

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

2010 MSPB 222

Docket No. AT-0353-10-0150-I-1

**Joan M. Young,
Appellant,**

v.

**United States Postal Service,
Agency.**

November 10, 2010

Joan M. Young, Columbia, Tennessee, pro se.

Dana E. Morris, Esquire, Memphis, Tennessee, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The appellant petitions for review of the March 5, 2010 initial decision in which the administrative judge denied the appellant's restoration appeal on the merits. For the reasons set forth below, we DENY the appellant's petition for review, GRANT the agency's cross-petition for review, VACATE the initial decision, and DISMISS the appeal for lack of jurisdiction.

BACKGROUND

¶2 The appellant filed a November 08, 2008 appeal in which she alleged that the agency failed to restore her to her Rural Carrier position in violation of

[5 C.F.R. § 353.301\(a\)](#).¹ Initial Appeal File (IAF), Tab 1 at 2, 5; *see* [5 U.S.C. § 8151](#). The appellant claimed that, on May 10, 2006, the Office of Workers' Compensation Programs (OWCP) had accepted her claim for an April 5, 2006 work-related injury. *See* IAF, Tab 15 at 2; *see also* IAF, Tab 7 at 27-28. The appellant also asserted that the agency had placed her on administrative leave from the date of her compensable injury, April 5, 2006, until November 21, 2008, making her ineligible for wage loss benefits until November 22, 2008. IAF, Tab 1 at 6, 24. The appellant argued that because OWCP officially terminated her benefits effective October 24, 2009, she was entitled to immediate restoration as of that date because she had fully recovered within 1 year of the date she became eligible for wage loss compensation, i.e., November 22, 2008. *Id.* at 5-7, 24-26.

¶3 The administrative judge gave the appellant comprehensive notice of the nonfrivolous allegations required to establish jurisdiction over a restoration appeal under 5 C.F.R. part 353. IAF, Tab 10 at 2-5; [5 C.F.R. § 353.301\(a\)-\(c\)](#). In response, the appellant cited a September 17, 2009 letter from the OWCP that recommended termination of her benefits as evidence that she had fully recovered from her compensable injury. IAF, Tab 22 at 3 (citing IAF, Tab 7 at 27-28). She alleged that the agency subsequently failed to restore her, reiterating her argument that she had fully recovered from her compensable injury within 1 year from the date she became eligible for wage loss compensation. IAF, Tab 22 at 3-4.

¶4 The appellant only pursued her claim under [5 C.F.R. § 353.301\(a\)](#). *See, e.g.*, IAF, Tab 32 at 4-5. That section provides that an employee who fully recovers from a compensable injury within 1 year from the date that employee's

¹ Because we find, for the reasons set forth in this Opinion and Order, that the Board lacks jurisdiction over the appellant's restoration appeal, and no appealable action remains, the Board also lacks jurisdiction to consider the appellant's affirmative defenses and claims of prohibited personnel practices. *Wren v. Department of the Army*, [2 M.S.P.R. 1](#), 2 (1980), *aff'd*, [681 F.2d 867](#), 871-73 (D.C. Cir. 1982).

eligibility for compensation began is entitled to immediate and unconditional restoration to her former position or an equivalent one. [5 C.F.R. § 353.301\(a\)](#). The administrative judge confirmed the appellant's assertion during a February 16, 2010 status conference. IAF, Tab 39 at 1. During that conference, the appellant made clear that she was not asserting a claim that she was a fully recovered individual whose recovery took longer than one year from the date of her eligibility for compensation, nor was she requesting priority consideration under 5 C.F.R. § 353.301(b). *Id.*; *see* IAF, Tab 45 at 22.

¶5 Because the administrative judge found that there were no “genuine issues of material fact with regard to whether the appellant is fully recovered and whether that recovery occurred within one year,” she attempted to schedule a telephonic hearing for the appellant to present oral argument on that issue and set a date for the close of the record.² IAF, Tab 39 at 2. The appellant declined to participate in a telephonic hearing and the administrative judge subsequently decided the appeal on the written record. IAF, Tabs 38 at 4-5, 39 at 2; IAF, Tab 46, Initial Decision (ID) at 2.

¶6 The administrative judge determined that, under Office of Personnel Management (OPM) regulations, the appellant needed to show that she was fully recovered by April 5, 2007 in order to establish that she was entitled to immediate and unconditional restoration under [5 C.F.R. § 353.301\(a\)](#). ID at 5. The administrative judge observed that it was undisputed that the appellant was fully recovered in October 2009, which was more than one year after she was

² Although the appellant objected to the administrative judge's decision to deny the appellant's request for an in-person evidentiary hearing and instead schedule a telephonic hearing to allow the appellant an opportunity to present oral argument on the legal issues involved in the appeal, it was not error for the administrative judge to do so. *See Jordan v. Office of Personnel Management*, [108 M.S.P.R. 119](#), ¶ 21 (2008). Specifically, the appellant was not entitled to an evidentiary hearing because she failed to nonfrivolously allege that she recovered from her compensable injury within 1 year after she became eligible for compensation. [5 C.F.R. § 353.301\(a\)](#).

eligible for compensation. *Id.* The administrative judge found jurisdiction over the appeal under 5 C.F.R. § 353.302(a), but she denied the appellant's restoration request on the merits. ID at 1-2, n.1.

¶7 In her petition for review, the appellant reargues her entire appeal. Petition for Review (PFR) File, Tab 1. In addition, for the first time in her petition for review, she asserts that she requested restoration in July 2006 and that the agency may have determined that she could have returned to work in November or December 2006. PFR File, Tab 1 at 6-10, Exhibits A, L. Also for the first time on review, the appellant claims that the administrative judge should have afforded her an opportunity to establish that she was fully recovered more than a year after the date her eligibility for compensation began under [5 C.F.R. § 353.301\(b\)](#). *Id.* at 18. Further, the appellant claims that the administrative judge was biased against her. *Id.* at 5. The agency responds that the appellant's petition for review fails to meet the Board's criteria for review and files a cross-petition for review arguing that the administrative judge erred in finding jurisdiction over the appeal. PFR File, Tab 3.

ANALYSIS

The appellant fails to establish that the evidence she offers in her petition for review is material or that it was unavailable, before the close of the record below, despite her due diligence.

¶8 Under [5 C.F.R. § 1201.115](#), the Board will not consider evidence submitted for the first time with the petition for review absent a showing that it was unavailable before the record was closed despite the party's due diligence. *Avansino v. U.S. Postal Service*, [3 M.S.P.R. 211](#), 214 (1980). The regulation also requires the allegedly new evidence to be material. [5 C.F.R. § 1201.115\(d\)\(1\)](#). In her petition for review, the appellant offers two pieces of evidence that she concedes are not new but claims are material to her appeal. PFR File, Tab 1 at 6-10. The first is a July 26, 2006 letter she asserts was a request for restoration. *Id.* at 6-8, Exhibit (Ex.) A. She claims that she did not submit the letter before

the close of the record below because she did not think it was necessary to her case. *Id.* at 6. More importantly, however, the appellant fails to explain how the letter would have enabled her to make a nonfrivolous allegation of jurisdiction under 5 C.F.R. § 353.301(a).

¶9 The second piece of evidence is a November 19, 2006 e-mail exchange between Dr. LaRae Kemp, the U.S. Postal Service Southeast Associate Area Medical Director, and Deborah Baker, an individual in the agency's Injury Compensation Office. PFR File, Tab 1 at 8-10, Ex. E. The appellant claims that she has possessed the e-mail message since 2007 but did not realize its ramifications until now. *Id.* at 8. She explains that the e-mail means that Dr. Kemp may have determined that she could return to work in November or December 2006. *Id.* However, Dr. Kemp makes no such assertion in the e-mail exchange, and Ms. Baker notes that the appellant's physician cannot verify that the appellant is capable of returning to work. PFR File, Tab 1 at Ex. E. The appellant's speculation fails to amount to a nonfrivolous allegation that she was entitled to restoration under [5 C.F.R. § 353.301\(a\)](#). Thus, we find that neither piece of evidence is new or material, and we therefore need not consider it. *Avansino*, 3 M.S.P.R. at 214; 5 C.F.R. § 1201.115(d)(1).

The appellant's new argument on petition for review is not based on new and material evidence that was unavailable despite her due diligence.

¶10 As noted above, the appellant asserts in her petition for review that the administrative judge should have afforded her an opportunity to establish jurisdiction over her restoration claim under [5 C.F.R. § 353.301\(b\)](#). However, the record reflects that the administrative judge did so, and that the appellant rejected that theory of her case. *See* IAF, Tab 10 at 4. Indeed, the appellant adamantly insisted in her appeal below that she was not claiming entitlement to priority consideration under [5 C.F.R. § 353.301\(b\)](#) as an employee fully recovered after 1 year from the date her eligibility for compensation began. *See, e.g.* IAF, Tabs 32 at 4-7, 40 at 8, 45 at 22. Moreover, as discussed below, the appellant accused the

administrative judge of bias for even suggesting that the appellant might have a claim under [5 C.F.R. § 353.301\(b\)](#). *See, e.g.*, IAF, Tabs 32 at 4-5, 45 at 22. In a February 16, 2010 telephonic status conference before the record closed, the administrative judge specifically ascertained that the appellant was not asserting a claim under 5 C.F.R. § 353.301(b) as an employee whose full recovery took longer than 1 year from the date her eligibility for compensation began. IAF, Tab 39 at 1; *see* IAF, Tab 45 at 22.

¶11 Thus, despite the fact that the appellant did not make this argument in her appeal below, but rather purposefully and specifically disavowed it, precluding the administrative judge's consideration of it, she now argues in her petition for review that the administrative judge erred in failing to address it. PFR File, Tab 1 at 18. To the extent that the appellant now argues, based on evidence already in the record, that she is entitled to the restoration rights of an employee fully recovered after 1 year from the date her eligibility for compensation began, we will not consider her argument. The Board will not consider an argument raised for the first time in a petition for review absent a showing that it is based on new and material evidence not previously available despite the party's due diligence. *Banks v. Department of the Air Force*, [4 M.S.P.R. 268](#), 271 (1980).

The appellant failed to establish jurisdiction over her claim of a denial of restoration under [5 C.F.R. § 353.301\(a\)](#).

¶12 Under the authority of [5 U.S.C. § 8151\(b\)](#), OPM issued regulations governing the restoration rights of employees after recovery from a compensable injury.³ *See* [5 C.F.R. § 353.301](#). The Board's jurisdiction in restoration cases is

³ The appellant argues that OWCP regulations should apply to her restoration claim. *See, e.g.*, IAF, Tab 1 at 6. However, the appellant cites a provision of the Federal Employees' Compensation Act Claims Manual, not OWCP regulations. *Id.* Regardless, we note the Board's determination that OWCP regulations do not pertain to an agency's restoration obligations, which are found in a separate set of regulations issued by OPM. 5 C.F.R. part 353, subpart C; *see* [5 U.S.C. § 8151\(b\)](#) (authorizing OPM to issue regulations governing restoration to duty after absence due to compensable injury). *Dean v. U.S. Postal Service*, [115 M.S.P.R. 56](#), ¶ 21 (2010).

set forth at [5 C.F.R. § 353.304](#). That section provides for review of a denial of restoration of an employee in the executive branch (including the U.S. Postal Service and the Postal Rate Commission) who fully recovered within 1 year of sustaining a compensable injury if the appellant makes nonfrivolous allegations that: (1) She is an employee of an executive branch agency; (2) she suffered a compensable injury; (3) she fully recovered from the compensable injury within 1 year from the date her eligibility for compensation began; and (4) the agency failed to restore her or improperly restored her. *Steinmetz v. U.S. Postal Service*, [106 M.S.P.R. 277](#), ¶ 7 (2007), *aff'd*, 283 F. App'x 805 (Fed. Cir. 2008).⁴ As noted above, OWCP accepted the appellant's claim for a work-related injury that occurred on April 5, 2006. *See, e.g.*, IAF, Tab 1 at 24. Thus, the record reflects that the appellant satisfied the first and second elements set forth above. For the following reasons, we find that the appellant failed to establish the third element set forth above, whether she fully recovered from her compensable injury within 1 year from the date her eligibility for compensation began.

The appellant became eligible for compensation at the time of her work-related injury.

¶13 The appellant wrongly assumes that because she was not eligible to receive OWCP wage loss benefits until November 22, 2008, that that was the date upon which she became eligible for compensation for purposes of [5 C.F.R. § 335.304](#). However, under the relevant statutory authority, 5 U.S.C., chapter 81, subchapter I, "compensation" is defined in relevant part to include "the money allowance payable to an employee or his dependents and any other benefits paid for from the Employees' Compensation Fund." [5 U.S.C. § 8101](#)(12); *see Bartol v. U.S. Postal*

⁴ The jurisdictional test contains a fifth prong not relevant to this matter. *See Steinmetz*, [106 M.S.P.R. 277](#), ¶ 7. That prong provides that, if the employee was separated from her position prior to the alleged failure to restore or improper restoration, her separation must have been from a position without time limitation and substantially related to her compensable injury. *Id.*

Service, [69 M.S.P.R. 106](#), 108-09 (1995). Under [5 U.S.C. § 8103](#), the medical expenses of an employee injured while in the performance of duty are to be paid out of the Employees' Compensation Fund. *Bartol*, 69 M.S.P.R. at 109. Further, the Board has found that "the payment of medical expenses related to such an injury out of the Employees' Compensation Fund is sufficient to make the injury a compensable injury within the meaning of [5 U.S.C. § 8151](#)," triggering an employee's restoration rights. *Id.* Importantly, the OWCP provides that "[p]ayment of medical benefits is available for all treatment necessary due to a work-related condition." [20 C.F.R. § 10.500](#). Thus, compensation includes the payment of medical benefits, which is available for all treatment necessary for a work-related condition accepted by OWCP.

¶14 As noted above, OWCP accepted the appellant's claim for an April 5, 2006 work-related injury on May 10, 2006. *See* IAF, Tab 15 at 2; *see also* IAF, Tab 7 at 27-28. OWCP's acceptance of the appellant's claim made her eligible to be compensated for all treatment made necessary by that injury. *See* [20 C.F.R. § 10.500](#). Therefore, she became eligible for compensation for purposes of [5 C.F.R. § 353.304](#) as of April 5, 2006, i.e. the date of her work-related injury. *Cf. Mendenhall v. U.S. Postal Service*, [74 M.S.P.R. 430](#), 437 (1997) (finding that the appellant became eligible for compensation on the date of injury while compensation benefits commenced two months later). The appellant fully recovered in October 2009, approximately two and a half years after she became eligible for compensation. *See* IAF, Tab 1 at 5-6, 24-26. Therefore, the appellant failed to make a nonfrivolous allegation that she fully recovered from her compensable injury within 1 year from the date she became eligible for compensation and failed to establish jurisdiction over her restoration appeal under 5 C.F.R. § 353.301(a).

¶15 Accordingly, we must dismiss the appeal for lack of jurisdiction. Further, because no otherwise appealable action remains, the Board lacks jurisdiction to

adjudicate the appellant's affirmative defenses. *E.g.*, *Wren v. Department of the Army*, [2 M.S.P.R. 1](#), 2 (1980), *aff'd*, [681 F.2d 867](#), 871-73 (D.C. Cir. 1982).

The appellant fails to establish that the administrative judge was biased.

¶16 The appellant argues in her petition for review that the administrative judge is biased because she was previously employed as an attorney for the U.S. Postal Service. *See, e.g.*, PFR File, Tab 1 at 5. In the course of her appeal below, the appellant filed a motion to disqualify the administrative judge, which she revised and then moved to refile as an interlocutory appeal. IAF, Tabs 30-34. The administrative judge denied both motions. IAF, Tab 35 at 1.

¶17 In her submissions, the appellant complains in detail about seemingly uncontroversial aspects of the administrative judge's conduct of her appeal. *See* IAF, Tabs 30-34. For example, the appellant's motion to disqualify begins with the argument that the administrative judge was "running interference for the agency" by finding in a February 2, 2010 order that the appellant had apparently set forth a nonfrivolous allegation that she was denied priority consideration. IAF, Tab 32 at 4; *see* IAF, Tab 29 (February 2, 2010 Order) at 1. As noted above, the appellant adamantly insisted that she was not asserting a claim under [5 C.F.R. § 353.301\(b\)](#), which entitles an employee who is fully recovered from a compensable injury after 1 year from the date her eligibility for compensation began to priority consideration for restoration. IAF, Tab 39 at 1; IAF, Tab 45 at 22. Regardless of the appellant's theory of her case, the administrative judge's finding does not evidence bias.

¶18 Similarly, the appellant's motion for an interlocutory appeal begins with a complaint that the administrative judge "redundantly, unreasonably and arbitrarily ORDERED the appellant to 'Show Cause' as to why MSPB had jurisdiction over her case." IAF, Tab 34 at 5. The appellant's complaint refers to the administrative judge's December 18, 2009 jurisdictional order. IAF, Tab 10. In it, the administrative judge specifically noted that "[t]he appellant has the burden of proof, by preponderant evidence, on the issue of jurisdiction." *Id.* at 1

(citing [5 C.F.R. § 1201.56\(a\)\(2\)\(i\)](#)). This is bedrock Board law and a burden that every appellant before the Board must meet. It does not evidence bias for the administrative judge to order the appellant to establish jurisdiction over her appeal.

¶19 An administrative judge’s conduct during the course of a Board proceeding warrants a new adjudication only if the administrative judge’s comments or actions evidence “a deep-seated favoritism or antagonism that would make fair judgment impossible.” *Bieber v. Department of the Army*, [287 F.3d 1358](#), 1362-63 (Fed. Cir. 2002) (quoting *Liteky v. United States*, [510 U.S. 540](#), 555 (1994)). Further, in making a claim of bias or prejudice against an administrative judge, a party must overcome the presumption of honesty and integrity that accompanies administrative adjudicators. *Oliver v. Department of Transportation*, [1 M.S.P.R. 382](#), 386 (1980). The appellant’s complaints about the administrative judge’s conduct in the adjudication of her appeal do not evidence anything that would make fair judgment impossible and are insufficient to overcome the presumption of honesty and integrity that accompanies administrative adjudicators.

ORDER

¶20 Accordingly, we DISMISS the appellant’s restoration appeal for lack of jurisdiction. This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) ([5 C.F.R. § 1201.113\(c\)](#)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit

717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, [931 F.2d 1544](#) (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 ([5 U.S.C. § 7703](#)). You may read this law, as well as review the Board's regulations and other related material, at our website, <http://www.mspb.gov>. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's [Rules of Practice](#), and Forms [5](#), [6](#), and [11](#).

FOR THE BOARD:

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