

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

RODESSA TAYLOR,
Appellant,

DOCKET NUMBERS
DA-0353-11-0113-I-1
DA-0353-11-0348-I-1

v.

UNITED STATES POSTAL SERVICE,
Agency.

DATE: August 22, 2012

THIS ORDER IS NONPRECEDENTIAL¹

Charles M. Tillman, Dallas, Texas, for the appellant.

Susan L. LaSalle, Esquire, Dallas, Texas, 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 these cases asking us to reconsider the initial decisions issued by the administrative judge. We grant petitions such as these only when significant new evidence is presented to us that was not available for consideration earlier or when the administrative judge made

¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions.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\(c\)](#).

an error interpreting a law or regulation. The regulation that establishes 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 JOIN these cases for adjudication pursuant to [5 C.F.R. § 1201.36\(a\)\(2\)](#), GRANT the appellant's petitions for review, and REMAND the cases to the regional office for further adjudication in accordance with this Order.

DISCUSSION OF ARGUMENTS ON REVIEW

The appellant is a Mail Handler with the agency. MSPB Docket No. DA-0353-11-0113-I-1 Appeal File (0113-AF), Tab 4, Part 3 at 255. She suffered an on-the-job injury in 2004, and was thereafter assigned limited duty within her medical restrictions. 0113-AF, Tab 4, Part 3 at 207, 210, 252.

On November 23, 2010, the appellant filed an appeal, alleging that on September 17, 2010, the agency violated her restoration to duty rights when it informed her that, pursuant to its National Reassessment Process² (NRP), there was no work available within her medical restrictions. 0113-AF, Tab 1. The appellant requested a hearing with respect to this matter. *Id.*

The administrative judge informed the appellant about the jurisdictional requirements in a restoration appeal and ordered the appellant to submit evidence and argument on this issue. 0113-AF, Tab 2. The administrative judge, however, did not raise the issue of whether the appellant's November 23, 2010 appeal of the agency's September 17, 2010 action was timely filed. *Id.*

The agency filed a motion to dismiss the appeal for lack of jurisdiction, asserting that the appellant did not present a nonfrivolous allegation that the agency violated her restoration rights. 0113-AF, Tab 4, Part 1 at 15-18. The

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.*

agency also stated that the appellant filed a grievance of the September 17, 2010 determination that it lacked work within the appellant's medical restrictions, that the appellant provided the agency with updated medical documentation, that the agency then conducted another search for work within the medical restrictions, and that, on December 16, 2010, the agency again informed the appellant that it lacked such work. 0113-AF, Tab 4 at 13-15.

The appellant did not reply to either the administrative judge's show cause order or the agency's motion to dismiss.

On December 16, 2010, the agency issued the appellant another NRP notice indicating that the agency no longer had work for the appellant to perform that was within her medical restrictions and told her not to report to work until further notice. 0113-AF, Tab 4, Part 1 at 31.

On March 16, 2011, the appellant filed a second appeal, referring to the agency's September 17, 2010 determination as a proposal notice and the December 16, 2010 NRP letter as a final decision. MSPB Docket No. DA-0353-11-0348-I-1 Appeal File (0348-AF), Tab 1. The appellant again alleged that the agency's determination, that it had no work within her medical restrictions, violated her restoration rights, and further asserted that the agency discriminated against her with respect to its action and attached a copy of the agency's March 1, 2011 final decision on her discrimination complaint regarding the agency's September 17, 2010 action. *Id*

On March 23, 2011, the administrative judge dismissed the appellant's first appeal for lack of jurisdiction, without holding the appellant's requested hearing. 0113-AF, Tab 5. Specifically, the administrative judge found that the appellant did not present a nonfrivolous allegation that the agency acted arbitrarily and capriciously in denying restoration because the appellant did not present a nonfrivolous challenge to the scope of the local commuting area in which the agency conducted its search for work for the appellant, and because the agency had authority to determine whether particular duties are operationally necessary.

Id. at 6. In doing so, the administrative judge examined whether the appellant had presented a nonfrivolous allegation that the agency violated her restoration rights with respect to the December 16, 2010 NRP determination, rather than the September 17, 2010 determination that the appellant had appealed. *Id.* at 2; 0113-AF, Tab 1.

Two days after dismissing this appeal, the administrative judge issued an acknowledgment order in the appellant's second appeal, and directed the appellant to present evidence and argument showing that her restoration claim was within the Board's jurisdiction. 0348-AF, Tab 2. On March 29, 2011, however, the agency moved to dismiss the appeal under the doctrine of res judicata, asserting that the issues in this second appeal were identical to the issues in the first appeal, which the administrative judge had recently dismissed. 0348-AF, Tab 4, Volume 2 at 6-7. In the alternative, the agency moved to dismiss the appeal for lack of jurisdiction, arguing that the appellant did not present a nonfrivolous allegation that the agency violated her restoration rights. *Id.* at 7, 16-20.

On April 26, 2011, the appellant filed a petition for review of the initial decision dismissing her first appeal. 0113 Petition for Review (PFR) File, Tab 1. The appellant asserted that she did not respond to the administrative judge's show cause order because she lacked an understanding of Board procedures and because she was taking, and continues to take, medication that affects her judgment and decision-making. *Id.* The appellant then asserted that she presented a nonfrivolous allegation of jurisdiction by alleging that the agency's search for positions within her medical restrictions was inadequate with respect to the agency's September 17, 2010 determination that it lacked work within her medical restrictions, and that work within those restrictions, in fact, continued to exist. *Id.* at 4.

Meanwhile, on June 15, 2011, the administrative judge issued another show cause order in the second appeal, in response to the agency's motion to dismiss.

0348-AF, Tab 6. In this order, the administrative judge found that, contrary to the agency's argument, the doctrine of res judicata did not apply to bar the appeal because the prior appeal did not include a judgment on the merits, a requirement for res judicata. *Id.* The administrative judge also noted, however, that the doctrine of collateral estoppel might apply to preclude the second appeal, informed the appellant of the elements of this doctrine, and ordered the appellant to show why collateral estoppel did not preclude the appeal. *Id.*

The agency then moved to dismiss the appeal under the doctrine of collateral estoppel or alternatively for lack of jurisdiction based upon the appellant's failure to present a nonfrivolous allegation of jurisdiction. 0348-AF, Tab 10, Volume 7 at 7-8, 18-22. The agency also noted that it had issued a final decision on the appellant's discrimination complaint on March 1, 2011. *Id.* at 37-55.

The appellant, however, argued, among other things, that her appeal was properly before the Board because she had filed an equal employment opportunity (EEO) complaint before filing her Board appeal. 0348-AF, Tab 11 at 5-7. The appellant also asserted that another employee is currently performing her former duties. *Id.* at 8.

The Board then took additional action on the appellant's petition for review in her first appeal. After the agency responded to the appellant's petition, the Clerk of the Board issued an order on September 23, 2011, informing the appellant that it appeared that she had untimely filed her appeal because the agency placed her off work on September 17, 2010, and she did not file her appeal until November 23, 2010. 0113-PFR File, Tabs 3, 4. The order noted that the administrative judge did not address this issue, and informed the appellant of the requirements for showing that she timely filed her appeal or that good cause existed for a filing delay, including the requirements for establishing that a medical condition justified waiving the filing deadline. 0113-PFR File, Tab 4.

The order then directed the appellant to submit evidence and argument on this matter. *Id.*

In response to the Clerk's order, the appellant asserted that, upon being released from work on September 17, 2010, she filed a grievance on September 20, 2010. 0113-PFR File, Tab 6 at 3. She also recounted other actions she took with respect to the matter before filing her appeal on November 23, 2010, and also described her medical conditions and medications during that time. *Id.* at 3-5. She further provided numerous medical documents purportedly supporting her description of her medical condition. *Id.* at 10-104.

The agency argued, however, that the appellant's medical documentation did not show that she lacked sufficient mental or physical capacities within 30 days after being placed off duty that prevented her from timely filing her appeal or requesting an extension of time for filing. 0113-PFR File, Tab 5. Instead, the agency asserted that the record showed that the appellant was mentally and physically competent to pursue her rights and remedies through multiple forums, including filing a grievance on September 20, 2010, filing a claim with the Department of Labor on September 22, 2010, and initiating an EEO complaint on October 11, 2010. *Id.* The agency also submitted evidence showing that, after initiating her EEO complaint, the appellant filed a formal discrimination complaint of the agency's September 17, 2010 action on November 12, 2010. *Id.*, Exhibit A.

On December 8, 2011, the administrative judge dismissed the second appeal for lack of jurisdiction, finding that collateral estoppel precluded adjudicating the issues in the second appeal, and that, in any event, the appellant failed to present a nonfrivolous allegation of jurisdiction. 0348-AF, Tab 13. In this latter regard, the administrative judge found that the appellant did not present a nonfrivolous allegation that the agency acted arbitrarily and capriciously in denying restoration because the appellant did not present a nonfrivolous challenge to the propriety of the agency's search for work within her medical

restrictions and because the agency had authority to determine whether particular duties were operationally necessary. *Id.* at 6-8.

The appellant petitioned for review of this second initial decision, asserting that collateral estoppel did not bar her appeal, that the agency's search for work within her medical restrictions was inadequate, and that the agency discriminated against her in denying her restoration to duty. 0348-PFR File, Tab 1

We first find that the appellant's first appeal was not untimely filed. As discussed above, the appellant filed her formal discrimination complaint of the agency's September 17, 2010 NRP determination before filing her Board appeal. The Board appeal was, therefore, premature, rather than untimely. Specifically, when an appellant has been subjected to an action that is appealable to the Board, and alleges that the action was effected, in whole or in part, because of discrimination on the basis of race, color, religion, sex, national origin, handicap, or age, she may initially file a mixed case complaint with her employing agency, or a mixed case appeal with the Board, but not both, and whichever is filed first is deemed to be an election to proceed in that forum. *Galvan v. Equal Employment Opportunity Commission*, [113 M.S.P.R. 322](#), ¶ 8 (2010). Where an employee elects to pursue her agency's EEO procedure, she is required to wait 120 days from the date that she filed her formal EEO complaint or until the agency issued its final decision before appealing to the Board. *Id.*, ¶ 9. Because those 120 days have passed, the appeal, which was initially premature, may now be adjudicated by the Board. *Id.*

We next find that collateral estoppel does not bar the second appeal. Collateral estoppel, or issue preclusion, is appropriate when (1) an issue is identical to that involved in the prior action, (2) the issue was actually litigated in the prior action, (3) the determination on the issue in the prior action was necessary to the resulting judgment, and (4) the party precluded was fully represented in the prior action. *Kroeger v. U.S. Postal Service*, [865 F.2d 235](#), 239 (Fed. Cir. 1988). Here, the issues in the two appeals are not identical, and the

issue in the first appeal was never adjudicated. Specifically, the first appeal concerned the appellant's claim that the agency violated her restoration rights with respect to the September 17, 2010 NRP letter, and the second appeal concerned the appellant's restoration rights with respect to the agency's December 16, 2010 letter. 0113-AF, Tab 1; 0348-AF, Tab 1. The administrative judge, however, never adjudicated the September 17, 2010 issue and instead only made findings with respect to the agency's December 16, 2010 NRP letter, a matter the appellant had not raised. 0113-AF, Tab 5 at 2, 5-7. Under these circumstances, we find that neither the September 17, 2010 restoration issue nor the December 16, 2010 restoration was actually litigated in the first action, and that collateral estoppel does not bar the second appeal regarding the December 16 matter. Further, if the appellant presented a nonfrivolous allegation of jurisdiction in the first appeal regarding the September 17, 2010, she would be entitled to further adjudication there, as well, because the administrative judge made no findings with respect to that action.

Upon examining the document records in both appeals, we find that the appellant presented a nonfrivolous allegation of jurisdiction in both cases. 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 v. U.S. Postal Service*, [117 M.S.P.R. 400](#), ¶ 10 (2012). 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 here has satisfied the first three jurisdictional

elements. 0113-AF, Tab 5 at 4-5; 0348-AF, Tab 13 at 6. Thus, the ultimate issue is whether the appellant has proven by preponderant evidence that the denial of restoration was arbitrary and capricious.

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. 0113-AF, Tab 4, Part 1 at 21-30, 33-221, Part 3 at 3-201; 0113-AF Tab 5 at 5-7; 0348-AF, Tab 4, Volume 2 at 96-100, 103-165, Volume 3 at 166-291, Volume 5 at 10-132, Volume 6 at 133-208; 0348-AF, Tab 10, Volume 7 at 112-149, Volume 8 at 150-249, Volume 9 at 250-300; 0348-AF, Tab 13 at 6-8; *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 his particular case. *Latham*, [117 M.S.P.R. 400](#), ¶ 65.

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?³ (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. Considering the foregoing, we find that the appellant made a nonfrivolous allegation that the denial of restoration was arbitrary and capricious when she asserted that her duties are still available, that other employees are now performing them, and that

³ 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.

the agency's action was discriminatory. 0113-AF, Tab 1; 0348-AF, Tab 1, Tab 11 at 5-8; *see Latham*, [117 M.S.P.R. 400](#), ¶ 66. Although the appellant presented little evidence to support her claim, she is not required to make her entire case at the nonfrivolous allegation stage, and we find that her pleadings are sufficient to establish a justiciable issue of material fact that can only be resolved after a jurisdictional hearing. *See id.* Additionally, the administrative judge should consider the appellant's discrimination claim on remand insofar as it bears on the jurisdictional issue and allow the appellant to present relevant evidence and argument at the jurisdictional hearing. *See Latham*, [117 M.S.P.R. 400](#), ¶¶ 58, 76.

ORDER

For the reasons discussed above, we REMAND this case to the regional office for further adjudication in accordance with this Remand Order.

FOR THE BOARD:

William D. Spencer
Clerk of the Board

Washington, D.C.