UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2012 MSPB 90

Docket Nos. DA-0353-10-0415-I-1
DA-3443-11-0501-I-1

James A. Penna,

Appellant,

v.

United States Postal Service,

Agency.

July 20, 2012

James C. Latham, Amarillo, Texas, for the appellant.

Nadalynn F. Jenkins, Dallas, Texas, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

OPINION AND ORDER

¶1 The appellant has petitioned for review of two initial decisions, one that denied his request for restoration and one that dismissed his restoration claim for lack of jurisdiction. For the reasons set forth below, we DENY the appellant's petitions for review, VACATE the initial decision in Docket No. DA-0353-10-0415-I-1 (the 0415 appeal), and AFFIRM the initial decision in Docket No. DA-3443-11-0501-I-1 (the 0501 appeal), as MODIFIED by this Opinion and Order. We JOIN the appeals under 5 C.F.R. § 1201.36 and DISMISS both appeals for lack of jurisdiction.

BACKGROUND

¶2 The appellant, a preference eligible veteran, worked as a City Carrier at the Amarillo Main Post Office in Amarillo, Texas. *Penna v. U.S. Postal Service*, MSPB Docket No. DA-0353-10-0415-I-1, Initial Appeal File-0415 (IAF-0415), Tab 1 at 1, 6; *id.*, Tab 7 at 223. On March 27, 2009, the appellant suffered a work-related injury and thereafter worked in a modified capacity. *Id.*, Tab 7 at 212. On November 6, 2009, the appellant accepted a new limited duty job offer as a City Carrier. *Id.*, Tab 18 at 1.

¶3 In 2009, the Fort Worth District, of which the Amarillo Main Post Office is a part, began to participate in Phase 2 of the agency's National Reassessment Process (NRP). *Id.*, Tab 7 at 32-33. Under the NRP, supervisors and managers of employees performing limited duty review those employees' assignments to ensure that they are consistent with the employees' medical restrictions and contain only "operationally necessary" tasks.[1] *Id.* In an April 27, 2010 letter, the agency informed the appellant that a search of the local commuting area surrounding his duty station failed to identify any operationally necessary tasks within his medical restrictions and placed the appellant on administrative leave for 30 days after which he was placed in a leave without pay status. *Id.* at 44.

Proceedings in the 0415 appeal

¶4 On May 5, 2010, the appellant filed an appeal with the Board, asserting that the agency denied his request for restoration, committed harmful procedural error, and discriminated against him on the bases of his disability and age. IAF-0415, Tab 1 at 7; *id.*, Tab 3 at 1-2; *id.*, Tab 4 at 8; *id.*, Tab 20 at 1-2; *see id.*, Tab 21. After holding a hearing on the merits of the appellant's restoration claim, Administrative Judge Cornelius denied the appellant's request for restoration. *Id.*, Tab 31, Initial Decision at 13. Administrative Judge Cornelius found that the

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[1] The agency has since discontinued the NRP. *See Latham v. U.S. Postal Service*, 117 M.S.P.R. 400, ¶ 2 n.4 (2012).

appellant made nonfrivolous allegations sufficient to establish Board jurisdiction over his restoration appeal, including finding that the appellant nonfrivolously alleged that the agency's denial of restoration was arbitrary and capricious when he "challenged the sufficiency of the agency's search to find a position meeting his medical limitations." *Id.* at 5. The administrative judge determined, however, that the appellant failed to prove by preponderant evidence that the agency acted arbitrarily and capriciously, finding that the agency showed that it conducted a search for operationally necessary tasks within the appellant's facility and throughout the 50-mile local commuting area and that the appellant failed to show that the area searched did not meet the definition of the local commuting area or to identify a vacant position within his medical restrictions. *Id.* at 8. The administrative judge also rejected the appellant's claims of disability discrimination, age discrimination, and harmful error. *Id.* at 11-13. The appellant has filed a timely petition for review, and the agency has filed a response in opposition.[2] *Penna v. U.S. Postal Service*, MSPB Docket No. DA-0353-10-0415-I-1, Petition for Review File-0415 (PFR File-0415), Tabs 1, 4.

Proceedings in the 0501 appeal

¶5 On June 2, 2011, the appellant filed a new appeal with the Board, asserting that the agency failed to restore him; failed to comply with the ADA Amendments Act of 2008 (ADAAA), Executive Order 13548, and various Equal Employment Opportunity Commission (EEOC) regulations; committed harmful procedural error and prohibited personnel practices; and discriminated against him on the bases of his disability and age. *Penna v. U.S. Postal Service*, MSPB

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[2] The appellant also filed a reply to the agency's response to his petition for review on February 23, 2011. PFR File-0415, Tab 5. Because the record closed on review on February 8, 2011, we have not considered the appellant's February 23, 2011 submission. *See id.*, Tab 2; *see also* 5 C.F.R. § 1201.114(i) (once the record closes no additional evidence or argument will be accepted unless the party submitting it shows that it was not readily available before the record closed).

Docket No. DA-3443-11-0501-I-1, Initial Appeal File-0501 (IAF-0501), Tab 1 at 3-7. The appellant emphasized, in response to Administrative Judge Thayer's show cause order, that his appeal was not related to the NRP, but rather was based on the agency's failure to comply with the ADAAA, EEOC regulations, and the Executive Order. *Id.*, Tab 5 at 1, 5. Administrative Judge Thayer dismissed the appeal for lack of jurisdiction, noting that the appellant's prior appeal was currently pending on review before the Board and dealt specifically with the appellant's claim that the agency failed to restore him. IAF-0501, Tab 9, Initial Decision at 5. The administrative judge found that none of the appellant's additional claims provided an independent source of Board jurisdiction. *Id.* The appellant has filed a petition for review, and the agency has filed a response in opposition.[3] *Penna v. U.S. Postal Service*, MSPB Docket No. DA-3443-11-0501-I-1, Petition for Review File-0501 (PFR File-0501), Tabs 1, 3.

ANALYSIS

¶6 In order to establish jurisdiction over a restoration appeal as a partially recovered individual under 5 C.F.R. § 353.304(c), an appellant must prove by preponderant evidence that: (1) He was absent from his position due to a compensable injury; (2) he 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 him; (3) the agency denied his request for restoration; and (4) the denial was arbitrary and capricious because the agency failed to perform its obligations under 5 C.F.R. § 353.301(d). *Bledsoe v. Merit Systems Protection Board*, 659 F.3d 1097, 1104 (Fed. Cir. 2011); *Latham*, 117 M.S.P.R. 400, ¶ 10. As a consequence of the court's decision in *Bledsoe*, an

[3] The appellant also filed an objection to the agency's response to his petition for review on September 15, 2011. PFR File-0501, Tab 4. Because the record closed on review on September 11, 2011, we have not considered the appellant's September 15, 2011 submission. *See id.*, Tab 2; *see also* 5 C.F.R. § 1201.114(i).

appellant who establishes jurisdiction over a 5 C.F.R. § 353.301(c) appeal automatically prevails on the merits. *Latham*, 117 M.S.P.R. 400, ¶ 10 n.9.

¶7 It is undisputed that the appellant here has satisfied the first three jurisdictional elements. *See* IAF-0415, Tab 31, Initial Decision at 7. He has been both absent from his official position due to a compensable injury and able to return to duty in a position with less demanding physical requirements. *See* IAF-0415, Tab 7 at 212. Additionally, the Board has found that the decision under the NRP to completely eliminate limited duty work previously afforded a partially-recovered employee satisfies the third element of the test. *See Latham*, 117 M.S.P.R. 400, ¶ 10 n.8; *Sanchez v. U.S. Postal Service*, 114 M.S.P.R. 345, ¶¶ 2-4, 11 (2010); *Urena v. U.S. Postal Service*, 113 M.S.P.R. 6, ¶¶ 2-4, 9 (2010). Thus, the ultimate issue is whether the appellant has proven by preponderant evidence that the agency's denial of restoration was arbitrary and capricious.

¶8 First, in this case, we agree with the administrative judge that there is no indication in the record that the agency's job search was geographically inadequate. IAF-0415, Tab 7 at 49, 50, 52-158; *id.*, Tab 17 at 10-11; *id.*, Tab 27 at 7, 22-42; *cf. Urena*, 113 M.S.P.R. 6, ¶ 13 (evidence that the agency failed to search the local commuting area as required by 5 C.F.R. § 353.301(d) constitutes a nonfrivolous allegation that the agency acted arbitrarily and capriciously in rescinding the appellant's limited duty assignment). Further, to the extent the appellant challenges the NRP in general, such challenges do not constitute a nonfrivolous allegation that the agency's application of the NRP resulted in an arbitrary and capricious denial of restoration in his particular case. *Latham*, 117 M.S.P.R. 400, ¶ 65.

¶9 However, the following line of inquiry set forth in *Latham* is a relevant framework for analyzing the instant appeal: (1) Are the tasks of the appellant's

former modified assignment still being performed by other employees?[4] (2) If so, did those employees lack sufficient work prior to absorbing the appellant's modified duties? (3) If so, did the reassignment of that work violate any other law, rule, or regulation? *See Latham*, 117 M.S.P.R. 400, ¶ 33.

¶10 The appellant reasserts in his petition for review in the 0415 appeal that his previously assigned duties continue to be performed and he notes that agency witnesses testified that the duties he was performing, including "casing mail, delivering Express mail, Hub mail, Edit Books and CFS mail were 'operationally necessary task[s].'" PFR File-0415, Tab 1 at 5. As the agency notes in its response to the appellant's petition for review, James R. Chambers, Postmaster, testified that these tasks were attached to other employees' job assignments, had previously been pulled from those job assignments in order to provide work for limited duty employees, and were properly returned back to the employees who held the job assignments to which the work was attached pursuant to the NRP. PFR File-0415, Tab 4 at 9-10; *see* Hearing CD 1 (testimony of Mr. Chambers). Therefore, under the first prong of the framework set forth in *Latham*, there is no dispute that the duties of the appellant's modified assignment are still being performed by other employees. *See Latham*, 117 M.S.P.R. 400, ¶ 33.

¶11 However, the appellant failed under the second prong of the framework to assert that those who absorbed his former duties did not previously lack sufficient work, e.g., that they were not previously underburdened or that they are now forced to work overtime to perform the additional duties returned to their job assignments. *See Latham*, 117 M.S.P.R. 400, ¶ 33. While the agency did not present evidence or testimony establishing that those who absorbed the appellant's previously assigned duties lacked sufficient work before absorbing

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[4] An appellant may also identify other tasks within his medical restrictions that were available for him to perform either inside or outside the context of a vacant funded position. *Latham*, 117 M.S.P.R. 400, ¶ 55.

those duties, it is the appellant who carries the burden of proof in a 5 C.F.R. § 353.304(c) appeal before the Board. *See Latham*, 117 M.S.P.R. 400, ¶ 34. Accordingly, the appellant has failed to show by preponderant evidence that the agency's decision to discontinue his limited duty assignment and return his previously assigned duties to those who held the job assignments to which the work was attached was arbitrary and capricious. Thus, the appellant has failed to establish Board jurisdiction over his restoration claim as a partially recovered individual under 5 C.F.R. § 353.304(c), and we DISMISS his restoration claim in the 0415 appeal on that basis.[5] *See Bledsoe*, 659 F.3d at 1104.

¶12 Further, despite the appellant's assertions to the contrary, his claims in the 0501 appeal are also based on the agency's underlying decision to discontinue his limited duty assignment under the NRP. *See* IAF-0501, Tab 1 at 3-7. Because the appellant failed to prove in his 0415 appeal that the agency's action was arbitrary and capricious, we find that he is collaterally estopped from proving the same matter in the instant appeal. *See Killeen v. Office of Personnel Management*, 558 F.3d 1318, 1323 (Fed. Cir. 2009) (collateral estoppel, or issue preclusion, bars litigation of an issue if the identical issue was actually litigated and necessarily decided in a prior case where the interests of the party to be precluded were fully represented). We therefore find that the Board lacks jurisdiction over the 0501 appeal as well.

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[5] We note that, while Administrative Judge Cornelius found jurisdiction over the 0415 appeal, his finding was based on the Board's prior, less onerous jurisdictional standard requiring only nonfrivolous allegations satisfying the four jurisdictional elements to establish Board jurisdiction over a partially recovered individual's restoration claim. *See* IAF-0415, Tab 2 at 3 (citing *Barrett v. U.S. Postal Service*, 107 M.S.P.R. 688, ¶ 5 (2008)); IAF-0415, Tab 31, Initial Decision at 3-5. Under the new jurisdictional standard articulated in *Bledsoe*, the proper disposition is to dismiss the appeal for lack of jurisdiction rather than to deny the appellant's request for restoration. *Bledsoe*, 659 F.3d at 1104; *Latham*, 117 M.S.P.R. 400, ¶ 10.

¶13 Moreover, with respect to the appellant's claims of discrimination on the bases of his disability and his age in both appeals, the Board lacks jurisdiction over such claims per se in the absence of an otherwise appealable action.[6] *Latham*, 117 M.S.P.R. 400, ¶ 58; *see Garcia v. Department of Homeland Security*, 437 F.3d 1322, 1342–43 (Fed. Cir. 2006) (en banc). Similarly, the Board lacks jurisdiction over the appellant's claims of harmful error, prohibited personnel practices, and the agency's alleged failure to comply with the ADAAA, EEOC regulations, and Executive Order 13548 absent an appealable underlying action. *See, e.g.*, *Wren v. Department of the Army*, 2 M.S.P.R. 1, 2 (1980) (prohibited personnel practices are not an independent source of jurisdiction), *aff'd*, 681 F.2d 867, 871-73 (D.C. Cir. 1982); *Davis v. Department of Defense*, 105 M.S.P.R. 604, ¶ 16 (2007) (absent an otherwise appealable action, the Board cannot consider a prohibited personnel practice claim). Lastly, we have reviewed the remainder of the appellant's arguments on petition for review regarding Administrative Judge Cornelius's rulings on witnesses and his handling of the 0415 appeal, and we find them to be without merit.[7]

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[6] We have, however, considered the appellant's claims of discrimination to the extent that they pertain to the jurisdictional issue and find that he failed to prove by preponderant evidence that the denial of restoration was arbitrary and capricious because it was based on discrimination. *See Latham*, 117 M.S.P.R. 400, ¶¶ 58-59; IAF-0415, Tab 31, Initial Decision at 9-13; *see also Bledsoe*, 659 F.3d at 1106.

[7] While the appellant submitted several documents for the first time with his petition for review in the 0415 appeal, these documents are either not new or not material. *See Avansino v. U.S. Postal Service*, 3 M.S.P.R. 211, 214 (1980) (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); *Russo v. Veterans Administration*, 3 M.S.P.R. 345, 349 (1980) (the Board will not grant a petition for review based on new evidence absent a showing that it is of sufficient weight to warrant an outcome different from that of the initial decision); PFR File-0415, Tab 1 at 4-5, 97-99; *id.*, CD; *id.*, Tab 3.

ORDER

¶14 Accordingly, for the reasons set forth above, we VACATE the initial decision in the 0415 appeal, AFFIRM the initial decision in the 0501 appeal as MODIFIED, and DISMISS both restoration appeals for lack of jurisdiction. This is the final decision of the Merit Systems Protection Board in these appeals. 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:

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