UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 204

Docket No. SF-0353-09-0574-I-1

Sandra M. Soto,

Appellant,

v.

United States Postal Service,

Agency.

October 25, 2010

Sandra M. Soto, Azusa, California, pro se.

Afshin Miraly, 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 non-preference eligible Mail Processing Clerk at the agency's Pasadena Processing and Distribution Center (P&DC). Initial Appeal File (IAF), Tab 1 at 1, Tab 10, Subtab 4L. On September 18, 2005, the appellant suffered a compensable injury and thereafter began work in a series of limited duty assignments,[1] most recently in an assignment where she was required to perform various sorting, casing, and internal mail processing functions for 8 hours per day. IAF, Tab 6, Subtabs 1-7, Tab 10, Subtabs 4N-4Q.

¶3 In 2009, the Sierra Coastal District, of which the Pasadena P&DC is a part, began to participate in a National Reassessment Process (NRP) Pilot Program. IAF, Tab 18 at 18-19. Under the NRP, supervisors and managers of employees performing limited duty review those employees' assignments to ensure that they are consistent with the employees' medical restrictions and contain only "operationally necessary tasks." IAF, Tab 10, Subtab 4M at 107, Tab 18 at 21-23. If a limited duty assignment does not meet these criteria, the NRP prescribes procedures for identifying and offering alternative limited duty assignments that do meet the criteria. IAF, Tab 18 at 23-26. If the supervisor or manager is unable to identify any operationally necessary tasks available within the employee's work restrictions, the employee will be placed on leave until such work becomes available or his medical restrictions change. *Id*. at 24-25, 27. If there are operationally necessary tasks available within the employee's work restrictions, but not enough to provide the employee with a full day's work, the employee will be scheduled to work partial days, i.e., she will remain in duty status long enough to complete the operationally necessary tasks available and be

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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).

placed on leave for the remainder of the workday. *Id*. at 26. This arrangement will continue until either the availability of work or the employee's medical restrictions change. *Id*. at 26-27. During the employee's absence, she will account for work hours through the use of approved leave, leave without pay, or a continuation of pay.[2] *Id*. at 24-26.

¶4 On April 9, 2009, the agency issued the appellant a letter stating in relevant part that, because there was no operationally necessary work available for the appellant within her medical restrictions and within her regular duty hours at the Pasadena P&DC, the appellant should not report again for duty unless she was informed that such work had become available. IAF, Tab 10, Subtab 4I. During this absence, the agency directed the appellant to account for her work hours through the use of leave or continuation of pay. *Id*.

¶5 The appellant filed a Board appeal of the agency's action, alleging that the agency improperly denied her restoration and that the agency's action constituted disability discrimination. IAF, Tab 1 at 2-3, 5. The administrative judge notified the appellant of her burden of establishing Board jurisdiction over a restoration appeal and ordered her to file evidence and argument on the issue.[3] IAF, Tab 2 at 2-4, Tab 13 at 2-6. The appellant responded, addressing the pertinent issues. IAF, Tabs 6, 17. The agency also responded, arguing that the Board lacks jurisdiction over the appeal. IAF, Tab 10 at 6-15, Tab 18 at 7-12. The appellant withdrew her disability discrimination claim and her request for a hearing. IAF,

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[2] The right to continuation of pay is governed by 20 C.F.R. part 10, subpart C.

[3] The appellant also alleged that the agency's action constituted a constructive suspension. IAF, Tab 17 at 1-2. Although the administrative judge did not adjudicate the constructive suspension issue, the appellant's substantive rights were not prejudiced because she would be unable to establish Board jurisdiction over such a claim. *See Kinglee v. U.S. Postal Service*, 114 M.S.P.R. 473, ¶¶ 16-22 & n.4 (2010); *see also Panter v. Department of the Air Force*, 22 M.S.P.R. 281, 282 (1984) (an adjudicatory error that is not prejudicial to a party's substantive rights provides no basis for reversal of an initial decision).

Tab 1 at 2-3, Tab 7, Tab 14 at 2-3, Tab 15. During the pendency of the appeal, on May 19, 2009, the appellant accepted the agency's offer of a part-time limited duty assignment of 3 hours per day. IAF, Tab 6, Subtab 10.

¶6 The administrative judge issued an initial decision dismissing the appeal for lack of jurisdiction. IAF, Tab 21, Initial Decision (ID) at 1, 15. She found that, although the appellant made nonfrivolous allegations satisfying the first three jurisdictional criteria for a restoration appeal as a partially recovered employee, the appellant failed to make a nonfrivolous allegation that the agency's denial of restoration was arbitrary and capricious. ID at 8-15. The administrative judge discussed the part-time limited duty assignment that the appellant received on May 19, 2009, but she determined that it was immaterial to the outcome of the appeal. ID at 8-11.

¶7 The appellant has filed a petition for review, arguing that the administrative judge erred in finding that she failed to make a nonfrivolous allegation that the agency's discontinuation of her limited duty assignment constituted an arbitrary and capricious denial of restoration.[4] Petition for Review File (PFR File), Tab 1 at 3. She argues that the administrative judge erred by failing to follow an arbitration decision that she submitted into the record below, *id.*; IAF, Tab 6, Subtab 11, and she alleges that the agency might rescind her part-time limited duty assignment at any time, PFR File, Tab 1 at 3. The agency has not filed a response.

ANALYSIS

Denial of Restoration

¶8 The Federal Employees' Compensation Act and its corresponding regulations at 5 C.F.R. part 353 provide that federal employees who suffer

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[4] The petition for review was untimely filed. PFR File, Tabs 1, 2. However, we find good cause to waive the filing deadline in this case. *See* 5 C.F.R. § 1201.114(f). We also note that the agency has not alleged prejudice from the delay.

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 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.[5] *Delalat v. Department of the Air Force*, 103 M.S.P.R. 448, ¶ 17 (2006); 5 C.F.R. §§ 353.102, 353.301(d).

¶9 "An individual who is partially recovered from a compensable injury may appeal to 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, an 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).

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[5] It appears that the appellant's medical conditions are permanent and stationary. IAF, Tab 6 at 4, 6, Tab 10, Subtab 4P. Therefore, the appellant may be "physically disqualified" as that term is 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 found that she is entitled to the restoration rights of a partially recovered employee. ID at 7-8 & n.4; *see Kravitz v. Department of the Navy*, 104 M.S.P.R. 483, ¶ 5 (2007); 5 C.F.R. § 353.301(c), (d).

¶10 For the reasons explained in the initial decision, the appellant made nonfrivolous allegations sufficient to satisfy the first three jurisdictional criteria. ID at 8-9 & n.5; IAF, Tab 6 at 4-7. The agency argued below that the appellant was not denied restoration because it eventually awarded her a part-time limited duty assignment. IAF, Tab 18 at 8. However, the administrative judge correctly found that the appellant was denied restoration from April 9, 2009, when the agency discontinued her former full-time limited duty assignment, until at least May 12, 2009, when the agency offered her the part-time limited duty assignment. ID at 8-9; IAF, Tab 6, Subtab 10, Tab 10, Subtab 4I. The appellant's allegations are supported by documentary evidence, IAF, Tab 6, Subtabs 1-7, 15-16, Tab 17, Subtabs 2-4, and the agency has not challenged the administrative judge's findings on review.

¶11 Regarding the fourth jurisdictional criterion, we agree with the administrative judge that the appellant's submissions themselves fail to raise a nonfrivolous allegation that the agency's denial of restoration was arbitrary and capricious, ID at 11-15, and we find that the appellant's arguments on review provide no basis to disturb the administrative judge's finding, PFR File, Tab 1 at 3. The appellant argued that she was entitled to remain in her limited duty assignment regardless of whether her duties were operationally necessary. IAF, Tab 6 at 8, Tab 17 at 4. However, the Board has previously rejected this argument, finding that the limited duty assignments of current employees are contingent upon there being necessary and available work for them to perform in furtherance of the agency's mission. *See Chen v. U.S. Postal Service*, 114 M.S.P.R. 292, ¶ 10 & n.3 (2010). The appellant also argued that other employees continue to perform the tasks of her former limited duty assignment. IAF, Tab 6 at 6, Tab 17 at 2. However, the Board has previously rejected this argument as well, finding that the agency has the authority to economize its operations by consolidating the tasks being performed by limited duty employees and reassigning them to the non-limited duty employees who would be otherwise

performing them. *See Hunt v. U.S. Postal Service*, 114 M.S.P.R. 379, ¶ 11 (2010). The appellant further argued that the agency's decision to discontinue her limited duty assignment was not based on an individualized assessment, IAF, Tab 6 at 8, Tab 17 at 4, but she has not alleged any facts to support her claim, which is unsupported by the record, IAF, Tab 10, Subtab 4I; *see Urena v. U.S. Postal Service*, 113 M.S.P.R. 6, ¶ 11 (2009) ("Facts without support do not constitute nonfrivolous allegations."). Likewise, the appellant has not alleged any facts to support her bare assertion that there are 8 hours of daily work available within her medical restrictions. IAF, Tab 17 at 2.

¶12 The appellant argues on review that the administrative judge erred in finding that a particular arbitration decision, *In re Arbitration between U.S. Postal Service and American Postal Workers Union*, Case No. E90C-4E-C 95076238 (2002) (Das, Arb.), does not support her claim that the denial of restoration was arbitrary and capricious. PFR File, Tab 1 at 3; IAF, Tab 6 at 7-8, Subtab 11, Tab 17 at 3. However, the administrative judge correctly found that the appellant's arguments regarding that arbitration decision do not constitute a nonfrivolous allegation that the agency's action was arbitrary and capricious. ID at 11-13; *see Chang v. U.S. Postal Service*, 114 M.S.P.R. 258, ¶ 8 (2010). The appellant also argues that the agency might discontinue her part-time limited duty assignment at any time, PFR File, Tab 1 at 3, but even so, speculation as to future agency actions cannot bring the instant appeal within the Board's jurisdiction, *cf. Larkin v. Veterans Administration*, 6 M.S.P.R. 245, 247 (1981) (speculation that a removal may occur in the future does not bring an appeal within the Board's jurisdiction). The remainder of the appellant's arguments on review constitute mere disagreement with the initial decision and therefore provide no basis to grant the petition for review. PFR File, Tab 1 at 3; *see 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) (mere disagreement with the administrative judge's findings

and credibility determinations does not warrant full review of the record by the Board).

¶13 Although the appellant's documentary submissions themselves are insufficient to satisfy the fourth jurisdictional criterion, the agency's documentary submissions are sufficient to render nonfrivolous the appellant's allegation that the denial of restoration was arbitrary and capricious. *See, e.g.*, *Sanchez v. U.S. Postal Service*, 114 M.S.P.R. 345, ¶¶ 12-14 (2010); *see also 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 her 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).

¶14 "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. *E.g.*, *Sanchez*, 114 M.S.P.R. 345, ¶ 13.

¶15 In this case, the agency submitted evidence showing that it searched for a suitable position for the appellant only at the Pasadena P&DC. IAF, Tab 10, Subtabs 4E, 4I. Unless the Pasadena P&DC is the only agency facility in the local commuting area, the applicable regulation requires a more extensive search. *See* 5 C.F.R. § 353.301(d). However, it does not appear that the agency's search was actually limited to the Pasadena P&DC because the appellant's current part-time limited duty assignment is at the West Arcadia Post Office, a facility apparently separate from the Pasadena P&DC. IAF, Tab 6, Subtab 10, Tab 18 at 7. Nevertheless, this evidence does not suggest that the agency searched the entire local commuting area, and in light of the other evidence suggesting that the agency did not search the entire local commuting area, the record as a whole suggests that the agency failed to search the entire local commuting area as required by OPM's regulation. *See* 5 C.F.R. § 353.301(d). 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 Sanchez*, 114 M.S.P.R. 345, ¶ 14; *Barachina v. U.S. Postal Service*, 113 M.S.P.R. 12, ¶ 7 (2009). Because the appellant made nonfrivolous allegations satisfying all of the jurisdictional criteria, we find that the Board has jurisdiction to consider the merits of her restoration appeal. *See Sanchez*, 114 M.S.P.R. 345, ¶ 14.

¶16 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 reopen the record for further development on this issue, including the opportunity for further discovery by the parties. *See Sanchez*, 114 M.S.P.R. 345, ¶ 15; *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).

Part-Day Restoration

¶17 The agency argued that it restored the appellant to duty on or about May 19, 2009, when it provided her with a part-time limited duty assignment of 3 hours per day. IAF, Tab 6, Subtab 10, Tab 18 at 8. The administrative judge discussed, but did not resolve the issue of whether the April 9, 2009 denial of restoration continued after the date of the part-day restoration. ID at 8-11. Because it will likely be necessary to resolve this issue in adjudicating the merits of the appeal, we address it on review.

¶18 The Board has found that when the agency awards an employee a full-time limited duty assignment and then reduces the employee's hours to part time under the NRP, the agency has denied the employee restoration. *Kinglee v. U.S. Postal Service*, 114 M.S.P.R. 473, ¶¶ 13-14 (2010). The facts of the instant appeal are somewhat different than in *Kinglee* because the appellant in this case was completely out of work for over a month between the date that the agency discontinued her full-time limited duty assignment and the date that it returned her to limited duty part time, IAF, Tab 6, Subtab 10, Tab 10, Subtab 4I, whereas the appellant in *Kinglee* was never out of work entirely, but went directly from a full-time limited duty assignment to a part-time limited duty assignment, 114 M.S.P.R. 473, ¶¶ 3-4. Nevertheless, we see no material distinction between the two cases, and we find that the merits of the agency's decision to restore the appellant to part-time limited duty rather than full-time limited duty is within the Board's jurisdiction under the particular circumstances of this case. *See Kinglee*, 114 M.S.P.R. 473, ¶¶ 14-15.

ORDER

¶19 Accordingly, we reverse the initial decision and remand the appeal to the Western Regional Office for further adjudication of the appeal consistent with this Opinion and Order.

FOR THE BOARD:

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