

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
2009 MSPB 154**

Docket No. AT-0752-09-0009-I-1

Albertha Carey,¹

Appellant,

v.

Department of Health and Human Services,

Agency.

August 6, 2009

Darryl A. Hines, Esquire, Lilburn, Georgia, for the appellant.

Pamela S. Moseley, Atlanta, Georgia, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant has filed a petition for review (PFR) of an initial decision (ID) that dismissed her alleged involuntary retirement appeal for lack of jurisdiction. For the reasons discussed below, we GRANT the petition under [5 C.F.R. § 1201.115\(d\)](#), VACATE the ID, and REMAND the appeal for further adjudication consistent with this Opinion and Order.

¹ The appellant's name appears to have been spelled incorrectly as "Alberta Carey" in the initial decision and other materials. See Initial Appeal File (IAF), Tab 4, Attachment (Affidavit).

BACKGROUND

¶2 Previously, the appellant filed a PFR of the ID in her appeal in MSPB Docket No. AT-0531D-08-0407-I-1. The Board denied the PFR, but forwarded the appellant's new allegation that her retirement was involuntary, raised for the first time on PFR, to the regional office for docketing as a new appeal. IAF, Tab 1 (Final Order in MSPB Docket No. AT-0531D-08-0407-I-1). The new allegation was based upon her retirement from her position of GS-13 Public Health Analyst at the Centers for Disease Control in Atlanta, Georgia, which took place shortly after she filed her appeal. IAF, Tab 4, Attachment (affidavit).

¶3 Consistent with the Board's order, the regional office docketed the matter as a new appeal and the administrative judge (AJ) assigned to the case issued a jurisdictional order notifying the appellant that the Board may not have jurisdiction over her appeal. He generally advised her what she must allege to establish the Board's jurisdiction, and directed her to file evidence and argument regarding the issue of jurisdiction. IAF, Tab 3. In her response, the appellant stated that she retired "under duress" because, despite her severe allergies, vertigo, and chemical sensitivity, the agency refused to allow her to telecommute, an accommodation which she alleged would have allowed her to continue working. IAF, Tab 4. She also claimed that she was the victim of discrimination based on her disability. *Id.* The agency filed a response arguing that its evidence established that the appellant was not disabled but that, even so, it made adequate attempts to accommodate her, and that therefore her retirement was shown to be voluntary by a "preponderance of the evidence." IAF, Tab 7, Subtab 1 at 9. Without holding a hearing, the AJ dismissed the appeal for lack of jurisdiction. IAF, Tab 8.

¶4 The appellant filed a timely PFR, arguing, among other things, that the AJ erred in dismissing her appeal without holding a hearing. Petition for Review File (PFRF), Tab 1. The agency did not file a response.

ANALYSIS

¶5 The appellant has the burden of proving the Board's jurisdiction by a preponderance of the evidence. *Parrott v. Merit Systems Protection Board*, [519 F.3d 1328](#), 1332 (Fed. Cir. 2008); [5 C.F.R. § 1201.56\(a\)\(2\)](#). An employee-initiated action, such as a retirement or resignation, is presumed to be voluntary, and thus outside the Board's jurisdiction. *See Vitale v. Department of Veterans Affairs*, [107 M.S.P.R. 501](#), ¶ 17 (2007). An involuntary retirement, however, is equivalent to a forced removal and therefore within the Board's jurisdiction. *Garcia v. Department of Homeland Security*, [437 F.3d 1322](#), 1328 (Fed. Cir. 2006) (en banc). To overcome the presumption that a retirement is voluntary, the employee must show that it was the result of the agency's misinformation or deception or was coerced by the agency. *See Vitale*, [107 M.S.P.R. 501](#), ¶ 19. To establish involuntariness on the basis of coercion, the appellant must establish that the agency imposed the terms of the retirement, the appellant had no realistic alternative but to retire, and the retirement was the result of improper actions by the agency. *Garcia*, 437 F.3d at 1329. If the employee claims that her retirement was coerced by the agency's creating intolerable working conditions, she must show that a reasonable employee in her position would have found the working conditions so oppressive that she would have felt compelled to retire. *Id.* When an appellant raises an allegation of discrimination in connection with a claim of involuntariness, the allegation may be addressed only insofar as it relates to the issue of jurisdiction and not whether it would establish discrimination as an affirmative defense. *Pickens v. Social Security Administration*, [88 M.S.P.R. 525](#), ¶ 6 (2001).

¶6 Once the appellant presents nonfrivolous allegations of Board jurisdiction - allegations of fact which, if proven, would establish the Board's jurisdiction - she is entitled to a hearing at which she must prove jurisdiction by a preponderance of the evidence. *Parrott*, 519 F.3d at 1332; *Garcia*, 437 F.3d at 1344. In assessing whether an appellant has made nonfrivolous allegations entitling her to

a hearing, an AJ may consider the agency's documentary submissions; however, to the extent the agency's evidence contradicts the appellant's otherwise adequate prima facie showing of jurisdiction, the AJ may not weigh evidence and resolve conflicting assertions, and the agency's evidence may not be dispositive. *Ferdon v. U.S. Postal Service*, [60 M.S.P.R. 325](#), 329 (1994).

¶7 Here, the appellant submitted an affidavit in which she alleged that her retirement was involuntary because the agency denied her request for an accommodation (telecommuting) that, according to her doctors, would have permitted her to continue to work despite her allergies, vertigo, and chemical sensitivity. IAF, Tab 4. This suffices as a nonfrivolous allegation of the Board's jurisdiction. *See Garcia*, 437 F.3d at 1324 (failure to renovate the appellant's workspace to accommodate her medical condition may have forced her to accept a demotion).

¶8 Instead of providing the appellant an opportunity for a hearing, the AJ went on to assess the adequacy of the agency's alternative accommodation efforts, opined that she was not disabled, and suggested that she had a different motive for retiring. IAF, Tab 8 at 4-6. This was error because an AJ may not weigh evidence or resolve conflicting assertions regarding disputed facts material to the question of jurisdiction without affording the appellant the opportunity for a hearing. *Ferdon*, 60 M.S.P.R. at 329-30.

ORDER

¶9 Accordingly, we remand this case to the regional office for a hearing on the issue of whether the appellant's retirement was the result of coercion based on intolerable working conditions and therefore an involuntary act within the Board's jurisdiction. If, on remand, the AJ determines that the appellant's retirement was involuntary and the Board has jurisdiction over this appeal, the AJ

shall adjudicate the appellant's discrimination claim on the merits under the substantive standards of antidiscrimination law.² *See Garcia*, 437 F.3d at 1341.

FOR THE BOARD:

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

² The ADA Amendments Act of 2008 (ADAAA), Pub. L. No. 110-325, 122 Stat. 3553 (2008), came into effect on January 1, 2009. *See* ADAAA § 8. The ADAAA significantly alters existing law by explicitly overruling years of precedent. *Id.* § 2. If, on remand, the AJ finds Board jurisdiction over this appeal, he must determine whether the ADAAA applies retroactively to the appellant's retirement appeal in order to ascertain the appropriate standards to apply in adjudicating her claim.