UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2013 MSPB 79

Docket No. SF-4324-12-0023-I-1

William L. Mims,

Appellant,

v.

Social Security Administration,

Agency.

October 25, 2013

William L. Mims, Hercules, California, pro se.

Scott J. Borrowman, San Francisco, California, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant has filed a petition for review of the initial decision that dismissed his appeal for lack of jurisdiction. For the reasons set forth below, we GRANT the appellant's petition, VACATE the initial decision, and REMAND the appeal for further adjudication of his involuntary retirement and restoration claims.[1]

[1] 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.

BACKGROUND

¶2 The appellant is a 10-point preference eligible veteran with a disability rating of 30 percent or more. Initial Appeal File (IAF), Tab 8, Volume 2 at 8 of 52. He joined the agency in 1989, and in October 2001 he was promoted from Benefit Authorizer to Claims Authorizer. *Id*. at 14 of 52; IAF, Tab 23 at 37 of 89. The Claims Authorizer position involves high-level technical analysis and decision making and requires formal classroom training followed by on-the-job training. IAF, Tab 8, Volume 3 at 45 of 76. The position is sedentary and requires no lifting, bending, or standing. *Id*.

¶3 On January 15, 2003, the appellant suffered an on-the-job injury when he tripped on the stairs. IAF, Tab 23 at 38 of 89. The Department of Labor (DOL), Office of Workers' Compensation Programs (OWCP), subsequently approved the appellant's claim for low back strain, right ankle strain, and displacement of lumbar disc. IAF, Tab 1 at 10. As a result of the injury, the appellant was absent from work beginning March 15, 2003. IAF, Tab 23 at 43 of 89. In August 2003, the Office of Personnel Management (OPM) approved the appellant's application for disability retirement, but he withdrew that application. IAF, Tab 8, Volume 3 at 45, 50-51 of 71.

¶4 On December 12, 2003, the appellant's treating physician cleared the appellant to work 4 hours per day, "sit and stand at will," with no lifting or stair climbing, beginning December 15, 2003. IAF, Tab 8, Volume 3 at 25 of 76. The appellant did not request any accommodation other than the reduced hours. IAF, Tab 23 at 46-47 of 89. On December 15, 2003, he returned to modified duty on a 4-hour work schedule. IAF, Tab 1 at 10. Following a flare-up of his condition, the appellant stopped working again on January 27, 2004, but returned to a 4-hour schedule on February 17, 2004. *Id*.

¶5 The appellant alleges that, while he was at the office, his supervisor asked him how long he would continue working 4 hours per day and stated that, as a trainee, he could not remain on that schedule indefinitely. IAF, Tab 23 at 42, 44

of 89. According to the appellant, his supervisor referred him to the personnel department, where he was informed that there was no other work available unless he was able to resume an 8-hour shift. *Id*. at 45, 47-48 of 89; IAF, Tab 1 at 1. The appellant entered leave without pay status for "medical reasons" on March 15, 2004, his final day of work with the agency. IAF, Tab 8, Volume 2 at 10 of 52. He applied for disability retirement a second time, was approved, and retired effective May 20, 2004. *Id*. at 8 of 52. The Standard Form 50 recording the retirement bears the remark "no work available." *Id*.

¶6 On June 22, 2004, the appellant underwent a second opinion examination by a doctor who opined that the appellant was able to work 8 hours per day at a sedentary job. IAF, Tab 8, Volume 3 at 13-20. OWCP notified the agency of the findings from the second opinion examination, and, on September 24, 2004, the agency offered to restore the appellant to his former job as a Claims Authorizer on an 8-hour schedule. IAF, Tab 8, Volume 2 at 56-57 of 87. The agency explained that the position was sedentary and would not require him to work beyond his restrictions. *Id*. On October 6, 2004, the appellant declined the offer, stating that he disagreed with the medical assessment based on the second opinion examination, that he was still suffering pain from the injury, and that the stress of the offered position could contribute to a reoccurrence of prostate cancer. *Id*. at 66 of 87. He attached a copy of a July 28, 2004 Supplemental Report by his treating physician, who opined that, contrary to the second opinion, the appellant should remain on a 4-hour schedule, as he was still having decreased active range of motion of his dorsolumbar spine. *Id*. at 69 of 87. The appellant's treating physician indicated that the appellant "has done quite well with [4] hours per day, being able to sit and stand at will." *Id*.

¶7 On May 31, 2005, the appellant underwent an Independent Medical Examination (IME) by a third doctor, who opined that the appellant was capable of working 4 hours per day for 1 or 2 months, after which he could increase his schedule by 1 hour per day each month until reaching 8 hours. IAF, Tab 8,

Volume 2 at 54 of 70. Because of the conflict in medical opinions between the appellant's treating physician and the physician who performed the second opinion examination, and because it was unclear from the first IME whether the appellant was currently capable of working 8 hours per day, OWCP again referred the case to the third doctor for a definitive opinion regarding the appellant's work capabilities. *Id*. On June 20, 2006, that doctor conducted a second IME, this time concluding that the appellant had reached permanent and stationary status and was restricted to working 4 hours per day, with a possibility of at some point increasing to 6 hours per day. IAF, Tab 8, Volume 2 at 38 of 70.

¶8 In December 2006, OWCP referred the appellant to a vocational rehabilitation consultant in an effort to find him employment with the agency. IAF, Tab 8, Volume 2 at 39-46 of 70. In early January 2007, the agency informed the rehabilitation consultant of its determination that, based on the medical restrictions outlined in the June 20, 2006 report, the appellant could not be returned to modified work. *Id*. at 30 of 70. The agency indicated that this was primarily due to the fact that the appellant was unable to work an 8-hour day and was required to take 5- to 10-minute breaks every hour. *Id*. The agency explained that, in order to return to work as a Claims Authorizer, the appellant would need to attend an 8-hour per day training program for a period of 7 months, that hourly breaks were not possible, and that other suggestions by the appellant, e.g., mentoring, telecommuting, attendance every other day, were likewise not feasible. *Id*.

¶9 Following the death of his wife in February 2007, the appellant sought to return to full-time work. IAF, Tab 23 at 51-52 of 89. In a medical report dated April 19, 2007, the appellant's treating physician released the appellant to work 8 hours per day, with restrictions of no prolonged standing, walking, or lifting over 25 pounds and with the proviso that he be allowed 5 minutes each hour to stretch. IAF, Tab 15 at 20; IAF, Tab 23 at 56 of 89. In an email dated May 1, 2007, the rehabilitation consultant advised the agency that the appellant had been medically

released to work 8 hours per day and was interested in returning to the agency. IAF, Tab 24 at 5.

¶10 Apparently under the impression that the appellant had fully recovered, the agency responded that, since recovery had occurred after more than 1 year, the appellant would be entitled to priority consideration provided he applied within 30 days of the termination of his OWCP compensation. *Id.*; *see* 5 C.F.R. § 353.301(b). By email dated May 3, 2007, the rehabilitation consultant informed the agency that she had notified the OWCP Claims Examiner of the agency's response and that the Claims Examiner had stated that the first step would be to inquire whether the agency was willing to accept the appellant back at that time. IAF, Tab 24 at 3. The rehabilitation consultant indicated that she had the latest medical report and could fax it to the agency for review. *Id.* In response, the agency questioned the validity of the new report, inquiring: "How is it medically possible or even likely that after two independent medical exams, that are similar in opinion with regard to permanent residuals, that Mr. Mims has completely improved to the point that he can return to work?" *Id.* The agency again indicated that an employee who fully recovers after 1 year is entitled to priority consideration if an application is made within 30 days after compensation ceases and stated that "DOL needs to make this ruling." *Id.* OWCP did not terminate the appellant's compensation at that time, and the agency did not find work for the appellant. IAF, Tab 15 at 20.

¶11 On April 7, 2008, OWCP advised the appellant that he was entitled to an OPM annuity and OWCP compensation benefits, but needed to elect which to receive. IAF, Tab 8, Volume 2 at 13-14 of 70. By letter dated April 25, 2008, OWCP notified the appellant that his compensation benefits were stopped as of April 13, 2008, based on his election of the OPM annuity. *Id.* at 51 of 52. The appellant received a schedule award, beginning April 13, 2008. *Id.* at 46-48 of 52. On May 31, 2008, the appellant sent a letter to OWCP, inquiring about his restoration rights as an OWCP employee who fully recovered after 1 year. *Id.* at

42-43 of 52. By letter dated June 17, 2008, OWCP responded that the agency had met its obligations by holding his position for 1 year. *Id*. at 40 of 52. OWCP further stated: "Since you have 'work limitations' and you have not fully recovered, your agency was not able to accommodate you." *Id*. OWCP indicated that it had fulfilled its mission by referring him to vocational rehabilitation services and directed the appellant to discuss any retention rights with the agency. *Id*. The appellant has since applied for a number of positions with the agency, but without success. IAF, Tab 1 at 1; IAF, Tab 15 at 6-8; IAF, Tab 23, Mims Deposition at 61-62 of 89.

¶12 On October 7, 2011, the appellant filed a Board appeal in which he alleged that he was forced into retirement in 2004 and that the agency had improperly denied his request to return to work in 2007. IAF, Tab 1 at 1. He alleged that the agency had subjected him to age, race, and disability discrimination and also raised claims under the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Veterans Employment Opportunities Act (VEOA). He attached an August 11, 2011 letter to OWCP in which he stated that friends had told him that the agency was "hiring a lot of young people" through the Federal Career Intern Program (FCIP), which the Board had recently found to constitute a violation of veterans' preference rights.[2] *Id*. at 16. He further alleged that the agency has "an unspoken history of retaliation against those who file injury claims." *Id*.

¶13 The administrative judge informed the appellant in detail of his burden of proof on jurisdiction with respect to involuntary retirement, USERRA, VEOA, and restoration claims. IAF, Tab 2. With the exception of the VEOA claim, however, the administrative judge did not direct the appellant to present evidence and argument concerning the timeliness of his claims. *Id*. In response to the

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[2] The appellant was apparently referring to the Board's decision in *Dean v. Office of Personnel Management*, 115 M.S.P.R. 157 (2010), issued on November 2, 2010.

jurisdictional order, the appellant contended that the agency had violated his restoration rights as a partially recovered employee under 5 C.F.R. § 353.301(d); that he was removed when the agency refused to provide reasonable accommodation; that the agency failed to recognize his rights as a disabled veteran; and that "there was an agenda to remove [him] from the agency, or at least disability discrimination." IAF, Tab 5. He also provided a copy of a July 6, 2011 letter to OWCP in which he referred to the Board's ruling concerning FCIP and contended that the agency had violated VEOA and the Americans with Disabilities Act (ADA) by refusing to rehire him. *Id*.

¶14 On October 24, 2011, the appellant submitted a complaint to the Secretary of Labor, alleging that the agency and DOL had violated his "re-employment rights as a Disabled Veteran (VEOA)" and "under the ADA as a worker with an on the job injury." IAF, Tab 6. The appellant again asserted that he had been forced into retirement and that the agency improperly failed to return him to work after he was cleared to work 8 hours with stretching breaks. *Id*. The subject line of the letter referred to "MSPB decision dated 11/2/2010 [finding that] FCIP violates veteran's preference," but the appellant did not mention FCIP elsewhere in the letter. *Id*. On November 30, 2011, DOL responded to the appellant's complaint, explaining that the matters raised by the appellant did not involve VEOA and recommending that he instead pursue a remedy with the Equal Employment Opportunity Commission. IAF, Tab 18.

¶15 The administrative judge dismissed the appeal without the requested hearing, finding that the appellant had failed to nonfrivolously allege that his retirement was involuntary or that the agency had arbitrarily and capriciously denied him restoration. IAF, Tab 27, Initial Decision. The administrative judge further found that the appellant had failed to meet his burden of establishing jurisdiction under USERRA or VEOA. *Id*. Having dismissed the appeal for lack of jurisdiction, the administrative judge did not reach the issue of timeliness. On petition for review, the appellant reasserts his involuntary retirement and denial

of restoration claims. Petition for Review (PFR) File, Tab 1. The agency has filed a response. PFR File, Tab 3.

ANALYSIS

The appellant has nonfrivolously alleged that his disability retirement was involuntary.

¶16 A retirement is presumed to be voluntary and therefore outside the Board's jurisdiction. *See Vitale v. Department of Veterans Affairs*, 107 M.S.P.R. 501, ¶ 17 (2007). An involuntary retirement, however, is equivalent to a forced removal within the Board's jurisdiction under chapter 75. *Garcia v. Department of Homeland Security*, 437 F.3d 1322, 1328 (Fed. Cir. 2006) (en banc). If an appellant makes nonfrivolous allegations of jurisdiction, i.e., allegations that, if proven, would establish the Board's jurisdiction, he is entitled to a hearing at which he must prove jurisdiction by a preponderance of the evidence. *Id*. at 1344; *Goodwin v. Department of Transportation*, 106 M.S.P.R. 520, ¶ 12 (2007). In determining whether the appellant has made a nonfrivolous allegation, the administrative judge may consider the agency's documentary submissions; however, to the extent that the agency's evidence constitutes mere factual contradiction of the appellant's otherwise adequate prima facie showing of jurisdiction, the administrative judge may not weigh evidence and resolve conflicting assertions of the parties, and the agency's evidence may not be dispositive. *Ferdon v. U.S. Postal Service*, 60 M.S.P.R. 325, 329 (1994).

¶17 Generally, an appellant who claims that a retirement was involuntary may rebut the presumption of voluntariness in a variety of ways, for example, by showing that the retirement was the result of misinformation or deception by the agency, intolerable working conditions, or the unjustified threat of an adverse action. *SanSoucie v. Department of Agriculture*, 116 M.S.P.R. 149, ¶ 14 (2011). However, the Board has recognized that involuntary disability retirement cases are somewhat different from ordinary involuntary retirement appeals. In most

cases, an appellant who alleges that his disability retirement was involuntary must show: (1) he indicated to the agency that he wished to continue working, but that his medical limitations required a modification of his work conditions or duties, i.e., accommodation; (2) there was a reasonable accommodation available during the period between the date on which he indicated to the agency that he had medical limitations but desired to continue working and the date that he was separated that would have allowed the appellant to continue working; and (3) the agency unjustifiably failed to offer that accommodation. [3] *Id.*, ¶ 15.

¶18 Contrary to the initial decision, we find the appellant has made nonfrivolous allegations sufficient to entitle him to a hearing on the question of whether his retirement was voluntary. The administrative judge appears to have found that the appellant's refusal of the agency's October 6, 2004 job offer established that he was unable to work even with accommodation. *See* Initial Decision at 9-10. However, both the June 22, 2004 Work Capacity Evaluation and the July 28, 2004 Supplemental Report indicate that the appellant was at that time capable of working *at least* 4 hours per day in a sedentary position; the only matter in dispute was whether the appellant was then capable of working 8 hours per day. In any event, for purposes of determining whether the appellant's disability retirement was voluntary, the relevant time frame is the period between December 12, 2003, when he first requested accommodation, and his separation on May 20, 2004. *See SanSoucie*, 116 M.S.P.R. 149, ¶ 15. The medical evidence in the record indicates that the appellant was capable of working 4 hours per day

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[3] In unusual cases, the Board has applied the general jurisdictional tests for involuntary retirement in the disability retirement context. *See, e.g.*, *Vaughan v. Department of Agriculture*, 116 M.S.P.R. 493, ¶¶ 13-14 (2011) (the appellant alleged that he was coerced into retirement because the agency's conduct in creating a discriminatory, hostile work environment caused him to be disabled); *Hosford v. Office of Personnel Management*, 107 M.S.P.R. 418, ¶¶ 8-9 (2007) (the appellant alleged his disability retirement was involuntary on the basis of misinformation). These exceptions are not relevant here.

beginning December 15, 2003, and the agency provided that very accommodation from December 15, 2003, to January 27, 2004, and again from February 17 to March 15, 2004. The appellant asserts that he remained capable of working a 4-hour day at the time of his retirement, and the record contains no medical evidence to the contrary. He further asserts that, even if he could not have continued as a Claims Authorizer trainee on a 4-hour schedule (which he disputes), he could have been placed in his former position as a Benefits Authorizer, and that such work was available. IAF, Tab 1. In either scenario, the agency's denial of the requested accommodation would have been unjustifiable. Because the appellant's allegations, taken as true, could support a finding that his disability retirement was involuntary, he is entitled to a jurisdictional hearing on remand.

The appellant has nonfrivolously alleged that the agency arbitrarily and capriciously denied him restoration as a partially recovered employee.

¶19 The appellant also seeks to appeal the agency's denial of his restoration rights as a partially recovered employee. Under 5 C.F.R. § 353.301(d), an agency must make every effort to restore in the local commuting area, according to the circumstances of each case, an individual who has partially recovered from a compensable injury and who is able to return to limited duty. An individual who is partially recovered from a compensable injury may appeal to the Board for a determination of whether the agency is acting arbitrarily and capriciously in denying restoration. 5 C.F.R. § 353.304(c).

¶20 In order to establish jurisdiction 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 agency's 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 of jurisdiction with respect to all four elements of the jurisdictional standard, he is entitled to a jurisdictional hearing. *Bledsoe*, 659 F.3d at 1102.

¶21 The record reflects that the appellant was absent from his position due to a compensable injury, that he recovered sufficiently to return to work on at least a part-time basis, and that the agency denied his request for restoration on at least three occasions. The first denial of restoration occurred prior to the appellant's retirement when, having initially granted the appellant restoration rights as a partially recovered employee, the agency informed him that he could no longer continue work as a Claims Authorizer on a 4-hour schedule. *See Brehmer v. U.S. Postal Service*, 106 M.S.P.R. 463, ¶ 9 (2007) (the rescission of restoration rights that were previously granted may be appealable under 5 C.F.R. § 353.304(c)). The second denial of restoration occurred in January 2007, when the agency determined that the appellant could not be accommodated in his Claims Authorizer position based on the restrictions set forth in the June 20, 2006 IME. The third denial of restoration occurred in May 2007, when, after receiving a request to restore the appellant to modified duty on an 8-hour schedule with stretching breaks, the agency apparently failed to make any effort to restore him to duty. We find that the appellant has nonfrivolously alleged that the agency acted arbitrarily and capriciously in denying him restoration on all three occasions. Accordingly, the appellant is entitled to a hearing at which he must prove jurisdiction under 5 C.F.R. § 353.304(c) by a preponderance of the evidence. *Bledsoe*, 659 F.3d at 1102.

USERRA does not provide a basis for Board jurisdiction over this appeal.

¶22 To establish Board jurisdiction over a USERRA discrimination appeal, an appellant must allege that: (1) he performed duty or has an obligation to perform duty in a uniformed service of the United States; (2) the agency denied him initial employment, retention, promotion, or any benefit of employment; and (3) the

denial was due to the performance of duty or obligation to perform duty in the uniformed service. *Gossage v. Department of Labor*, 118 M.S.P.R. 455, ¶ 10 (2012). A discrimination claim under USERRA should be broadly and liberally construed in determining whether it is nonfrivolous, particularly where, as here, the appellant is pro se. *Id*. The appellant has not explained the basis for his USERRA claim apart from asserting that, based on his status as a disabled veteran, "USERRA applies." IAF, Tab 1 at 1. While it is undisputed that the appellant is a disabled veteran, he has not alleged that his actions at issue in the appeal, i.e., the alleged involuntary retirement and denials of restoration, were due to his prior military service. To the extent the appellant claims that he was discriminated against based on a disability arising from his military service, such a claim is not cognizable under USERRA. *See McBride v. U.S. Postal Service*, 78 M.S.P.R. 411, 415 (1998). Accordingly, USERRA does not provide an independent ground for jurisdiction over this appeal.

The appellant failed to establish that he exhausted his administrative remedies with respect to his VEOA claim.

¶23 In order to establish Board jurisdiction over a VEOA appeal, an appellant must, among other things, show that he exhausted his administrative remedy with DOL. *Burroughs v. Department of the Army*, 115 M.S.P.R. 656, ¶ 9, *aff'd*, 445 F. App'x 347 (Fed. Cir. 2011). The first step of the exhaustion process is for the appellant to file a complaint with DOL containing "a summary of the allegations that form the basis for the complaint." *Id*. (citing 5 U.S.C. § 3330a(a)(2)(B) and 5 C.F.R. § 1208.23(a)(4)). The purpose of this requirement is to afford DOL the opportunity to conduct an investigation that might lead to corrective action before involving the Board in the case. *Id*. (citing 5 U.S.C. § 3330a(b)-(c)).

¶24 Although the Board uses a liberal pleading standard for allegations of veterans' preference in a VEOA appeal, evidence of the exhaustion requirement is mandatory under the statute and is not subject to the same liberal construction. *Id*. (citing 5 U.S.C. § 3330a(d)). Here the appellant noted in his letter to DOL

that he was a 30 percent disabled veteran and made a vague reference to the "MSPB decision dated 11/2/2010 [finding that] FCIP violates veteran's preference," IAF, Tab 6, but failed to identify any particular instance in which his rights under a statute or regulation relating to veterans' preference were allegedly violated. Because the appellant's complaint to DOL was insufficient to inform DOL of any particular alleged veterans' preference violations, we find that he failed to satisfy the exhaustion requirement and therefore has not met his burden of establishing jurisdiction under VEOA. *See Graves v. Department of Veterans Affairs*, 117 M.S.P.R. 491, ¶ 11 (2012).[4]

ORDER

¶25 We REMAND the appeal for further adjudication consistent with this Opinion and Order, including a jurisdictional hearing on the appellant's involuntary retirement and restoration claims. If the administrative judge determines that the Board has jurisdiction over one or more of those claims, he shall provide the parties an opportunity to present evidence and argument

[4] To the extent the appellant's July 6 and August 11, 2011 letters to OWCP could be construed as misfiled VEOA complaints, they would not satisfy the exhaustion requirement because they were not resolved within 60 days and the appellant has not shown that he provided the Secretary of Labor written notice of his intent to file a Board appeal. *See* 5 U.S.C. § 3330a(d); *Becker v. Department of Veterans Affairs*, 114 M.S.P.R. 29, ¶ 8 (2010).

concerning the timeliness of those claims and, if appropriate, adjudicate them on the merits.

FOR THE BOARD:

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