UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 206

Docket No. SF-0353-09-0676-I-1

Cynthia A. Nevers,

Appellant,

v.

United States Postal Service,

Agency.

October 28, 2010

Cynthia A. Nevers, 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 filed a petition for review of the initial decision that dismissed her restoration to duty appeal for lack of jurisdiction. We find that the petition does not meet the criteria for review set forth at 5 C.F.R. § 1201.115(d) and therefore DENY it. We REOPEN the appeal on our own motion under 5 C.F.R. § 1201.118, however, REVERSE the initial decision and REMAND the appeal for further adjudication.

BACKGROUND

¶2 The appellant is employed by the agency as a Mail Processing Clerk at the agency's Pasadena Processing and Distribution Center (P&DC) in Pasadena, California. Initial Appeal File (IAF), Tab 1 at 1, 10. On November 30, 1999, she suffered an injury to her wrists, elbows, and shoulders while performing her duties. IAF, Tab 5 at 15. On August 24, 2000, the Office of Workers' Compensation Programs accepted the appellant's claim for compensation arising out of her November 1999 injury. *Id.*

¶3 On August 5, 2002, the agency offered the appellant a full-time rehabilitation job offer as a Flat Sorter Operator. IAF, Tab 5 at 18. The appellant accepted the offer on August 7, 2002. *Id.* It appears that the appellant remained in that rehabilitation job for more than 6 years. On March 23, 2009, the agency informed the appellant that it was reconfiguring her position as a Mail Processing Clerk. *Id.* at 40.

¶4 Effective April 9, 2009, the appellant accepted a modified job assignment working 4.5 hours per day. IAF, Tab 6 at 58. The agency informed her that in connection with its National Reassessment Process (NRP), it had searched for operationally necessary tasks meeting her medical restrictions within her regular hours of duty and within the same facility, but that it was unable to identify enough available operationally necessary work in order for her to work a full day. *Id.* at 83. Effective May 19, 2009, the appellant accepted a new modified job offer working 2 hours per day. IAF, Tab 5 at 30. On May 22, 2009, the agency informed the appellant that it was unable to identify any operationally necessary tasks within her medical restrictions, her regular duty hours, and the same facility, and it instructed her not to report to work unless it contacted her. IAF, Tab 6 at 60.

¶5 The appellant filed a Board appeal on June 4, 2009, seeking to be returned to full-time work. IAF, Tab 1. She made, but later withdrew, a hearing request. *Id.*, Tabs 1, 12. The administrative judge issued an Acknowledgment Order and

Order to Show Cause setting forth the standards for establishing Board jurisdiction over a restoration claim as a partially recovered employee. *Id.*, Tabs 2, 7. Both parties responded regarding jurisdiction. *Id.*, Tabs 5, 6, 10, 11.

¶6 On September 21, 2009, the administrative judge issued an initial decision dismissing the appeal for lack of jurisdiction. IAF, Tab 14. He found that the appellant failed to make a nonfrivolous allegation that she was denied restoration with respect to the agency's offer of less than full-time work on April 9, 2009. *Id.* at 6-7. The administrative judge further found that the appellant made a nonfrivolous allegation that the agency's action in sending her home without any work beginning May 22, 2009, was a nonfrivolous allegation that she was denied restoration. *Id.* at 7. However, the administrative judge found that the appellant failed to make a nonfrivolous allegation that this action was arbitrary and capricious. *Id.* at 7-8. He also held that, assuming the agency's provision of part-time work was a denial of restoration, there also was not a nonfrivolous allegation that it was arbitrary and capricious. *Id.* at 8.

¶7 The appellant has filed a timely petition for review of the initial decision. Petition for Review (PFR) File, Tab 1. She argues that the agency's actions were arbitrary and capricious, and that the administrative judge erred by failing to consider a 2002 arbitration decision. *Id.* at 3. She attached to her petition for review a June 24, 2009 letter from the agency denying her request for reasonable accommodation. *Id.* at 5-6. The agency has not responded to the petition for review.

ANALYSIS

¶8 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, 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).

¶9 "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 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).

¶10 We find that the appellant's argument on review regarding an unspecified 2002 arbitration decision provides no reason to disturb the administrative judge's findings.[*] Accordingly, we deny the petition for review for failure to meet the Board's review criteria under 5 C.F.R. § 1201.115(d). We reopen the appeal on the Board's own motion under 5 C.F.R. § 1201.118, however, to address whether

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[*] We note that we recently held, in a restoration case in which a similar argument was raised, that an arbitration decision which involved a different issue and different employee did not compel a finding in favor of the appellant therein. *Sandoval v. U.S. Postal Service*, 114 M.S.P.R. 302, ¶ 11 (2010) (citing *Horner v. Schuck*, 843 F.2d 1368, 1378 (Fed. Cir. 1988)).

the appellant has established jurisdiction over her restoration claim as a partially recovered employee.

¶11 We find that the appellant has made nonfrivolous allegations satisfying the first two jurisdictional criteria. The record evidence shows that she returned to work after a compensable injury in a position with less demanding physical requirements. IAF, Tab 5 at 15, 18. With respect to the third jurisdictional criterion, the administrative judge correctly found that the appellant made a nonfrivolous allegation that she was denied restoration when she was sent home without any work on May 22, 2009. 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).

¶12 The administrative judge also held that the appellant failed to make a nonfrivolous allegation of denial of restoration when she was given only part-time work from April 9, 2009, through May 21, 2009. The Board has recently held, however, that such a provision of part-time work, i.e., where an agency has partially eliminated previously afforded limited duty pursuant to the NRP, constitutes a nonfrivolous allegation of denial of restoration. *Kinglee v. U.S. Postal Service*, 114 M.S.P.R. 473, ¶ 14 (2010). The Board concluded that "this is not a case where an appellant is challenging the details or circumstances of a restoration but is instead a situation where the agency is rescinding a previously provided restoration." *Id.* Therefore, we find that the appellant has satisfied the third jurisdictional criterion with regard to the agency's provision of only part-time work, as well as its subsequent denial of any work to her, under the NRP.

¶13 Further, we find that the fourth jurisdiction element, which requires the appellant to nonfrivolously allege that the denial was arbitrary and capricious, has been met. *See Barachina v. U.S. Postal Service*, 113 M.S.P.R. 12, ¶ 7 (2010) (although the appellant's allegations alone did not constitute a nonfrivolous allegation that the agency acted arbitrarily and capriciously, the documentary evidence showed that the arbitrary and capricious criterion was met). In *Sanchez*

v. U.S. Postal Service, 114 M.S.P.R. 345, ¶¶ 12-14 (2010), the Board held that a partially recovered appellant satisfies this final jurisdictional requirement where the agency did not examine the entire local commuting area in determining the available work under the NRP, as required under 5 C.F.R. § 353.301(d). "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." *Id.*, ¶ 13 (quoting *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. *Id.*, ¶ 13. 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. *Id.*

¶14 Here, the agency claimed that it searched for operationally necessary work outside the Pasadena P&DC and within a "commutable area," but it found no work for the appellant. IAF, Tab 10 at 6-7. However, it appears from the agency's documentary evidence that it searched for work within the appellant's medical restrictions only at the Pasadena P&DC and other facilities within the agency's Sierra Coastal District. IAF, Tab 6 at 59-110. Evidence that the agency searched only within a single district, when the entire local commuting area may include all or part of other districts, such as Los Angeles and Santa Ana, constitutes a nonfrivolous allegation that the agency acted arbitrarily and capriciously in denying restoration. *Sanchez*, 114 M.S.P.R. 345, ¶ 14. The appellant has therefore met all of the jurisdictional requirements for a restoration claim and is entitled to an adjudication on the merits of her claim.

¶15 The appellant did not raise a claim of disability discrimination before the administrative judge during the jurisdictional proceedings. However, as noted above, she has provided with her petition for review a copy of the agency's June 24, 2009 letter denying her request for reasonable accommodation. PFR File, Tab 1 at 5-6. Therefore, on remand, the administrative judge shall ascertain

whether the appellant intends to raise a claim of disability discrimination. Because the Board has jurisdiction over her restoration claim, the Board also would have jurisdiction over such a disability discrimination claim. *See Kinglee*, 114 M.S.P.R. 473, ¶ 15; *Sanchez*, 114 M.S.P.R. 345, ¶ 14.

ORDER

¶16 Accordingly, we REMAND this appeal for an adjudication of the merits of the appellant's restoration claim.

FOR THE BOARD:

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