UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

99 M.S.P.R. 453

MICHAEL D. REED,
Appellant,

DOCKET NUMBER
CH-3443-04-0272-I-1

v.

UNITED STATES POSTAL SERVICE,
Agency.

DATE: August 24, 2005

Theodore R. Saker, Jr., Esq., Columbus, Ohio, for the appellant.

Julie L. Kitze, Philadelphia, Pennsylvania, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Barbara J. Sapin, Member

OPINION AND ORDER

¶1 The agency has petitioned for review, and the appellant has cross petitioned for review, of an initial decision that reversed the appellant's alleged constructive suspension and involuntary demotion. For the reasons set forth below, we GRANT the agency's petition, VACATE the portions of the initial decision that reversed the alleged constructive suspension and demotion, and DISMISS the appeal for lack of jurisdiction. We DENY the cross petition for review because it does not meet the criteria for review set forth at 5 C.F.R. § 1201.115(d).

BACKGROUND

¶2 The appellant, a preference eligible with more than one year of current, continuous service, filed an appeal alleging that the agency improperly failed to hire him for a position in May 1985, constructively suspended him from February 2002 until September 2003, and demoted him from the position of PS-06 Letter Carrier to PS-05 Mail Processing Clerk in September 2003. Initial Appeal File (IAF), Tab 1 at 1, 5-8. He also raised claims of age and disability discrimination. *Id*. at 9-13. Following a hearing on the matter, the administrative judge issued an initial decision dismissing the failure-to-hire claim for lack of jurisdiction. Initial Decision (I.D.) at 2. The administrative judge accepted jurisdiction over the constructive suspension and demotion actions and reversed them. *Id*. at 2-6. He declined to sustain the appellant's age and disability discrimination claims. *Id*. at 7-9. The agency timely filed a petition for review of the initial decision, Petition for Review File (PFRF), Tab 1, and the appellant has responded in opposition to the petition for review, PFRF, Tab 4. The appellant cross petitions for review of the administrative judge's decision declining to sustain the disability discrimination claim. PFRF, Tab 4.

ANALYSIS

The Constructive Suspension Claim

¶3 An employee's absence for more than 14 days that results in a loss of pay may be a constructive suspension appealable under 5 U.S.C. §§ 7512(2) and 7513(d). Constructive suspension claims may arise in two situations: When an agency places an employee on enforced leave pending an inquiry into his ability to perform; or 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. *McFadden v. Department of Defense*, 85 M.S.P.R. 18, ¶ 9 (1999). The dispositive issue in determining whether a suspension occurred is who initiated the absence. *Alston v. Social Security Administration*, 95 M.S.P.R. 252, ¶ 11

(2003). If the appellant initiated the absence, then it is not a constructive suspension. *Id*. An appellant who asserts a constructive suspension claim bears the burden of establishing that his absence was involuntary. *Id*.

¶4 The appellant testified that, when he began working as a carrier in 1986, he was able to perform all the duties of the position, including the requirements for lifting and for casing mail. July 21, 2004 Hearing Tape (H.T.). He developed carpal tunnel syndrome in 1997, and he worked in the carrier craft on a limited-duty basis from 1997 until 2001. *Id*. In June 2001, he had surgery for shoulder tendonitis, and he returned to work as a carrier in a limited-duty status that September. *Id*. His duties included delivering express mail and clerk craft duties. *Id*. In December 2001, the agency offered the appellant, who was at that time a PS-06 carrier, a PS-05 clerk position.[*] *Id*. The appellant refused the clerk position and continued his modified carrier duties. *Id*. The appellant admitted that, prior to December 2001, he had rejected several other job offers. *Id*.

¶5 In February 2002, the appellant was called into a supervisor's office where three agency managers and a union representative were present. *Id*. The agency again presented the December 2001 offer to the appellant. *Id*. Although the appellant was working at the time, he was informed that there was no work available. *Id*. John Knapp, an agency manager, told the appellant that he was instructed to walk the appellant off the premises if he refused the offer. *Id*. When the appellant refused to accept the offer, he was escorted from the premises and told not to return until the matter was resolved. *Id*. Neither the December 2001 offer nor the February 2002 offer informed the appellant of his appeal rights. August 3, 2004 H.T., Side A; IAF, Tab 7, Subtab 4f.

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[*] The record indicates that this offer was a "rehab" position, which the agency offers when the effects of the injury are considered permanent or the employee has reached maximum medical improvement. IAF, Tab 7, Subtab 4a; Tab 18, Exh. 1.

¶6 Knapp testified that there was no work available for the appellant, despite the fact that he had been working for nearly one year following his shoulder surgery, because he complained that his limited-duty work with labels and stamping return-to-sender mail violated his repetitive motion restrictions. August 3, 2004 H.T., Side A. Knapp explained that the appellant could not work as a carrier, as he could not carry a bag due to his shoulder tendonitis. *Id*. There was no 100% mounted carrier position available, and the appellant was unable to case mail and to load his mail onto the truck, as is required of all carriers, even those on mounted routes. *Id*.; July 21, 2004 H.T.

¶7 The administrative judge found that this action constituted a constructive suspension that is appealable to the Board. I.D. at 3. He then reversed the constructive suspension, as the agency failed to provide due process. *Id*.

¶8 The agency argued before the administrative judge that this case is analogous to *Moon v. Department of the Army*, 63 M.S.P.R. 412, 419-20 (1994), where the Board rejected an appellant's argument that the agency initiated the leave and declined to find a constructive suspension. There, the agency issued a letter informing the appellant that it would not be feasible for her to continue in her light-duty status and offering a choice between either returning to her regular position or requesting leave and/or applying for Office of Workers' Compensation Programs (OWCP) benefits. *Id*. at 419. The Board emphasized that the crux of the matter was whether the agency's letter terminating the light-duty assignment instructed the appellant to cease reporting to work. *Id*. The Board determined that the letter did not deny the appellant the right to return to duty. *Id*. The Board further reasoned that such a choice of unpleasant alternatives did not render involuntary her decision not to return to her regular position. *Id*. at 419-20. The administrative judge, however, relied upon *Lewis v. U.S. Postal Service*, 82 M.S.P.R. 254 (1999), in determining that the appellant was constructively suspended. In *Lewis*, the Board concluded that the appellant had raised allegations of a constructive suspension where he alleged that he was

given conflicting advice as to whether he needed to be cleared by the medical unit before reporting to work and the medical unit prevented him from returning to work without clearance. 82 M.S.P.R. 254, ¶¶ 7-8.

¶9 Here, the appellant complained that some of his limited-duty tasks violated his repetitive motion restrictions, and he could not work as a carrier on a mounted route. The agency offered him a distribution clerk position that it believed to be within his physical limitations and which was later determined by OWCP to be an appropriate offer. When the agency presented the offer, it indicated that, should the appellant refuse the offer, it had no other work for him within his restrictions. The agency offered the appellant the options of accepting the offer, accepting the offer under protest, or refusing the offer. In addition, Knapp testified that the written offer informed the appellant that he had time to peruse the offer and return it, and the written copy of the December 2001 job offer provided the appellant with ten days to respond to the offer. August 3, 2004 H.T., Side A; IAF, Tab 7, Subtab 4f at 3. The appellant could have opted to take this time to consider the offer. Finally, in a March 5, 2002 letter, the agency informed him that the offer remained open. IAF, Tab 18, Exh. 1. The appellant placed himself out of work when he declined the distribution clerk position. The agency did not instruct the appellant to cease reporting for work, and his choice between unpleasant alternatives did not render his refusal of the offer involuntary. *See Moon*, 63 M.S.P.R. at 419-20.

¶10 We acknowledge that an agency supervisor did escort the appellant from the premises and instruct him not to return until the matter was resolved. In this instance, however, the appellant was escorted from the worksite and given this instruction only after he refused a position that was appropriate to his physical limitations. We also note that this case is distinguishable from *Dize v. Department of the Army*, 73 M.S.P.R. 635, 639 (1997), where the Board found that the appellant had made a non-frivolous allegation that the agency initiated the absence. There, the agency informed the appellant that it was unable to

continue to accommodate her neck injury with light-duty assignments because light-duty work was no longer available. *Id*. at 637. The appellant there, however, alleged that she was "fully able to work" and that she reported to work and requested to be placed on duty, only to be told that no work was available. *Id*. at 639. The appellant here has made no such allegations.

¶11 A constructive suspension may also occur where 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. *Baker v. U.S. Postal Service*, 71 M.S.P.R. 680, 693 (1996). Here, § 546.142 of the Employee and Labor Relations Manual (ELM) requires the agency to "make every effort toward assigning the employee to limited duty consistent with the employee's medically defined work limitation tolerance." IAF, Tab 7, Subtab 4a. If the agency is unable to assign work within the employee's craft within his regular work facility, it may assign other work. *Id*. If we were to assume *arguendo* that the ELM reflects agency policy and that the appellant requested work within his medical restrictions, the agency did offer the work that was available within the appellant's physical limitations. The appellant complained that the work he was doing at the time the agency offered the clerk position violated his repetitive motion restrictions. The evidence showed that a mounted carrier position was not available and, even if it was, the appellant was unable to perform the duties of the position. Knapp testified that the position offered to the appellant was the only work available within the appellant's restrictions. The agency complied with the ELM's policy by offering the appellant clerk craft work that was within his physical abilities. Thus, even under this alternative, there was no constructive suspension. *See Okleson v. U.S. Postal Service*, 90 M.S.P.R. 415, ¶¶ 16-17 (2001).

The Involuntary Demotion Claim

¶12 An employee's acceptance of a lower-graded position is generally considered to be voluntary and not subject to the Board's jurisdiction. *Cohn v. Department of Transportation*, 5 M.S.P.R. 365, 368 (1981). If, however, the action is not initiated by the employee, it is not presumed to be voluntary. *Soler-Minardo v. Department of Defense*, 92 M.S.P.R. 100, ¶ 5, *review dismissed*, 53 Fed. Appx. 545 (Fed. Cir. 2002). For an action to be "initiated by" the employee, it is not required that the employee first suggest the change; rather, an employee may initiate an action by voluntarily accepting the agency's proposal. *Id*. The employee's decision to accept the agency's proposal is not involuntary because the employee must choose between two unpleasant options. *Id*. An appellant may show that an employee-initiated action is involuntary by presenting sufficient evidence to establish that the action was obtained through duress or coercion or showing that a reasonable person would have been misled by the agency. *Talley v. Department of the Army*, 50 M.S.P.R. 261, 263 (1991). To establish a claim of duress or coercion, the appellant must show that: (1) One side involuntarily accepted the terms of another; (2) circumstances permitted no alternative; and (3) those circumstances were the result of coercive acts of the opposite party. *Soler-Minardo*, 92 M.S.P.R. 100, ¶ 6. However, an employee cannot establish that an acceptance is involuntary by making a written notation that an action was accepted "under duress." *Id*. at ¶ 5.

¶13 The administrative judge concluded that the appellant's demotion to the clerk position was involuntary, despite the fact that the appellant signed the documents that effected the action. I.D. at 4-6. He reasoned that the improper constructive suspension caused the appellant to experience personal problems and financial hardship. *Id*. at 5. The administrative judge relied upon the appellant's testimony that he felt he had no choice but to accept the demotion because OWCP certified that he could perform the duties of the job and he risked losing OWCP benefits if he refused to accept the job. *Id*. The administrative judge concluded

that the constructive suspension placed the agency in a position of power over the appellant such that he had no realistic alternative but to accept the demotion. *Id*. at 6. Because the administrative judge reached that conclusion, he did not determine whether the demotion was involuntary based on any alleged misrepresentation regarding pay and seniority benefits. *Id*. at 6 n.5.

¶14 We find that the appellant voluntarily accepted the clerk position. The agency offered the clerk position in June 2003, and DoL found that the position was suitable to the appellant's work capabilities in July. July 21, 2004 H.T. The appellant accepted the offer and began working in September. *Id*. The appellant asserted that he was forced to choose between accepting the offer and losing his OWCP benefits and testified that he wished to remain in the modified carrier position until he could either get a mounted route or carry mail. *Id*. The fact that the appellant faced a choice between the unpleasant alternatives of a demotion and the loss of his OWCP benefits did not render his acceptance involuntary. *See Soler-Minardo*, 92 M.S.P.R. 100, ¶ 5. The circumstances surrounding the appellant's refusal of the February 2002 job offer and his financial and personal difficulties show that he faced unpleasant choices, but those circumstances do not make this an involuntary action. Indeed, had the appellant been working in the modified carrier position at the time of the June 2003 offer, he still would have been faced with the unpleasant alternatives of accepting the distribution clerk position or being denied OWCP benefits. The Federal Circuit has noted, in the context of an alleged involuntary retirement, that the doctrine of coercive involuntariness is a narrow one, and it should not apply where an employee chooses to resign or retire because he does not want to accept a measure that the agency is authorized to adopt, even if that measure makes continuing in the job so unpleasant for the employee that he feels that he has no realistic option but to leave. *Staats v. U.S. Postal Service*, 99 F.3d 1120, 1124 (Fed. Cir. 1996). The Federal Circuit's reasoning applies with equal force to the present case:

> As this court has explained, the fact that an employee is faced with an unpleasant situation or that his choice is limited to two unattractive options does not make the employee's decision any less voluntary. To adopt a different rule would enable an employee to defeat lawful agency action, such as a geographical transfer, by resigning in protest, appealing on the ground that the resignation was rendered involuntary by the hardship imposed by the transfer, and obtaining reinstatement (presumably with an immunity from the transfer) if the Board concluded that the employee retired unwillingly.

Id. (internal citations omitted).

¶15 Moreover, one of the reasons that the appellant provided for accepting the position under protest indicates that he misunderstood the position's physical requirements. The appellant wrote that he accepted the offer under protest because he believed that he was not physically suited for the position, as in 1985 the agency found him to be unfit for a distribution clerk position due to his respiratory problems. IAF, Tab 7, Subtab 4c; Tab 1, Exh. 2. The position at issue in 1985, however, required "arduous physical exertion," including lifting mail sacks of up to 70 pounds and prolonged standing, walking, reaching, and throwing. IAF, Tab 1, Exh. 2. The June 2003 position required the appellant to lift a maximum of ten pounds, was limited to no more than four hours of standing or walking at a time, and involved up to eight hours of sitting. IAF, Tab 4, Subtab 4c at 3. An agency Human Resources Specialist testified that the distribution clerk position offered in 2003 was different from the 1985 position. July 21, 2004 H.T. Finally, as noted above, the appellant's notation that the acceptance was "signed under protest" does not render his acceptance of the offer involuntary. *See Soler-Minardo*, 92 M.S.P.R. 100, ¶ 5.

¶16 An acceptance may also be involuntary where the appellant shows that he relied upon the agency's misinformation when making his decision. *Soler-Minardo*, 92 M.S.P.R. 100, ¶ 5. Because the administrative judge found that the appellant had no realistic option but to accept the clerk position, he did not address the issue of whether the action was involuntary based upon any agency

misrepresentation regarding the appellant's pay and seniority benefits. I.D. at 6 n.5. The distribution clerk job offer indicates, without further explanation, that there will be "No loss of Salary." IAF, Tab 7, Subtab 4e. The appellant testified that, after he returned to work, he learned that his salary was "frozen" at its present level until the clerks' salary reaches the same level as his 2003 carrier salary. July 21, 2004 H.T. However, the July 23, 2003 letter from OWCP explained to the appellant, "Upon acceptance of this position, you will be paid compensation *based on the difference (if any) between the pay of the offered position and the pay of your position on the date of injury*." IAF, Tab 7, Subtab 4d (emphasis added). While the appellant may not have understood this explanation, he did not rely upon a material misrepresentation regarding compensation.

¶17 The appellant testified that, from September until December 2003, he was told that the agency was not implementing the offer and that his Form 50s indicated that he was a carrier. July 21, 2004 H.T. In December 2003, he received a new Form 50 indicating that he was a clerk. *Id*. An agency human resources specialist confirmed that she initially processed a Form 50 showing that the appellant was a carrier and that she issued a corrected Form 50 in November indicating that the appellant changed to the clerk craft effective September 20, 2003. *Id*. Even if the agency explicitly informed the appellant from September until December that he would remain a carrier, this misrepresentation would not have affected his decision to accept the clerk position since that decision was made in August.

¶18 The appellant also testified that, after he returned to work, he learned that he lost 18 years of seniority when he changed crafts. *Id*. One of the appellant's stated reasons for rejecting the December 2001 offer was that, "this job offer harms [him] . . . per seniority, start times and split days off . . . ." IAF, Tab 7, Subtab 4f at 3. The appellant has not shown that he relied upon agency misinformation regarding his vacation seniority, as the appellant's notation on the

December 2001 job offer indicates that he knew he would lose his seniority if he accepted the clerk position. Accordingly, we conclude that the appellant did not rely upon an agency misrepresentation regarding his salary, seniority, or status as a carrier in accepting the distribution clerk position such as to render his acceptance involuntary. *See Soler-Minardo*, 92 M.S.P.R. 100, ¶ 7.

¶19 Finally, an appellant may also show that his acceptance is involuntary if he had insufficient time to make his decision. *Soler-Minardo*, 92 M.S.P.R. 100, ¶ 7. The appellant received the distribution clerk job offer in June 2003. July 21, 2004 H.T. The July 23, 2003 letter from OWCP informed him that the position was suitable to his work capabilities and that he had 30 days from the date of the letter either to accept the position or to provide an explanation of the reasons for refusing it. IAF, Tab 7, Subtab 4d. The appellant accepted the position on August 22, 2003. *Id.*, Subtab 4c. Thus, the appellant had sufficient time to make his decision. For the foregoing reasons, the appellant's acceptance of the demotion was voluntary and the Board lacks jurisdiction to consider it.

The Cross Petition for Review

¶20 The appellant has filed a cross petition for review in which he asserts that the administrative judge erred in declining to sustain his disability discrimination claim. PFRF, Tab 4. Because we lack jurisdiction over the appellant's non-selection in 1985 and the alleged constructive suspension and involuntary demotion actions, we also lack jurisdiction to hear the allegations of age and disability discrimination. *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).

ORDER

¶21 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 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 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:

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Bentley M. Roberts, Jr.
Clerk of the Board

Washington, D.C.