UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 209

Docket No. SF-0353-09-0651-I-1

Annette Ferrin-Rodgers[1],

Appellant,

v.

United States Postal Service,

Agency.

October 29, 2010

Zedie E. Ramage, Jr., Fresno, California, for the appellant.

Jason Marsh, Esquire, Long Beach, California, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant has petitioned for review of the initial decision that dismissed her restoration appeal for lack of jurisdiction. For the reasons set forth below, we GRANT the petition for review, AFFIRM the initial decision with respect to its finding that the appellant failed to establish Board jurisdiction over

[1] The agency has indicated that the appellant may have died while the petition for review was pending. Petition for Review File (PFR File), Tab 6. However, it has not been firmly established that this is the case. On remand, the administrative judge shall determine whether the appellant has died and, if she has, shall take appropriate actions.

her demotion and constructive suspension claims, REVERSE the initial decision with respect to its finding that the appellant failed to establish Board jurisdiction over her restoration claim, and REMAND the appeal for further adjudication consistent with this Opinion and Order.

BACKGROUND

¶2 The appellant is a non-preference eligible Mail Processing Clerk at the agency's Santa Ana Processing and Distribution Center (P&DC). Initial Appeal File (IAF), Tab 2 at 2, Tab 6 at 61. On April 8, 1992, the appellant suffered a compensable injury, and on December 8, 2008, she accepted a limited duty assignment entailing 8 hours of work per day. IAF, Tab 6 at 6-9, Tab 7 at 6.

¶3 On April 23, 2009, the appellant submitted updated medical documentation, indicating an improvement in her machinery operating capability, and a deterioration in her sitting, bending/stooping, and twisting capabilities. IAF, Tab 6 at 6, 16. The agency stated that it reviewed the appellant's most recent medical restrictions and the available necessary and productive work at the Santa Ana P&DC, and under the criteria established by its National Reassessment Process (NRP),[2] it determined that there were "about three hours worth of operationally necessary tasks [available] within her medical restrictions on her tour and within her facility." IAF, Tab 7 at 6. On April 27, 2009, the agency offered the appellant a limited duty assignment performing automation duties for 3 hours per day. IAF, Tab 6 at 17-18. The appellant accepted the assignment "under protest due to not being accommodated 8 [hours] per day." *Id*. at 17.

¶4 The appellant filed a timely Board appeal of the agency's action and requested a hearing, alleging that the agency improperly denied her restoration by

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[2] The NRP is an agency initiative to ensure that employees with medical restrictions are provided only with operationally necessary tasks within their medical restrictions. IAF, Tab 6 at 10.

failing to provide her with 8 hours of work per day.[3] IAF, Tab 2 at 3-4. The administrative judge issued an acknowledgment order, notifying the appellant of how to establish Board jurisdiction over a restoration appeal as a partially recovered employee. IAF, Tab 3 at 2. The agency filed a motion to dismiss the appeal for lack of jurisdiction, IAF, Tab 7 at 4-10, and the appellant submitted allegations pertaining to the availability of work within her medical restrictions, IAF, Tab 8 at 2. The appellant also filed a motion to compel discovery, IAF, Tab 9, which the agency opposed, IAF, Tab 10.

¶5 The administrative judge issued an initial decision dismissing the appeal for lack of jurisdiction without a hearing. IAF, Tab 11, Initial Decision (ID) at 2, 5. She found that the appellant was essentially disputing the particulars of her restoration, and that she failed to make a nonfrivolous allegation that her assignment of 3 hours of limited duty work per day was so unreasonable as to constitute an arbitrary and capricious denial of restoration. ID at 4-5. "In view of the dismissal for lack of jurisdiction," the administrative judge denied the appellant's motion to compel. ID at 5 n.3.

¶6 The appellant has filed a petition for review, arguing that the administrative judge erred in finding that the agency did not arbitrarily and capriciously deny her proper restoration, PFR File, Tab 1 at 1-7, the administrative judge ignored her motion to compel, *id*. at 6, and the administrative judge should have allowed her witnesses to testify, *id*. The agency

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[3] The appellant also alleged that the agency's action constituted a constructive suspension and a demotion, IAF, Tab 2 at 3-4, but the administrative judge found that the Board lacks jurisdiction over these claims, IAF, Tab 11 at 1 n.1. Because the petition for review does not challenge the administrative judge's findings, we will not consider the constructive suspension and demotion claims any further. *See* 5 C.F.R. § 1201.114(b) (the Board normally will consider only issues raised in a timely petition for review or cross-petition for review). In any event, the administrative judge correctly dismissed the constructive suspension claim because that claim is subsumed in the appellant's restoration appeal. *See Kinglee v. U.S. Postal Service*, 114 M.S.P.R. 473, ¶¶ 19-22 (2010).

filed an untimely response to the petition for review, addressing the appellant's arguments on review and arguing that the initial decision was correctly decided. PFR File, Tab 3 at 4-6. The agency subsequently filed an unopposed motion for the Board to accept its untimely filing. PFR File, Tab 5 at 4-7.

ANALYSIS

¶7 The agency requests that the Board waive the deadline for filing the response to the petition for review and accept its untimely submission on the basis that the agency representative scheduled the task in his calendar for the wrong day. PFR File, Tab 3, Tab 5 at 4-7. The Board has found that a representative's clerical errors do not provide good cause to waive a filing deadline. *E.g.*, *Moore v. Department of the Treasury*, 41 M.S.P.R. 35, 37 (1989); *Goldberg v. Department of Defense*, 39 M.S.P.R. 515, 517-18 (1989). This is especially so in light of the agency representative's decision to schedule the filing for the last possible day. PFR File, Tab 5 at 4; *see Gill v. Department of the Treasury*, 41 M.S.P.R. 267, 267-70 (1989). However, we need not decide the timeliness issue because, even considering the response to the petition for review, it would have no effect on the outcome of this appeal.

¶8 We find that the appellant has presented a nonfrivolous allegation that her restoration claim is within the Board's jurisdiction and that she is, therefore, entitled to her requested hearing and a decision on the merits. The regulations governing an agency's restoration to duty obligations provide that a partially recovered employee is one who cannot resume the full range of regular duties but has recovered sufficiently from a compensable injury to return to part-time or light duty, or to another position with less demanding physical requirements. 5 C.F.R. § 353.102; *see Urena v. U.S. Postal Service*, 113 M.S.P.R. 6, ¶ 8 (2009).

¶9 The Office of Personnel Management's (OPM) regulations afford restoration rights to a partially recovered employee. These rights require the agency to make every effort to restore in the local commuting area a partially

recovered employee who can return to limited duty, according to the circumstances in each case. 5 C.F.R. § 353.301(d).

¶10 A partially recovered employee's right to file a Board appeal over a violation of these rights also derives from OPM's regulations. *Urena*, 113 M.S.P.R. 6, ¶ 9. These regulations provide that a partially recovered employee may appeal to the Board only for a determination of whether the agency is acting in an "arbitrary and capricious" way in denying restoration. *Urena*, 113 M.S.P.R. 6, ¶ 9; 5 C.F.R. § 353.304(c). To establish Board jurisdiction over a restoration claim as a partially recovered employee, the appellant must make nonfrivolous allegations that the agency violated her restoration rights. *Urena*, 113 M.S.P.R. 6, ¶ 10. This requires the appellant to allege facts that would show, if proven, 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; (3) the agency denied her request for restoration; and (4) the denial was arbitrary and capricious. *Id.*; *Sanchez v. U.S. Postal Service*, 114 M.S.P.R. 345, ¶ 10 (2010).

¶11 In determining the parameters of this jurisdictional test, the Board has held that a partially-recovered individual who has been restored to duty may not challenge the details or circumstances of the restoration. *Urena*, 113 M.S.P.R. 6, ¶ 9. It has also found, however, that an agency's rescission of a previously provided restoration may constitute an appealable denial of restoration. *Id.* Similarly, the discontinuation of a limited duty position may constitute a denial of restoration for purposes of Board jurisdiction under 5 C.F.R. part 353. *Brehmer v. U.S. Postal Service*, 106 M.S.P.R. 463, ¶ 9 (2007).

¶12 Here, the appellant has clearly satisfied the first two elements of the jurisdictional test. She has been both absent from her official position due to a compensable injury and able to return to duty in a position with less demanding physical requirements. IAF, Tab 6 at 6-9, 16; *see Baldwin v. Department of*

Veterans Affairs, 109 M.S.P.R. 392, ¶¶ 11, 32 (2008) (the Board may consider the agency's documentary submissions in finding that an appellant has made a nonfrivolous allegation of Board jurisdiction).

¶13 The next question concerns whether the appellant has presented a nonfrivolous allegation that the agency's decision to reduce her limited duty from 8 hours to 3 hours per day pursuant to its NRP constitutes a restoration denial within the meaning of the third element of the jurisdictional test. For the following reasons, we agree with the appellant that, under the particular circumstances of this case, the agency's decision to provide her with less than full-time work constituted a denial of restoration. PFR File, Tab 1 at 3-4, 7. In *Kinglee*, 114 M.S.P.R. 473, ¶ 14, the Board found that the partial elimination of previously afforded limited duty pursuant to the NRP is a denial of restoration within the Board's jurisdiction. Accordingly, the appellant here is not merely appealing the details and circumstances of her restoration, and an analysis of whether the restoration was so unreasonable as to constitute a denial of restoration does not apply. *See Kinglee*, 114 M.S.P.R. 473, ¶ 14; *cf. Jones v. U.S. Postal Service*, 86 M.S.P.R. 464, ¶¶ 2, 6-7 (2000) (where the agency restored the appellant to duty, but the appellant alleged that she could not physically perform the tasks of her new assignment, it was appropriate to address whether the restoration was so unreasonable as to amount to a denial of restoration). We therefore find that the appellant has met the third jurisdictional element.[4] *See Kinglee*, 114 M.S.P.R. 473, ¶ 14.

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[4] The agency appears to have returned the appellant to work full time on August 19, 2009. PFR File, Tab 1 at 6. This fact has no bearing on the jurisdictional issue because the appellant may still be entitled to back pay and benefits for any period during which restoration was arbitrarily and capriciously denied. *See Chism v. U.S. Postal Service*, 85 M.S.P.R. 436, ¶¶ 10-11 (2000) (although the appellant was ultimately restored to duty, the agency's delay in restoring him could constitute a denial of restoration for which the appellant could be entitled to back pay and benefits), *overruled on other grounds by Chen v. U.S. Postal Service*, 97 M.S.P.R. 527, ¶¶ 17-18 (2004); *see also Hardy v. U.S. Postal Service*, 104 M.S.P.R. 387, ¶ 20 (an agency's delay in restoring a

¶14 The final jurisdictional element requires the appellant to nonfrivolously allege that the denial was arbitrary and capricious. In *Sanchez*, the Board held that an appellant satisfies this requirement where the record shows that the agency did not examine the entire local commuting area in determining the available work under the NRP, as required under 5 C.F.R. § 353.301(d). 114 M.S.P.R. 345, ¶¶ 12-14. Here, the agency's submissions below indicate that it did not examine the entire local commuting area in determining the available work under the NRP, as required under 5 C.F.R. § 353.301(d). Rather, the agency stated only that it searched for work within the appellant's medical restrictions at the Santa Ana P&DC. IAF, Tab 7 at 6. Because the record suggests that the agency failed to search throughout the local commuting area, it establishes a nonfrivolous allegation that the agency's restoration denial was arbitrary and capricious. *See Vazquez v. U.S. Postal Service*, 114 M.S.P.R. 264, ¶ 14 (2010). The appellant has, therefore, satisfied all the elements of the jurisdictional test, and is entitled to an adjudication of the merits of her restoration claim, including her requested hearing.

ORDER

¶15 Accordingly, we reverse the initial decision and remand the appeal to the Western Regional Office for further adjudication of the appeal consistent with this Opinion and Order. Because the Board has jurisdiction over the appeal, the

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partially recovered employee may constitute a denial of restoration), *aff'd*, 250 F. App'x 332 (Fed. Cir. 2007).

administrative judge shall make a new ruling on the appellant's motion to compel. ID at 5 n.3; IAF, Tab 9.

FOR THE BOARD:

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