UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

CYNTHIA E. LUNDY,
Appellant,

DOCKET NUMBER
AT-0353-11-0369-I-1

v.

UNITED STATES POSTAL SERVICE,
Agency.
_____/

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April 14, 2011

AGENCY'S RESPONSE TO APPELLANT'S PETITION FOR REVIEW

COMES NOW the Agency, United States Postal Service ("Postal Service"), and files its response to Appellant's Petition for Review. The Postal Service avers that the Merit Systems Protection Board ("Board") should dismiss Appellant's petition for two reasons. First, Appellant has not shown the availability of new and material evidence that, despite due diligence, was not available when the record closed. Second, Appellant has not shown that the decision of the judge was based on an erroneous interpretation of statute or regulation. Therefore, Appellant's Petition for Review must be dismissed.

BACKGROUND

1. Appellant was issued a Complete Day, No Work Available letter through the National Reassessment Process on September 23, 2010 and was advised that there was no operationally necessary work available to Appellant within her current medical restrictions.
2. Appellant filed the subject Appeal claiming failure to restore.

3. However, Appellant did nothing further to litigate her case. She did not respond to the Agency's February 1, 2011 motion to dismiss. She did not respond to the February 10, 2011 Show Cause Order. She did not respond to the Agency's discovery requests. She did not respond to the Agency's Motion to Compel. She did not comply with the Board's Order requiring compliance.
4. On March 2, 2011, in his Initial Decision, Administrative Judge Garry Wade Klein dismissed Appellant's appeal for lack of jurisdiction.
5. The Appellant has filed this Petition for Review, challenging the Administrative Judge's decision.

ARGUMENT

I. APPELLANT HAS FAILED TO SHOW THE AVAILABILITY OF NEW AND MATERIAL EVIDENCE THAT WAS NOT AVAILABLE WHEN THE RECORD CLOSED

Under the Board's regulations, the review jurisdiction of the Board is limited to those cases involving new evidence and to those cases involving errors of law:

> The petition for review must state objections to the initial decision that are supported by references to applicable laws or regulations and by specific references to the record.

5 C.F.R. § 1201.115(a). This section provides further:

> The Board...may grant a petition for review when it is established that:
>
> (1) New and material evidence is available that, despite due diligence was not available when the record closed; or (2) the

decision of the judge is based on an erroneous interpretation of statute or regulation.

In her Petition for Review, Appellant does not present any new and material evidence that was not available when the record closed. Appellant's petition is nothing more than a futile attempt to reargue her case. Appellant's assertions in the Petition for Review do not constitute new and material evidence. In fact, she makes no new allegations whatsoever.

The aforementioned allegations do not constitute new and material evidence as required by 5 C.F.R. § 1201.1159(a) and therefore, Appellant's Petition for Review should be denied.

II. APPELLANT HAS NOT SHOWN THAT JUDGE KLEIN'S DECISION WAS BASED ON AN ERRONEOUS INTERPRETATION OF STATUTE OR REGULATION.

Appellant totally fails to demonstrate that Judge Klein's decision was legally defective. Appellant fail to show that the Judge's interpretation was based on an erroneous interpretation of law.

To establish Board jurisdiction over a restoration claim as a partially recovered employee, the appellant must make nonfrivolous allegations that the agency violated her restoration rights. Urena v. U.S. Postal Service, 113 M.S.P.R. 6, ¶6 (2009). To do so, she must nonfrivolously allege facts that would show, if proven, 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 denial was arbitrary and capricious. Id.

In this case, the Agency searched within a 50-mile radius of Appellant's place of work and did not find any necessary work available within Appellant's medical restrictions. Appellant did not assert or proffer any evidence that the Agency's search was inadequate or did not encompass the local commuting area. As stated before, other than filing the appeal itself, Appellant made no effort to promote her case. Accordingly, Judge Klein found that Appellant had failed to make a nonfrivolous allegation that the agency failed to properly define the local commuting area and failed to raise a nonfrivolous allegation that the agency arbitrarily and capriciously denied her restoration.

CONCLUSION

The above summary of applicable law supports the Initial Decision of Judge Klein. Appellant has not demonstrated that Judge Klein's decision was based on erroneous interpretation of statute or regulation, as required by 5 C.F.R. § 1201.115(a) (2). As shown above, Appellant has also failed to bring forth new and material evidence, as required by 5 C.F.R. § 1201.115(a) (1). Therefore, the Board should deny Appellant's Petition for Review, in its entirety.

Respectfully submitted,

Earl L. Cotton Sr.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of **"AGENCY'S RESPONSE TO PETITION FOR REVIEW"** was transmitted by First Class Mail on this **14th day of April, 2011** to the following parties:

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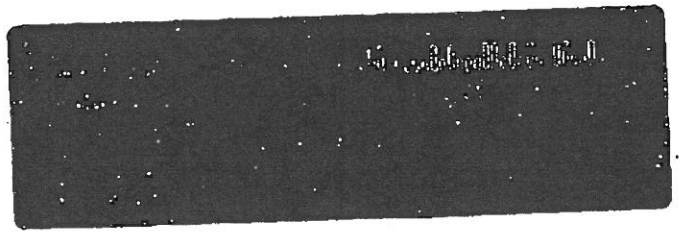

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