UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2007 MSPB 2

Docket No. CH-0353-05-0849-I-1

Rick L. Hardy,

Appellant,

v.

United States Postal Service,

Agency.

January 10, 2007

Jeff Reihs, Ashland, Kentucky, for the appellant.

James E. Campion, Jr., Esq., Philadelphia, Pennsylvania, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman
Barbara J. Sapin, Member

OPINION AND ORDER

¶1 The appellant has filed a petition for review of an initial decision that dismissed his appeal for lack of jurisdiction. For the reasons discussed below, we find that the petition does not meet the criteria for review set forth at 5 C.F.R. § 1201.115, and we therefore DENY it. We REOPEN this appeal on our own motion under 5 C.F.R. § 1201.118, however, and AFFIRM AS MODIFIED the initial decision's dismissal of the appellant's constructive suspension claim for lack of jurisdiction. We REVERSE that portion of the initial decision which found that the appellant's restoration appeal was untimely and find that the restoration appeal was timely filed. We AFFIRM AS MODIFIED the initial

decision's finding that we lack jurisdiction over the appellant's claim that the agency's July 21, 2004 job offer was so unreasonable as to be an effective denial of restoration. As to the appellant's claim that the agency acted arbitrarily and capriciously in denying his August 2, 2005 request for restoration, we REVERSE the initial decision's dismissal of his restoration claim for lack of jurisdiction and find that the Board has jurisdiction over this claim but that the appellant has failed to meet his burden of proving by a preponderance of the evidence that the agency acted arbitrarily and capriciously in denying restoration. We further find that the appellant has not established his affirmative defense of disability discrimination.

BACKGROUND

¶2 The appellant was employed as a PS-6 General Expeditor at the Ashland, Kentucky Processing and Distribution Center until he suffered an on-the-job injury which affected his right shoulder and aggravated a back condition. Initial Appeal File (IAF), Tab 10, Subtabs 4l, 4p. The Department of Labor (DOL) Office of Workers' Compensation Programs (OWCP) accepted his claim based on shoulder and back conditions, and the appellant began receiving OWCP benefits in July 2003. *Id.*, Subtab 4p. The appellant also applied for disability retirement and, in April 2004, the Office of Personnel Management (OPM) informed him that his application was approved. *Id.*, Subtabs 4m, 4o. OPM further informed the appellant that he had not yet been separated and that OPM would be asking his employing agency to separate him. *Id.*, Subtab 4m. Upon OPM's request, the agency separated the appellant due to disability retirement effective May 3, 2004, and issued a PS Form 50 reflecting that the appellant was separated. *Id.*, Subtab 4l; IAF, Tab 22 at 4.

¶3 On July 21, 2004, the agency presented the appellant with a modified job offer. IAF, Tab 10, Subtab 4k. The appellant declined the job offer on July 30, 2004. *Id.* at 2. He stated that his restrictions prevented him from working eight

hours per day and further stated, "THIS IS WHY OPM HAS ALREADY RETIRED ME & I AM OFFICIALLY SEPARATED FROM YOUR ORG. (AS OF 4/28/04). I DO NOT WISH TO RETURN." *Id.* The appellant also requested that the agency send OPM additional information regarding his health and life insurance, as this was "holding up my retirement check." *Id*.

¶4 The agency then requested that OWCP make a ruling on the suitability of the job offer. IAF, Tab 10, Subtab 4j. In August 2004, OWCP informed the agency that it found the offer to be suitable, but the appellant had indicated to OWCP that he had been accepted for and intended to elect OPM disability retirement benefits. *Id*. Nevertheless, OWCP indicated that it would provide the agency with a copy of its response after its final action in the matter. *Id*. In October 2004, OPM wrote to the appellant and informed him that he had to elect either OWCP benefits or retirement benefits. IAF, Tab 10, Subtab 4i at 2. An October 12, 2004, Report of Contact form indicates that the appellant informed OPM that he elected to continue to receive OWCP benefits but would keep OPM's approval letter in case he changed his mind. *Id*. at 1.

¶5 OWCP sent the appellant for a second medical opinion examination in January 2005 and a final independent medical examination in April 2005, both of which found no continuing disabling conditions. IAF, Tab 10, Subtab 4g. On June 16, 2005, and again on July 18, 2005, OWCP informed the appellant that it would terminate his benefits effective July 23, 2005. IAF, Tab 10, Subtab 4d. OWCP also informed the appellant of his restoration rights as a fully recovered employee. *Id*. On July 28, 2005, the appellant requested reconsideration of OWCP's decision to terminate his benefits, asserting that another physician disputed the findings of OWCP's physicians. IAF, Tab 10, Subtab 4c. He further stated that he contacted the agency "to inquire about [his] job status, as [he had] not been given any job offer at all" and that he understood "at least [he] would maintain [his] employment status . . . if [his OWCP] compensation was terminated." *Id*. at 2.

¶6 The appellant reported for work on August 2, 2005, at which time he was told that he no longer was on the employee rolls. IAF, Tab 7 (letter to Postmaster David Leader). In an August 9, 2005 letter, he asserted that he had been involuntarily terminated and requested that he receive administrative paid leave until the situation could be resolved. *Id.* On August 18, 2005, the appellant requested administrative leave from July 24 until August 19 because OWCP had told him to report to work and the agency had not responded. IAF, Tab 7 (Form 3971). In a letter dated September 12, 2005, and mailed September 21, 2005, the appellant requested that he be allowed to bid on positions under the collective bargaining agreement. IAF, Tab 10, Subtab 4a; Tab 20, Subtab B. In response, the agency stated that its records indicated that the appellant had retired and that he had not been removed. IAF, Tab 10, Subtab 4a. The agency informed the appellant that, because he was no longer an agency employee, he was not entitled to bid or apply for leave. *Id.* On August 22, 2005, the appellant filed an appeal with the Board alleging that the agency constructively removed him, violated his rights under the Rehabilitation Act, and denied him a reasonable accommodation. IAF, Tab 1.

¶7 During the course of the appeal, the appellant raised an additional claim that his retirement was involuntary. IAF, Tab 32. The administrative judge docketed that claim as a separate action in *Hardy v. U.S. Postal Service*, MSPB Docket No. CH-0752-06-0267-I-1 (MSPB Docket No. 06-0267). He determined that the Board lacked jurisdiction over the involuntary retirement claim because the appellant had not shown that he was a preference-eligible employee based upon his service in the United States Marine Corps. *Hardy*, MSPB Docket No. 06-0267, slip op. at 6-7 (Initial Decision Mar. 31, 2006). The administrative judge further concluded that the appellant did not claim to be a management or supervisory employee or an employee engaged in personnel work in other than a purely non-confidential clerical capacity. *Id.* at 6. Neither party petitioned for

review and the initial decision became the Board's final decision on May 5, 2006. *Id.* at 12.[1]

¶8 In the initial decision in the present appeal, the administrative judge first addressed the appellant's contention that he had been constructively suspended since his OWCP benefits were terminated on July 23, 2005. Initial Decision (ID) at 6-7. The administrative judge noted that he was to address the issue of whether the appellant was a Postal employee with Board appeal rights under 5 U.S.C. Chapter 75 in MSPB Docket No. 06-0267. *Id.* at 7. The administrative judge noted that the appellant may not have Board appeal rights because he did not appear to be a preference-eligible, management, or supervisory employee, or an employee engaged in personnel work in other than a purely non-confidential clerical capacity. *Id.* The AJ further noted that it did not appear that the appellant was a preference eligible but that, in any event, the appellant's absence from work was not an appealable suspension, ruling in the alternative that the appellant had not shown that the agency violated any agency policy, regulation, or contractual provision in failing to return the appellant to work. *Id.* at 6-8.

¶9 As to the appellant's claim that the July 21, 2004 job offer was so unreasonable as to be a denial of restoration, the administrative judge concluded that, based on the only suitability determination that OWCP had made to date (i.e., that the position offered was suitable), the Board was precluded from finding that the July 21, 2004 job offer was so unreasonable that it amounted to an arbitrary and capricious denial of restoration. *Id.* at 8-10. To the extent that the appellant was asserting a failure to restore following the June 16 and July 18,

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[1] On petition for review of the present appeal, the appellant refers to the circumstances surrounding his separation and appears to argue that he was not provided with accurate information regarding his retirement annuity. PFRF, Tab 1 at 4, 6. The appellant has not filed a petition for review of the initial decision in *Hardy*, MSPB Docket No. 06-0267, and we will not address any arguments relating to the alleged involuntary retirement in the present appeal.

2005 OWCP decisions, the administrative judge found that his assertions appeared to be based on a non-compensable injury. *Id.* at 11-12. To the extent that the appellant's claim was based on the August 9, 2005 letter he sent to the agency requesting restoration, the administrative judge reasoned that the claim failed because the appellant had not properly initiated the process for restoration and had not followed the agency's instructions to coordinate his return to work with the agency's personnel office and Injury Compensation/Shared Services. *Id.* at 13. The administrative judge further noted that the appellant has received all of the relief to which he would be entitled if he were a fully-recovered employee. *Id.* at 13-14. The administrative judge concluded that none of the appellant's restoration claims were within the Board's jurisdiction. *Id.* at 11-14. He determined further that, assuming *arguendo* the Board has jurisdiction over the restoration claims, the appeal was untimely without a showing of good cause. *Id.* at 15-18. The administrative judge concluded that, absent an appealable action, he could not address the appellant's disability discrimination claims. *Id.* at 18.

¶10 The appellant timely filed a petition for review in which he asserts that he is a 5-point preference-eligible veteran. Petition for Review File (PFRF), Tab 1 at 3. According to the appellant, the AJ erred in concluding that the Board lacked jurisdiction over his claim that the July 21, 2004 job offer was so unreasonable as to be a denial of restoration. *Id.* at 5-8. He disagrees with the factual findings on which the administrative judge relied in concluding that the Board lacked jurisdiction over his claim that the agency acted arbitrarily and capriciously in denying his August 2, 2005 request for restoration. *Id.* at 8-11. The appellant argues on review that, after he requested restoration on August 2, 2005, it was the agency's responsibility to locate a position and start an interactive process, which the agency failed to do. *Id.* at 11. The appellant concedes that he must cooperate with the agency but maintains that no law or rule governing restoration requires him to coordinate with the agency's personnel or injury compensation offices. *Id.* The agency has responded to the appellant's petition for review. PFRF, Tab 6.

ANALYSIS

Constructive Suspension

¶11 The administrative judge construed the appellant's contention that he had not been allowed to work since his OWCP benefits were terminated on July 23, 2005, as a constructive suspension claim. ID at 6. A suspension in excess of 14 days is an "adverse action" over which the Board has jurisdiction. 5 U.S.C. §§ 7512(2); 7513(d). To establish that he is an employee who may appeal an adverse action to the Board, the appellant, as a Postal Service employee, must show that he has completed one year of current continuous service in the same or similar positions and that he was either a preference-eligible, a management or supervisory employee, or an employee engaged in personnel work in other than a purely non-confidential clerical capacity. 39 U.S.C. § 1005(a)(4); *Bolton v. Merit Systems Protection Board*, 154 F.3d 1313, 1316 & n.2 (Fed. Cir. 1998); *Toomey v. U.S. Postal Service*, 71 M.S.P.R. 10, 12 (1996). The appellant bears the burden of proving jurisdiction by preponderant evidence. 5 C.F.R. § 1201.56(a)(2)(i).

¶12 Here, the appellant's representative asserted in a pleading that the appellant had four years of military service in the United States Marine Corps. IAF, Tab 7 at 1. The appellant's PS Form 50 indicated, however, that he was not a preference eligible. IAF, Tab 10, Subtab 4l. As noted above, the administrative judge determined in a related appeal that the appellant was not preference-eligible. *Hardy*, MSPB Docket No. 06-0267, slip op. at 6-7. The administrative judge further concluded that the appellant made no claim and presented no evidence to show that he was a management or supervisory employee or an employee engaged in personnel work in other than a purely non-confidential clerical capacity. *Id.* at 6. Further, the administrative judge provided the appellant with information regarding how to establish that he is an employee who may appeal an adverse action to the Board. IAF, MSPB Docket No. 06-0267, Tab 4.

¶13 For the first time on review of the present appeal, the appellant's representative states that the appellant is a 5-point preference eligible veteran. PFRF, Tab 1 at 3. To the extent that the appellant is attempting to relitigate this issue on petition for review of the present appeal, he is precluded from doing so. Collateral estoppel, or issue preclusion, is appropriate when:

> (1) The 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 against whom issue preclusion is sought had a full and fair opportunity to litigate the issue in the prior action, either as a party to the earlier action or as one whose interests were otherwise fully represented in that action.

McNeil v. Department of Defense, 100 M.S.P.R. 146, ¶ 15 (2005); *see Kroeger v. U.S. Postal Service*, 865 F.2d 235, 239 (Fed. Cir. 1988). The issue of whether the appellant is a preference eligible is identical to the issue involved in MSPB Docket No. 06-0267 and the issue was actually litigated in that appeal. Further, the determination of whether the appellant was a preference eligible was necessary to the dismissal of MSPB Docket No. 06-0267 for lack of jurisdiction. Finally, the appellant had a full and fair opportunity to litigate that issue in the prior action. For these reasons, the appellant is precluded from relitigating the issue of whether he is a preference-eligible veteran on petition for review of the present appeal.

¶14 However, even if the appellant were not precluded from relitigating this issue on review, he has not presented evidence (such as his DD-214) in either the present appeal or in MSPB Docket No. 06-0267 to show that he is a preference eligible. Moreover, the statements of the appellant's representative in the petition for review do not constitute evidence. *See Hendricks v. Department of the Navy*, 69 M.S.P.R. 163, 168 (1995). Accordingly, there is no evidence in the record to show that the appellant is a preference eligible and thus is an "employee" entitled to appeal the alleged constructive suspension to the Board.

Therefore, the administrative judge correctly dismissed the constructive suspension claim for lack of jurisdiction.

Restoration to Duty as a Partially Recovered Employee

Timeliness

¶15 An appeal from an agency action must be filed no later than 30 days after the effective date of the action being appealed or 30 days after the date of receipt of the agency's decision, whichever is later. 5 C.F.R. § 1201.22(b)(1). The Board will waive its filing deadline only upon a showing of good cause for the delay. 5 C.F.R. § 1201.22(c). In the initial decision, the administrative judge reasoned that, even if the Board had jurisdiction over the appellant's restoration claims, his appeal should be dismissed as untimely filed without a showing of good cause for the delay. ID at 15-18. As to the appellant's claim that the agency's July 21, 2004 job offer was so unreasonable as to be an effective denial of restoration, the administrative judge reasoned that the appeal was untimely, as it was filed on August 22, 2005, approximately 13 months after the agency allegedly failed to restore him. *Id.* at 15. In an appeal such as this, however, the Board may not be able to exercise jurisdiction over the appeal until OWCP makes a determination as to the suitability of a job offer. *See Ballesteros v. U.S. Postal Service*, 88 M.S.P.R. 428, 432, ¶¶ 8-9 (2001). Where, as here, the administrative judge concluded that the Board was precluded from finding that the July 21, 2004 job offer was unsuitable because OWCP had not yet reversed its initial finding that the offer was suitable, ID at 9-10, the appeal as it concerned this offer should not be dismissed as untimely filed. Moreover, the appeal of the agency's alleged denial of the appellant's August 2, 2005 request for restoration, filed on August 22, 2005, was timely.

Jurisdiction and Merits

¶16 The Board has jurisdiction over appeals based on the denial of restoration rights following a compensable injury, including restoration appeals from Postal

Service employees. 5 C.F.R. § 353.304; *Norwood v. U.S. Postal Service*, 100 M.S.P.R. 494, ¶ 4 (2005). Agencies must make every effort to restore in the local commuting area, according to the circumstances in each case, an individual who has partially recovered from a compensable injury and who is able to return to limited duty. 5 C.F.R. § 353.301(d). A partially recovered employee is an injured employee who, although not ready to resume the full range of his or her regular duties, has recovered sufficiently to return to part-time or light duty or to another position with less demanding physical requirements. 5 C.F.R. § 353.102. A compensable injury is defined as one that is accepted by OWCP as job-related and for which medical monetary benefits are payable from the Employees' Compensation Fund. *Norwood*, 100 M.S.P.R. 494, ¶ 4. The Board may review an agency's actions with respect to restoration of an individual who is partially recovered from a compensable injury only to determine whether the agency "is acting arbitrarily and capriciously in denying restoration." 5 C.F.R. § 353.304(c).

¶17 To establish jurisdiction over such an appeal, the partially recovered employee must allege facts which, if proven, would show 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 imposed on him; (3) the agency denied his request for restoration; and (4) the denial was arbitrary and capricious. *Welby v. Department of Agriculture*, 101 M.S.P.R. 17, ¶ 15 (2006); *see Chen v. U.S. Postal Service*, 97 M.S.P.R. 527, ¶ 12 (2004). Once an employee has made non-frivolous allegations sufficient to establish jurisdiction, he is entitled to a hearing on the merits. *Chen*, 97 M.S.P.R. 527, ¶ 13. Where there is a bona fide dispute as to any of these elements, the appellant bears the burden of proving them because they are issues that implicate both jurisdiction and the merits. *See Welby*, 101 M.S.P.R. 17, ¶ 16. For the reasons set forth below, we find that the Board lacks jurisdiction over the appellant's claim that the agency's July 21, 2004 job offer was so unreasonable as to be a denial of

restoration. As to the appellant's August 2, 2005 request for restoration, while we find that the appellant has made non-frivolous allegations sufficient to establish jurisdiction, he has failed to prove his restoration claim by preponderant evidence. *See Chen*, 97 M.S.P.R. 527, ¶ 13.

The Agency's July 21, 2004 Modified Job Offer

¶18 The appellant presented no evidence to show that he had requested restoration at the time the agency presented the July 21, 2004 modified job offer and accordingly has failed to establish jurisdiction over this claim. *See Chen*, 97 M.S.P.R. 527, ¶ 12. We acknowledge that, in the instant case, the employing agency initiated the process by offering the appellant a job, in contrast to a situation where the employee begins the process by claiming partial recovery and requesting restoration. In the present case, however, the appellant stated that he was permanently prevented from working eight hours per day, asserted that he could work only 1-2 hours per day with maximum restrictions, and further stated, "THIS IS WHY OPM HAS ALREADY RETIRED ME & I AM OFFICIALLY SEPARATED FROM YOUR ORG. (AS OF 4/28/04). I DO NOT WISH TO RETURN." IAF, Tab 9, Subtab 4k. Under the unique facts of this appeal, where the appellant responded to the agency's offer by explicitly stating that he had no desire to return to work, we find that the appellant has failed to establish jurisdiction over his claim that the July 21, 2004 modified job offer was an effective denial of restoration. Having found that the Board lacks jurisdiction over this claim, we decline to address the appellant's contentions on review that the administrative judge erred in finding that OWCP found the job offer to be suitable and his assertions that OWCP found the job offer to be unsuitable. PFRF, Tab 1 at 5-8. Furthermore, we will not consider the evidence relating to this issue submitted for the first time on review. *Id.*, Exh. A-2.

The Appellant's August 2, 2005 Request for Restoration

¶19 The appellant also alleged that the agency denied the request for restoration he made on August 2, 2005, after OWCP terminated his benefits. Our review of the record indicates that the appellant has made non-frivolous allegations as to the jurisdictional elements. The record makes clear that the appellant was separated from his position due to a compensable injury. The appellant alleges that he is partially recovered from his compensable injury, and the May 3, 2004 report of his treating physician offers some support for this claim. IAF, Tab 20, Subtab A1. The agency stipulated that the appellant requested restoration on August 2, 2005. IAF, Tab 22 at 3. Finally, the appellant has alleged that the agency denied his request for restoration and that the agency's actions were arbitrary and capricious. For example, the appellant contended that the agency's requirement that he complete a medical exam and re-qualify on the "473 exam"[2] is arbitrary and capricious and that the agency was "doing everything possible to keep him from returning to work." IAF, Tab 25 at 2, 4.

¶20 An agency's delay in restoring a partially recovered employee may constitute a denial of restoration sufficient to establish Board jurisdiction over a restoration appeal. *Chism v. U.S. Postal Service*, 85 M.S.P.R. 436, ¶ 10 (2000), *overruled on other grounds by Chen v. U.S. Postal Service*, 97 M.S.P.R. 527 (2004); *Taylor v. U.S. Postal Service*, 69 M.S.P.R. 479, 483 (1996). In *Taylor*, we remanded the appeal to the administrative judge for a determination of whether the agency's three-week delay in returning the appellant to a position constituted an arbitrary and capricious denial of restoration. *Taylor*, 69 M.S.P.R. at 483. In *Taylor*, however, the appellant alleged that the agency's medical unit failed to timely approve her physician's clearance to return to work. *Id.* at 481. Further, the agency placed appellant Taylor in a light-duty position for one and one-half hours and then delayed for three weeks in returning her to this position.

[2] The record does not explain what a "473 exam" entails.

Id. at 483. In *Chism*, we vacated an initial decision that dismissed the appeal for lack of jurisdiction and remanded the appeal for further adjudication on the merits. There, the appellant's physicians furnished OWCP with letters indicating that the appellant could return to work full-time with certain restrictions. *Chism*, 85 M.S.P.R. 436, ¶ 2. On multiple occasions between 1991 and 1998, appellant Chism and an OWCP claims examiner requested that the agency restore the appellant to a position within his restrictions. *Id.*

¶21 In the present case, Dr. Richard T. Sheridan found in April 2005 that the appellant had full range of motion in his shoulder, he no longer suffered any residual effects of the accepted conditions, he required no restrictions in the workplace, he had reached maximum medical improvement, and light duty could be used to increase the appellant's "ability to work 2 to 4 to 6 to eventually progress to 8 hours per day." IAF, Tab 10, Subtab 4g at 6, 10. In contrast, an August 18, 2005 examination by Dr. Laura Reese indicated that the appellant's "passive range of motion of his right shoulder is very limited" and that he had pain in the lumbar spine area with bending and extension. IAF, Tab 10, Subtab 4b. Dr. Reese recommended further testing of the appellant's shoulder and gave no indication as to whether the appellant may return to work in a limited-duty position. *Id.* When the appellant reported for work on August 2, 2005, he told Paul Edwin Helton, the Ashland Plant Manager, that he was unsure whether he could do his job but that he wanted to try. Hearing Tape (H.T.) 1, Side B. In contrast to *Chism* and *Taylor*, the agency here is faced with conflicting assessments of the appellant's abilities, and there is no indication that OWCP has made a final determination regarding the appellant's restrictions. Thus, the facts of the present case are distinguishable from those of *Chism* and *Taylor* and, under the facts of the present case, we cannot conclude that the agency's decision to await OWCP's final determination constituted an arbitrary and capricious denial of restoration.

¶22 The appellant has not otherwise presented sufficient evidence to show that the agency acted arbitrarily and capriciously in denying his request for restoration. The appellant presented little evidence to show that he complied with the agency's instructions. On August 2, 2005, the appellant reported for work at the Ashland Post Office. IAF, Tab 7 (Letter to Postmaster Leader). Helton informed the appellant that he was retired and that Helton could not bring him back, and Helton suggested that the appellant call his case worker. H.T. 1, Side B. Instead, the appellant wrote to Postmaster Leader on August 9, 2005, and asked "to be notified in writing as to my status with the USPS" and to receive paid administrative leave until the situation could be corrected. IAF, Tab 7 (Letter to Postmaster Leader). The appellant then filed this appeal on August 22, 2005. IAF, Tab 1. The appellant argues on review that, after he requested restoration on August 2, 2005, it was the agency's responsibility to locate a position and start an interactive process, which the agency failed to do. PFRF, Tab 1 at 11. The appellant concedes that he must cooperate with the agency but maintains that no law or rule governing restoration requires him to coordinate with the agency's personnel or injury compensation departments. *Id.*

¶23 In a letter mailed September 21, 2005, the appellant requested that he be allowed to exercise his right to bid on positions pursuant to the collective bargaining agreement. IAF, Tab 10, Subtab 4a; Tab 20, Subtab B. In response, the agency informed the appellant that he had retired and that he should contact OPM or Mike Russell, the Manager of Personnel Services, with questions about his retirement and that he should contact Shared Services with questions about his OWCP benefits. IAF, Tab 10, Subtab 4a. The appellant left a voice mail with Russell at the end of August or early September 2005; however, he did not leave a phone number where he could be reached. H.T. 2, Side B. Moreover, Russell testified that he believed that the appellant was requesting work as a reemployed annuitant and, as such, he would not be entitled to restoration priority consideration. *Id.*; *see Johnson v. Merit Systems Protection Board*, 812 F.2d 705,

708-09 (Fed. Cir. 1987). On November 7, 2005, the agency representative wrote to the appellant and informed him that he must notify OPM and the Kentuckiana District Human Resources Manager of his intent to remove himself from the retirement rolls and to return to the agency and notify the agency of his desire to be placed on the reemployment priority list. IAF, Tab 20, Subtab C. The appellant presented no evidence to show that he has complied with any of these instructions. The appellant merely testified that he believed he had done everything that he was supposed to do, he never told the agency that he was unwilling to return to work, he never said he was fully incapacitated and cannot return to work, and he kept in touch with Plant Manager Helton throughout the process. H.T. 4, Side A.

¶24 Instead of following the above instructions, the appellant argued below that he had not retired, that he never received the PS Form 50 documenting his separation, and that the agency wrongfully removed him from its employment rolls. This argument is unpersuasive. On April 28, 2004, OPM informed the appellant that it would be asking the agency to separate him from government service. IAF, Tab 10, Subtab 4m. The appellant stipulated that the agency issued a PS Form 50 documenting the appellant's separation effective May 3, 2004. IAF, Tab 22 at 4. Moreover, in declining the agency's July 21, 2004 job offer, the appellant indicated that he had retired and was separated from the agency and urged the agency to send OPM information needed for him to begin receiving his retirement check. IAF, Tab 10, Subtab 4k at 2.

¶25 The appellant further contended that the agency acted arbitrarily and capriciously in filling two positions after his August 2, 2005 request for restoration. Russell testified that the agency filled two positions between August 2, 2005, when the appellant appeared for work, and December 2, 2005, when the appellant was placed on the priority reemployment list. H.T. 3, Side A; IAF, Tab 23. The agency filled a part-time clerk position in Louisa, Kentucky and a part-time city carrier position. H.T. 3, Side A. The appellant testified that

he was qualified for and had applied for the clerk position. H.T. 4, Side A. Russell explained that the appellant would have been qualified for the clerk position had he passed the "473 exam." H.T. 3, Side A. However, there was no evidence regarding the physical requirements of the two positions or that the appellant was physically capable of performing the duties of either position. Further, the record before us does not show that the appellant followed the agency's directions to properly request restoration or that the agency understood the appellant was requesting restoration rights under 5 C.F.R. § 353.301(d), as opposed to requesting work as a reemployed annuitant, at the time the positions were filled. Thus, we cannot conclude on this record that the agency's decision not to place the appellant in either position was an arbitrary and capricious denial of restoration.

¶26 On December 2, 2005, the agency placed the appellant on the reemployment priority list, apparently anticipating that the appellant would be found to be fully recovered. IAF, Tab 23. Russell testified that the agency has not offered any jobs since December 2, 2005, because the agency was withholding positions for employees impacted by Hurricane Katrina and for employees of a Philadelphia area plant whose positions were to be lost to automation. H.T. 3, Side A. This testimony was uncontested. After the record on review closed, the appellant's representative submitted a pleading in which he asserts that he has evidence to show that Russell's explanation for the agency's decision not to fill any positions after December 2, 2005, was false. PFRF, Tab 7 at 1-2. We will not consider this evidence and argument as it was submitted after the record closed and the appellant has not explained why this evidence was unavailable before the record on review closed. *See* 5 C.F.R. § 1201.114(i). Moreover, this evidence and argument is not material, as the administrative judge did not rely on Russell's testimony on this issue. Rather, the administrative judge reasoned that he could not conclude that the agency's actions were arbitrary and capricious where the agency provided the appellant with information regarding

how to proceed and the appellant failed to show that he had acted in accordance with the agency's instructions. ID at 13-14.

¶27 An employee fully recovered from a compensable injury more than one year from the date his eligibility for compensation began is entitled to priority consideration, agencywide, for restoration to the position he left or an equivalent position, provided he applies for reappointment within 30 days of the cessation of OWCP compensation. 5 C.F.R. § 353.301(b); *King v. Department of the Navy*, 100 M.S.P.R. 116, ¶ 10 (2005), *aff'd*, 167 F. App'x 191 (Fed. Cir. 2006). The appellant has consistently maintained that he was a partially recovered employee and not a fully recovered employee. He acknowledges that there is no priority placement for partially recovered employees. IAF, Tab 25 at 4. Nevertheless, he raised an alternative argument regarding his December 2, 2005 placement on the reemployment priority list. Specifically, he maintained below that, if the Board finds that he should be placed on the reemployment priority list, his placement should be retroactive to August 2, 2005. *Id*. However, the administrative judge's Summary of the Prehearing Conference stated as follows:

> The following issues are in dispute and all others are precluded:
>
> A. Whether the appellant filed a timely petition for appeal, and, if not, whether he established good cause for waiving the filing deadline.
>
> B. Whether the appellant established that the Board has jurisdiction over his appeal.
>
> C. Whether the appellant established that he had any restoration rights as a "partially recovered" employee.
>
> D. If so, whether the agency acted arbitrarily and capriciously in denying the appellant restoration.
>
> E. Whether the appellant met his burden of proving that the agency discriminated against him based on his disability.

IAF, Tab 22 at 1-2. The parties were instructed to raise any objections to the prehearing conference summary at the beginning of the hearing, *id*. at 5; however, the appellant raised no objection to the administrative judge's summary of the

issues. H.T. 1, Side A. Because the appellant did not raise an objection to the prehearing summary, he has not preserved the issue of whether he has restoration rights as a fully recovered employee, and we will not address this matter further. *See Wright v. Department of Labor*, 82 M.S.P.R. 186, ¶¶ 13-14 (1999); *Taylor v. Department of the Air Force*, 80 M.S.P.R. 450, ¶ 5 (1998).

¶28 In summary, based upon the facts before us, we conclude that the appellant has made non-frivolous allegations sufficient to establish Board jurisdiction over his claim that the agency acted arbitrarily and capriciously in denying his August 2, 2005 request for restoration. We cannot, however, conclude that the appellant has proved by a preponderance of the evidence that the agency has acted arbitrarily and capriciously in denying restoration. We note that there is conflicting evidence regarding whether the appellant has fully or partially recovered from his work-related injuries. The appellant has appealed OWCP's determination that he no longer suffers any residual effects of his work-related injury, and he presented no evidence over the course of the present appeal to show that OWCP has made a ruling on this issue. Further, there is no evidence in the record to show that the appellant made good-faith efforts to comply with the agency's instructions to work with OPM, the agency's personnel office, and Injury Compensation/Shared Services to facilitate his return to work. It is possible that the appellant may be better able to meet his burden of proof in a new restoration appeal after these matters are resolved.

The Appellant's Discrimination Claims

¶29 Having dismissed the appellant's restoration claim for lack of jurisdiction, the administrative judge dismissed the disability discrimination claim as also beyond the Board's jurisdiction. ID at 18; *see Wren v. Department of the Army*, 2 M.S.P.R. 1, 2 (1980), *aff'd*, 681 F.2d 867, 871-73 (D.C. Cir. 1982) (5 U.S.C. § 2302(b) is not an independent source of Board jurisdiction). Having concluded that the Board does have jurisdiction over his claim that the agency acted

arbitrarily and capriciously in denying his August 2, 2005 request for restoration, we turn to the issue of whether this denial was discriminatory. Where, as here, a hearing has been held and the record is complete, the Board will proceed to the ultimate question, which is whether, upon weighing the evidence presented by both parties, the appellant has met his burden of proving by preponderant evidence that the action under appeal was discriminatory. *See Harris v. Department of the Air Force*, 100 M.S.P.R. 452, ¶ 5 (2005).

¶30 An appellant who raises a claim of disability discrimination must show: (1) He is a disabled person; (2) the action appealed was based on his disability; and (3), to the extent possible, that there was a reasonable accommodation under which the appellant believes he could perform the essential duties of his position or of a vacant position to which he could be reassigned. *Savage v. Department of the Navy*, 36 M.S.P.R. 148, 151-52 (1988). A disability is a physical or mental impairment that substantially limits one or more major life activities, such as working. 29 C.F.R. § 1630.2(g). Assuming *arguendo* that the appellant is a disabled person, he has not articulated a reasonable accommodation under which he could perform the essential duties of his position or of a vacant position to which he could be assigned. *See Savage*, 36 M.S.P.R. at 152. The appellant here simply testified that he was "qualified" for the clerk position and that he would entertain any job he could do, and yet he also testified that he was disabled as to walking, standing, sitting, twisting, turning, stooping, and bending. H.T. 4, Side A.

¶31 A review of the appellant's questioning of agency witnesses indicates that he may have been trying to show that agency employees regarded him as disabled. An appellant may establish that he was the victim of disability discrimination if he was regarded as disabled by showing that: (1) His employer mistakenly believes that he has an impairment that substantially limits one or more major life activities; or (2) his employer mistakenly believes that an actual, nonlimiting impairment substantially limits one or more major life activities.

Wentz v. U.S. Postal Service, 91 M.S.P.R. 176, ¶ 9 (2002). "In both cases, it is necessary that the employer entertain misperceptions about the individual--either that the individual has a substantially limiting impairment that he does not have or that he has a substantially limiting impairment when, in fact, the impairment is not so limiting." *Id.* The agency's awareness of the existence of the impairment alone is not a sufficient basis to support a finding of discrimination. *Harris*, 100 M.S.P.R. 452, ¶ 9. Russell testified that he did not know whether the appellant was disabled under either the Americans with Disabilities Act or the Rehabilitation Act. H.T. 3, Side A. Postmaster Leader testified that he considered the appellant to be disabled because he was medically retired and he assumed that OPM would not offer the appellant a disability retirement if he were not disabled. H.T. 2, Side B. This testimony is not sufficient to show that the agency entertained misperceptions as to whether the appellant was impaired.

¶32 It also appears that the appellant may have attempted to establish that the agency regarded him as being disabled from performing the major life activity of work, as the appellant testified that he was disabled as to walking, sitting, standing, twisting, turning, stooping, and bending. H.T. 4, Side A. To establish that he was regarded as disabled from performing the major life activity of work, the appellant must show that the employer believed that he was unable to perform a broad range of jobs compared to the average person having comparable training, skills, and abilities. *Wentz*, 91 M.S.P.R. 176, ¶ 12. The appellant has not shown that the agency believed he was unable to perform a broad range of jobs compared to the average person having comparable training, skills, and abilities. *See id*.

¶33 An appellant may establish a discrimination claim based on disparate treatment by showing that: (1) He is a member of a protected group; (2) he was situated similarly to an individual who was not a member of the protected group; and (3) he was treated more harshly than the individual who was not a member of his protected group. *Spahn v. Department of Justice*, 93 M.S.P.R. 195, ¶ 10

(2003). For other employees to be deemed similarly situated, the Board has held that all relevant aspects of the appellant's employment situation must be "nearly identical" to those of the comparative employees. *Id*. ¶ 13. The appellant, however, has not presented evidence to show that there was a comparison employee whose employment situation was "nearly identical" to his. Accordingly, we conclude that the appellant has not proved his claim of disability discrimination based on disparate treatment.

¶34 In summary, we AFFIRM AS MODIFIED the initial decision's dismissal of the appellant's constructive suspension claim for lack of jurisdiction. We REVERSE that portion of the initial decision which found that the appellant's restoration appeal was untimely and find that the restoration appeal was timely filed. We AFFIRM AS MODIFIED the initial decision's finding that we lack jurisdiction over the appellant's claim that the agency's July 21, 2004 job offer was so unreasonable as to be an effective denial of restoration. As to the appellant's claim that the agency acted arbitrarily and capriciously in denying his August 2, 2005 request for restoration, we REVERSE the initial decision's dismissal of his restoration claim for lack of jurisdiction and find that the Board has jurisdiction over this claim but that the appellant has failed to meet his burden of proving by a preponderance of the evidence that the agency acted arbitrarily and capriciously in denying restoration. Finally, we find that the appellant has not established his affirmative defense of disability discrimination.

ORDER

¶35 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request further review of this final decision.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review this final decision on your discrimination claims. *See* Title 5 of the United States Codes, section 7702(b)(1) (5 U.S.C. § 7702(b)(1)). You must send your request to EEOC at the following address:

Equal Employment Opportunity Commission
Office of Federal Operations
P.O. Box 19848
Washington, DC 20036

You should send your request to EEOC no later than 30 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 EEOC no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time.

Discrimination and Other Claims: Judicial Action

If you do not request EEOC to review this final decision on your discrimination claims, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. *See* 5 U.S.C. § 7703(b)(2). You must file your civil action with the district court no later than 30 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 district court no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e5(f); 29 U.S.C. § 794a.

Other Claims: Judicial Review

If you do not want to request review of this final decision concerning your discrimination claims, but you do want to request review of the of the Board's decision without regard to your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review this final decision on the other issues in your appeal. 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 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, http://fedcir.gov/contents.html. 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:

_____
Bentley M. Roberts, Jr.
Clerk of the Board
Washington, D.C.