UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

TIMOTHY W. KLUG,
Appellant,

v.

UNITED STATES POSTAL SERVICE,
Agency.

DOCKET NUMBER
DC-0752-10-0825-I-1

DATE: November 17, 2011

THIS FINAL ORDER IS NONPRECEDENTIAL[1]

Laura A. O'Reilly, Esquire, Virginia Beach, Virginia, for the appellant.

Gail A. Nettleton, Esquire, Landover, Maryland, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

FINAL 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

[1] A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

that was not available for consideration earlier or when the administrative judge made 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).

An employee's voluntary absence from work is not an action appealable to the Board. *Johnson v. U.S. Postal Service*, 110 M.S.P.R. 679, ¶ 8 (2009). If, however, an agency bars an employee from duty for more than 14 days, the employee's absence is considered a constructive suspension within the Board's appellate jurisdiction. *Id.; see* 5 U.S.C. §§ 7512(2), 7513(d). The dispositive question in such a case is whether the employee or the agency initiated the absence; if the absence is involuntary, i.e., at the direction of the agency, then the employee has been constructively suspended. *Mills v. U.S. Postal Service*, 106 M.S.P.R. 441, ¶ 6 (2007).

As relevant here, the Board has recognized that constructive suspension claims may arise when an employee who is absent from work for medical reasons asks to return to work with altered duties, and the agency denies the request. *Reed v. U.S. Postal Service*, 99 M.S.P.R. 453, ¶ 3 (2005), *aff'd*, 198 F. App'x 966 (Fed. Cir. 2006). In this situation, when an employee requests work within his medical restrictions, and the agency is bound by policy, regulation, or contractual provision to offer available work to the employee, but fails to do so, his continued absence for over 14 days constitutes an appealable constructive suspension. *Johnson*, 110 M.S.P.R. 679, ¶ 9.

The instant appeal, which concerns the termination of the appellant's light duty assignment, falls within this scenario. *Johnson*, 110 M.S.P.R. 679, ¶ 9. However, the termination of a light duty assignment is not, per se, an adverse action appealable to the Board. *See* 5 U.S.C. § 7512; *Johnson*, 110 M.S.P.R. 679, ¶ 12. Rather, as stated above, an agency's failure to provide work within an employee's physical restrictions, resulting in an absence for more than 14 days, is a constructive suspension only if the agency has an obligation to provide such

work and has not fulfilled its obligation. *See Simpson v. U.S. Postal Service*, 113 M.S.P.R. 346, ¶ 15 (2010); *Mojarro v. U.S. Postal Service*, 113 M.S.P.R. 335, ¶ 10 (2010).

Here, as the administrative judge recognized, the governing collective bargaining agreement does not guarantee that light duty will be provided, but requires that careful consideration be given to a request for light duty. Initial Appeal File (IAF), Tab 26, Initial Decision (ID) at 5; *see Carmack v. U.S. Postal Service*, 98 M.S.P.R. 128, ¶ 10 (2005). The administrative judge correctly held that the agency met its obligation under the collective bargaining agreement to search for a light duty assignment for the appellant, but that no work was available within the employee's restrictions until he returned to work on August 12, 2010, working a light duty assignment for 4 or more hours per shift. ID at 5-11. *See, e.g.*, Hearing Compact Disc (Hearing CD), Testimony of Acting Plant Manager Joan Richardson-Lanier; IAF, Tab 10 at 19-23 (Second Richardson-Lanier Declaration). Furthermore, the appellant's previous light duty assignment – sorting mail by hand – had significantly decreased due to mechanization. IAF, Tab 10 at 22. Although the agency referred to a list of vacant positions at the plant, the appellant was unable to apply for any of them because of his medical restrictions.

The appellant also contends on review that his absence was involuntary because there was no real choice for him to make between going home or returning to his bid position, which he was not physically able to perform. Petition for Review (PFR) File, Tab 1 at 5. This contention also lacks merit. Here the appellant was faced with the unpleasant alternatives of returning to work with duties outside his medical restrictions, or requesting leave. IAF, Tab 10 at 14, ¶ 6 (Declaration of Denise Santiago, Manager, Distributions Operations). The appellant's decision not to return to his regular duties, however unpleasant, was nonetheless voluntary. *See Moon v. Department of the Army*, 63 M.S.P.R. 412, 419-20 (1994). Therefore, the appellant did not suffer an appealable constructive

suspension when the agency terminated his temporary light duty assignment due to the absence of productive work within his medical restrictions.[2] *See Reed*, 99 M.S.P.R. 453, ¶ 9; *Moon*, 63 M.S.P.R. at 419-20.

There is also a second period in which the appellant alleged a constructive suspension. As noted above, after the agency terminated the appellant's initial light duty assignment, he submitted to the agency another light duty request with different medical restrictions, the agency approved the request, and he returned to work on August 12, 2010, working a different light duty assignment for 4 or more hours per shift. ID at 2, 8; *see also* IAF, Tab 7, Subtabs D-E. Thus, the agency not only searched for a light duty assignment based on the appellant's new medical restrictions, it provided him with such an assignment. The appellant nevertheless contends on review, as he did below, that the alleged constructive suspension at issue continues to the present date, because even after he received his new assignment, there was additional work that he could have performed to extend his shift to 8 hours per work day. PFR File, Tab 1 at 7; IAF, Tab 23 at 2

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[2] On review, the appellant contends that the administrative judge erred in considering the merits of his constructive suspension claim as part of the jurisdictional analysis. PFR File, Tab 1 at 7. The appellant is incorrect. The appellant bears the burden of proof to show that his absence was involuntary and thus that there was a constructive suspension within the Board's jurisdiction. *Mojarro*, 113 M.S.P.R. 335, ¶ 11; *Tardio v. Department of Justice*, 112 M.S.P.R. 371, ¶ 23 (2009). In constructive adverse actions, such as this, subject matter jurisdiction and the merits of the appeal are intertwined. *Heath v. U.S. Postal Service*, 107 M.S.P.R. 366, ¶ 6 (2007). Therefore, nonfrivolous allegations do not establish jurisdiction; rather, the appellant must prove by preponderant evidence that the act was involuntary to establish jurisdiction. *Id.; see Mojarro*, 113 M.S.P.R. 335, ¶ 11. Having reviewed the record, we find that the administrative judge applied the proper framework and correctly considered the merits of the appellant's constructive suspension appeal in determining whether he proved by preponderant evidence that the Board has jurisdiction over it. *See* ID at 3. We similarly find that it was appropriate for the administrative judge to consider, and discuss, the agency's explanation for the lack of available work within the appellant's medical restrictions, particularly the economic situation facing the agency as well as the increased mechanization of tasks that the appellant had been performing as part of his former light duty assignment, to determine whether the appellant proved that the agency failed to fulfill its obligation to give careful consideration to his light duty request.

("Please be advised it is the appellant's contention that the constructive suspension is still in place, as the agency is requiring the appellant to leave work before the end of his shift every day."). During the hearing, the appellant, his supervisor Luther Trawick, Manual Distribution Clerk Valerie Claud, and Modified Clerk Marsha James all testified that there was additional work the appellant could perform to extend his shift to 8 hours per work day. *See* Hearing CD. The administrative judge, however, cited Richardson-Lanier's undisputed hearing testimony that the mail processing work identified by these witnesses amounts to "filler" work that is processed throughout the work day as needed, and that Claud and James would be entitled to perform the work at issue because, unlike the appellant, they are entitled to full-time work in their limited duty and bid positions. *Id*.; ID at 9-10. The initial decision on this point reflects that the administrative judge considered the evidence as a whole, drew appropriate inferences, and made reasoned conclusions. *See Yang v. U.S. Postal Service*, 115 M.S.P.R. 112, ¶ 12 (2010) (mere disagreement with the administrative judge's findings is insufficient to disturb the initial decision); *see also Broughton v. Department of Health & Human Services*, 33 M.S.P.R. 357, 359 (1987) (there is no reason to disturb the conclusions of the administrative judge when the initial decision reflects that the administrative judge considered the evidence as a whole, drew appropriate inferences, and made reasoned conclusions). Moreover, the Board has previously rejected claims that the agency is obligated to provide an employee in light duty status with a full 40-hour workweek. *See Zysk v. U.S. Postal Service,* 108 M.S.P.R. 520, ¶ 5 (2008); *cf. Alves v. U.S. Postal Service*, 95 M.S.P.R. 587, ¶ 17 (2004) (failure to provide a postal service employee 8 hours of light duty each day is not an appealable furlough within the Board's jurisdiction); *see also Chen v. U.S. Postal Service,* 114 M.S.P.R. 292, ¶10 (2010) (stating that "it is axiomatic that an agency must determine what work is necessary and available to accomplish its mission").

We recognize that the appellant alleged disability discrimination in connection with his claim of a constructive suspension. IAF, Tab 21 at 5-8 (Summary of Prehearing Conference). It is therefore incumbent on the Board to also consider whether the agency met its obligation, if any, to provide a reasonable accommodation to the appellant pursuant to the Rehabilitation Act to determine if there is jurisdiction over his constructive suspension claim based on any agency obligation to provide him light duty work.[3] *Mojarro*, 113 M.S.P.R. 335, ¶ 10; *Mills*, 106 M.S.P.R. 441, ¶ 6. Although the initial decision does not contain such an analysis, the record is sufficiently developed for the Board to make this determination on review, and it is therefore unnecessary to remand the appeal for further proceedings. *See Slater v. Department of Homeland Security*, 108 M.S.P.R. 419, ¶ 12 (2008).

Prior to the enactment of the recent Americans with Disabilities Act (ADA) Amendments, a temporary or transitory medical condition did not fall within the definition of a disability. *See Pinegar v. Federal Election Commission*, 105 M.S.P.R. 677, ¶ 44 (2007).[4] However, under the ADA Amendments, a condition of short duration may be considered a disability. *See Equal Employment Opportunity Commission (EEOC) Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act*, 76 Fed. Reg. 16,999, 17,001 (Mar. 25, 2011), codified at 29 C.F.R. § 1630.2(j)(1)(ix). "For example . . . if an individual has a back impairment that results in a 20-pound lifting restriction that lasts for several months, he is substantially limited in the major life activity of lifting, and therefore covered" by the definition of a

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[3] Because we find that the Board does not have jurisdiction over the appeal, we do not address the appellant's affirmative defenses, including his claim of disability discrimination, and we only address the disability discrimination issue in the context of his constructive suspension claim.

[4] The ADA standards have been incorporated into the Rehabilitation Act and are used in determining whether there has been a Rehabilitation Act violation. *See, e.g., Simpson*, 113 M.S.P.R. 346, ¶ 8.

person with a disability. *EEOC Appendix to Part 1630, Interpretative Guidance on Title I of the ADA*, 76 Fed. Reg. at 17,011. Here, the evidence shows that the appellant's medical restrictions on July 2, 2010, placed limits on his ability to lift, carry, push, pull, stoop, squat, twist, walk, stand, bend repeatedly, climb steps or ladders, or operate power equipment. IAF, Tab 20 at 18 (Light Duty Medical Certification). We will assume that the appellant had a substantial limitation in lifting and therefore was a person with a disability within the meaning of the Rehabilitation Act. *See* 29 C.F.R. § 1630.2(g)(1).

As stated above, prior to assigning the appellant to his current light duty assignment, the agency searched for vacant positions within his medical restrictions and none were available. Hearing CD (testimony of Richardson-Lanier). The only accommodation identified by the appellant for his current medical restrictions is his current light duty assignment, supplemented with other mail processing tasks that the appellant, Trawick, Claud, and James testified that he could perform to extend his shift to 8 hours per work day. It is well established, however, that an agency is not obligated to accommodate a disabled employee by permanently assigning him to light duty tasks when those tasks do not comprise a complete and separate position. *Mengine v. U.S. Postal Service*, 82 M.S.P.R. 123, ¶ 8 (1999); *see also Gonzalez-Acosta v. Department of Veterans Affairs*, 113 M.S.P.R. 277, ¶ 13 (2010) (the agency is not required to create a light duty or other position for a person with a disability as a form of reasonable accommodation); *Collins v. U.S. Postal Service*, 100 M.S.P.R. 332, ¶ 13 (2005). Because the agency had no obligation under the Rehabilitation Act to create a light duty position for the appellant as a form of reasonable accommodation and he has identified no other effective accommodation within his medical

restrictions, his claim of disability discrimination fails to provide a jurisdictional basis for his constructive suspension claim.[5]

After fully considering the filings in this appeal, we conclude that there is no new, previously unavailable, evidence and that the administrative judge made no error in law or regulation that affects the outcome. 5 C.F.R. § 1201.115(d). Therefore, we DENY the petition for review.

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

This is the Board's final decision in this matter. 5 C.F.R. § 1201.113. 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

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[5] The appellant also contends for the first time on review that the agency's action circumvented RIF regulations set forth at section 351 of part 5. PFR File, Tab 1 at 8-9; *see* IAF, Tab 1, Tab 19 at 2 (Appellant's Prehearing Submission), Tab 21 (Summary of Prehearing Conference). The Board will not consider an argument raised for the first time in a petition for review absent a showing that it is based on new and material evidence not previously available despite the party's due diligence. *Banks v. Department of the Air Force*, 4 M.S.P.R. 268, 271 (1980). Here, the appellant does not claim on review that his contention is based on new and material evidence. Therefore, we have not considered this argument on review.

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.