UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

RUSSELL A. SMITH, Appellant, v. UNITED STATES POSTAL SERVICE, Agency.	DOCKET NUMBER DC-3443-98-0468-I-1 DATE: FEB 26 1999

Michael B. Walkup, Troutville, Virginia, for the appellant.

Timothy E. Romine, Wintz, Virginia, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant petitions for review of an initial decision issued on July 22, 1998, dismissing his appeal for lack of jurisdiction without the benefit of a hearing. For the reasons set forth below, we DENY the petition for review for failure to meet the criteria for review set forth at 5 C.F.R. § 1201.115. We REOPEN this appeal on our own motion under 5 C.F.R. § 1201.118, however, VACATE the initial decision, and REMAND this appeal to the regional office to provide the appellant with notice of what he must allege to establish Board jurisdiction over his restoration claims.

BACKGROUND

¶2 Along with his petition for review, the appellant attached documentation from which it appears that the Department of Labor, Office of Workers' Compensation Programs (OWCP) awarded the appellant benefits for an on-the-job injury that resulted in a 25% permanent impairment that the appellant suffered on November 19, 1983. PFR File, Tab 1, April 17, 1987 letter from OWCP. It further appears that the appellant was assigned to a position as a city carrier, PFR File, Tab 1, SF 2824D, and received a civil service annuity from the Office of Personnel Management (OPM) from February 17, 1988, through April 30, 1995, at which time the appellant elected to receive OWCP benefits in lieu of the annuity. PFR File, Tab 1, June 5, 1995 letter from OPM to OWCP; *see* 20 C.F.R. § 10.313 (except as otherwise provided by law, a person may not concurrently receive OWCP benefits and a retirement annuity). It is unclear whether OWCP subsequently terminated the appellant's benefits. However, on November 22, 1997, the agency restored the appellant to the position of part-time flexible Window Distribution Clerk, PS-05, at the Vinton, Virginia Post Office pursuant to 5 C.F.R. Part 353. Initial Appeal File (IAF), Tab 8, PS Form 50. On April 18, 1998, the appellant filed an appeal with the Board's Washington Regional Office in which he alleged that "I should have never been forced back into work," and he sought restoration to his status as of November 21, 1997. IAF, Tab 1 at 3. The appellant also claimed that the agency violated the Veterans Preference Act and the regulations implementing the Federal Employees' Compensation Act (FECA), and he further alleged that the agency committed age and disability discrimination. *Id*. The administrative judge issued an acknowledgment order advising the appellant that the Board might not have jurisdiction over his appeal since it appeared that he was seeking a return to workers' compensation status. IAF, Tab 2 at 2. The administrative judge ordered the appellant to file evidence and argument to prove that his appeal was within the Board's jurisdiction. *Id*. In

response, the appellant alleged that the Board had jurisdiction pursuant to 5 C.F.R. § 1201.3(a)(2) and (6),[1] and he stated that the agency was attempting to constructively remove him by forcing him to accept an early disability retirement. IAF, Tab 3 at 1. The appellant also claimed that the agency improperly restored him because it assigned him to a part-time position rather than a full-time position. *Id*. The agency filed a motion for summary judgment, alleging that the appellant did not suffer any adverse action since being reemployed. IAF, Tab 9. On July 22, 1998, the administrative judge issued an initial decision in which she found that the Board did not have jurisdiction to review the appellant's entitlement to benefits from OWCP. IAF, Tab 10, Initial Decision (ID) at 2. She informed the appellant that he could file a separate appeal concerning his restoration claims, ID at 2, and she dismissed his discrimination and veterans preference claims upon finding that the Board lacked jurisdiction to consider these claims in the absence of an otherwise appealable action. ID at 3. The appellant filed a timely petition for review in which he argues that the Board has jurisdiction to address his constructive removal. Petition for Review (PFR) File, Tab 1 at 3.

ANALYSIS

The appellant's constructive removal claim.

¶3 The exact nature of the appellant's argument is not apparent from his petition for review. The crux of the appellant's argument appears to be that he was

[1] The Board's regulation at 5 C.F.R. § 1201.3 does not establish jurisdiction over an agency action; it merely describes the agency actions over which the Board has jurisdiction pursuant to various other laws. rules, or regulations. Subsection (a)(2) refers to the Board's jurisdiction to consider adverse actions pursuant to 5 C.F.R. Part 752, subparts C and D, and 5 U.S.C. § 7512; subsection (a)(6) refers to the Board's jurisdiction to consider determinations affecting the rights or interests of an individual or of the United States under the Civil Service Retirement System or the Federal Employees' Retirement System pursuant to 5 C.F.R. Parts 831, 842, and 844, and 5 U.S.C. §§ 8347(d)(1)-(2) and 8461(e)(1).

receiving OWCP benefits for a work-related injury, and that the agency improperly restored him in order to force him to apply for disability retirement. IAF, Tab 3 at 1. The appellant has not presented any evidence that the agency has removed him or that he has filed for or been awarded an annuity based on his disability. Thus, to the extent that the appellant is alleging a constructive removal based on an involuntary disability retirement, his appeal appears to be premature.

¶4 In any case, even if his involuntary disability retirement appeal was ripe, i.e., ready for adjudication, because of various allegations made in his appeal form, our jurisdictional case law may preclude this claim.

The appellant's restoration claim.

¶5 Although the appellant specifically alleged that the agency improperly restored him to duty, IAF, Tab 3 at 1, neither the administrative judge nor the agency's response to the acknowledgment order provided the appellant with explicit notice of what he was required to show to establish Board jurisdiction over his restoration claim. For this reason, we are remanding this appeal to the regional office to afford the appellant the opportunity to raise a nonfrivolous allegation that the Board has jurisdiction over his restoration appeal after he has been provided with proper notice. *See Burgess v. Merit Systems Protection Board*, 758 F.2d 641, 643-44 (Fed. Cir. 1985) (an appellant must receive explicit information on what is required to establish an appealable jurisdictional issue). Because the appellant specifically raised the restoration issue in his response to the acknowledgment order, and by implication in his appeal form, the interests of fairness and adjudicatory efficiency would not be served by delaying consideration of this issue until the appellant files a separate appeal. *See Isabelle v. Office of Personnel Management*, 69 M.S.P.R. 176, 182 (1996). If the appellant does not wish to pursue his restoration claim after receiving proper notice, he may withdraw his appeal.

¶6 Upon an employee's recovery from a compensable injury, the employee is entitled to restoration rights under 5 C.F.R. Part 353 that are dependent upon both the extent of recovery and the time it takes for the appellant to recover. An employee who fully recovers from a compensable injury within 1 year from the date eligibility for compensation began is entitled to be restored immediately and unconditionally to his or her former position or an equivalent one. 5 C.F.R. § 353.301(a). An employee whose full recovery takes longer than 1 year is entitled to priority consideration, agencywide, for restoration to the position he or she left or an equivalent one, provided that he or she applies for reappointment within 30 days of the cessation of compensation. 5 C.F.R. § 353.301(b). An equivalent position for the purposes of Part 353 is one of like seniority, status, and pay. *See Britton v. Department of Agriculture*, 23 M.S.P.R. 170, 172 (1984). Finally, when an individual partially recovers from a compensable injury and is able to return to limited duty, agencies must make every effort to restore the individual in the local commuting area. 5 C.F.R. § 353.301(d). For the purposes of Part 353, "fully recovered" means compensation payments have been terminated on the basis that the employee is able to perform all the duties of the position he or she left or an equivalent one. 5 C.F.R. § 353.102. "Partially recovered" means 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. *Id*.

¶7 An employee's Board appeal rights also differ depending on the extent and the timing of the employee's recovery. To establish Board jurisdiction over an appeal alleging entitlement to immediate restoration, the appellant must show that: (1) he had a compensable injury or recurrence of a compensable injury; (2) his OWCP benefits had been terminated within 1 year from the date on which the benefits began, on the basis that he had fully recovered from the compensable injury; and (3) his separation from his position was substantially related to his compensable

injury. *See Denny v. Department of the Navy*, 43 M.S.P.R. 123, 127 (1990). Because partially recovered employees, and those whose full recovery takes longer than 1 year, are not entitled to immediate and unconditional restoration, their appeal rights are not as extensive as those of an employee who fully recovers within 1 year. *See* 5 C.F.R. § 353.304. A fully recovered excepted service[2] employee entitled to priority consideration may appeal a violation of his or her restoration rights to the Board by presenting factual information that he or she was denied restoration rights because of the employment of another person. 5 C.F.R. § 302.501. An individual who is partially recovered from a compensable injury may appeal to the Board only for a determination of whether the agency is acting arbitrarily and capriciously in denying restoration. 5 C.F.R. § 353.304(c). Upon reemployment, a partially recovered employee may also appeal the agency's failure to credit time spent on compensation for purposes of rights and benefits based upon length of service, *id*., but a partially recovered employee has no right to appeal an allegedly improper restoration. *See Scott v. U.S. Postal Service*, 59 M.S.P.R. 245, 248 (1993), *appeal dismissed*, 22 F.3d 1106 (Fed. Cir. 1994) (Table). However, under appropriate circumstances, the restoration of a partially recovered employee may be deemed so unreasonable as to amount to a denial of restoration within the Board's jurisdiction. *See id*. at 248-49. In order to make a nonfrivolous allegation that the Board may exercise jurisdiction over such an appeal, an appellant must present specific, independent evidence corroborating his allegations that the restoration was unreasonable. *See Moore v. U.S. Postal Service*, 76 M.S.P.R. 373, 377 (1997).

¶8 However, to the extent that the appellant claimed that he was not qualified for restoration and should have continued to receive OWCP benefits, we discern no

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[2] Positions in the Postal Service are excepted service positions. *See Besemer v. U.S. Postal Service*, 77 M.S.P.R. 260, 263 n.2 (1998); *Daisy v. U.S. Postal Service*, 68 M.S.P.R. 15, 19 (1995).

error in the administrative judge's dismissal of this claim for lack of jurisdiction.[3] As the file now stands, we are unable to determine the exact nature of the appellant's restoration rights and the agency's corresponding obligations because it is impossible to determine the series of events that resulted in the appellant's restoration to duty. It is possible that OWCP notified the appellant that it intended to terminate his benefits and the appellant subsequently applied for restoration. If OWCP terminated the appellant's benefits on the basis that he was able to perform all the duties of the position he left, or an equivalent one, the appellant would be entitled to the restoration rights of a fully recovered excepted service employee. *See* 5 C.F.R. § 353.301(b). However, the Board would lack jurisdiction to consider OWCP's determination regarding termination of his benefits. *See Miller v. U.S. Postal Service*, 26 M.S.P.R. 210, 213 (1985) (OWCP decisions are final regarding an employee's entitlement to benefits, but the Board retains the authority to hear and decide collateral issues, such as whether the employee committed fraud in obtaining OWCP benefits).

¶9 It is also possible, however, that OWCP informed the appellant that it would terminate his benefits if he did not accept a suitable job offer from the agency. An agency may hasten a partially disabled employee's return to the workplace by offering suitable work to the employee. The regulations implementing FECA provide that the agency, in cooperation and coordination with OWCP, may offer

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[3] In his appeal form, the appellant alleged that the agency ordered him to return to work in order to force him to apply for disability retirement and thereby "take a cut in benefits." IAF, Tab 1 at 3. We note that prior to his restoration, the appellant was receiving OWCP benefits, PFR File, Tab 1, and we further note that compensation from OWCP generally provides an employee with greater benefits than a disability retirement annuity. *See* CSRS and FERS Handbook for Personnel and Payroll Offices, § 102A2.1-2(A) (Aug. 15, 1995). However, although an appellant who is entitled to both disability retirement benefits and compensation from OWCP must elect between them, he can change his election for different periods of time based on the benefits which will be more advantageous. *Id.* Thus, even if we were to accept the appellant's allegation as true, his application for disability retirement would not prejudice his right to receive OWCP benefits if he is otherwise entitled to these benefits.

reemployment in a position suitable to the former employee's capabilities. 20 C.F.R. § 10.123(d). FECA provides that "A partially disabled employee[4] who- (1) refuses to seek suitable work; or (2) refuses or neglects to work after suitable work is offered to, procured by, or secured for him; is not entitled to compensation." 5 U.S.C. § 8106(c). The FECA regulations provide:

> Where an employee has been offered suitable employment (or reemployment) by the employing agency (i.e., employment or reemployment which [OWCP] has found to be within the employee's educational and vocational capabilities, within any limitations and restrictions which pre-existed the injury, and with the limitations and restrictions which resulted from the injury), ... the employee is obligated to return to such employment. An employee who refuses or neglects to work after suitable work has been offered or secured for the employee has the burden of showing that such refusal or failure to work was reasonable or justified, and shall be provided with the opportunity to make such showing before a determination is made with respect to termination of entitlement to compensation as provided by 5 U.S.C. § 8106(c)(2).

20 C.F.R. § 10.124(c). An employee may appeal OWCP's final decision to terminate compensation on the basis of the employee's refusal to work after suitable work has been offered to the Employees' Compensation Appeals Board (ECAB). 20 C.F.R. § 10.139.

¶10 If the appellant "was forced back into work" because OWCP notified the appellant that it would terminate his compensation if he refused to accept the agency's suitable job offer, the Board would have no authority to overrule OWCP's determination. *See New v. Department of Veterans Affairs*, 142 F.3d 1259, 1264 (Fed. Cir. 1998) ("It is the OWCP, not employing agencies or the

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[4] A partially disabled employee is an "injured employee who is unable to return to the position held at the time of injury (or to earn equivalent wages) but who is not totally disabled for all gainful employment." 20 C.F.R. § 10.303(a). Thus, an employee who is partially recovered for the purposes of 5 C.F.R. Part 353, i.e., one who has recovered sufficiently to return to part-time or light duty or to another position with less demanding physical requirements, will generally be a partially disabled employee for the purposes of FECA.

Board, that possesses the requisite expertise to evaluate whether a position is suitable for an employee in light of that employee's particular medical condition."). Thus, to the extent that the appellant may be claiming that he was a partially recovered employee whose restoration rights were violated because he was restored to an unsuitable position which OWCP has found suitable, the Board does not have jurisdiction to consider this claim.[5]

The appellant's discrimination and Veterans Preference Act claims.

¶11 Absent an otherwise appealable action, the Board does not have jurisdiction to consider the appellant's age and disability discrimination claims. *See Wren v. Department of the Army*, 2 M.S.P.R. 1, 2 (1980) (5 U.S.C. § 2302(b) is not an independent source of Board jurisdiction), *aff'd*, 681 F.2d 867, 871-73 (D.C. Cir. 1982).

¶12 The appellant also claimed that he was a 10 point veteran, but the agency only gave him credit as a 5 point veteran.[6] PFR File, Tab 1 at 4. Assuming that the appellant's contention is correct, the appellant has not explained how this error was likely to have caused the agency to reach a conclusion different from the one it would have reached in the absence or cure of the error. *See Stephen v.*

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[5] Part 10 of Title 20, Code of Federal Regulations, provides the means by which an appellant may contest OWCP's findings concerning the suitability of a job offer.

[6] Preference eligible veterans who receive a passing grade in an examination for entrance into the Postal Service are entitled to additional points above the earned rating pursuant to 5 U.S.C. § 3320. This section provides that the appointing authority shall select for appointment to each vacancy in the excepted service from the qualified applicants in the same manner and under the same conditions required for the competitive service by sections 3308-3318 of Title 5, United States Code. Section 3309 provides that a preference eligible under 5 U.S.C. § 2108(3)(C)-(G) is entitled to an additional 10 points above the earned rating, while a preference eligible under 5 U.S.C. § 2108(3)(A) is entitled to an additional 5 points. In addition to the points such veterans are awarded in evaluating entrance examinations, preference eligible veterans are accorded other employment advantages including special retention standing during a reduction-in-force (RIF), *see* 5 U.S.C. § 3502, and priority consideration for reemployment. See 5 C.F.R. § 302.303(b).

Department of the Air Force, 47 M.S.P.R. 672, 681, 685 (1991) (harmful error under 5 U.S.C. § 7701(c)(2)(A) cannot be presumed; an agency error is harmful only where the record shows that the procedural error was likely to have caused the agency to reach a conclusion different from the one it would have reached in the absence or cure of the error). However, if the appellant establishes Board jurisdiction over his appeal on remand, the administrative judge should allow the appellant the opportunity to establish harmful error on the basis of his status as a veteran, and she must decide the merits of the appellant's age and disability discrimination claims in accordance with the procedures set forth at 5 U.S.C. § 7701. *See Currier v. U.S. Postal Service*, 79 M.S.P.R. 177, 180 (1998).

ORDER

¶13 Accordingly, we REMAND this appeal to the regional office. The administrative judge shall provide the appellant with explicit notice concerning the facts he must demonstrate to establish Board jurisdiction over his restoration claims. The administrative judge may also require the appellant to file evidence and argument to show that his appeal was timely filed or that good cause existed for the delay.[7] If the appellant raises a nonfrivolous allegation of fact that, if proven, would establish Board jurisdiction over his restoration claims, and the administrative judge determines that the appeal was timely filed or that good cause existed for the delay, the administrative judge shall conduct a jurisdictional hearing. *See Staats v. U.S. Postal Service*, 99 F.3d 1120, 1125 (Fed. Cir. 1996) (a hearing is required with respect to jurisdictional questions only if the employee

[7] The agency restored the appellant on November 22, 1997, IAF, Tab 8, PS Form 50, but he did not file his appeal until April 18, 1998. IAF, Tab 1. Board regulations provide that an appeal must be filed no later than 30 days after the effective date, if any, 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). Thus, to the extent that the appellant is challenging his restoration on November 22, 1997, it appears that his appeal was untimely filed.

makes a non-frivolous allegation that, if proved, would establish Board jurisdiction).

FOR THE BOARD: _____

Robert E. Taylor
Clerk of the Board

Washington, D.C.