UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2009 MSPB 194

Docket No. DC-0752-09-0322-I-1

Jennifer C. Bynum,

Appellant,

v.

United States Postal Service,

Agency.

October 1, 2009

Jennifer C. Bynum, Rocky Mount, North Carolina, pro se.

Beverly R. Brooks, Esquire, Charlotte, North Carolina, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant has petitioned for review of the initial decision dismissing her restoration appeal for lack of jurisdiction. For the reasons stated below, we GRANT the appellant's petition, REVERSE the initial decision as to its finding that the Board lacks jurisdiction over the appellant's restoration appeal, and FIND that the agency did not act arbitrarily and capriciously in denying the appellant's request for restoration.

BACKGROUND

¶2 The appellant worked as a Flat Sorting Machine Operator for the agency. Initial Appeal File (IAF), Tab 1 at 1. On February 6, 2009, she was removed for

failure to be regular in attendance, failure to follow instructions, and absence without leave. *Id.*, Tab 12 at 11-14. The appellant appealed her removal to the Board and also asserted that the agency failed to restore her to duty. *See id.*, Tab 1 at 2. She submitted evidence that she was injured on duty on August 3, 2003, and that she is receiving compensation from the Office of Workers' Compensation Programs (OWCP), and she asserted that she was absent from work because the agency failed to provide a limited duty position. *Id.* at 3; IAF, Tab 10 at 12, 14-16. In response, the agency asserted that OWCP notified it on November 7, 2008, that the appellant's physician indicated that she was able to return to work without restrictions. IAF, Tab 12 at 7; *see id.* at 15. The agency further asserted that the appellant was consequently directed to return to work or present acceptable documentation to her supervisor establishing that she was unable to work. *Id.* at 16. In its notice proposing the appellant's removal, it asserted that the appellant failed to return to work and failed to attend a scheduled investigative interview on the matter. *Id.* at 11-12; *see id.* at 17.

¶3 The administrative judge (AJ) found that the Board lacked jurisdiction over the appellant's removal because she is not preference-eligible, or a manager, supervisor, or personnelist doing other than purely non-confidential clerical work, and thus is not an "employee" as defined by 5 U.S.C. § 7511 entitled to appeal an adverse action. IAF, Tab 14, Initial Decision (ID) at 2-3. With regard to her restoration claim, the AJ found that the appellant was absent due to a compensable injury but that she failed to make a nonfrivolous allegation that she requested restoration as a partially recovered employee or that the agency arbitrarily and capriciously denied her request. *Id.* at 4. He found that the appellant did nothing more than submit a January 16, 2009 letter to her supervisor in response to the January 7, 2009 Notice of Removal that stated that the agency was "required to offer [her] a written limit (sic) duty job offer within [her] restrictions." *Id.* at 5; *see* IAF, Tab 10 at 11. He further found that even if the appellant's letter was construed as a request for restoration "the agency cannot in

light of its aforementioned efforts to return the appellant to work be said to have 'act[ed] arbitrarily and capriciously in denying restoration.'" ID at 5; *see* 5 C.F.R. § 353.304(c). He accordingly dismissed the appeal for lack of Board jurisdiction. ID at 5.

¶4 The appellant filed a timely petition for review, Petition for Review File (PFRF), Tab 1, and the agency filed a response in opposition, *id.*, Tab 4.

ANALYSIS

The Board does not have jurisdiction over the appellant's removal.

¶5 The appellant did not challenge the AJ's dismissal of her removal appeal for lack of jurisdiction; nevertheless, the Board affirms the AJ's decision on this issue. *See* ID at 2-3. The record reflects that the appellant is not a preference eligible veteran, nor a manager or supervisor, nor does she engage in personnel work in other than a purely non-confidential clerical capacity. *See* IAF, Tab 1 at 1; ID at 2-3. Thus, the appellant does not satisfy the definition of "employee" set forth in either 5 U.S.C. § 7511(a)(1)(B)(ii) or 39 U.S.C. § 1005(a)(4)(A), as required by 5 U.S.C. § 7511(b)(8), and the Board does not have jurisdiction over the appellant's removal. *See* ID at 2-3.

The appellant alleged facts that establish the Board's jurisdiction over her restoration appeal.

¶6 The appellant asserted on review that the AJ erred in finding that a November 7, 2008 letter from OWCP established that her on-the-job injury was resolved and she could return to duty without restriction. PFRF, Tab 1 at 1. She further asserted that medical restrictions dated November 24, 2008, and December 29, 2008, along with a January 16, 2009 letter written in response to the agency's Notice of Removal, constituted requests for work within her restrictions and that she "should have been restored as a partially recovered individual to a limited duty job." *Id.* at 2-3.

¶7 The Board may have jurisdiction over a Postal Service employee's claim that the agency violated her restoration rights following her full or partial recovery from a compensable injury, regardless of whether the employee would satisfy the definition of "employee" for the purposes of the Board's adverse action jurisdiction. *See* 5 C.F.R. §§ 353.102-.103; 353.304; *Rumph v. U.S. Postal Service*, 101 M.S.P.R. 243, ¶ 9 (2006). The extent of an employee's rights to restoration depends on whether she is fully or partially recovered and if fully recovered how long such recovery took. 5 C.F.R. § 353.301.

¶8 Under 5 C.F.R. § 353.102, "[*p*]*artially 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 duty or to another position with less demanding physical requirements." Under 5 C.F.R. § 353.301(d), "[a]gencies must make every effort to restore in the local commuting area, according to the circumstances in each case, an individual who has partially recovered from a compensable injury and who is able to return to limited duty." A partially recovered employee may appeal to the Board for a determination of whether the agency is acting arbitrarily or capriciously in denying restoration. 5 C.F.R. § 353.304(c). Where there is a bona fide dispute as to any of these elements, the appellant bears the burden of proving them because they are issues that implicate both jurisdiction and the merits. *See Welby v. Department of Agriculture*, 101 M.S.P.R. 17, ¶ 16 (2006).

¶9 In order to establish Board jurisdiction over a restoration claim as a partially recovered employee, the appellant must allege facts that would show, if proven, that: (1) She was absent from her position due to a compensable injury; (2) she recovered sufficiently to return to duty on a part-time basis, or to return to work in a position with less demanding physical requirements than those previously required of her; (3) the agency denied her request for restoration; and (4) the denial was "arbitrary and capricious." *Chen v. U.S. Postal Service*, 97 M.S.P.R. 527, ¶ 13 (2004); *see* 5 C.F.R. § 353.304(c).

¶10 A compensable injury is defined as one that is accepted by OWCP as job-related and for which medical monetary benefits are payable from the Employees' Compensation Fund. *Norwood v. U.S. Postal Service*, 100 M.S.P.R. 494, ¶ 4 (2005). While OWCP's November 7, 2008 letter noted that the physicians who examined the appellant found that her condition had "resolved" and that she was "able to return to work without restrictions," the appellant submitted evidence below showing that she continued to receive OWCP benefits after the November 7, 2008 letter. *See* IAF, Tab 10 at 12, 14-16. Indeed, the record reveals that she continued to receive benefits through at least February 14, 2009. *See id.* at 16.

¶11 OWCP's position on the appellant's compensable injury is not entirely clear given that its November 7, 2008 letter noted that the appellant's condition had resolved and that she was able to return to work without restrictions. IAF, Tab 10 at 12. However, it is clear that OWCP never terminated her benefits before her removal. IAF, Tab 10 at 14-16. Board precedent establishes that an OWCP determination that the appellant is fully recovered from the work-related portion of her injury is considered final and conclusive for all purposes and with respect to all questions of law and fact. *See, e.g.*, *Williams v. U.S. Postal Service*, 84 M.S.P.R. 374, ¶ 6 (1999). In so holding, the Board has relied on 5 U.S.C. § 8128(b)(1), which provides that determinations "in allowing or denying a payment" are considered final and conclusive and are not subject to review. Here, however, OWCP's November 7, 2008 letter was written solely in response to the appellant's October 2, 2008 letter, in which she requested authorization to obtain another medical opinion, and OWCP's letter primarily detailed why it could not authorize her request. *See* IAF, Tab 10 at 12-13. While it stated that her physicians indicated that she was able to return to work without restrictions, it did not propose to terminate or actually terminate her benefits and thus did not allow or deny payment under 5 U.S.C. § 8128(b)(1). *See* IAF, Tab 10 at 12. Accordingly, the Board is not bound by the statement in OWCP's November 7, 2008 letter that the appellant could return to work without restrictions. The

appellant therefore has made a nonfrivolous allegation that her absence from work was due to a compensable injury.

¶12 The record also reveals that the appellant recovered sufficiently to return to duty in a position with less demanding physical requirements. IAF, Tab 10 at 6, 9. However, the AJ found that the appellant "made no allegation that if proven would show that she requested restoration as a partially recovered employee," and indicated that he did not consider her January 16, 2009 letter to her supervisor in response to the agency's Notice of Removal to constitute a request for restoration. *See* ID at 4-5. The appellant asserts that her January 16, 2009 letter, as well as her November 24, 2008, and December 29, 2008 medical restrictions constituted requests for restoration as a partially recovered employee. PFRF, Tab 1 at 2-3; IAF, Tab 10 at 2.

¶13 The Board has specifically cautioned against the imposition of additional notice requirements for an individual who seeks restoration to his former employing agency. *Gerdes v. Department of the Treasury*, 89 M.S.P.R. 500, ¶ 12 (2001); *Larsen v. Department of the Interior*, 36 M.S.P.R. 669, 671 (1988). In *Larsen*, the Board explicitly rejected the agency's attempt to require that a request for restoration be in writing to constitute a proper request. *Larsen*, 36 M.S.P.R. at 671. The Board also disapproved of the agency's further argument that an individual must submit an actual application for employment before the agency is required to consider her restoration. *Id.* at 671-72. In *Gerdes*, the Board found that "aside from making a request for restoration, e.g., submitting a reemployment application, or making an oral or written request for reemployment with the agency, 5 C.F.R. § 353.301(c) [applying to physically disqualified individuals] contains no additional requirements for placing an agency on notice that restoration is sought." *Gerdes*, 89 M.S.P.R. 500, ¶ 13.

¶14 The November 24, 2008, and December 29, 2008 medical restrictions submitted by the appellant do not constitute requests for restoration. *See* IAF, Tab 10 at 6, 9. The record is devoid of evidence that the appellant communicated

a desire to return to duty with the agency or asked to return to work within the medical restrictions outlined in the documentation submitted prior to her January 16, 2009 letter. Indeed, the medical documentation is not accompanied by any type of communication from the appellant, and she has not alleged that she communicated orally or in writing with anyone at the agency about returning to work until her January 16, 2009 letter.

¶15 The AJ erred, however, in finding that the appellant's January 16, 2009 letter was not a request for restoration. *See* ID at 4-5. In her January 16, 2009 letter, written in response to the agency's January 7, 2009 Notice of Removal, the appellant, citing the work restrictions she had previously submitted, explicitly requested that the agency "rescind the removal dated January 7, 2009, offer [her] a written job offer, and allow [her] a 30-day extension to reply so [her] physician [could] review the job offer." IAF, Tab 10 at 11. She stated that she believed the agency was "required to offer [her] a written limit[ed] duty job offer within [her] restrictions" based on the medical restrictions she previously submitted. *Id.* Accordingly, her January 16, 2009 letter constitutes a "written request for reemployment with the agency" and thus a request for restoration. *See Gerdes*, 89 M.S.P.R. 500, ¶ 13. The appellant also made allegations of fact that, if proven, show that the agency denied the appellant's January 16, 2009 request for restoration as the agency responded to the appellant's request for restoration by removing her effective February 6, 2009.

¶16 Under the last prong of the jurisdictional test, an appellant who is partially recovered from a compensable injury must allege facts that would show, if proven, that the agency "is acting arbitrarily and capriciously in denying restoration." 5 C.F.R. § 353.304(c). In determining whether the appellant has made a nonfrivolous allegation of jurisdiction, the AJ may consider the agency's documentary submissions; however, to the extent that the agency's evidence constitutes mere factual contradiction of the appellant's otherwise adequate prima facie showing of jurisdiction, the AJ may not weigh evidence and resolve

conflicting assertions of the parties and the agency's evidence may not be dispositive. *Ferdon v. U.S. Postal Service*, 60 M.S.P.R. 325, 329 (1994).

¶17 The appellant alleged that she was ordered to return to duty in a position whose duties she alleges she was physically unable to perform. *See* IAF, Tab 10 at 2-3, 5, 7-8. Her allegation was supported by medical evidence indicating that her physician imposed 10-pound and 20-pound lifting restrictions and by evidence indicating that she was still receiving OWCP benefits for her injury. *Id.* at 6, 9, 14-16. Accordingly, the appellant made allegations that, if proven, would establish that the agency acted arbitrarily and capriciously in denying her request for restoration as a partially recovered employee.

¶18 The appellant has thus met all four prongs of the jurisdictional test for a restoration claim brought by a partially recovered employee, and the Board therefore has jurisdiction over the appeal. *See Chen*, 97 M.S.P.R. 527, ¶ 13; 5 C.F.R. § 353.304(c). If an employee makes all the requisite nonfrivolous allegations needed to establish Board jurisdiction over her partial restoration appeal, then she is entitled to an adjudication of the merits of her appeal, including a hearing on the merits if requested. *Barrett v. U.S. Postal Service*, 107 M.S.P.R. 688, ¶ 8 (2008). Because the appellant did not request a hearing, *see* IAF, Tab 1 at 2, the Board has decided the merits of the appeal on the basis of the written record.

The documents submitted on review are either not new or immaterial.

¶19 The appellant submits several documents with her petition for review. *See* PFRF, Tab 1 at 9-11, 15. She submits a March 2, 2009 letter from a Vocational Rehabilitation Specialist to her Vocational Rehabilitation Counselor, stating that the appellant is capable of engaging in light duty work and discussing the development of a modified job. PFRF, Tab 1 at 9. It notes that if the agency is "no longer able to develop modified employment a vocational evaluation should be completed to assess [the appellant's] feasibility for employment in the open labor market." *Id.* The appellant also submits a March 11, 2009 letter from her

Vocational Rehabilitation Counselor setting up an appointment with the appellant for an "initial vocational assessment." *Id.* at 10. She asserts that these two letters demonstrate that OWCP's November 7, 2008 letter "was not a determination [she] could return to full duty." *Id.* at 2. The appellant asserts that she received these two letters, which were mailed together in an envelope postmarked March 11, 2009, on March 13, 2009, after she submitted her response to the AJ's show cause order and she thus received them after the record closed below. *Id.* at 1, 11. She also submits an April 25, 2009 letter from a Rehabilitation Counselor regarding the scheduling of vocational testing. *Id.* at 15.

¶20 Under 5 C.F.R. § 1201.115, the Board will not consider evidence submitted for the first time with the petition for review absent a showing that it was unavailable before the record was closed despite the party's due diligence. *Avansino v. U.S. Postal Service*, 3 M.S.P.R. 211, 214 (1980). The Board will not grant a petition for review based on new evidence absent a showing that it is of sufficient weight to warrant an outcome different from that of the initial decision. *Russo v. Veterans Administration*, 3 M.S.P.R. 345, 349 (1980). The letters submitted by the appellant, dated March 2, 2009, and March 11, 2009, are not material, and thus the Board need not determine whether the appellant has shown that they are properly before the Board on review. Moreover, the April 25, 2009 letter, while new, is also not material. 5 C.F.R. § 1201.115(d)(1).

¶21 The appellant also submits several emails, dated February 18, 2009, April 29, 2009, May 8, 2009, and May 15, 2009, between the appellant and her union president in which the union president stated that the appellant's supervisor stated to him that he did not read the appellant's January 16, 2009 letter but rather threw it away. [1] *See* PFRF, Tab 1 at 17-21. The appellant concedes that some of the

[1] The union president refers to the appellant's "January 19, 2009" letter, but presumably he was referring to the appellant's January 16, 2009 letter. *See* PFRF, Tab 1 at 17.

emails are dated before the record closed below, but she asserts she did not receive them because her computer crashed and she did not have internet access for a period of time. *Id.* at 3. The string of email suggests that the appellant sought comments on February 18, 2009, from her union president regarding his impression of her supervisor's reaction to her January 16, 2009 letter. *Id.* at 18. It also appears that she emailed her union president on April 29, 2009, May 8, 2009, and May 15, 2009, believing he did not respond to her February 18, 2009 request. *See id.* at 19-21. In response to her May 15, 2009 email, the union president forwarded his initial February 18, 2009 response to her request, which she asserts she did not receive due to computer malfunctions. *See id.* at 3, 17. Assuming, *arguendo*, that the appellant was without internet access at her home for a period of time, the dates on the emails demonstrate that the union president responded to the appellant's February 18, 2009 request for information the same day, and the appellant does not assert that she lost internet access the same day on which she emailed her request. She merely states that her computer crashed and she had no access to the internet. *Id.* at 3. Moreover, businesses and libraries provide internet access to the public for little or no charge, and the appellant failed to assert that she attempted to retrieve her email from any such location. Accordingly, she has failed to show that she acted with due diligence in attempting to secure the February 18, 2009 email before the record closed below, and the Board will not consider it on review.

The agency's denial of the appellant's request for restoration was not arbitrary and capricious.

¶22 The Board has concluded that an agency does not act arbitrarily or capriciously in denying restoration where the agency is faced with conflicting assessments of the appellant's abilities. *See Hardy v. U.S. Postal Service*, 104 M.S.P.R. 387, ¶ 21 (concluding that the agency's decision to delay restoration was not an arbitrary and capricious denial of restoration when an earlier report stated the appellant required no restrictions in the workplace and a later report

stated the appellant continued to have very limited range of motion), *aff'd*, 250 F. App'x. 332 (Fed. Cir. 2007).

¶23 Decisions on the suitability of an offered position are within the exclusive domain of OWCP, and it is that agency, not the employing agency and not the Board, which possesses the requisite expertise to evaluate whether a position is suitable in light of that employee's particular medical condition. *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, ¶ 9 (1999). There is no indication in the record that OWCP has made an official determination that the appellant could return to work without restrictions, or that it has made any final determination regarding any restrictions on the appellant's duties.[2] As we have noted above, however, OWCP issued a letter on November 7, 2008, indicating that examining physicians had found the appellant able to work without restrictions. In light of this letter, it is understandable that the agency issued its November 21, 2008 letter to the appellant ordering her to return to work or bring "acceptable documentation to [her] supervisor . . . as to why [she was] unable to work and the expected duration of incapacity." *See* IAF, Tab 10 at 5. The appellant failed to report for work but asserts that she submitted medical documentation dated November 24, 2008 by mail and fax, indicating that she had a lifting restriction of 10 pounds. *Id.* at 2, 6. As noted previously, the medical documentation, which consisted of a prescription indicating simply that she was to "[l]imit lifting to no more than 10 lbs until Dec[.] 16, 2008," was not accompanied by a request to return to work or any other written or oral communication on behalf of the

[2] Because the AJ granted the agency's motion to stay discovery pending resolution of the jurisdictional issue, the agency did not submit a response file, although it submitted several documents in response to the appellant's submissions. *See* IAF, Tabs 5-6, 12. In deciding the merits of the appeal, the Board need not review the agency's response file as the appellant has failed to meet her burden of proving that the agency acted arbitrarily and capriciously in denying her request for restoration.

appellant. *See id.* The appellant continued to fail to report to work or contact the agency following her submission, and the agency issued a December 11, 2008 letter stating that the appellant was required to submit medical documentation stating that she was "incapacitated from duty and . . . could not perform any of the duties of [her] position" since submitting her 10-pound lifting restriction. *Id.* at 7. The agency directed the appellant to report to work with such documentation on December 12, 2008. *Id.* at 7-8. The appellant does not deny that she failed to report on December 12, 2008. *See* IAF, Tab 12 at 11.

¶24 By letter dated December 20, 2008, the agency ordered the appellant to report to work on December 23, 2008, for a pre-disciplinary interview regarding her attendance situation and to bring any documentation supporting her continued absence. IAF, Tab 12 at 17. The letter notified the appellant that failure to report on December 23, 2008 would "result in the appropriate disciplinary action . . . ." *Id.* The appellant does not dispute the agency's assertion that she failed to report to the December 23, 2008 pre-disciplinary interview, *see id.* at 12, and she has failed to assert that she in any way contacted the agency from November 24, 2008, until December 31, 2008, when she submitted medical documentation dated December 29, 2008, indicating a 20-pound lifting restriction, *see* IAF, Tab 10 at 2, 9. The December 29, 2008 medical documentation more fully described the appellant's condition and indicated that the appellant should "not lift anything over 20 lbs . . . indefinitely." *Id.* at 9. Again, the medical documentation was not accompanied by any written or oral communication from the appellant. Therefore, as of December 31, 2008, the agency was faced with conflicting evidence regarding the appellant's restrictions, based on OWCP's letter and the appellant's medical documentation, and an employee who refused to report to the work site as directed or to otherwise contact the agency. *See* IAF, Tab 10 at 5-6, 9, 12; *see also Hardy*, 104 M.S.P.R. 387, ¶ 21. The agency thus issued a Notice of Removal on January 7, 2009, *see* IAF, Tab 12 at 11-14, to which the appellant

responded by making her request for restoration as a partially recovered employee on January 16, 2009, *see* IAF, Tab 10 at 11.

¶25 The appellant has presented no evidence to show that she complied with the agency's repeated instructions to report to the work site with clear documentation of her medical restrictions. Accordingly, the appellant has not presented sufficient evidence to show that the agency acted arbitrarily and capriciously in denying her request for restoration.[3]

ORDER

¶26 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 the United States Court of Appeals for the Federal Circuit to review this final decision. 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

---

[3] We note that, before the AJ, the appellant stated that she would like to amend her appeal to include allegations of disability discrimination and retaliation. *See*, IAF, Tab 7. She did not, however, pursue those matters. Because the AJ dismissed the appeal for lack of jurisdiction, he found no basis upon which to address those claims. ID at 5, n.*. The appellant has not challenged the AJ's findings in that regard and has not renewed the allegations on PFR. Therefore, we have not considered them.

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.