UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2009 MSPB 50

Docket No. CH-0752-08-0542-I-1

Darcy Johnson,

Appellant,

v.

United States Postal Service,

Agency.

April 7, 2009

Dallas H. Jones, Jr., Washington, D.C., for the appellant.

Richard L. Rampage, Esquire, Chicago, Illinois, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman

OPINION AND ORDER

¶1 The appellant has petitioned for review, and the agency has cross petitioned for review, of an initial decision that reversed one of the appellant's alleged constructive suspensions, and dismissed his other constructive suspension claims for lack of jurisdiction. For the reasons set forth below, we GRANT the agency's cross petition for review (cross-PFR), AFFIRM the initial decision in its findings that the appellant was not constructively suspended prior to June 2, 2008, or after June 27, 2008, REVERSE the initial decision in its finding that the appellant was constructively suspended from June 2 through June 27, 2008, and DISMISS the appeal for lack of jurisdiction. We DENY the appellant's petition

for review (PFR) for failure to meet the review criteria set forth at 5 C.F.R. § 1201.115(d).

BACKGROUND

¶2 The appellant is a preference-eligible full-time Mail Handler at the agency's Detroit Processing and Distribution Center. Initial Appeal File (IAF), Tab 6 at 73. On October 12, 2007, the appellant, who was suffering from injuries to his back and knee, requested light-duty work within his medical restrictions.[1] *Id*. at 80, 84-85. Senior Plant Manager Efrain Alvarado granted the appellant's request, and the appellant began work on a temporary light-duty assignment. *Id*. at 83. The appellant continued to work on light duty until early January 2008, when his condition worsened, and he began a period of absence. *Id*. at 54, 77-78; Hearing Tape (HT) 1, Side B (testimony of the appellant). It is undisputed that the appellant was unable to work in any capacity from that time until March 2008. IAF, Tab 6 at 11, 67, Tab 15 at 2. Beginning in March 2008, the appellant requested several times to return to work in a light-duty capacity with restrictions different than those in his former light-duty position, IAF, Tab 6 at 35, 64-67, 69-72, 75-78, but Mr. Alvarado disapproved each request, stating that there was no productive work available for the appellant within his new medical restrictions, *id*. at 35, 63, 68, 74.

¶3 On May 22, 2008, Labor Relations Specialist Mona Patel awarded the appellant a temporary light-duty assignment beginning May 27, 2008, and ending June 27, 2008. *Id*. at 51. Ms. Patel testified that she awarded the assignment

---

[1] The appellant testified that the Office of Workers' Compensation Programs has not ruled his conditions compensable, Hearing Tape 1, Side B, and the appellant has not claimed entitlement to limited-duty work, *see Simonton v. U.S. Postal Service*, 85 M.S.P.R. 189, ¶ 8 (2000) (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).

based on her mistaken belief that the appellant, a preference-eligible disabled veteran, was entitled to work without regard to the agency's normal criteria for awarding temporary light-duty assignments. HT 2, Side A. On or about June 1, 2008, Mr. Alvarado returned from a period of absence, discovered that the appellant had been awarded the assignment, determined that the assignment was not properly awarded, and ordered the assignment terminated on the basis that there was a lack of productive work for the appellant. HT 2, Side B (testimony of Mr. Alvarado). Under the applicable collective bargaining agreement, Mr. Alvarado is responsible for the ultimate decision on all employee requests for light duty at the Processing and Distribution Center. IAF, Tab 6 at 93-94. On June 2, 2008, Manager of Distribution Operations James Reid prevented the appellant from reporting to duty in his temporary light-duty assignment. HT 1, Sides A, B (testimony of Mr. Reid and the appellant).

¶4 The appellant filed the instant appeal, alleging that the agency constructively suspended him for various periods between October 2007 and May 2008. IAF, Tab 5 at 2. He also alleged that the agency subjected him to another constructive suspension, beginning with the June 2, 2008 termination of his temporary light-duty assignment, and that this suspension was ongoing. IAF, Tab 7 at 2-3. The administrative judge apprised the appellant of his jurisdictional burden in a constructive suspension appeal. IAF, Tab 2 at 2, Tab 15 at 1. The appellant further alleged that the agency's denial of his request for reasonable accommodations constituted disability discrimination, and that the agency effected his suspension without affording him minimal due process. IAF, Tab 11 at 2-4, Tab 15 at 1.

¶5 After a hearing, the administrative judge issued an initial decision. IAF, Tab 17 (ID). He found that neither the appellant's absences prior to June 2, 2008, nor his continuing absence after June 27, 2008, constituted constructive

suspensions.[2] He therefore dismissed these claims for lack of jurisdiction. ID at 14-15. He found, however, that the early termination of the appellant's May 27 to June 27, 2008 temporary light-duty assignment constituted a constructive suspension of 26 calendar days, and that the appellant was not afforded notice or an opportunity to respond to the agency's action. ID at 18, 21-22. He therefore reversed the termination of the temporary light-duty assignment, and ordered the agency to retroactively restore the appellant effective June 2 through June 27, 2008, and to award him back pay and benefits for that period. ID at 22. The administrative judge also found that the appellant failed to prove his affirmative defense of disability discrimination. ID at 21. The administrative judge declined to order interim relief for the appellant on the basis that his continuing absence after June 27, 2008, did not constitute a constructive suspension. ID at 23.

¶6 The appellant filed a PFR, arguing that the administrative judge erred in finding that his continuing absence after June 27, 2008, did not constitute a constructive suspension. Petition for Review File (PFRF), Tab 1 at 3. He further argues that the administrative judge should have granted him interim relief for his ongoing suspension. *Id*. at 3-4. The appellant does not dispute the administrative judge's findings regarding his disability discrimination claim or his claims for other periods of constructive suspension.

¶7 The agency filed a cross-PFR and response to the appellant's PFR. PFRF, Tab 3. The agency argues that the administrative judge erred in finding that the early termination of the appellant's temporary light-duty assignment constituted a constructive suspension, *id*. at 21-26, but that the administrative judge properly

---

[2] There appears to be some discrepancy between the dates of alleged constructive suspension prior to June 2, 2008, that the appellant identified in his pleadings, and the administrative judge's characterization of those dates. IAF, Tab 5 at 2; ID at 6-7. However, because the parties have not contested the administrative judge's findings on any alleged constructive suspensions prior to June 2, 2008, these apparent discrepancies are not material to the outcome of the appeal.

denied the appellant's request for interim relief, *id*. at 26-27. The appellant has not responded to the agency's cross-PFR.

ANALYSIS

¶8 An employee's voluntary absence from work is unappealable. If, however an agency bars an employee from duty for more than 14 days, the employee's absence is considered a constructive suspension appealable to the Board. *Baker v. U.S. Postal Service*, 71 M.S.P.R. 680, 691-92 (1996); *see* 5 U.S.C. §§ 7512(2), 7513(d); *Perez v. Merit Systems Protection Board*, 931 F.2d 853, 855 (Fed. Cir. 1991). An employee who alleges that he was constructively suspended must prove by preponderant evidence that his absence was involuntary. *Baker*, 71 M.S.P.R. at 692; 5 C.F.R. § 1201.56(a)(2)(i). The dispositive question in such a case is whether the agency or the employee initiated the absence. *Dones v. U.S. Postal Service*, 107 M.S.P.R. 235, ¶ 10 (2007); *see Holloway v. U.S. Postal Service*, 993 F.2d 219, 221 (Fed. Cir. 1993). If the employee initiated the absence, then it is not a constructive suspension. *Dones*, 107 M.S.P.R. 235, ¶ 10.

¶9 As relevant here, the Board has recognized that 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. *Reed v. U.S. Postal Service*, 99 M.S.P.R. 453, ¶ 3 (2005), *aff'd*, 198 F. App'x 966 (Fed. Cir. 2006). In the latter situation, when 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, his continued absence for over 14 days constitutes an appealable constructive suspension. *Okleson v. U.S. Postal Service*, 90 M.S.P.R. 415, ¶ 16 (2001). Once an employee who was absent due to a medical condition makes a nonfrivolous allegation that he was able to work within certain restrictions, that he

communicated his willingness to work, and that the agency prevented him from returning to work, the burden of production shifts to the agency to show that there was no work available within the employee's restrictions, or that it offered such work to the employee and he declined it. *Baker*, 71 M.S.P.R. at 693. If the agency meets its burden, then the appellant must present sufficient rebuttal evidence to meet his overall burden of persuasion. *Id*.

¶10 In this case, the administrative judge found that the appellant was absent from work for medical reasons, ID at 8; IAF, Tab 6 at 54, 67, and that, during his absence, he requested to return to work within his medical restrictions, ID at 9; IAF, Tab 6 at 35, 64-67, 69-72, 75-78. It is undisputed that, although the appellant was not guaranteed a light-duty position, the collective bargaining agreement required the agency to make its best efforts to assign him available light-duty work within his restrictions upon his request. ID at 5-6, 14-15; IAF, Tab 6 at 93-94. The administrative judge found that there was no productive light-duty work available within the appellant's medical restrictions at the time he made his requests. ID at 14; IAF, Tab 6 at 27-29, 44-50; HT 2, Side B; HT 3, Side A (testimony of Mr. Alvarado). He therefore found that the appellant failed to establish Board jurisdiction over his constructive suspension claims prior to June 2, 2008, and after June 27, 2008. ID at 14-15; *see Baker*, 71 M.S.P.R. at 692-93 (the appellant's absence did not constitute a constructive suspension because, though he requested work within his medical restrictions, there was no such work available for him to perform). The administrative judge further found that the appellant failed to demonstrate the existence of a vacant funded position within his medical restrictions to which he could be reassigned, and that the agency's reason for terminating his May 27, 2008 light-duty assignment, i.e. lack of productive work, was supported by the evidence. ID at 21. The parties have provided no basis to disturb any of these findings on review, and the Board therefore adopts them.

¶11 The administrative judge also found that the appellant's absence from June 2 through June 27, 2008, constituted an appealable constructive suspension because the written terms of the appellant's May 27, 2008 temporary light-duty job assignment granted him work through the end of that period,[3] and the agency terminated the assignment without affording him notice and an opportunity to respond. ID at 18; IAF, Tab 6 at 51. This finding was in error.

¶12 The termination of a light-duty assignment is not, per se, an adverse action appealable to the Board, *see* 5 U.S.C. § 7512, and an allegation that an agency failed to afford an appellant minimal due process does not confer upon the Board an independent basis to review matters outside its statutory jurisdiction, *see Riddick v. Department of the Navy*, 41 M.S.P.R. 369, 372 (1989). Although, under certain circumstances, an agency's termination of an employee's light-duty assignment may constitute a constructive suspension, these circumstances are not present here.

¶13 In *Dize v. Department of the Army*, 73 M.S.P.R. 635, 637 (1997), the appellant alleged that the agency terminated her light-duty assignment, and that the agency denied her subsequent requests to return to work in her regular duties. The Board found that the appellant had made a nonfrivolous allegation that the agency initiated her absence from work after she requested to return to her regular duties, and that she had therefore made a nonfrivolous allegation that the agency subjected her to an appealable constructive suspension. *Dize*, 73 M.S.P.R. at 639. In *Moon v. Department of the Army*, 63 M.S.P.R. 412, 419 (1994), the Board found that, though the agency terminated the appellant's light-duty assignment, the letter terminating the assignment did not prevent the appellant from returning to work in her regular capacity. The Board found,

---

[3] Although the letter awarding the assignment stated that it would be in effect from May 27 through June 27, 2008, the letter also stated that "Light Duty is granted based upon the work available and this schedule may be changed based upon the needs of the United States Postal Service." IAF, Tab 6 at 51.

therefore, that the agency's termination of the appellant's light-duty assignment presented her with the choice of requesting leave, applying for workers' compensation benefits, or attempting to perform the assigned duties of her regular position. *Moon*, 63 M.S.P.R. at 419. It found that, though the appellant's choice was unpleasant, and though her ultimate decision to request leave may have been medically justifiable, "it was entirely voluntary and not at the behest, or under the control, of the agency." *Id*. at 419-20.

¶14 The facts in the instant appeal are more akin to *Moon* than they are to *Dize*. We find that, though the agency terminated the appellant's light-duty assignment, it did not prevent him from returning to work in his regular duties. Although Mr. Reid testified that he was instructed not to let the appellant work on June 2, 2008, and he barred the appellant from the workplace on that date, HT 1, Side A, the evidence shows that Mr. Reid's objective was merely to prevent the appellant from performing further work in his then-terminated light-duty assignment, HT 2, Side B (testimony of Mr. Alvarado); *see Reed*, 99 M.S.P.R. 453, ¶ 10 (although the appellant was escorted from the agency's premises and instructed not to return until the matter was resolved, the Board found that the agency did not prevent the appellant from working because the appellant had already made clear that he was unwilling or unable to accept the only available work within his physical limitations). Mr. Alvarado testified that, if the appellant had requested at that time to return to work in his regular duties, or even to return to work in his October 2007 light-duty capacity, he would have immediately granted the appellant's request. HT 2, Side B. The appellant did not allege that he requested to return to work in either of these available positions. *Compare Reed*, 99 M.S.P.R. 453, ¶ 10 (the appellant initiated his own absence because, after the agency terminated his light-duty assignment, he did not request to return to work in another available position) *with Dize*, 73 M.S.P.R. at 639 (the appellant made a nonfrivolous allegation that the agency initiated her absence when she alleged

that, after the agency terminated her light-duty assignment, she requested to return to work in her regular duties and the agency denied her request).

¶15 The appellant was faced with the unpleasant alternatives of returning to work with duties outside his medical restrictions, or requesting leave. *See Moon*, 63 M.S.P.R. at 419-20. The appellant's decision not to return to his regular duties or to his October 2007 light-duty work, however unpleasant, was nonetheless voluntary. *See id*. at 420. Therefore, the appellant did not suffer an appealable constructive suspension when the agency terminated his temporary light-duty assignment due to the absence of productive work within his medical restrictions. *See Reed*, 99 M.S.P.R. 453, ¶ 9; *Moon*, 63 M.S.P.R. at 419-20. Because the Board lacks jurisdiction over the appellant's constructive suspension claim, the Board also lacks jurisdiction over his affirmative defenses. *See Reed*, 99 M.S.P.R. 453, ¶ 20; *Moon*, 63 M.S.P.R. at 420.

¶16 In light of the foregoing, we find unpersuasive the appellant's argument that his continuing absence after June 27, 2008, constitutes a constructive suspension. In addition, since the administrative judge correctly found that the appellant's continuing absence was not a constructive suspension, he did not abuse his discretion in declining to award the appellant interim relief under 5 U.S.C. § 7701(b)(2)(A). *See Marshall-Carter v. Department of Veterans Affairs*, 94 M.S.P.R. 518, ¶ 14 n.2 (2003) (applying the abuse of discretion standard to the Board's review of an administrative judge's decision not to award interim relief), *aff'd*, 122 F. App'x 513 (Fed. Cir. 2005); *McIntire v. Federal Emergency Management Agency*, 55 M.S.P.R. 578, 582 (1992) (the administrative judge should not have ordered interim relief in a suspension appeal where the suspension period expired before the administrative judge issued the initial decision).

ORDER

¶17 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 Codes, 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 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 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, www.cafc.uscourts.gov. 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:

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