

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

IRMA URENA,

Appellant,

DOCKET NUMBER

SF-0353-11-0566-I-1

v.

UNITED STATES POSTAL SERVICE,

Agency.

DATE: July 20, 2012

THIS ORDER IS NONPRECEDENTIAL¹

Omar Gonzalez, Burlingame, California, for the appellant.

Kris Ashman, Esquire, Long Beach, California, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman

Anne M. Wagner, Vice Chairman

Mark A. Robbins, Member

REMAND ORDER

The appellant has filed a petition for review in this case asking us to reconsider the initial decision issued by the administrative judge. We grant petitions such as this one only when significant new evidence is presented to us that was not available for consideration earlier or when the administrative judge made an error interpreting a law or regulation. The regulation that establishes

¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions. In contrast, a precedential decision issued as an Opinion and Order has been identified by the Board as significantly contributing to the Board's case law. See [5 C.F.R. § 1201.117\(c\)](#).

this standard of review is found in Title 5 of the Code of Federal Regulations, section 1201.115 ([5 C.F.R. § 1201.115](#)). For the reasons discussed below, we GRANT the appellant's petition for review and REMAND the case to the regional office for further adjudication in accordance with this Order.

The appellant is a Mail Processing Clerk for the agency. Initial Appeal File (IAF), Tab 5, Subtab D at 40. She suffered a compensable injury on March 25, 1993, and thereafter worked in a modified capacity. *See, e.g., id.* at 31. On April 29, 2009, the agency discontinued the appellant's most recent modified assignment pursuant to the National Reassessment Process (NRP)² because there were no operationally necessary tasks available within her medical restrictions. *See id.* at 10. The appellant filed a Board appeal, and the parties eventually entered into a settlement agreement, which provided the appellant with operationally necessary tasks within her medical restrictions beginning on February 13, 2010. *Id.* at 10, 40; *see Urena v. U.S. Postal Service*, MSPB Docket No. SF-0353-09-0650-B-1, Initial Decision (Feb. 12, 2010). After the agency again placed the appellant off duty on May 6, 2010, because it could not locate operationally necessary tasks within her medical restrictions, the appellant filed a petition for enforcement on June 16, 2010, which was denied by the administrative judge. *See Urena v. U.S. Postal Service*, MSPB Docket No. SF-0353-09-0650-C-1, Compliance Decision (Oct. 12, 2010). The Board denied the appellant's petition for review of the compliance decision. *See Urena v. U.S. Postal Service*, MSPB Docket No. SF-0353-09-0650-C-1, Nonprecedential Final Order (July 12, 2011).

In a September 20, 2010 letter to the agency, the appellant sought restoration and provided updated medical documentation from September 16,

² The stated purpose of the NRP was to review current modified assignments within the agency in order to ensure that they consist only of "operationally necessary tasks" within the employees' medical restrictions. *See Latham v. U.S. Postal Service*, [117 M.S.P.R. 400](#), ¶ 2 n.4 (2012). The agency has since discontinued the NRP. *Id.*

2010. IAF, Tab 5, Subtab D at 37-39. In a February 4, 2011 letter, the appellant's representative once again requested the appellant's restoration to duty and eventually provided medical documentation dated February 3, 2011, and February 15, 2011. *Id.* at 4-5, 30-32. In February and March 2011, the agency performed a search throughout the local commuting area for operationally necessary tasks within the appellant's medical restrictions. *Id.*, Subtab A at 6-7; *id.*, Subtab B at 21-22, 32; *id.*, Subtab C at 3. In letters dated March 16, March 21, and April 8, 2011, the agency advised the appellant that it was unable to identify operationally necessary tasks in the local commuting area within her medical restrictions. IAF, Tab 1 at 8-9, 12.

On May 6, 2011, the appellant filed a Board appeal and requested a hearing. *Id.*, Tab 1. The appellant asserted that the agency's letters demonstrated that its search for work was arbitrary and capricious because the letters did not mention her most recent medical documentation. IAF, Tab 4 at 2. She further asserted that she has a right to restoration following a compensable injury. *Id.* The appellant also asserted a claim of disability discrimination, contending that the agency failed to accommodate her. *Id.*, Tab 1 at 3, 5.

The administrative judge issued two show cause orders, notifying the appellant of her burden of establishing jurisdiction over a restoration appeal as a partially recovered individual and ordering her to file evidence and argument on the issue.³ IAF, Tabs 2, 6. The agency moved to dismiss the appeal for lack of

³ In her June 23, 2011 order to show cause, the administrative judge found that the appellant's appeal with respect to the agency's April 8, 2011 denial of her request for restoration was timely filed, but her appeal was untimely with respect to the agency's March 16, 2011 and March 21, 2011 denials of her request for restoration. IAF, Tab 6 at 2. However, because the agency provided the appellant with the wrong address to which to send her Board appeal and because the appellant asserted that she sent her appeal to the correct address 9 days after learning the address provided by the agency was incorrect, the administrative judge found good cause for the appellant's delay in filing her appeal. *Id.*

jurisdiction on the basis that it had conducted a proper job search. *Id.*, Tab 5, Subtab A at 10-11.

The administrative judge issued an initial decision dismissing the appeal for lack of jurisdiction without a hearing. IAF, Tab 9, Initial Decision (ID) at 1, 7. The administrative judge found that the appellant failed to make a nonfrivolous allegation that the denial of restoration was arbitrary and capricious because, while the evidence indicated that the agency did not conduct a search for operationally necessary tasks using the more stringent medical restrictions set forth in the appellant's February 3 and February 15, 2011 medical documentation, the appellant failed to nonfrivolously allege that the agency's search for work was inadequate because there was no indication that a search with additional restrictions would have been more successful in locating operationally necessary work for the appellant. ID at 6-7. The administrative judge further found that, because the appellant failed to establish Board jurisdiction over the underlying action, she could not consider the appellant's claim of discrimination. ID at 7 n.2.

The appellant has filed a petition for review in which she seems to assert that the agency has failed to comply with the Employee and Labor Relations Manual (ELM) and EL 505. Petition for Review (PFR) File, Tab 1 at 1. She also asserts that there "is adequate work [she] can perform and was performing within her work tolerance." *Id.* The agency has filed a response, arguing that the petition should be denied for failure to meet the Board's review criteria. *Id.*, Tab 3.

In order to establish jurisdiction over a restoration appeal as a partially recovered individual, an appellant must prove by preponderant evidence 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. *Bledsoe v. Merit Systems Protection Board*, [659 F.3d 1097](#), 1104 (Fed. Cir. 2011); *Latham*, [117 M.S.P.R. 400](#), ¶ 10. If the appellant makes nonfrivolous allegations to support jurisdiction, then and only then will she be entitled to a jurisdictional hearing at which she must prove jurisdiction by preponderant evidence. *Bledsoe*, 659 F.3d at 1102. It is undisputed that the appellant made nonfrivolous allegations in support of the first three jurisdictional elements. IAF, Tab 1 at 8-9, 12; Tab 9 at 6. However, for the reasons explained in the initial decision, we agree that the appellant failed to make a nonfrivolous allegation that the denial was arbitrary and capricious. First, she failed to make a nonfrivolous allegation that the agency's search for work was inadequate. ID at 6-7; IAF, Tab 5, Subtab B at 21-66, Subtab C at 4-46; *cf. 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\(d\)](#) constitutes a nonfrivolous allegation that the agency acted arbitrarily and capriciously in denying restoration). 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 her particular case. *Latham*, [117 M.S.P.R. 400](#), ¶ 65; *see* PFR File, Tab 1 at 1.

We have also considered the appellant's argument that the discontinuation of her modified assignment violated the ELM and Handbook EL-505. PFR File, Tab 1 at 1. In deciding this issue the Board has found the following line of inquiry to be appropriate: (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

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

duties?; and (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.

Although the appellant appeared to allege that the tasks of her former modified assignment are still being performed by other employees, PFR File, Tab 1 at 1, she has not alleged that those employees already had sufficient work or explained how the reassignment of that work might have violated some other law, rule or regulation. We therefore find that the appellant has not made a nonfrivolous allegation that the discontinuation of her modified assignment was in violation of the ELM or EL-505.⁵ *See Latham*, [117 M.S.P.R. 400](#), ¶ 33.

Nevertheless, the appellant alleged below that the agency's action constituted disability discrimination because the agency failed to offer her a reasonable accommodation that would have allowed her to return to work. IAF, Tab 1 at 3, 5, Tab 4 at 1. The administrative judge did not reach the issue because she found that the Board lacks jurisdiction over the appeal. ID at 7 n.2. The Board, however, has found that a claim of discrimination must be considered at the jurisdictional stage to the extent that it bears on the issue of arbitrariness and capriciousness. *Latham*, [117 M.S.P.R. 400](#), ¶ 58 & n.27. Although we find that the appellant has not yet made a nonfrivolous allegation that the agency's action constituted disability discrimination, she has not received adequate notice of what she must show to prove such a claim. *See Burgess v. Merit Systems Protection Board*, [758 F.2d 641](#), 643-44 (Fed. Cir. 1985) (an appellant must receive explicit information on what is required to establish an appealable jurisdictional issue); *see also Carlisle v. Department of Defense*, [93 M.S.P.R. 280](#), ¶¶ 11, 13 (2003) (where the appellant specifically raised the issue of "failure to accommodate," he was entitled to information regarding the burden of proof on a disability discrimination claim and the kind of evidence he would need to

⁵ To the extent that the appellant is arguing that the agency has an unconditional obligation to provide her with a modified assignment, the Board has previously found that it does not. *Latham*, [117 M.S.P.R. 400](#), ¶ 55.

produce to meet that burden). We therefore remand the appeal for the administrative judge to notify the appellant of her burden of proving disability discrimination and to provide the appellant an opportunity to respond on the issue.

The agency filed an April 3, 2012 motion to dismiss the appellant's restoration appeal as moot on the ground that the appellant retired effective September 30, 2011, and the agency has submitted a copy of a PS Form 50 documenting the appellant's retirement. PFR File, Tab 4. Even though an action may be within the Board's jurisdiction, subsequent events may render an appeal moot and foreclose the Board's review. *Rodriguez v. Department of Homeland Security*, [112 M.S.P.R. 446](#), ¶ 12 (2009). Mootness can arise at any stage of litigation, and an appeal will be dismissed as moot when, by virtue of an intervening event, the Board cannot grant any effectual relief in favor of the appellant, as when the appellant, by whatever means, obtained all of the relief she could have obtained had she prevailed before the Board and thereby lost any legally cognizable interest in the outcome of the appeal. *Id.*

The fact that the appellant has now retired does not render this restoration appeal moot because the appellant has not been afforded all of the relief she could have obtained if her appeal had been adjudicated and she had prevailed. *White v. U.S. Postal Service*, [117 M.S.P.R. 244](#), ¶ 11 (2012). First of all, we are not convinced that the Office of Personnel Management's (OPM) disability retirement determination necessarily forecloses the appellant from establishing that she is capable of performing in a modified assignment. OPM will grant disability retirement when an employee is incapable of rendering useful and efficient service in a "position," but a modified assignment is not a "position." *Bracey v. Office of Personnel Management*, [236 F.3d 1356](#), 1358-63 (Fed. Cir. 2001). In addition, even if the appellant is unable to return to work at this time, she may still be entitled to an award of back pay and benefits, as well as the

restoration of any leave she may have had to take when she was sent home.⁶ *White*, [117 M.S.P.R. 244](#), ¶ 12. Further, the appellant's disability discrimination claim could afford her additional relief if she prevails on that claim. *Id.*, ¶¶ 15-16. Thus, the agency's motion to dismiss this appeal as moot is DENIED.

ORDER

For the reasons discussed above, we REMAND this appeal to the regional office for further proceedings consistent with this Nonprecedential Order. On remand, the administrative judge shall notify the appellant of how to prove a disability discrimination claim and provide her with an opportunity to file evidence and argument on the issue. If the appellant makes a nonfrivolous allegation that the agency's action constituted disability discrimination, the administrative judge shall afford the appellant her requested hearing. *See Latham* [117 M.S.P.R.400](#), ¶ 58 & n.27, ¶¶ 75-76.

FOR THE BOARD:

William D. Spencer
Clerk of the Board

Washington, D.C.

⁶ *Special Counsel ex rel. Steen v. Department of Veterans Affairs*, [81 M.S.P.R. 601](#), ¶ 9 (1999) (although an appellant's receipt of Office of Workers' Compensation Programs (OWCP) payments does not preclude an award of back pay for the same period of time, the agency may reduce the back pay award by the amount of the OWCP payments received for that period).