facility. Initial Appeal File (IAF),

Tab 8 at 82-83. She was working as a Letter Carrier in January 1994 when she fell delivering mail and injured her coccyx, resulting in nerve damage and back pain. *Id.* at 69. The injury of back strain was accepted as compensable by the Office of Workers' Compensation Programs. *Id.* at 87. The appellant suffered permanent physical limitations from the injury. *Id.* at 84-86. She accepted a rehabilitation job offer<sup>1</sup> in November 1996 and worked in modified duties with medical restrictions thereafter. *Id.*, at 5, 84-86. The agency placed the appellant in the Information Clerk assignment in October 2005, in which she performed a variety of light clerical duties. *Id.*, Tab 8 at 83. Her work restrictions were no lifting, pushing, pulling, or carrying over 5-10 pounds, and no extensive walking. *Id.* at 84.

¶3 In 2008, the agency's Boston District began to implement its National Reassessment Process (NRP). *See* IAF, Tab 8 at 74. Under the NRP, the District reviewed rehabilitation and limited duty employees' assignments and medical restrictions and searched for operationally necessary work, to determine if such work was available within the employees' restrictions. *Id.* at 14-15, 70. On May 28, 2009, the agency issued a notice to the appellant in which it informed her that there was no work available for her within the operational needs of the service and her medical restrictions and within the local commuting area. IAF, Tab 8 at 57-58. The notice defined the local commuting area as the 50 miles surrounding the appellant's current work location. *Id.* at 58. In addition, the record contains an affidavit from the Manager, Operations Programs Support, for the Boston District which states that a search was done within that District for

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<sup>1</sup> In the U.S. Postal Service, rehabilitation assignments are a type of limited duty provided to employees who have permanent injuries or have reached maximum medical improvement. *Ancheta v. Office of Personnel Management*, [95 M.S.P.R. 343](#), ¶ 11 n.4 (2003). Limited duty refers to modified work provided to employees who have restrictions due to work-related injuries, in contrast to light duty, which is provided to those with restrictions due to non-work related conditions. *Simonton v. U.S. Postal Service*, [85 M.S.P.R. 189](#), ¶ 8 (2000).

productive work, but none was found within the appellant's restrictions.<sup>2</sup> *Id.* at 14-15.

¶4 The May 28, 2009 notice placed the appellant on administrative leave until June 11, 2009, and provided her with an opportunity to challenge its determinations that there was no work available within her restrictions and of the appropriate job search area. *Id.* at 57-58. On June 11, 2009, the District issued a "Letter of Decision" to the appellant stating that there was no work available for her within "the agreed upon search area," her medical restrictions, and current operational needs. *Id.* at 52. The letter provided the appellant with Board appeal rights. *Id.* at 53. This appeal followed. IAF, Tab 1. In it, the appellant alleged violation of her restoration rights and disability discrimination. *Id.* at 4-5.

¶5 The administrative judge issued an initial decision dismissing the appeal for lack of jurisdiction. IAF, Tab 13. The administrative judge found that the appellant did not establish jurisdiction over her appeal because she made only conclusory allegations that work was available within her restrictions and did not make a nonfrivolous allegation that the agency's actions were arbitrary or capricious. *Id.* at 4. Specifically, the administrative judge concluded, based on the documentary evidence, that the agency searched for work within the appellant's medical restrictions and that "encompassed her local commuting area." *Id.* The administrative judge did not address the additional three criteria for establishing jurisdiction in a restoration appeal.

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<sup>2</sup> The "Necessary Work Identification Worksheets" in the record from various facilities where a job search was done contain the heading "Boston Performance Cluster." IAF, Tab 8 at 16-50. The agency record does not define the term "Boston Performance Cluster," and the agency has not explained if or how the performance cluster boundary differs from the District or a 50-mile radius. We note, however, that evidence in a prior case indicates that a performance cluster is made up of "combined mail processing and customer service activities within the geographical confines of a customer service district." *Hoover v. U.S. Postal Service*, [77 M.S.P.R. 352](#), 364 (1998).

¶6 In her petition for review, the appellant asserts that she was denied a meaningful opportunity for discovery when the administrative judge held in abeyance her motion to compel discovery pending a determination on jurisdiction. Petition for Review (PFR) File, Tab 1 at 2-3. The appellant asserts that discovery would have produced evidence to refute the agency's representations that no work was available for her. *Id.* She also reiterates her contentions on appeal that she could have performed duties being done by other employees in the Boston District and other districts. PFR File, Tab 1 at 4-5. Finally, the appellant contends that the work search documentation relied upon by the administrative judge in finding she failed to nonfrivolously allege that the agency's actions were arbitrary and capricious did not encompass the entire Boston District and did not include the surrounding districts. *Id.* at 4. The agency has filed a response in opposition to the appellant's petition for review.<sup>3</sup> *Id.*, Tab 7.

## ANALYSIS

### Denial of restoration

¶7 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), *abrogated on other grounds by Garcia v. Department of Homeland Security*, [437 F.3d 1322](#) (Fed. Cir. 2006); *Tat v. U.S. Postal Service*, [109 M.S.P.R. 562](#), ¶ 9 (2008). In the case of a partially

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<sup>3</sup> Both parties have submitted numerous documents on petition for review. However, the documents appear to duplicate the submissions on appeal. They are not, therefore, new and material evidence under [5 C.F.R. § 1201.115\(d\)](#), i.e., evidence that was unavailable before the record was closed despite the party's due diligence. *Meier v. Department of the Interior*, [3 M.S.P.R. 247](#), 256 (1980) (evidence that is already a part of the record is not new).

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 her 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 establish Board jurisdiction over a restoration claim as a partially recovered employee,<sup>4</sup> an 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).

¶9 In this case, the appellant made nonfrivolous allegations satisfying the first three jurisdictional criteria. The appellant’s allegations in this regard are supported by the undisputed record evidence. IAF, Tab 8 at 52, 57, 83-87; *see Brehmer v. U.S. Postal Service*, [106 M.S.P.R. 463](#), ¶ 9 (2007) (discontinuation of a limited duty position may constitute a denial of restoration for purposes of

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<sup>4</sup> In this case, it appears that the conditions underlying the appellant’s medical restrictions are “permanent and stationary,” and that the appellant is therefore “physically disqualified” as that term is defined under [5 C.F.R. § 353.102](#). IAF, Tab 8 at 84, 86. However, because more than 1 year has passed since the appellant was first eligible for workers’ compensation, the administrative judge correctly analyzed the appellant’s restoration rights as those of a partially recovered employee. IAF, Tab 13 at 3; *see Kravitz v. Department of the Navy*, [104 M.S.P.R. 483](#), ¶ 5 (2007); 5 C.F.R. § 353.301(c), (d).

Board jurisdiction under 5 C.F.R. part 353). Thus, the first three jurisdictional criteria for the appellant's restoration claim as a partially recovered employee are satisfied. *See Chen*, [97 M.S.P.R. 527](#), ¶ 13; [5 C.F.R. § 353.304\(c\)](#).

¶10 Although the appellant's submissions themselves are insufficient to satisfy the fourth jurisdictional criterion, we find that the agency's documentary submissions are sufficient to render nonfrivolous the appellant's allegation that the denial of restoration was arbitrary and capricious. *Sanchez v. U.S. Postal Service*, [114 M.S.P.R. 345](#), ¶ 12 (2010); *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. *Sanchez*, [114 M.S.P.R. 345](#), ¶ 12; *see Sapp v. U.S. Postal Service*, [73 M.S.P.R. 189](#), 193-94 (1997).

¶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). 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. *Sanchez*, [114 M.S.P.R. 345](#), ¶ 13.

¶12 In this case, the agency's evidence indicates that it searched for a suitable position for the appellant within a 50-mile radius of her existing work location, but only within the Boston District. IAF, Tab 8 at 14-50, 57-58, 61, 63, 76-77; PFR File, Tab 7 at 8, 10. Because the agency's search was apparently limited to a 50-mile radius and a single district, whether the agency searched the entire local commuting area remains an unanswered question of material fact. Evidence that the agency failed to search the entire local 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 Sanchez*, [114 M.S.P.R. 345](#), ¶ 14.

¶13 Although the documentary evidence suggests that the agency failed to search the entire local commuting area, the evidence in the record is insufficient for the Board to determine the extent of the local commuting area on review. Therefore, in the interest of justice, we remand the appeal for further development on this issue, including the opportunity for further discovery by the parties.<sup>5</sup> *See Sanchez*, [114 M.S.P.R. 345](#), ¶ 15 (citing *Sapp*, 73 M.S.P.R. at 193-94 (remanding 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)). On remand, the administrative judge shall

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<sup>5</sup> Because we are remanding this matter for proceedings on the merits, including a renewed opportunity for discovery, we need not address the appellant's contention on petition for review that she was denied a meaningful opportunity for discovery during the proceedings on jurisdiction.

afford the appellant her requested hearing. *Vazquez v. U.S. Postal Service*, [114 M.S.P.R. 264](#), ¶ 15 (2010).

#### Disability Discrimination Claim

¶14 Because the Board has jurisdiction to consider the merits of the restoration appeal, the Board also has jurisdiction to consider the appellant's disability discrimination claim. [5 U.S.C. § 7702\(a\)\(1\)](#); *Sanchez*, [114 M.S.P.R. 345](#), ¶ 14. As discussed in *Sanchez*, [114 M.S.P.R. 345](#), ¶ 18, 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. 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. *Sanchez*, [114 M.S.P.R. 345](#), ¶ 18.

¶15 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. *Luna v. U.S. Postal Service*, [114 M.S.P.R. 273](#), ¶ 16 (2010); *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. *Luna*, [114 M.S.P.R. 273](#), ¶ 16. "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." *Id.* (quoting *Collins v. U.S. Postal Service*, [100 M.S.P.R. 332](#), ¶ 11 (2005)).

ORDER

¶16 Accordingly, we reverse the initial decision and remand the appeal to the Northeastern 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.