UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2014 MSPB 20

Docket No. DE-0752-12-0023-I-2

Stevan E. Wren,

Appellant,

v.

Department of the Army,

Agency.

March 25, 2014

Jeffrey H. Jacobsen, Esquire, Tucson, Arizona, for the appellant.

Gwendolyn Thea Davis Franks, Ft. Huachuca, Arizona, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

OPINION AND ORDER

¶1 The agency has filed a petition for review of the initial decision, which reversed its action removing the appellant from employment based on a charge of medical inability to perform. For the reasons discussed below, we GRANT the agency's petition for review, REVERSE the initial decision IN PART by finding that the agency did prove its charge, and REMAND the case to the regional office for adjudication of the appellant's claim of disability discrimination and, if appropriate, the reasonableness of the penalty.

BACKGROUND

¶2 The appellant was removed from his Information Technology (IT) Specialist position for medical inability to perform. Initial Appeal File (IAF) (I-1 File)[1], Tab 8 at 23. Up through the agency's action effecting his removal, and even after the appellant filed his Board appeal, there did not appear to be any controversy about this. As the administrative judge found: (1) there was no dispute that the appellant's essential duties included a significant amount of work-related travel as an engineering-lead and/or data-lead on agency IT projects; (2) the appellant's physicians restricted him from traveling (they recommended **no** such travel) because of his chronic obstructive pulmonary disorder (COPD); and (3) by the time of the removal action, the appellant's supervisor had exhausted the non-travel work he could assign the appellant. Initial Decision (ID) at 2-5. Regarding item (2), all of the medical reports in existence at the time of the appellant's removal indicated that he was unable to engage in significant travel. *See* IAF (I-1 File), Tab 10 at 7-10 (May 2011 report by Dr. Bronnimann, recommending "no out of town travel" and "no travel to higher elevations"; *id.* at 16 (April 2009 report by Dr. Knowles, stating that the appellant "is not fit for any TDY travel"); *id.* at 3 (May 2011 report by Dr. Boulet, stating that the appellant's "medical condition is reasonably stable as long as he has his oxygen and is not required to travel any significant distances"); *id.* at 20 (March 2009 report by Dr. Boulet, stating that the appellant "should be relieved of his obligations for out of state travel"); IAF (I-1 File), Tab 9 at 33 (May 2011 report by Dr. Carnett stating that the appellant's COPD and coronary artery disease are severe, that full recovery was not expected and that "it is not recommended that he be released to any temporary duty assignments in the future"); *id.* at 13 (January 2009 report by

[1] The original docket number was DE-0752-12-0023-I-1 (the "I-1" File). That appeal was dismissed without prejudice and later reinstated under the current docket number (the "I-2" File).

Dr. Carnett, giving his recommendation that the appellant "not be required to do any out of town traveling").

¶3 Despite the above, the administrative judge found that the agency failed to establish that the appellant was medically unable to perform the duties of his position. This finding was based primarily on a May 2012 medical opinion submitted by Dr. Bronnimann, the appellant's treating physician, which stated (in its entirety):

> [The appellant] has COPD. I am his pulmonary physician and see him regularly for his condition. He is stable for travel as long as the travel duration is no more than 2 weeks and he can use supplemental oxygen at the work site. Travel to very cold climates or significant elevation should be restricted. Other than these restrictions, travel to a wide variety of locations would be approved.

Initial Decision at 5 (quoting the report at IAF (I-2 File), Tab 9 at 6).

¶4 Regarding the appellant's claim that the agency committed disability discrimination by failing to provide him a reasonable accommodation for his medical condition, the administrative judge found that, although the agency's search for suitable work that might accommodate the appellant's condition was well intentioned, it was legally inadequate because its search was limited to GS-13 positions in the 2210 Position Series which the appellant held, and the agency official did not explore whether the appellant was interested in and qualified for positions in other series, whether at Fort Huachuca or elsewhere. ID at 11-12. The judge did not, however, make a finding whether the agency had engaged in disability discrimination. The administrative judge noted that a proper search, conducted retroactively, necessitates the examination of information uniquely within the agency's control. The judge stated that he would entertain a compliance action from the appellant if he believed that the agency had not afforded him back pay retroactive to the effective date of the removal action without providing him acceptable proof that a correct search for vacant positions would have not resulted in his reassignment to a vacant, funded position. *Id.* at 12.

¶5 In its petition for review, the agency argues, among other things, that: the administrative judge erred in concluding that the evidence showed that the appellant was able to engage in significant work-related travel; that the judge erred in allowing Dr. Bronnimann's May 2012 report into the record because it was untimely filed without a showing of good cause; and that the judge erred in failing to resolve the appellant's disability discrimination claim and leaving that matter to a possible compliance proceeding in the future. Petition for Review (PFR) File, Tab 1.

ANALYSIS

¶6 Although not cited by the administrative judge, there is a line of Board case law that stands for the proposition that, even when an agency proves by preponderant evidence that the appellant was physically unable to perform the duties of his position at the time he was removed, the removal action may be rescinded on the basis that such action would not promote the efficiency of the service, as required by 5 U.S.C. § 7513(a), where the evidence clearly and unambiguously demonstrates that the appellant has recovered during the pendency of a Board appeal such that he is able to perform the essential duties of his position. The first case so holding was *Street v. Department of the Army*, 23 M.S.P.R. 335 (1984), where the employee recovered from his disabling condition within 2 months of his removal. This holding was applied to reverse a removal action in *Morgan v. U.S. Postal Service*, 38 M.S.P.R. 676 (1988), where the employee recovered within 3 months of the effective date of his removal, and was reaffirmed when the Board denied the Office of Personnel Management Director's request that the Board reconsider and reverse this line of precedent, *Morgan v. U.S. Postal Service*, 48 M.S.P.R. 607 (1991). Recently, in *Johnson v. U.S. Postal Service*, 120 M.S.P.R. 87, ¶ 8 (2013), the Board stated that post-removal evidence of recovery must clearly and unambiguously establish the appellant's ability to perform the essential functions of the position in order to

warrant reversal of a removal for physical inability to perform. *Id*. (citing *Casillas v. Department of the Air Force*, 64 M.S.P.R. 627, 633-34 (1994)).

¶7 The holdings in *Street* and *Morgan* were based on several premises: (1) the Board has "de novo" review authority and may consider evidence that was not available to the agency when it made its decision; (2) the "efficiency of the service" standard of 5 U.S.C. § 7513(a) is the "ultimate criterion" for determining both whether any discipline is warranted and whether a particular penalty may be sustained; (3) inherent in an action effecting a removal for physical inability to perform is that such inability will be permanent or at least long-enduring rather than temporary; and (4) as the "last voice" in the Executive Branch, the Board must avoid the "manifest absurdity" of upholding a removal for physical incapacitation when intervening events show that the appellant is no longer incapacitated and, thus, removal cannot promote the efficiency of the service. *Morgan*, 48 M.S.P.R. at 610-13; *Street*, 23 M.S.P.R. at 340-43.

¶8 The Board's reviewing court recently issued a decision in Norris v. Securities & Exchange Commission, 675 F.3d 1349 (Fed. Cir. 2012). Although Norris did not involve a removal for inability to perform, we believe that the opinion nonetheless supports the Board's approach with regard to the admissibility and potential relevance of post-removal evidence in such cases. In Norris, the court framed the issue as "whether the arbitrator was obligated to consider new, post-removal evidence in mitigation of the penalty that was not before the deciding official," 675 F.3d at 1355, and it resolved that question in the affirmative. In so ruling, the court emphasized the de novo nature of Board proceedings, as did Street and Morgan, and further stated:

> Given the Board's duty to conduct an independent assessment of the Douglas factors to determine the reasonableness of the penalty, we see no reason to distinguish between requiring the Board to consider new evidence relating to the agency's decision on the merits of the underlying misconduct and requiring the Board to consider new evidence regarding the reasonableness of the penalty imposed. Thus,

> we think new evidence, even on the question of penalty, should be considered by the Board . . . .

Norris, 675 F.3d at 1356 (citation deleted). The court concluded that "the arbitrator erred in holding that 'post-removal . . . good conduct is not relevant to the issue before the arbitrator.'" *Id.* at 1357. The court thereafter remanded the case to the arbitrator with instructions to consider the appellant's post-removal evidence in assessing the reasonableness of the penalty imposed, while explicitly declining to express any opinion as to the weight to be given that evidence. *Id.* at 1357. As noted above, the Board has, in cases involving removal for physical inability to perform, said that post-removal evidence of recovery must clearly and unambiguously establish the appellant's ability to perform the essential functions of the position to warrant reversing a removal. Therefore, we must examine whether the appellant's proffered post-removal medical evidence meets that standard.

¶9 In assessing the probative weight of medical opinion, the Board considers whether the opinion was based on a medical examination, whether the opinion provided a reasoned explanation for its findings as distinct from mere conclusory assertions, the qualifications of the expert rendering the opinion, and the extent and duration of the expert's familiarity with the appellant's treatment. *Slater v. Department of Homeland Security*, 108 M.S.P.R. 419, ¶ 15 (2008); *see also Henderson v. Office of Personnel Management*, 117 M.S.P.R. 313, ¶ 17 (2012) (a medical opinion unsupported by medical evidence, e.g., a diagnosis, clinical findings, etc., is not very persuasive). For the reasons discussed below, we conclude that Dr. Bronnimann's May 2012 report does not clearly and unambiguously establish that the appellant had in fact recovered sufficiently from his condition at that time as to enable him to engage in the work-related travel necessary to his position.

¶10 Dr. Bronnimann's May 2012 letter contains nothing but a bare opinion—that the appellant can engage in work-related travel as long as the travel duration

is no more than 2 weeks at a time. This opinion is unsupported by clinical findings or any discussion of the basis for the opinion, and contradicts Dr. Bronnimann's May 2011 opinion, noted above, that the appellant should not engage in any work-related travel. The appellant admitted at the hearing that Dr. Bronnimann had not examined him since March 2011, which was the basis for Dr. Bronnimann's previous opinion that the appellant should not engage in any work-related travel. Hearing Transcript (Day 2) at 206. We note that the administrative judge did not discuss the contrary opinions of Dr. Boulet or Dr. Carnett, also noted above. The only other opinion discussed by the judge in the initial decision was that of Dr. Knowles, whose opinion was viewed as less persuasive than that of Dr. Bronnimann because he was not a treating physician and had not conducted an examination of the appellant. Both Drs. Boulet and Carnett had examined and treated the appellant, and both concluded that he was not able to engage in significant work-related travel. Dr. Carnett conducted his last examination in May 2011, 2 months later than Dr. Bronnimann's last examination. In his response to the agency's petition for review, the appellant pointed out that there was evidence of telephone conversations between him and Dr. Bronnimann after the doctor's last physical examination. PFR File, Tab 4 at 4-5. The existence of telephone conversations between Dr. Bronnimann and the appellant, in which the appellant expressed his own opinion that his medical condition had improved, could not be considered adequate to justify a change in Dr. Bronnimann's opinion about the appellant's medical condition, especially where Dr. Bronnimann's later report did not include any indication of his reasoning process in reaching his conclusion.

¶11 As in *Johnson*, 120 M.S.P.R. 87, ¶ 7 (2013), where we concluded that a new medical report did not outweigh the great weight of consistent reports over a 2-year period that the appellant was medically unable to perform the essential duties of her position, the conclusory opinion expressed in Dr. Bronnimann's May 2012 report does not outweigh the consistent reports of other doctors (as

well as Dr. Bronnimann's own 2009 and 2011 reports) over more than a 2-year period that the appellant was unable to engage in substantial work-related travel.

¶12 Accordingly, we find that, even considering Dr. Bronnimann's May 2012 report, the agency proved by preponderant evidence that the appellant was medically unable to perform the duties of his position.[2]

¶13 In a mixed case such as this, i.e., one in which an individual alleges that a personnel action that is directly appealable to the Board was taken against him because of discrimination, 29 C.F.R. § 1614.302(a)(2), the requirements of 5 U.S.C. § 7702 are straightforward: "the Board shall . . . decide both the issue of discrimination and the appealable action in accordance with the Board's appellate procedures . . . ." Regardless of whether the agency's removal action against the appellant was being reversed on the merits, the appellant was entitled to an adjudication of his claim that the agency committed disability discrimination by failing to provide a reasonable accommodation for his medical condition. As discussed above, the administrative judge did not determine whether the agency discriminated against the appellant by failing to provide him a reasonable accommodation; he instead reserved any questions about whether an accommodation was available to a possible compliance proceeding if there were questions concerning back pay due to the appellant. It was error for the administrative judge not to adjudicate the appellant's claim of disability discrimination.

¶14 We agree with the administrative judge that the present record is insufficient to make a determination as to whether the agency could have provided the appellant an effective accommodation. A remand to provide a fuller

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[2] In light of this finding, we need not address the agency's contention that the report was untimely filed and that the administrative judge abused his discretion by accepting it into evidence without a showing of why the evidence could not have been submitted earlier.

record and adjudication is appropriate in such circumstances. *See Kitaura v. U.S. Postal Service*, 83 M.S.P.R. 270, 271 (1999); *Robinson v. Department of the Air Force*, 77 M.S.P.R. 486, 493 (1998); *Phillips v. Department of the Navy*, 67 M.S.P.R. 74, 79 (1995).

¶15 Should the administrative judge determine on remand that the agency committed disability discrimination, he shall order an appropriate remedy. If the administrative judge should determine that the agency did not commit disability discrimination, he will need to address the reasonableness of the removal penalty.

ORDER

¶16 For the reasons discussed above, we REMAND this case to the regional office for further adjudication in accordance with this Remand Order.

FOR THE BOARD:

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William D. Spencer
Clerk of the Board
Washington, D.C.