

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

2012 MSPB 4

Docket No. SF-0353-09-0895-I-2

**Albert White,
Appellant,**

v.

**United States Postal Service,
Agency.**

January 19, 2012

Omar Gonzalez, Burlingame, California, for the appellant.

Jason Marsh, 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 in this case asking us to reconsider the initial decision issued by the administrative judge dismissing his restoration appeal as moot. For the reasons set forth below, we DENY the petition for review.

BACKGROUND

¶2 The agency employed the appellant as a full-time Mail Processing Clerk at its Los Angeles Processing and Distribution Center (P&DC). *White v. U.S. Postal Service*, MSPB Docket No. SF-0353-09-0895-I-1 Appeal File (I-1 AF),

Tab 8 at 22. Although the record below is unclear, it appears that the appellant suffered an on-the-job injury and began working a modified assignment as a Mail Processing Clerk, effective December 2008. *See id.* at 94. This appeal concerns three separate time periods in 2009 during which the agency allegedly denied the appellant restoration: (1) May 16 to June 12, 2009, when the appellant received a complete day letter pursuant to its National Reassessment Process Program and was directed not to report for work; (2) July 14 to August 31, 2009, when the appellant received a partial day letter and worked less than 8 hours each week; and (3) September 15 to December 25, 2009, when the appellant again received a complete day letter and was directed not to report for work. *See* I-1 AF, Tab 5, Subtabs 3, 11 at 2; Tab 12 at 31. During this period, in February 2009, the agency notified the appellant that in accordance with the terms of the governing national collective bargaining agreement, he would be “excessed,” i.e., reassigned, from his craft and/or bid installation. I-1 AF, Tab 12 at 8.¹ Effective June 6, 2009, the appellant’s craft position was changed to Carrier (City), and his duty location was changed to the Bakersfield Post Office’s Hillcrest Carrier Annex. *White v. U.S. Postal Service*, MSPB Docket No. SF-0353-09-0895-I-2 Appeal File (I-2 AF), Tab 21 at 20.

¶3 The appellant filed the instant appeal on August 13, 2009, asserting that the agency acted arbitrarily and capriciously in denying his restoration following his partial recovery from a compensable injury, and requested a hearing. I-1 AF, Tab 1 at 1-3. The appellant also indicated that he was raising a discrimination claim, *see* I-1 AF, Tab 1 at 5, and later clarified that he was asserting that the agency’s action was the result of disability discrimination, I-2 AF, Tab 23 at 2.

¹ The appellant was one of approximately 223 clerks excessed from the Los Angeles P&DC due to a need to reduce staffing and identified as having the least seniority. *See* I-1 AF, Tab 5, Subtab 9. The National Agreement contains the processes for excessing employees. I-1 AF, Tab 20 at 70-87.

¶4 As stated above, on September 15, 2009, the agency issued the appellant a complete day letter advising him that it was unable to locate any work within his medical restrictions and directing him not to report back for duty unless it advised him that necessary work tasks had been identified within his medical restrictions. I-1 AF, Tab 12 at 31. The agency subsequently offered a modified assignment in Passport Operations at the Hillcrest Carrier Annex for 4 hours 1 day a week, which the appellant accepted under protest, commencing on December 30, 2009. I-1 AF, Tab 33 at 16-19; I-2 AF, Tab 12 at 6-7.

¶5 The agency thereafter informed the appellant that it had determined it appropriate to compensate him with back pay and benefits for the time period May 16 through June 12, 2009. I-1 AF, Tab 28 at 17. The appellant completed the necessary forms and returned them to the agency. *Id.* at 1. After a telephonic prehearing conference, the administrative judge issued an order and summary in which she stated that the appellant had, inter alia, “dropped his discrimination allegations with respect to the May-June 2009 . . . denial of restoration” allegation. I-1 AF, Tab 36 at 1. The administrative judge also stated that she “found the denial of restoration allegation moot for that period because the agency provided *status quo ante* relief.” *Id.* (emphasis in original).

¶6 In a submission dated October 26, 2010, the agency provided documentation indicating that it had also provided the appellant with back pay and benefits for the period from September 15 to December 30, 2009. I-2 AF, Tab 8 at 3-9; *see also* I-2 AF, Tab 19 at 1 (Order and Summary of Prehearing Conference).

¶7 In a submission dated December 8, 2010, the agency informed the appellant that it was rescinding the July 14, 2009 partial day letter, that it was also providing him “full ‘status quo ante relief’ (back pay and benefits)” for the dates from July 14 to August 31, 2009, and that it had provided the appellant with the necessary forms to obtain such relief. I-2 AF, Tab 18 at 4.

¶8 The agency subsequently filed a motion to dismiss the appeal, claiming that it was moot because it had taken action to rescind the actions at issue and had provided the appellant with status quo ante relief. I-2 AF, Tab 21 at 17-19. The appellant opposed the agency's motion on the grounds that he should not have been reassigned from the Los Angeles P&DC, that status quo ante relief would include reassignment to the Los Angeles P&DC, that the agency's failure to do so also amounted to a failure to provide him with reasonable accommodation under the Rehabilitation Act, and that the agency failed to conduct a search of the entire commuting area. I-2 AF, Tab 23 at 1-3.

¶9 The administrative judge dismissed the appeal as moot without conducting a hearing, however, finding that the agency had completely rescinded its actions and had restored the appellant to the status quo ante. I-2 AF, Tab 24, Initial Decision (ID) at 14. Although the administrative judge noted that the appellant had not been restored to a duty position at the Los Angeles P&DC, she determined that, because the reassignment action did not result in reduction in pay and grade, it was not appealable to the Board. ID at 9. The administrative judge also adjudicated the appellant's disability discrimination defense of failure to accommodate, recognizing that in cases where an agency adverse action has been rescinded, if the appellant has raised an affirmative defense on which he bases a claim for compensatory damages, the Board retains jurisdiction to adjudicate the affirmative defense. ID at 8-9. In connection with this claim, she found that, even assuming the appellant established that he is an individual with a disability, it is undisputed that he could not perform his position with or without reasonable accommodation, and that he had not identified any other vacant funded position, the duties of which he could perform with or without reasonable accommodation. ID at 12-13. The administrative judge also determined that the appellant failed to raise a genuine issue of material fact regarding his affirmative defense of disability discrimination on a disparate treatment theory, finding that there is no indication in the record of a discriminatory motive or inference of

discrimination in the agency's alleged failure to grant the appellant's requests for restoration. ID at 13-14. Thus, she concluded that, because the appellant had failed to prove his claims of disability discrimination, he had received all of the relief to which he was entitled, and the agency's provision of such relief therefore restored the status quo and rendered the appeal moot. ID at 14.

¶10 In his timely petition for review, the appellant reasserts his contention below that he should have been reassigned to the Los Angeles P&DC and that the agency's alleged failure to conduct an adequate search for duties within his medical restrictions amounted to a denial of restoration and a failure to grant reasonable accommodation. Petition for Review (PFR) File, Tab 1. He does not, however, contend that the administrative judge erred in determining that the agency provided him with the back pay and benefits to which he was entitled for the periods at issue, and he does not assert that the administrative judge erred in dismissing his disparate treatment claim. The agency has filed a submission in opposition to the appellant's petition for review. *Id.*, Tab 3.

ANALYSIS

¶11 The Board may dismiss an appeal as moot if the agency cancels or rescinds an appealable action. For an appeal to be deemed moot, however, the employee must have received all the relief he could have received if the matter had been adjudicated and he had prevailed. *Fernandez v. Department of Justice*, [105 M.S.P.R. 443](#), ¶ 5 (2007).

¶12 The administrative judge correctly determined that the appellant has received all of the relief he could have received if the matter had been adjudicated and had he prevailed. ID at 9-10. Thus, even if the Board were to find that the agency failed to restore the appellant for any period he was absent, it could not now order his return to duty because the agency has already restored him to duty status. As for back pay, the appellant does not allege that the

administrative judge erred in concluding that the agency has already taken the necessary steps to provide back pay and benefits for all three periods at issue.

¶13 Although the appellant renews his claim from below that he should have been returned to duties in the Los Angeles P&DC or restored to duties within the local commuting area from that facility, PFR File, Tab 1 at 1, his petition for review provides no basis for disturbing the initial decision. As the administrative judge correctly determined, a reassignment action that does not result in a reduction in pay and grade, here resulting from being excessed to Bakersfield, is not appealable to the Board, even where the employee's duties may be changed. ID at 9; *see Kukish v. U.S. Postal Service*, [68 M.S.P.R. 360](#), 363 (1995).

¶14 Further, as the administrative judge recognized, the appellant was advised as early as May 19, 2009, that he would be excessed to Bakersfield. ID at 10; *see* I-1 AF, Tab 8 at 20. The administrative judge correctly found that the agency did not fail to completely rescind the action when it did not restore the appellant to duties in the local commuting area from the Los Angeles P&DC. ID at 10. In any event, even if restoration of the status quo ante for the May 16, 2009 complete day letter required restoration to the Los Angeles P&DC, it would not preclude the agency from excessing him to Bakersfield thereafter. Because the appellant's duty station was Bakersfield upon his reassignment there effective June 6, 2009, *see* I-2 AF, Tab 21 at 20, and there is no dispute that the agency has placed him in a modified assignment in Passport Operations at the Hillcrest Carrier Annex commencing on December 30, 2009, *see* I-1 AF, Tab 33 at 16-19; I-2 AF, Tab 12 at 6-7, there is no further relief that the Board could provide the appellant.

¶15 Nevertheless, the Board will not dismiss an appeal as moot when an appellant has an outstanding claim of discrimination and has raised what appears to be a further claim for compensatory damages before the Board, because the agency's complete rescission of the adverse action appealed does not afford the appellant all the relief that the appellant could receive if the matter had been

adjudicated and he had prevailed.² *Deas v. Department of Transportation*, [108 M.S.P.R. 637](#), ¶ 11 (2008); *Antonio v. Department of the Air Force*, [107 M.S.P.R. 626](#), ¶ 13 (2008). If, however, the appellant's factual allegations in support of his discrimination claims cannot support an inference that the agency acted in a manner that would entitle him to an award of compensatory damages, the Board may properly dismiss the appeal as moot. *Deas*, [108 M.S.P.R. 637](#), ¶ 15.

¶16 An appellant may establish a disability discrimination claim based on failure to accommodate by showing that: (1) He is a disabled person; (2) the action appealed was based on his disability; and (3), to the extent possible, that there was a reasonable accommodation under which the appellant believes he could perform the essential duties of his position or of a vacant position to which he could be reassigned. *Sanders v. Social Security Administration*, [114 M.S.P.R. 487](#), ¶ 16 (2010). As discussed below, because the appellant failed to identify a reasonable accommodation under which he could perform the essential duties of his position or of a vacant position to which he could be reassigned, he has not raised allegations that, if proven, could support an inference of discrimination, much less discrimination that would additionally support an award of compensatory damages. Thus, he has failed to raise a viable discrimination claim that would prevent his appeal from being moot.

¶17 As stated above, effective June 6, 2009, the appellant's craft position was changed to Carrier (City), and his duty location was changed to the Bakersfield

² As noted above, the appellant also asserted below that the agency committed disability discrimination based on its failure to accommodate him. He further stated that he was seeking damages in a grievance alleging discrimination that was attached to his appeal. See ID at 8-9; I-1 AF, Tab 1 at 13. When an appellant raises claims 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).

Post Office's Hillcrest Carrier Annex. I-2 AF, Tab 21 at 20. The administrative judge found, and the appellant does not dispute, that he cannot perform the essential functions of his position of record, Carrier, with or without accommodation. ID at 12. The record does not indicate that the agency ever formally reassigned the appellant to a permanent limited duty position; rather, he continued to encumber the Carrier position, although he was performing modified duties. *See* I-1 AF, Tab 33 at 16; I-2 AF, Tab 12 at 6. The appellant contends on review, as he did below, that his current modified duty assignment in Bakersfield is not a reasonable accommodation because the additional commuting time to Bakersfield allegedly worsened his medical condition. PFR File, Tab 1 at 2; *see* I-2 AF, Tab 12 at 10-12. He contends that the agency was therefore obligated as a reasonable accommodation to reassign him to a modified position at the Los Angeles P&DC or within the Sierra Coastal District, and he states on review that he "has submitted hundreds of vacancies (more than 300) that existed and exist." PFR File, Tab 1 at 2; *see* I-2 AF, Tab 20 at A-1 – D-4.

¶18 The appellant's contentions lack merit. Immediately prior to the time the appellant was excessed to Bakersfield, his medical restrictions, as reflected in a letter dated June 1, 2009, from the agency's Los Angeles District Reasonable Accommodation Committee (DRAC), included a work hour limitation of one 8-hour workday each week, and the remaining 4 workdays restricted to 4 hours each day. I-1 AF, Tab 5, Subtab 8 at 1. In that letter, the DRAC informed him, *inter alia*, that "[t]here are no part-time positions available in the District and all vacant positions are full-time, 40 hours/week." *Id.* The appellant neither asserted on review nor below that he could perform all of the essential functions of any position at the Los Angeles P& DC within his work-hour limitations.

¶19 The appellant contends on review that the June 1 DRAC letter was in response to a previous request for accommodation, that the letter did not concern his subsequent request for accommodation due to the allegedly exacerbating effect that the commute to Bakersfield had on his disability, and that the agency

therefore failed to engage in the interactive process required by the Rehabilitation Act with respect to that request. PFR File, Tab 1 at 1-3. The failure to engage in the interactive process alone, however, does not violate the Rehabilitation Act; rather, the appellant must show that this omission resulted in failure to provide reasonable accommodation. *Gonzalez-Acosta v. Department of Veterans Affairs*, [113 M.S.P.R. 277](#), ¶ 16 (2010). The appellant has failed to make such a showing here.

¶20 The appellant’s medical documentation dated June 25, 2009, which postdates his reassignment to Bakersfield, continued to restrict his work hours to one 8-hour day per week. I-2 AF, Tab 12 at 9. Furthermore, a June 2010 letter from the appellant’s clinical psychologist states that he “is medically able to attend work-related responsibilities for one eight hour day per week,” but that, “in terms of long distance commuting to work, such as to Bakersfield, [he] is medically able to attend work-related-responsibilities for one eight hour day per month.” *Id.* at 12. The appellant does not contend that, subsequent to his reassignment to Bakersfield, there were any vacant positions within his work hour restrictions at the Los Angeles P&DC. Moreover, the agency produced evidence below that there were no such positions available in the Sierra Coastal District. *See* I-2 AF, Tab 21 at 61 (Declaration of Sierra Coastal District Complement Coordinator Lisa A. Diniakos stating that “[a]fter a review of the timekeeping reports for the Sierra Coastal District, I have not identified any part-time flexible . . . positions that were for a single tour each week of only 8 hours”). Thus, the appellant had the opportunity to offer evidence to the contrary on this issue, but failed to do so.

¶21 The appellant nonetheless contends that because the agency modified his duties in Bakersfield, it could also do so with respect to one of the vacancies that he identified at the Los Angeles P&DC or with respect to another position within the Sierra Coastal District. PFR File, Tab 1 at 3. Although the Board has recognized that entities such as the Office of Workers’ Compensation Programs

may have the authority to require agencies to create modified work assignments for employees who have suffered job-related injuries, *see Collins v. U.S. Postal Service*, [100 M.S.P.R. 332](#), ¶ 13 (2005), the Rehabilitation Act imposes no such obligation. When an appellant cannot show that he can perform the essential duties of his position with or without accommodation, the Rehabilitation Act does not require the agency to accommodate his medical condition. *McFadden v. Department of Defense*, [85 M.S.P.R. 18](#), ¶ 20 (1999); *see also Gonzalez-Acosta*, [113 M.S.P.R. 277](#), ¶ 13 (provision of limited or light duty tasks that do not constitute a separate position is not a reasonable accommodation) (citing *EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*); *Henry v. Department of Veterans Affairs*, [100 M.S.P.R. 124](#), ¶ 10 (2005) (the Rehabilitation Act does not require an agency to restructure a job to eliminate its essential functions); *id.*, ¶ 13 n.5 (an agency is not required to create a new position for the appellant in order to provide a reasonable accommodation). Thus, the appellant's claim that the agency was required to modify a position at the Los Angeles P&DC or within the Sierra Coastal District to meet his work hour restrictions is not one that is cognizable under the Rehabilitation Act.³ Accordingly, because the appellant's factual allegations in support of his discrimination claim cannot support an inference that

³ The appellant asserts for the first time on review that only the Los Angeles District's DRAC met with him and contends that the Sierra Coastal District's DRAC had an obligation to meet with him regarding his June 25, 2009 medical restrictions. PFR File, Tab 1 at 1. He asserts, without citation, that "[u]nder Agency regulations the Appellant is entitled to the interactive process both at the Los Angeles District and the different Sierra District Reasonable Accommodation Committees and to fully participate in that process." *Id.* 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). Because the appellant does not contend that this argument is based on new and material evidence not previously available despite his due diligence, the Board has not considered it on review. In any event, as discussed above, the appellant has failed to demonstrate how this alleged omission resulted in the failure to provide reasonable accommodation.

the agency acted in a manner that would entitle him to an award of compensatory damages, the administrative judge properly dismissed this appeal as moot. *Deas*, [108 M.S.P.R. 637](#), ¶ 15.

¶22 Finally, the appellant also contends that the administrative judge erred in dismissing his discrimination claims without conducting a hearing. PFR File, Tab 1 at 3. Here, the administrative judge correctly advised the parties that an appellant does not have an unconditional right to an evidentiary hearing on discrimination; rather, when there is no genuine dispute of material fact regarding discrimination, a hearing need not be conducted. I-2 AF, Tab 19 at 2; *see Redd v. U.S. Postal Service*, [101 M.S.P.R. 182](#), ¶¶ 5, 13 (2006). A factual dispute is “material” if, in light of the governing law, its resolution could affect the outcome. *Redd*, [101 M.S.P.R. 182](#), ¶ 14 (citing *Anderson v. Liberty Lobby, Inc.*, [477 U.S. 242](#), 248 (1986)). A dispute is “genuine” if there is sufficient evidence favoring the party seeking an evidentiary hearing for the administrative judge to rule in favor of that party should that party’s evidence be credited. *Id.*

¶23 The administrative judge in this appeal notified the appellant of the requisite standard for obtaining an evidentiary hearing on his discrimination claims, I-2 AF, Tab 19 at 2. Because, as discussed above, the appellant failed to raise factual allegations that would support an inference of discrimination, the administrative judge correctly concluded that the appellant also failed to demonstrate any genuine dispute of material fact regarding his discrimination claims that would entitle him to a hearing. The appellant’s contention that he was entitled to a hearing on those claims is therefore without merit.

¶24 Because the appellant’s objections to the dismissal of his appeal as moot lack merit, we DENY his petition for review.

ORDER

¶25 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 further review of this final decision.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review this final decision on your discrimination claims. See Title 5 of the United States Codes, section 7702(b)(1) ([5 U.S.C. § 7702\(b\)\(1\)](#)). You must send your request to EEOC at the following address:

Equal Employment Opportunity Commission
Office of Federal Operations
P.O. Box 77960
Washington, DC 20036

You should send your request to EEOC no later than 30 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 EEOC no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time.

Discrimination and Other Claims: Judicial Action

If you do not request EEOC to review this final decision on your discrimination claims, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. See [5 U.S.C. § 7703\(b\)\(2\)](#). You must file your civil action with the district court no later than 30 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 district court no later than 30 calendar

days after receipt by your representative. If you choose to file, be very careful to file on time. If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. See [42 U.S.C. § 2000e5\(f\)](#); [29 U.S.C. § 794a](#).

Other Claims: Judicial Review

If you do not want to request review of this final decision concerning your discrimination claims, but you do want to request review of the Board's decision without regard to your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review this final decision on the other issues in your appeal. 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.