UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

85 M.S.P.R. 189

DWIGHT A. SIMONTON,
Appellant,

DOCKET NUMBER
CH-3443-98-0758-I-1

v.

UNITED STATES POSTAL SERVICE,
Agency.

DATE: February 23, 2000

Dolores J. Belgrave, Esquire, Philadelphia, Pennsylvania, for the appellant.

Richard C. Nelson, Bloomingdale, Illinois, for the agency.

BEFORE

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

Vice Chair Slavet issues a concurring opinion.

OPINION AND ORDER

¶1 The appellant petitions for review of an initial decision that dismissed his appeal for lack of jurisdiction and denied his claim of discrimination on the basis of his military service. For the reasons discussed below, we GRANT his petition, REVERSE the initial decision with respect to its finding that the appellant was not constructively suspended from September 13, 1997, through January 31, 1998, AFFIRM the initial decision with respect to the other issues, and REMAND the appeal for further proceedings consistent with this Opinion and Order.

BACKGROUND

¶2 The following facts are undisputed. On September 12, 1997, the appellant called in sick, complaining of back pain and weakness in his leg. He was a Rural Letter Carrier but was assigned to limited duty following a work-related injury in 1992, which the Office of Workers' Compensation Programs (OWCP) accepted for a hematoma[1] of the left occipital,[2] hip, and buttock, as well as a concussion with mild amnesia, post-concussion syndrome, and depression. An agency official called him at home that day and informed him that his limited-duty assignment was withdrawn pending his submission of a functional capacity examination report from his treating physician and review of the report by the agency's Injury Compensation Office.

¶3 After the appellant exhausted his balance of sick and annual leave by September 16, he was placed on leave without pay commencing September 17. He subsequently submitted a functional capacity examination report dated September 17, 1997, which indicated that he was capable of performing the limited-duty work to which he was previously assigned. On September 24, the agency confirmed in writing its prior decision to withdraw the limited-duty assignment.

¶4 After requesting sick leave for 1 day on September 12, the appellant repeatedly asked the agency to return him to his prior limited-duty assignment, but the agency refused his requests. He did not return to work after September 12, 1997. Initial Appeal File (IAF), Tab 3, Exhibit 5, Tab 16, Subtabs 4Q, 4R, 4S, 4U, 4V, 4W; Initial Decision (ID) at 3-6, IAF, Tab 22.

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[1] "Hematoma" is "a circumscribed extravascular collection of blood, usually clotted, which forms a mass." *Blakiston's Gould Medical Dictionary* 597 (4th ed. 1979).

[2] "Occipital" means "of or pertaining to the occiput." *Id.* at 933. "Occiput" is "the back part of the head." *Id.* at 934.

¶5 On July 24, 1998, the appellant filed this appeal, asserting that he was constructively suspended. IAF, Tab 1. After holding a hearing, the administrative judge (AJ) dismissed the appeal for lack of jurisdiction, finding that the appellant's absence after September 12 did not constitute a constructive suspension because the agency was not obligated to provide limited duty or light duty thereafter. ID at 6-9. Based on this jurisdictional determination, the AJ found that he was without authority to consider the appellant's claims of discrimination based on gender, age, and disability, or to consider his claims of retaliation for pursuing his equal employment opportunity (EEO) and workers' compensation rights. *Id.* at 11-13. The AJ did consider the appellant's claim of discrimination under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), but denied it on the merits. *Id.* at 9-11.

¶6 On petition for review, the appellant disputes the AJ's jurisdictional dismissal of his appeal and raises arguments regarding his discrimination claims; he does not dispute the AJ's denial of his USERRA claim.[3] Petition for Review (PR), Petition for Review File (PRF), Tab 1. The agency has responded in opposition to the appellant's petition. PRF, Tab 3.

ANALYSIS

¶7 A suspension for more than 14 days is appealable to the Board. 5 U.S.C. §§ 7512(2) and 7513(d). An appealable constructive suspension may occur when an employee who is absent due to medical restrictions requests work within those

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[3] The appellant has submitted additional evidence with his petition for review. PR, Exhibits R-U. We have not considered Exhibits R and U, which are dated before the record closed below, because the appellant has not alleged or shown that they were not previously available despite his due diligence. 5 C.F.R. § 1201.115; *Avansino v. U.S. Postal Service*, 3 M.S.P.R. 211, 214 (1980). We have not considered Exhibits S and T, which are medical reports dated after the record closed below, because the appellant has not explained, nor can we discern, how they are material to the jurisdictional issues currently before the Board. The administrative judge may consider them on remand, to the extent that they may be relevant to the issues to be adjudicated.

restrictions, and the agency is bound by agency policy, regulation, or contractual provision to offer him available limited-duty or light-duty work but fails to do so.[4] *See McNamee-Marrero v. U.S. Postal Service*, 80 M.S.P.R. 487, 490 (1999); ID at 6. Thus, the jurisdictional issue here is whether the appellant was entitled to limited duty or light duty after September 12, 1997.

¶8 Regarding the terms "limited duty" versus "light duty," the AJ found, and it is undisputed on review, that in the U.S. Postal Service "limited duty" refers to modified work provided to employees who have medical restrictions due to work-related injuries, whereas "light duty" refers to modified work provided to employees who have medical restrictions due to nonwork-related injuries. ID at 7 n.3; *see Beltran v. U.S. Postal Service*, 50 M.S.P.R. 425, 427 n.1 (1991). Our use of these terms throughout the decision will be consistent with the meaning given them by the U.S. Postal Service.

¶9 When an individual has "partially recovered from a compensable injury and ... is able to return to limited duty," an agency must "make every effort to restore" him. 5 C.F.R. § 353.301(d). The term "partially recovered" means "an injured employee, though not ready to resume the full range of his or her regular duties, has recovered sufficiently to return to part-time or light [i.e., limited] duty or to another position with less demanding physical requirements …." 5 C.F.R. § 353.102. After the appellant partially recovered from his compensable injury in 1992, the agency satisfied its obligation under section 353.301(d) by restoring

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[4] The appellant's allegation that the agency improperly denied him limited-duty work may be also within the Board's jurisdiction as a denial of restoration, under 5 C.F.R. § 353.401(c). *See Allen v. U.S. Postal Service*, 73 M.S.P.R. 73, 76 (1997); *McCloud v. U.S. Postal Service*, 71 M.S.P.R. 508, 510-11 (1996). If viewed as a restoration appeal, the Board would have jurisdiction to determine whether the agency acted arbitrarily and capriciously in denying restoration to limited duty. *Id.* Based on the jurisdictional analysis in the text below, we find that the same result would be reached whether this appeal is characterized as an alleged denial of restoration or an alleged constructive suspension.

him to limited duty, until September 12, 1997, when it withdrew the limited duty temporarily and subsequently withdrew it permanently.

¶10 The agency's withdrawal of limited duty, and the AJ's finding that the withdrawal was appropriate, were based on the "independent" medical evaluation reports dated June 25 and September 19, 1997, by Dr. V. V. Kulkarni, an orthopedic surgeon, and Dr. C. E. Moore, a psychiatrist. ID at 3-4; IAF, Tab 16, Subtabs 4T, 4X. As the AJ found, these reports were based on examinations of the appellant in the summer of 1997, and contained the doctors' opinions that the appellant's current medical restrictions were not causally related to his work injury in 1992. Based on these reports, the agency and the AJ determined that the appellant's medical restrictions after September 12, 1997, were no longer causally related to his employment injury and that he thus ceased to be a "partially recovered" individual entitled to restoration rights under 5 C.F.R. § 353.301(d).

¶11 The determination of whether an individual suffers from a medical condition that is compensable under the Federal Employees' Compensation Act (FECA) is within the exclusive purview of OWCP (subject to review by the Employees Compensation Appeals Board), and neither the employing agency nor the Board has the authority to make such a determination. 5 U.S.C. § 8145; 20 C.F.R. § 10.2(a)(1998);[5] *see New v. Department of Veterans Affairs*, 142 F.3d 1259, 1264 (Fed. Cir. 1998); *McLain v. U.S. Postal Service*, 82 M.S.P.R. 526, ¶ 10 (1999); *see also* 20 C.F.R. § 10.1 (1999). Here, OWCP weighed the two independent medical evaluation reports by Drs. Kulkarni and Moore, in light of the pertinent facts and the previously submitted medical evidence, before issuing

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[5] Effective January 4, 1999, the regulations implementing FECA were revised. 63 Fed. Reg. 65, 284 (Nov. 25, 1998). The new regulations are not applicable to this appeal because they apply only when the initial decision by OWCP on a FECA issue is made on or after January 4, 1999, which is not the case here. *Id.* The revised regulations did not modify in any material way the regulatory provisions cited in this Opinion and Order.

a September 28, 1997 proposal to terminate the appellant's entitlement to compensation benefits. IAF, Tab 16, Subtab 4Q. In response to the proposal, the appellant submitted additional medical evidence. *Id.*, Subtab 4P. After considering the additional evidence, OWCP issued a January 15, 1998 decision terminating his entitlement to compensation benefits effective February 1, 1998.[6] *Id.* OWCP subsequently issued a decision granting the appellant compensation for wage loss from September 17, 1997, through January 31, 1998,[7] on the basis that the agency's withdrawal of limited duty resulted in a compensable wage loss. IAF, Tab 20; *cf.* 20 C.F.R. § 10.5(x) (1999) ("*Recurrence of disability* ... means an inability to work that takes place when a light-duty assignment made specifically to accommodate an employee's physical limitations due to his or her work-related injury or illness is withdrawn ...").

¶12 Although OWCP terminated the appellant's compensation benefits, it made this decision on January 15, 1998, and terminated those compensation benefits effective February 1, 1998. Because compensation benefits are payable only while an employee has a work-related, viz., "compensable," injury, OWCP's decisions reflected its determination that the appellant remained a compensably injured, partially recovered employee until February 1, 1998. *See* 5 C.F.R. § 353.102 (a "partially recovered" individual is one who suffers from residuals of a "compensable injury"); 20 C.F.R. §§ 10.5(14), (17), 10.300 (1998) (to receive wage-loss compensation based on "disability," the employee must have a work-related "injury"); *see also* 20 C.F.R. § 10.500 (1999) ("Benefits [under

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[6] In addition to the employment injury in 1992, OWCP also accepted that a verbal threat and harassment at work in 1996 and 1997 caused an aggravation of the appellant's anxiety. IAF, Tab 15, Exhibit B. It appears that the issue of whether he was disabled due to such anxiety after September 12, 1997, is currently pending before OWCP. *See* PR, Exhibits S, T; IAF, Tab 16, Subtab 4A.

[7] As noted in the text above, the appellant used paid leave from September 12 through 16, 1997. ID at 3; *cf.* 20 C.F.R. § 10.301(1998) (the employee has a right to elect paid leave in lieu of compensation for wage loss).

FECA] are available only while the effects of a work-related condition continue."). Until OWCP issued a decision on January 15, 1998, to terminate the appellant's compensation benefits effective February 1, 1998, the employing agency was without authority to determine on its own that his medical restrictions were no longer causally related to his employment injury, i.e., that he was no longer a "partially recovered" employee for purposes of restoration rights under 5 C.F.R. § 353.301(d). *See New*, 142 F.3d at 1264. We therefore find that the agency improperly withdrew the appellant's limited-duty assignment after September 12, 1997, solely based on its ultra vires determination that he was no longer a partially recovered employee. IAF, Tab 16. Accordingly, the appellant's absence from September 13, 1997, through January 31, 1998, constituted an appealable constructive suspension for more than 14 days.[8]

¶13 Regarding the appellant's absence after January 31, 1998, the restoration rights of partially recovered employees, under 5 C.F.R. § 353.301(d), apply only to those who partially (not fully) recover from a compensable injury, i.e, those who continue to suffer from residuals of the work-related injury. *See* 5 C.F.R. § 353.102 (definitions of "injury" and "partially recovered"); *see generally Leach v. Department of Commerce*, 61 M.S.P.R. 8, 15 (1994). Based on OWCP's decisions as discussed above, the appellant fully recovered[9] from the

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[8] This does not mean that an agency may never withdraw a limited-duty assignment in the absence of an appropriate determination by OWCP. If, for instance, an employee suffered a nonwork-related injury after being placed on limited duty, and the injury prevented him from performing his limited-duty assignment, the agency may of course withdraw the assignment. Here, as noted in the text above, the medical evidence showed that the appellant was capable of performing his limited-duty assignment during the period of his constructive suspension.

[9] That the appellant fully recovered *from his compensable injury* does not mean that he was a "fully recovered" individual entitled to restoration rights under 5 C.F.R. § 353.301(a),(b). For purposes of restoration rights under section 353.301(a),(b), the term "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 (emphasis added). Here, the appellant's

compensable injury as of February 1, 1998, although he continued to have medical restrictions due to noncompensable conditions. Thus, the agency was not obligated to make restoration efforts under 5 C.F.R. § 353.301(d) after January 31, 1998, and was therefore not obligated to offer him limited duty thereafter. In addition, the AJ found that the agency was not bound by any policy, regulation, or contractual provision to provide light duty or to reassign him under the circumstances. ID at 7-8. The appellant does not dispute on review the AJ's findings in this regard, and we otherwise find no reason to disturb them on review. We therefore find that the appellant was not constructively suspended after January 31, 1998.

¶14 Regarding the appellant's constructive suspension from September 13, 1997, through January 31, 1998, which is within the Board's jurisdiction as discussed above, we find that we must reverse the suspension because the record does not show that the agency satisfied the appellant's constitutional right to minimum due process as to the suspension. *See McLain*, 82 M.S.P.R. 526, ¶ 10; *Stephen v. Department of the Air Force*, 47 M.S.P.R. 672, 681 (1991). The appellant may be entitled to compensatory damages based on this constructive suspension if he prevails on his claims of discrimination based on his gender and disability, or his claim of retaliation for prior EEO activity involving Title VII; such damages are not available based on his claims of discrimination based on age and of retaliation for pursuing workers' compensation benefits. *See Farquhar v. Department of the Air Force*, 82 M.S.P.R. 454, ¶ 11 (1999); *Crosby v. U.S. Postal Service*, 74 M.S.P.R. 98, 106-07 (1997); *Currier v. U.S. Postal Service*, 72 M.S.P.R. 191, 196 & n.5 (1996). Because the appellant sought compensatory damages below

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compensation benefits were terminated on the basis that any current medical restrictions were not causally related to his employment injury, but it is undisputed that he was not able to perform all the duties of his former position or an equivalent one at the time his compensation benefits were terminated.

and on review, his claims of discrimination must be adjudicated on remand.[10] *See Farquhar*, 82 M.S.P.R. 454, ¶ 11; *Schultz v. U.S. Postal Service*, 78 M.S.P.R. 159, 164 (1998); PR at 7; IAF, Tab 1.

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[10] The Board's regulations now require requests for compensatory damages to be in writing and to state the amount of damages sought and the reasons why the appellant believes he is entitled to an award under the applicable statutory standards. 5 C.F.R. § 1201.204(b) (63 Fed. Reg. 41,177, 41, 180 (1998)). Because the appellant filed this appeal prior to the date when this regulation went into effect, we have not applied the regulation so as to preclude his claim for compensatory damages. *Farquhar*, 82 M.S.P.R. 454, ¶ 9 n.2.

CONCURRING OPINION OF VICE CHAIR BETH S. SLAVET

in

Dwight A. Simonton v. U.S. Postal Service, CH-3443-98-0758-I-1

I concur in the reasoning and result of the majority opinion. I write separately only to clarify a misleading impression left by the majority's opinion at footnote 7 that the Board decides in this opinion that the appellant made a valid election to use paid leave in lieu of OWCP compensation. OWCP paid compensation for wage losses from September 17, 1997 through January 31, 1998, because the appellant only claimed compensation from that beginning date, not the date of the onset of his forced absences on September 13, 1997. *See* IAF, Tab 20 (CA-8 claim form dated September 14, 1997). The appellant used available sick and annual leave for September 12 through September 16, inclusive. ID at 3; 11 n. 5. The record shows without dispute that his request for 3 days of annual leave was explicitly based upon the agency's withdrawal of the limited duty assignment, and that, but for the agency's wrongful action, he would have returned to the limited duty assignment on September 13, 1997. IAF, Tab 5, Appellant's Exhibit 5; Transcript at 112; 114-15. It is also undisputed that OWCP did not pay compensation for the 1 day of sick leave or 3 days of annual leave used by the appellant between September 12 and September 16, 1997. The appellant's use of sick leave on September 12th was at his own request, unconnected to the agency's decision to withdraw the limited duty assignment. However, that is not the case for the period from September 13 through September 16, for which 3 days of annual leave are restorable. *See* 5 U.S.C. § 5596(b)(1)(B); 5 C.F.R. § 550.805(a)(1), (2). The majority's observation that the appellant may choose to elect paid leave in lieu of compensation for wage

ORDER

¶15 On remand, the AJ shall adjudicate the appellant's claims of discrimination based on gender and disability, as well as his claim of retaliation for prior EEO activity. *See McLain*, 82 M.S.P.R. 526, ¶ 12.

¶16 Pending adjudication of these discrimination claims, we ORDER the agency to cancel the appellant's constructive suspension and to restore the appellant effective September 13, 1997 through January 31, 1998. *See Kerr v. National Endowment for the Arts*, 726 F.2d 730 (Fed. Cir. 1984). The agency must complete this action no later than 20 days after the date of this decision.

¶17 We also ORDER the agency to pay the appellant the correct amount of back pay, interest on back pay, and other benefits under the Office of Personnel Management's regulations, no later than 60 calendar days after the date of this decision. We ORDER the appellant to cooperate in good faith in the agency's efforts to calculate the amount of back pay, interest, and benefits due, and to provide all necessary information the agency requests to help it carry out the Board's Order. If there is a dispute about the amount of back pay, interest due, and/or other benefits, we ORDER the agency to pay the appellant the undisputed amount no later than 60 calendar days after the date of this decision.

¶18 We further ORDER the agency to tell the appellant promptly in writing when it believes it has fully carried out the Board's Order and of the actions it took to

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loss is true as far as it goes, but is inapplicable here inasmuch as the appellant was forced from his duties on September 13, 1997, without the choice of election.

_____ _____

Date

carry out the Board's Order. The appellant, if not notified, should ask the agency about its progress. *See* 5 C.F.R. § 1201.181(b).

¶19 No later than 30 days after the agency tells the appellant that it has fully carried out the Board's Order, the appellant may file a petition for enforcement with the office that issued the initial decision on this appeal if the appellant believes that the agency did not fully carry out the Board's Order. The petition should contain specific reasons why the appellant believes that the agency has not fully carried out the Board's Order, and should include the dates and results of any communications with the agency. 5 C.F.R. § 1201.182(a).

FOR THE BOARD:

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Robert E. Taylor
Clerk of the Board

Washington, D.C.

CONCURRING OPINION OF VICE CHAIR BETH S. SLAVET

I concur in the reasoning and result of the majority opinion. I write separately only to clarify a misleading impression left by the majority's opinion at footnote 7 that the Board decides in this opinion that the appellant made a valid election to use paid leave in lieu of OWCP compensation. OWCP paid compensation for wage losses from September 17, 1997 through January 31, 1998, because the appellant only claimed compensation from that beginning date, not the date of the onset of his forced absences on September 13, 1997. *See* IAF, Tab 20 (CA-8 claim form dated September 14, 1997). The appellant used available sick and annual leave for September 12 through September 16, inclusive. ID at 3; 11 n. 5. The record shows without dispute that his request for 3 days of annual leave was explicitly based upon the agency's withdrawal of the limited duty assignment, and that, but for the agency's wrongful action, he would have returned to the limited duty assignment on September 13, 1997. IAF, Tab 5, Appellant's Exhibit 5; Transcript at 112; 114-15. It is also undisputed that OWCP did not pay compensation for the 1 day of sick leave or 3 days of annual leave used by the appellant between September 12 and September 16, 1997. The appellant's use of sick leave on September 12th was at his own request, unconnected to the agency's decision to withdraw the limited duty assignment. However, that is not the case for the period from September 13 through September 16, for which 3 days of annual leave are restorable. *See* 5 U.S.C. § 5596(b)(1)(B); 5 C.F.R. § 550.805(a)(1), (2). The majority's observation that the appellant may choose to elect paid leave in lieu of compensation for wage loss is true as far as it goes, but is inapplicable here inasmuch as the appellant was forced from his duties on September 13, 1997, without the choice of election.