UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 205

Docket No. SF-0353-10-0212-I-1

Mari C. Rodriguez-Moreno,
Appellant,
v.
United States Postal Service,
Agency.

October 27, 2010

Mari C. Rodriguez-Moreno, Berkeley, California, pro se.

Monique L. Rutter, Esquire, San Francisco, 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 GRANT the petition for review, VACATE the initial decision, and REMAND the appeal for jurisdictional findings and further adjudication, if appropriate, consistent with this Opinion and Order.

BACKGROUND

¶2 The appellant is a non-preference eligible Sales Services Distribution Associate at the Berkeley Main Post Office, which is part of the Bay Valley

District. Initial Appeal File (IAF), Tab 1; *id.*, Tab 6, Subtab 4B at 1. On July 26, 2007, and February 4, 2008, she suffered on-the-job injuries, and she partially recovered, albeit with restrictions on the amount and type of work that she could perform. *See* IAF, Tab 6 at 11; *id.*, Subtab 4J at 5, (June 10, 2009 disability certificate), 9, 14. On June 26, 2009, the appellant accepted an offer of a modified limited duty assignment.[1] IAF, Tab 6, Subtab 4j at 4.

¶3 The Bay Valley District began participating in the National Reassessment Process (NRP), which requires supervisors and managers to identify operationally necessary tasks that will comprise work assignment offers made to employees with an approved compensable injury who have reached maximum medical improvement. IAF, Tab 6, Subtab 4A at 1. In May 2009, the Bay Valley District completed Phase 1, which focused on injured employees' records and required a review and updating of these records so that the agency had the employee's most current medical restrictions, a recent rehabilitation work assignment offer that reflected the actual tasks being performed by the employee, verification that the employee's current work tasks complied with the employee's most recent medical restrictions, and a recent Standard Form 50. *Id.* at 2. The Bay Valley District began Phase 2 in June 2009, and during this phase, the agency focused on the identification of the cumulative tasks available at each postal facility for the construction of work assignment offers. *Id.* at 2-3. To that end, each postal facility in the Bay Valley District was required to submit a worksheet of operationally necessary tasks at its respective sites. *Id.* at 3.

¶4 On November 4, 2009, the agency issued the appellant a letter, pursuant to the NRP, Phase 2, Limited Duty, which stated there was no operationally

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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 non-work-related injuries. *Simonton v. U.S. Postal Service*, 85 M.S.P.R. 189, ¶ 8 (2000).

necessary work available for her within her medical restrictions, in all crafts and on all tours within her facility and throughout the local commuting area within the District boundaries, and advising her that she should not report back for duty unless she was informed that necessary work tasks have been identified for her within her medical restrictions. IAF, Tab 1 at 8. During this absence, the agency directed the appellant to account for her work hours through the use of continuation of pay (if eligible), leave or leave without pay (injury on duty). *Id.*

¶5 On December 4, 2009, the appellant filed a Board appeal, alleging that the agency improperly denied her restoration and that its action was the result of prohibited discrimination, and she requested a hearing. *Id.* at 2, 5. The administrative judge issued an Acknowledgment Order, explaining that the Board does not have jurisdiction over all agency actions that are alleged to be incorrect, providing the appellant with notice of her burden to make nonfrivolous allegations of fact, which, if proven, would establish Board jurisdiction over her claim that the agency violated her restoration rights as a partially recovered employee under 5 C.F.R. part 353, at which point she would be entitled to a hearing, and ordering her to file evidence and/or argument on the jurisdictional issue. IAF, Tab 2 at 2-4.

¶6 The appellant responded to this Order, claiming that the agency failed to do a proper search for work for her within the local commuting area and explaining that other employees are performing the work that she used to perform. IAF, Tab 4. The agency filed a motion to dismiss, to which the appellant responded. IAF, Tabs 6, 7. The administrative judge issued another Order, reiterating the appellant's jurisdictional burden. *See* IAF, Tab 8. The appellant filed further submissions, in which she appeared to allege disability discrimination based on an alleged failure to accommodate. *See* IAF, Tabs 10, 11.

¶7 The administrative judge issued an initial decision, in which he found that the appellant made nonfrivolous allegations that she was absent from her position due to a compensable injury and that 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. IAF, Tab 14 at 3-5. He also found that she nonfrivolously alleged that the agency denied her request for restoration when it directed her to leave for the remainder of the workday on November 4, 2009, and not to report back for duty unless she was contacted. *See id.* at 6. However, he concluded that she failed to make a nonfrivolous allegation that the agency's discontinuation of her limited duty assignment was an arbitrary and capricious denial of restoration because she identified no facts to support her assertion that the agency made an insufficient search of the local commuting area and she did not explain how the agency's action violated the collective bargaining agreement, the NRP, or the relevant employee labor provisions. *Id.* at 6-8. Because the administrative judge found that the Board lacks jurisdiction over the appellant's restoration appeal, he stated that he lacked the authority to adjudicate her disability discrimination claim, and he dismissed the appeal without a hearing. *Id.* at 1, 8-9.

¶8 The appellant filed a timely petition for review, and the agency filed a response. Petition for Review (PFR) File, Tabs 1, 3. On review, the appellant argues that, at the time she was directed not to report to duty, the agency had not searched for operationally necessary tasks beyond her facility, that the agency did not conduct its "out of facility" search until 6 days later, on November 10, 2009, and that the agency's submissions did not show that a search for operationally necessary tasks was made within a 50-mile radius. PFR File, Tab 1 at 1-2. In particular, she alleges that offices in San Francisco, within 50 miles of Berkeley, were not searched, and that the agency incorrectly indicated that San Francisco and Sacramento had been searched. *Id.* at 2. The appellant includes two exhibits on review: an excerpt from the Employee Labor Manual (ELM) discussing the procedures for when an employee has partially overcome an injury or disability, and an April 20, 2010 correspondence from the North Berkeley Station,

indicating that a certain employee no longer works in that office, and that this employee left more than a few years ago. *Id.*, Exhibits 1-2.

ANALYSIS

Denial of Restoration

¶9 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 recovered employee,[2] *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).

¶10 "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, an appellant must make a nonfrivolous allegation that: (1) she was absent from her position due to a compensable injury; (2) she recovered

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[2] Even if the appellant was a "physically disqualified employee" as described in 5 C.F.R. § 353.102, because more than one year has passed since she was first eligible for workers' compensation, she is entitled to the restoration rights of a partially recovered employee. *See Kravitz v. Department of the Navy*, 104 M.S.P.R. 483, ¶ 5 (2007); 5 C.F.R. § 353.301(c), (d).

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).

¶11 As discussed in the initial decision, the appellant made nonfrivolous allegations satisfying the first three jurisdictional criteria. IAF, Tab 14 at 5-6; *see Brehmer v. U.S. Postal Service*, 106 M.S.P.R. 463, ¶ 9 (2007) (discontinuation of a limited duty assignment may constitute a denial of restoration for purposes of Board jurisdiction under 5 C.F.R. part 353). The appellant's documentary submissions are themselves insufficient to satisfy the fourth jurisdictional criterion; thus, we have considered the agency's documentary submissions to determine if the appellant made a nonfrivolous allegation that the denial of restoration was arbitrary and capricious. *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).

¶12 The Office of Personnel Management's (OPM's) 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. *See Sanchez v. U.S. Postal Service*, 114 M.S.P.R. 345, ¶ 12 (2010); *Sapp v. U.S. Postal Service*, 73 M.S.P.R. 189, 193-94 (1997).

¶13 "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.

¶14 In this case, the agency's documentary submissions show that on October 15, 2009, agency supervisor/manager Ben Skiles noted that he searched for available work and was unable to identify operationally necessary tasks for the appellant within her current medical restrictions, including all crafts and on all tours, within her facility. IAF, Tab 6, Subtab 4J at 1. On November 10, 2009, agency supervisor/manager Rose Chat noted that she searched within 50 miles of Berkeley for available work and was unable to identify operationally necessary tasks for the appellant within her current medical restrictions, including all crafts and on all tours, and outside the facility of Berkeley Station A.[3] *Id.* at 2. Ms. Chat also noted that she conducted a 50-mile search outside of the Bay Valley District, within the appellant's current medical restrictions, including all crafts and on all tours, outside the facility of Berkeley Station A. *Id.* Ms. Chat further noted that a Necessary Operational Task search was conducted for the appellant

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[3] The appellant claims on review that she worked at the Berkeley Main Post Office, not the Berkeley Station A facility. PFR File, Tab 1 at 3. We note that these offices are at two different locations, *see* IAF, Tab 4, Subtab 4J at 18, and the agency's own submissions show that the appellant worked at the Berkeley Main Post Office, *see id.* at 1, 4, 14. It therefore appears that Ms. Chat's search for available work for the appellant may have been based on an improper work facility.

"*within [] 50 miles into the San Francisco and Sacramento Districts*, and there was no Operational Work available for a Complete Day No Work for this employee from the facility of Berkeley Station A," and she included a notation, directing the reader's attention to the attachment for the offices searched. *Id.* (emphasis supplied).

¶15 In its submissions, the agency did not specifically define the term "local commuting area," but it implied that the search that it allegedly undertook, *i.e.*, within the Bay Valley District, 50 miles outside of the Bay Valley District, and 50 miles into the San Francisco and Sacramento Districts, constituted a search of the local commuting area.[4] *See* IAF, Tab 6 at 11 ("Per the NRP and prior to her being sent home, a search for work within her facility and local commuting area was conducted."). On petition for review, the appellant asserts that the agency's documents do not show that it actually searched each office within a 50-mile radius, and she claims that the agency failed to search offices in San Francisco and possibly in Sacramento. PFR File, Tab 1 at 2-3. Further, the agency's submissions do not reflect the efforts, described by Ms. Chat, to search for operationally necessary tasks for the appellant outside of the Bay Valley District. For instance, the agency included a document which appeared to show that there were 46 offices in the Bay Valley District, including the "San Francisco BMC" and "San Francisco BMC-REG." *See* IAF, Tab 6, Subtab 4J at 12-13 (showing the agency's efforts to identify operationally necessary tasks for employee #33, not the appellant[5]). However, the record does not include any information

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[4] This appeal is distinguishable from *Sanchez*, 114 M.S.P.R. 345, ¶ 14, *Sandoval v. U.S. Postal Service*, 114 M.S.P.R. 302, ¶ 13 (2010), *Luna v. U.S. Postal Service*, 114 M.S.P.R. 273, ¶ 12 (2010), and *Chang v. U.S. Postal Service*, 114 M.S.P.R. 258, ¶ 11 (2010), because, here, the agency did not claim that its search for available work in the local commuting area was limited to a single District.

[5] The appellant was identified as employee #35 in the agency's submissions. *See* IAF, Tab 6, Subtab 4J at 14.

identifying all the local commuting area offices that are included in the San Francisco and Sacramento Districts or the boundaries between these Districts and the Bay Valley District.

¶16 The agency provided a chart, purportedly showing that it conducted a limited duty search of the local commuting area within 50 miles as part of the NRP Phase 2, and that, with respect to employees #33-41, the agency completed its search of the "LCA Within Bay Valley" on October 27, 2009, and it completed its "Outside Bay Valley" search on November 3, 2009. *Id.* at 15-16. There was also a "Caller List," which appears to show that, as part of its 50-mile search response, 33 offices were contacted regarding operationally necessary tasks for employees #33-41. *Id.* at 17. Finally, the agency sent an e-mail to approximately 60 offices as part of its 50-mile search for operationally necessary tasks for employees #33-41, and it received responses from many of those offices. IAF, Tab 6, Subtab 4K. However, we cannot discern from the agency's evidence which offices, if any, included on the Caller List or on the e-mail were outside of the Bay Valley District and/or in the San Francisco or Sacramento Districts.

¶17 Evidence that the agency failed to search the local commuting area, as required by 5 C.F.R. § 353.301(d), would constitute a nonfrivolous allegation that the agency acted arbitrarily and capriciously in denying restoration. *See Chang*, 114 M.S.P.R. 258, ¶ 11 (citing *Barachina v. U.S. Postal Service*, 113 M.S.P.R. 12, ¶ 7 (2009), and *Urena v. U.S. Postal Service*, 113 M.S.P.R. 6, ¶ 13 (2009)). The administrative judge remarked in the initial decision that the evidence showed that the agency "searched within and beyond the appellant's assigned facility, including facilities outside of broader Bay Valley District, within the appellant's local [commuting] area." IAF, Tab 14 at 8. However, he did not note the discrepancy in the agency's evidence, discussed above, nor did he make explicit findings as to what constituted the local commuting area. Without a finding of what constitutes the local commuting area in this appeal, and an explanation of which offices outside of the Bay Valley District were actually

searched, we cannot determine if the appellant made a nonfrivolous allegation that the agency acted arbitrarily and capriciously in denying restoration. Accordingly, we are vacating the initial decision and remanding the appeal. On remand, the administrative judge shall make a finding as to what constitutes the applicable local commuting area in this case and he shall determine if the appellant satisfied her jurisdictional burden. *See Sanchez*, 114 M.S.P.R. 345, ¶ 15; *Chen*, 114 M.S.P.R. 292, ¶ 14; *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). In doing so, he shall oversee further development of the record by the parties, including an opportunity for discovery, and a hearing. *See Chen*, 114 M.S.P.R. 292, ¶ 14.

Disability discrimination

¶18 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 v. U.S. Postal Service*, 104 M.S.P.R. 387, ¶ 29, *aff'd*, 250 F. App'x 332 (Fed. Cir. 2007). Therefore, if the administrative judge finds that jurisdiction has been established over the restoration appeal, he shall also adjudicate the appellant's disability discrimination claim.

¶19 In this case, the agency argued that the appellant's disability discrimination claim was 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 6 at 16-18. Specifically, the agency argued that the appellant, as a limited duty employee who is subject to the NRP, may be eligible to become a member of the *McConnell* class,[6] and a binding

[6] The EEOC administrative judge recommended defining the *McConnell* class as "All permanent rehabilitation employees and limited duty employees at the Agency who

election was made for her; thus, she may only proceed with such claims in the *McConnell* class. IAF, Tab 6 at 17-18. The administrative judge rejected this argument in the initial decision. IAF, Tab 14 at 3-4. As we recently discussed in *Sandoval*, 114 M.S.P.R. 302, ¶ 16, and *Luna*, 114 M.S.P.R. 273, ¶ 15, *McConnell* is not a mixed case complaint; therefore, the appellant's alleged membership in the *McConnell* class does not divest the Board of jurisdiction over any aspect of her Board appeal.

¶20 Also, as we discussed in *Sandoval*, 114 M.S.P.R. 302, ¶ 17, and *Sanchez*, 114 M.S.P.R. 345, ¶ 18, the agency's 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. Here, 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. *Sandoval*, 114 M.S.P.R. 302, ¶ 17; *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. *Sandoval*, 114 M.S.P.R. 302, ¶ 17. "Both parties . . . have an obligation to assist in the search for an appropriate

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have been subjected to the NRP from May 5, 2006 [] to the present, allegedly in violation of the Rehabilitation Act of 1973." IAF, Tab 6, Subtab 4H at 24. 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 (January 14, 2010); *see generally* 29 C.F.R. §§ 1614.204, .403-.405.

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

¶21 Accordingly, we vacate the initial decision and remand the appeal to the Western Regional Office for jurisdictional findings, and if appropriate, further development of the record, a hearing, and adjudication of the appellant's restoration appeal and disability discrimination claim, consistent with this Opinion and Order.

FOR THE BOARD:

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