UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

BARBARA SHESTAK, Appellant, v. SOCIAL SECURITY ADMINISTRATION, Agency.	DOCKET NUMBER CB-7121-99-0057-V-1 DATE: November 1, 1999

Charles Estudillo, American Federation of Government Employees, Santa Rosa, California, for the appellant.

Gerard C. Dasey, Esquire, San Francisco, California, for the agency.

BEFORE

Ben L. Erdreich, Chairman
Beth S. Slavet, Vice Chair
Susanne T. Marshall, Member

OPINION AND ORDER

¶1 The appellant has filed a timely request for review of an arbitrator's award denying her grievance of the agency's action demoting her with pay retention. For the following reasons, we GRANT the request and SUSTAIN the award.

BACKGROUND

¶2 The agency demoted the appellant, effective March 2, 1997, from her GS-11 Claims Representative (CR) position to a GS-8 Contact Representative position with pay retention based on her inability to perform all of the essential functions of her job because of a medical condition. *See* Arbitration File (AF), Tab 1,

Arbitrator's Award (AA) at 6-7. The agency alleged that due to a November 1994 on-the-job injury, the appellant suffered from post-traumatic stress disorder and major depression which rendered her unable to perform an essential function of her CR position, namely, face-to-face interviews with the public. *Id*.

¶3 The appellant grieved her demotion in accordance with the collective bargaining agreement. Ultimately, an arbitrator denied the grievance after a hearing. The arbitrator found that the parties recognized that the propriety of the appellant's demotion turned upon an analysis of whether she was entitled to a reasonable accommodation within the meaning of the Rehabilitation Act and/or Americans with Disabilities Act (ADA). AA at 11. In this regard, the arbitrator found that although the appellant suffered from a disabling mental impairment, the impairment did not substantially limit a major life activity. AA at 11-13. The arbitrator further found, assuming *arguendo* that the appellant was substantially limited in a major life activity, that she did not prove that she was a qualified person with a disability because she did not show that she could perform the essential functions of the CR position, including face-to-face interviewing, with or without reasonable accommodation. AA at 13.

¶4 The appellant has filed a request for review of the arbitrator's award. AF, Tab 1.[*] The agency has filed a timely response opposing the request. AF, Tab 3.

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[*] The appellant submits for the first time with her petition for review evidence from 1994 and 1995 that does not appear to have been admitted into the record by the arbitrator. Request for Review at 4 ("Attached herein is an [sic] evidence of an SSA Claims Representative in Seattle, Washington, who was not only granted exclusion from face to face interviewing as a reasonable accommodation, but who was also provided with a 'clean room' to prevent infection due to his immuno-deficient condition (Attachment 5, see pgs. 1, 4, and 6).") In the absence of a showing that these documents were not readily available earlier, we decline to consider them. *Benson v. Department of the Navy*, 65 M.S.P.R. 548, 553-54 (1994) (declining to consider evidence submitted for the first time on review where there was no showing that it was not readily available earlier).

ANALYSIS

¶5 The Board has the authority, under 5 U.S.C. § 7121(d), to review the arbitrator's award because the appellant alleges that she has been affected by a prohibited personnel practice under 5 U.S.C. § 2302(b)(1), the underlying action is otherwise appealable to the Board under 5 U.S.C. § 7702, and a final arbitration decision has been issued. *Colon v. Department of Veterans Affairs*, 73 M.S.P.R. 659, 662 (1997).

¶6 The scope of the Board 's review, however, is limited. Unlike initial decisions issued by the Board's administrative judges, arbitrator's awards are entitled to deference. Thus, the Board will modify or set aside an arbitrator's award only when the arbitrator has erred as a matter of law in interpreting civil service law, rule, or regulation. Even if the Board would disagree with the arbitrator's decision, absent legal error, the Board cannot substitute its conclusions for those of the arbitrator. *See Higgs v. Social Security Administration*, 71 M.S.P.R. 48, 50-51 (1996); *Benson v. Department of the Navy*, 65 M.S.P.R. 548, 553-54 (1994) (even if the Board would disagree with the arbitrator after reviewing the facts of the record, it lacks the authority to second-guess the arbitrator and substitute its conclusions for the specific conclusions in the arbitrator's award absent legal error). The arbitrator's finding that the appellant did not prove disability discrimination is a factual determination entitled to deference unless the arbitrator erred in his legal analysis, *e.g.*, by misallocating burdens of proof or employing the wrong analytical framework. *See Armstrong v. U.S. International Trade Commission*, 74 M.S.P.R. 349, 356 (1997); *Means v. Department of Labor*, 63 M.S.P.R. 180, 182 (1994).

¶7 The appellant asserts on review that the arbitrator erred when he took into consideration the medication the appellant was taking in finding that her impairment did not substantially limit a major life activity. The arbitrator's findings, however, are consistent with the approach recently set forth by the U.S.

Supreme Court. In *Sutton v. United Air Lines, Inc.*, 119 S. Ct. 2139, 2143 2146 (1999), the Court held that the determination of whether an individual is disabled should be made with reference to measures that mitigate the individual's impairment; thus, evaluating persons in their hypothetical uncorrected states is impermissible. *See Murphy v. United Parcel Service, Inc.*, 119 S. Ct. 2133, 2136-37 (1999) (the lower court correctly considered petitioner in his medicated state when it held that his high blood pressure did not substantially limit one or more of his major life activities). The Court held that if a person is taking measures to correct for, or mitigate, a physical or mental impairment, the effects of those measures--both positive and negative--must be taken into account when judging whether that person is "substantially limited" in a major life activity, and thus disabled. *Sutton*, 119 S. Ct. at 2146. The appellant, therefore, has demonstrated no error of law, rule, or regulation by the arbitrator in this regard.

¶8 The appellant also claims that the arbitrator did not require the agency, rather than the appellant, to prove that face-to-face interviews were an essential function of the CR position, as set forth in *Monette v. Electronic Data Systems Corp.*, 90 F.3d 1173, 1184 (6th Cir. 1996) (if a disabled individual is challenging a particular job requirement as unessential, the employer will bear the burden of proving that the challenged criterion is necessary). *See also Hamlin v. Charter Township of Flint*, 165 F.3d 426, 430 (6th Cir. 1999) (applying *Monette*). The court in *Monette* noted that 42 U.S.C. § 12112(b)(6) provides that an employer discriminates within the meaning of the statute by "using qualification standards, employment tests, or other selection criteria that screen out or tend to screen out an individual with a disability ... unless the standard, test, or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity." *Monette*, 90 F.3d at 1184. The court reasoned that "[a]lthough this section of the statute expressly concerns only qualification standards, testing procedures, and selection criteria that tend to

screen out disabled individuals, we believe its clear import dictates that employers bear the burden of proving that a challenged job requirement is job-related." *Id.*

¶9 Ultimately, the employee claiming disability discrimination must prove that he is a "qualified" disabled person, *i.e.*, a disabled individual who can perform the essential functions of his position, with or without reasonable accommodation, without endangering the health and safety of himself or others. *Fox v. U.S. Postal Service*, 81 M.S.P.R. 522, ¶ 8 (1999). Contrary to *Monette*, other courts have held that it remains the plaintiff's duty, in establishing her prima facie case, to show that she was "otherwise qualified," which includes establishing the "essential functions" of her job. *See Laurin v. Providence Hosp.*, 150 F.3d 52, 58-59 (1st Cir. 1998) (since an ADA plaintiff ultimately must shoulder the burden of establishing that she was able to perform all "essential functions" of her position, she bore the burden of adducing competent evidence from which a rational factfinder could have found in her favor on the "essential function" inquiry); *Hernandez v. City of Hartford*, 959 F. Supp. 125, 131 n.6 (D. Conn. 1997) (citing *Borkowski v. Valley Cent. School Dist.*, 63 F.3d 131, 137 (2d Cir. 1995)); *cf. Benson v. Northwest Airlines, Inc.*, 62 F.3d 1108, 1113 (8th Cir. 1995) ("Because Northwest disputes Benson's evidence that he can perform the essential functions of the mechanic's job, it must put on some evidence of those essential functions."). Although bound to follow it, a district court criticized *Monette* on this issue. *See Hamlin v. Charter Township of Flint*, 942 F. Supp. 1129, 1137-38 (E.D. Mich. 1996) (*Monette* "equates a statutory prohibition (i.e., no unlawful or pretextual screening mechanisms) with the creation of a legal burden," and "effectively turns on its head the burden of proof in an ADA case because rather than the plaintiff being required to show that he or she is capable of performing all of the essential functions of a job, all he or she need do is challenge the essentiality of one of the job functions, and, thereby, shift the burden of proof on one of the critical factors for showing that he or she is qualified for the job. Such

a shift is clearly unwarranted because it allows a plaintiff to avoid making his or her prima facie case.") (footnote omitted).

¶10 We need not resolve this issue because, as previously found, the appellant has demonstrated no legal error in the arbitrator's finding that she did not show that her impairment substantially limited a major life activity. Therefore, she has not shown that she was an individual with a disability, let alone a qualified individual with a disability. In any event, because there appears to be a split in the courts on the issue of who has the burden of proving the essential functions of a position, and the appellant has identified (and we have found) no Equal Employment Opportunity Commission (EEOC) decision directly addressing this issue, the appellant has not demonstrated legal error by the arbitrator.

¶11 Finally, the appellant contends that the arbitrator improperly relied on a distinguishable court decision and a draft EEOC administrative law judge decision that was later withdrawn in finding that face-to-face interviewing was an essential function of the CR position. As previously noted, any legal error relating to the arbitrator's alternative finding on the essential function inquiry would not affect the outcome of this appeal because the appellant did not demonstrate error in the arbitrator's finding that she was not a disabled individual under the law. In any event, the arbitrator did not base his finding that face-to-face interviewing was an essential function of the CR position solely on the district court and EEOC decisions. Rather, he cited those decisions as corroborating his own finding based on position descriptions and testimony from witnesses called by both parties. AA at 7, 13. We discern no legal error in the arbitrator's reliance on those decisions.

¶12 In sum, we SUSTAIN the arbitrator's award because the appellant has not demonstrated that he erred as a matter of law in interpreting civil service law, rule, or regulation. *See Means*, 63 M.S.P.R. at 182 (since the appellant's objections related only to the arbitrator's factual findings and conclusions - including disputing the arbitrator's finding that his condition could not be

reasonably accommodated - which were entitled to deference, and did not demonstrate legal error, they provided no basis to set aside or modify the arbitrator's decision).

ORDER

¶13 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 Code, 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 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 5 U.S.C. § 7703. You may read this law as well as review other related material at our web site, www.mspb.gov.

FOR THE BOARD: _____
Robert E. Taylor
Clerk of the Board

Washington, D.C.