

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

VALERIE J. SCOTT,
Appellant,

DOCKET NUMBER
CH-0353-11-0362-I-1

v.

UNITED STATES POSTAL SERVICE,
Agency.

DATE: January 11, 2013

THIS ORDER IS NONPRECEDENTIAL¹

George Walker, Saint Louis, Missouri, for the appellant.

Heather McDermott, Esquire, Chicago, Illinois, for the agency.

BEFORE

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

Member Robbins issues a separate concurring opinion.

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. Generally, we grant petitions such as this one only when: the initial decision contains erroneous

¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

findings of material fact; the initial decision is based on an erroneous interpretation of statute or regulation or the erroneous application of the law to the facts of the case; the judge's rulings during either the course of the appeal or the initial decision were not consistent with required procedures or involved an abuse of discretion, and the resulting error affected the outcome of the case; or new and material evidence or legal argument is available that, despite the petitioner's due diligence, was not available when the record closed. *See* Title 5 of the Code of Federal Regulations, section 1201.115 ([5 C.F.R. § 1201.115](#)).² For the reasons discussed below, we GRANT the appellant's petition for review, VACATE the initial decision, and REMAND this appeal for further adjudication.

BACKGROUND

The appellant is a City Letter Carrier at the Southwest Station in St. Louis, Missouri. Initial Appeal File (IAF), Tab 1 at 1, Tab 10, Subtab 4G. She suffered a compensable injury on May 27, 1998. IAF, Tab 10, Subtab 4H. Thereafter, she began working 8 hours a day in a modified capacity as a Modified Letter Carrier. *Id.*, Subtab 4X. On June 9, 2010, the appellant accepted a limited duty assignment pursuant to the National Reassessment Process (NRP). *Id.*, Subtab 1 at 10. Under this most recent Modified Letter Carrier position, the appellant's work hours were limited to 1-2 hours a day. *Id.*; IAF, Tab 10, Subtab 4K.

The appellant filed an appeal and requested a hearing. IAF, Tab 1 at 2. After holding a hearing, the administrative judge issued an initial decision on December 19, 2011, dismissing the appellant's appeal for lack of jurisdiction. IAF, Tab 35, Initial Decision (ID) at 1, 6. Citing to *Bledsoe v. Merit Systems Protection Board*, [659 F.3d 1097](#), 1102 (Fed. Cir. 2011), the administrative judge

² Except as otherwise noted in this decision, we have applied the Board's regulations that became effective November 13, 2012. We note, however, that the petition for review in this case was filed before that date. Even if we considered the petition under the previous version of the Board's regulations, the outcome would be the same.

advised the appellant that she needed to establish jurisdiction over her appeal by preponderant evidence. ID at 4. The administrative judge found that it was undisputed that the appellant had satisfied the first three jurisdictional elements. *Id.* However, she found that the appellant failed to satisfy the fourth jurisdictional element. *Id.* at 5. Specifically, the administrative judge found that, because the appellant failed to identify a vacant position within her local commuting area that she could perform within her medical restrictions, she had failed to establish that her denial of restoration was arbitrary and capricious. *Id.* In addition, the administrative judge found that, absent an appealable action, the Board lacked jurisdiction over the appellant's race discrimination claim. *Id.* at 5-6.

The appellant timely filed a petition for review. Petition for Review (PFR) File, Tab 1. The agency has filed a response in opposition. PFR File, Tab 3.

ANALYSIS

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) 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*, 659 F.3d at 1104; *Latham v. U.S. Postal Service*, [117 M.S.P.R. 400](#), ¶ 10 (2012). If the appellant establishes jurisdiction over her restoration claim, she also prevails on the merits. *Latham*, [117 M.S.P.R. 400](#), ¶ 10 n.9. It is undisputed that the appellant has satisfied the first three jurisdictional elements. Thus, the ultimate issue is whether the appellant has proven by preponderant evidence that the denial of restoration was arbitrary and capricious.

In her Order Regarding Jurisdiction, the administrative judge informed the parties that a partially recovered individual's entitlement to restoration is limited to vacant positions the individual could occupy in the local commuting area. IAF, Tab 26 at 2. Thus, in order to raise a nonfrivolous allegation that a denial of restoration was arbitrary and capricious, the administrative judge informed the appellant that she must identify a vacant position, or positions, within the local commuting area that she could perform within her medical restrictions. *Id.* After finding that the agency's submissions failed to establish that it had searched the entire local commuting area for available work, the administrative judge determined that the appellant was entitled to a hearing on jurisdiction, but she informed the parties that the hearing would be limited to the issue of whether the appellant could prove by preponderant evidence that there was a vacant position to which she could be restored. *Id.* at 3. In the Order and Summary of Prehearing Conference, the administrative judge reiterated that the sole issue to be determined was whether the appellant could prove by preponderant evidence that there was a vacant position to which she could be restored. *Id.*, Tab 34.

As noted above, after conducting a hearing, the administrative judge found that the appellant failed to establish that her denial of restoration was arbitrary and capricious because she failed to identify a vacant position within her local commuting area that she could perform within her medical restrictions. *ID* at 5. While the administrative judge's notice on the appellant's burden was appropriate under Board precedent at the time, the Board has since expanded the test in restoration appeals with regard to this fourth element in cases where the agency has discontinued an employee's modified duty assignment. Specifically, in *Latham*, we determined that, under the U.S. Postal Service's modified duty rules, it may discontinue a modified assignment consisting of tasks within an employee's medical restrictions only where the duties of that assignment no longer need to be performed by anyone or those duties need to be transferred to other employees in order to provide them with sufficient work. [117 M.S.P.R.](#)

[400](#), ¶¶ 31–32. Accordingly, under *Latham*, we added the following line of inquiry as a relevant framework for analyzing the restoration appeals in the U.S. Postal Service: (1) Are the tasks of the appellant’s former modified assignment still being performed by other employees? (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? *Id.*, ¶ 33.

The appellant asserted below that the tasks of her modified assignment were still being performed by another employee, Marilyn Scheipeter, who had also been offered a limited duty assignment pursuant to the NRP. IAF, Tab 28 at 1; IAF, Hearing CD, Hearing Testimony of Marilyn Scheipeter; IAF, Tab 31 at 52. During the hearing, Ms. Scheipeter testified that, during her time on limited duty performing some of the same duties the appellant performed, she had worked overtime. IAF, Hearing Tape, Hearing Testimony of Marilyn Scheipeter. Thus, the appellant presented some evidence at hearing that work she was performing had not “gone away” and that someone performing those duties was not previously under-burdened.

However, the administrative judge made no explicit finding on these claims. Furthermore, because the administrative judge limited the issues for hearing and examined them under the pre-*Latham* framework for determining jurisdiction for partially recovered employees, the parties were not provided with an opportunity to fully develop the record regarding whether the appellant’s duties were still being performed by other employees, whether those employees lacked sufficient work prior to absorbing the appellant’s modified duties, and whether the reassignment of work violated any other law, rule, or regulation. Therefore, it is necessary to remand this appeal for further development of the record on this jurisdictional issue.

Furthermore, with regard to the appellant’s discrimination claims, we note that a denial of restoration based on prohibited discrimination would also be an alternative method for proving that the denial was arbitrary and capricious.

Latham, [117 M.S.P.R. 400](#), ¶ 58. Accordingly, on remand, the administrative judge should first consider the appellant's discrimination claims insofar as they bear on the jurisdictional issue. *See Manning v. U.S. Postal Service*, [118 M.S.P.R. 313](#), ¶ 11 n.* (2012).

ORDER

We REMAND this appeal to the Central Regional Office for further adjudication consistent with the above analysis, including a supplemental hearing on the issue of jurisdiction. In addition, should the administrative judge find jurisdiction over the appeal, she shall adjudicate the appellant's discrimination claims.

FOR THE BOARD:

William D. Spencer
Clerk of the Board

Washington, D.C.

CONCURRING OPINION OF MEMBER ROBBINS

in

Valerie J. Scott v. United States Postal Service

MSPB Docket No. CH-0353-11-0362-I-1

¶1 I agree with the majority that the present record does not provide an adequate basis for the Board to make a final determination whether the agency's denial of restoration was arbitrary and capricious. I write separately because I believe the administrative judge should have the benefit of a Board member's views as to the relevance and significance of information in the present record in making this determination on remand.

¶2 As the majority opinion notes, there was evidence that some of the duties that the appellant had performed when she was working 8 hours per day as a Modified Letter Carrier were performed by another employee, Marilyn Scheipeter, after the appellant's modified duties were reduced to 1-2 hours per day, and Ms. Scheipeter testified that, during her time on limited duty performing some of the same duties the appellant performed, she had worked overtime.

¶3 The record does not appear to reflect how often Ms. Scheipeter worked overtime or for how many hours. It also does not appear to reflect whether the overtime Ms. Scheipeter performed included duties that the appellant had previously performed.³ If Ms. Scheipeter's overtime work did not consist of duties that were formerly part of the appellant's limited duty assignment, I do not think that such overtime would be relevant to a determination whether the agency treated the appellant arbitrarily and capriciously. Even if Ms. Scheipeter's

³ The record reflects that, in addition to being given 1-2 hours work per day as a Modified Letter Carrier, Ms. Scheipeter was given an additional assignment on a different shift involving clerical work for 4 hours per day, and that these clerical duties were not within the appellant's medical restrictions. Initial Decision at 2-3 & n.1. This raises the possibility that the overtime work performed by Ms. Scheipeter consisted solely of clerical work that the appellant could not have performed.

overtime work did consist at least in part of duties formerly performed by the appellant, I do not believe that the mere existence of any amount of such overtime, however de minimis, justifies the conclusion that the agency acted arbitrarily and capriciously with respect to the appellant.

¶4 A determination of whether the agency acted arbitrarily and capriciously with respect to the appellant because of duties performed by Ms. Scheipeter is complicated by another factor. There are indications in the record that, at the time in question, the agency mistakenly believed that Ms. Scheipeter had the same status as the appellant—an employee who had partially recovered from a compensable injury—and that it gave her the same limited job duties in that capacity, i.e., 1-2 hours per day.⁴ Initial Decision at 2 n.1. To the extent that the agency assigned overtime work to one employee it believed had partially recovered from a compensable injury rather than to another, while mistaken, I do not believe the agency could be said to have acted arbitrarily and capriciously.

Mark A. Robbins
Member

⁴ I note that there is no basis for making definitive findings in this regard.