UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 210

Docket No. SF-0353-10-0183-I-1

Blanca G. Patino,

Appellant,

v.

United States Postal Service,

Agency.

October 29, 2010

Blanca G. Patino, San Lorenzo, California, pro se.

Deborah C. Winslow, 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 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, VACATE the initial decision, and REMAND the appeal for further adjudication consistent with this Opinion and Order.

BACKGROUND

¶2 The appellant is employed by the agency as a PS-6 Sales, Services and Distribution Associate (Sales Associate) in San Leandro, California. Initial

Appeal File (IAF), Tab 7, Part 2 at 100, Part 3 at 95. The Office of Workers' Compensation Programs accepted as compensable the appellant's 2007 claim for bilateral carpal tunnel syndrome and a 2008 claim regarding bilateral tenosynovitis and neck sprain. *See id.*, Part 2 at 96, Part 3 at 87. The appellant had worked on limited duty with modifications to her bid position as a Sales Associate at least since October 2008. *Id.*, Part 3 at 92. As of November 2009, her work restrictions were intermittent lifting of 35 pounds for no more than 4 hours per day, fine manipulation (including keyboarding) for no more than 1 hour per day, and reaching above the shoulder for no more than 30 minutes per day. *Id.*, Part 2 at 96.

¶3 In June 2009, the agency's Bay-Valley District began implementation of Phase 2 of the National Reassessment Program (NRP). IAF, Tab 7, Part 2 at 50-51, 68. Under the NRP, the agency seeks to identify operationally necessary work for employees with compensable injuries. *Id.* at 48. The Bay-Valley District undertook to identify operationally necessary tasks and assess employees on limited duty assignments for modified work assignments. *Id.* at 49-51, 65-68. On November 18, 2009, pursuant to the NRP, the agency provided the appellant a modified assignment as a Sales Associate for 3 hours a day. *Id.* at 88. Starting December 17, 2009, the agency assigned the appellant to work 8 hours a day as a lobby host for the holiday season.[*] *Id.*, Part 1 at 22; IAF, Tab 8 at 66.

¶4 The appellant filed an appeal alleging that the agency's provision of only 3 hours of work was a rescission of her restoration to duty after a compensable injury and denial of reasonable accommodation. IAF, Tab 1. The agency filed a Motion to Dismiss the appeal for lack of jurisdiction. *Id.*, Tab 7 at 4-15. The administrative judge issued an initial decision granting the agency's motion. *Id.*,

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[*] There is no evidence as to the exact length of this assignment, but the agency indicated on review that the appellant returned to 3 hours of work per day after the 2009 holiday season ended. PFR File, Tab 3 at 6.

Tab 12. The administrative judge found that the appellant was appealing the details or circumstances of her restoration to duty and that she therefore had not made a nonfrivolous allegation of denial of restoration. *Id.* at 6. The administrative judge also held that the appellant failed to nonfrivolously allege that the agency's action was arbitrary and capricious. *Id.* at 7. The administrative judge stated that the agency had submitted evidence that it searched for available work within the appellant's medical restrictions in her commuting area. *Id.* The administrative judge also held that, in the absence of Board jurisdiction over the appellant's restoration claim, the Board has no jurisdiction over her claim of disability discrimination. *Id.*

¶5 The appellant has filed a petition for review. Petition for Review (PFR) File, Tab 1. She asserts that the administrative judge misstated her physical restrictions, did not consider the relevancy of the collective bargaining agreement, and erroneously found that the agency's action was not arbitrary and capricious because she had been doing the same work since 2007. She further contends that the agency failed to search for work within a 50-mile radius and directed the offices to which it sent search requests to respond negatively. *Id.* The agency has filed a response in opposition to the appellant's petition. PFR File, Tab 3.

ANALYSIS

¶6 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).

¶7 "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).

¶8 In this case, it is undisputed that the appellant made nonfrivolous allegations satisfying the first two jurisdictional criteria. With regard to the third criterion, the Board has recently held 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 under the NRP. As explained below, we are remanding this matter for additional evidence as to the fourth

jurisdictional criterion, i.e., whether the agency's action was arbitrary and capricious.

¶9 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. *Sanchez v. U.S. Postal Service*, 114 M.S.P.R. 345, ¶ 12 (2010); *see Sapp v. U.S. Postal Service*, 73 M.S.P.R. 189, 193-94 (1997); *see also Urena v. U.S. Postal Service*, 113 M.S.P.R. 6, ¶ 13 (2009) (evidence that the agency failed to search the local commuting area as required by 5 C.F.R. § 353.301(d) rendered nonfrivolous the appellant's allegation that the agency acted arbitrarily and capriciously in denying restoration).

¶10 "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 ordinarily is 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.

¶11 In this case, the record contains evidence indicating that the agency searched for a suitable position for the appellant within her own facility. *See*

IAF, Tab 7, Part 2 at 6-47, 88; *id.*, Part 1 at 22; IAF, Tab 8 at 66. The record also contains requests to managers in facilities in several other municipalities for available work and their negative responses. IAF, Tab 7, Part 1 at 23-197. Each of the requests states that it is being made "because your facility is within the Local Commuting Area (LCA)." *Id.* The record, however, does not reflect how the agency defined the local commuting area or contain evidence as to what the local commuting area is. On petition for review, the appellant has argued that the agency failed to search for work within a 50-mile radius of the San Leandro, California facility. PFR File, Tab 1 at 2. We interpret this to mean that the appellant contends the proper local commuting area is within that geographic area.

¶12 Although the initial decision states that "the agency submitted evidence that it searched for available work within the appellant's medical restrictions in her commuting area," it does not define the local commuting area relevant in the appellant's restoration claim. Therefore, we are remanding the appeal for supplemental proceedings and issuance of a new initial decision. *See Mubdi v. U.S. Postal Service*, 114 M.S.P.R. 559, ¶ 12 (2010). On remand, the administrative judge shall oversee further development of the record by the parties on this issue, including an opportunity for discovery by the parties and a hearing. *Id.*; *see Sanchez*, 114 M.S.P.R. 345, ¶ 15; *Sapp*, 73 M.S.P.R. at 193-94 (remanding the appeal for further development of the record on what constituted the local commuting area and whether the agency's job search properly encompassed that area).

¶13 With regard to the appellant's disability discrimination claim, 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. *Id.*

¶14 We make no determination as to the scope of the agency's 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. *Mubdi*, 114 M.S.P.R. 559, ¶ 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. *Mubdi*, 114 M.S.P.R. 559, ¶ 17. "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

¶15 Accordingly, we REMAND this appeal 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.