UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 43

Docket Nos. SF-0752-09-0479-I-1
SF-0752-09-0624-I-1

Dennis W. Simpson,

Appellant,

v.

United States Postal Service,

Agency.

March 1, 2010

Stephen Millard, Covina, California, for the appellant.

Kris Ashman, Long Beach, California, for the agency.

Afshin Miraly, Esquire, Long Beach, California, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The appellant has filed a petition for review (PFR) of an initial decision (ID) that dismissed for lack of Board jurisdiction his constructive suspension appeal and affirmed the agency's removal action. For the reasons set forth below, we DENY the petition for review, REOPEN the appeals on our own motion, and AFFIRM the ID as MODIFIED, still DISMISSING the constructive suspension appeal for lack of jurisdiction and SUSTAINING the appellant's removal.

BACKGROUND

¶2 The appellant was employed as a Modified Mail Processing Clerk when, in December 2006, he left work due to a back condition (degenerative disc disease) and other medical problems, including hypertension, depression and carpal tunnel syndrome. Hearing CD (HCD) (testimony of the appellant); Initial Appeal File, MSPB Docket No. SF-0752-09-0479-I-1 (IAF-1), Tab 10, Subtab 4 at 57, 91, 109. Sometime in October, and again in mid-December 2007, the appellant notified the agency that he wished to return to work in his prior position. *Id.* at 91-93. In his modified clerk position, the appellant had performed window sales duties and also did computer input, answered telephones, and handled mail forwarding and similar ancillary tasks. *Id.* at 108-114. He had a lifting restriction of 20 pounds and could stand for up to 1 hour. *Id.* at 109; HCD (testimony of the appellant). When the appellant requested to return to work, his physician stated he had a 10-pound lifting limitation, could not stand for more than 15 minutes, and could not engage in customer contact, either in person or by phone. *Id.* at 94-96.

¶3 Following the appellant's request to return to work in his prior position, the agency submitted requests for medical information that would clear the appellant for return to work. IAF-1, Tab 10, Subtab 4 at 29, 33, 76, 79, 81, 86, 93. The appellant provided some additional information. *Id.* at 68, 75, 92. An orthopedic fitness for duty (FFD) examination was conducted in October 2008. *Id*. at 40-59. Ultimately, the agency removed the appellant, effective March 8, 2009, for being on leave-without-pay in excess of 1 year due to illness, in accord with the policy set forth in its Employee and Labor Relations Manual (ELM). *Id.* at 17. The removal was held in abeyance because the appellant had filed a grievance of his proposed removal. IAF-1, Tab 4, Exh. D; Tab 10, Subtab 4 at 16. The appellant retired on April 6, 2009. *Id.*, Tab 4, Exh. E.

¶4 The appellant filed a mixed case equal employment opportunity (EEO) complaint regarding the agency's failure to return him to work, alleging disability

discrimination and retaliation for protected EEO activity. MSPB Docket No. SF-0752-09-0624-I-1 (IAF-2), Tab 1; *see also* IAF-1, Tab 5, Exh. 1. Following receipt of the final agency decision on his mixed case complaint, the appellant filed an appeal with the Board, which was docketed as a constructive suspension appeal. IAF-2, Tab 1. The appellant, who is preference-eligible, also appealed his removal, and requested a hearing. IAF-1, Tab 1. In the removal appeal, he raised the affirmative defenses of disability discrimination and retaliation for protected EEO activity. *Id.* The administrative judge (AJ) held that the Board retained jurisdiction over the appellant's removal despite his retirement and joined the removal and constructive suspension appeals for processing. IAF-1, Tab 6.

¶5 After holding the hearing the appellant requested, the AJ dismissed the constructive suspension appeal for lack of jurisdiction. IAF-1, Tab 19 (ID) at 7. The AJ based the dismissal on his finding that the appellant did not produce medical evidence showing that he could perform the essential functions of his job without posing a hazard to himself or others and that the agency reasonably determined it had no work within his restrictions. *Id.* at 6-7. The AJ also affirmed the agency's removal action and held that the appellant did not prove his affirmative defense of disability discrimination or retaliation. *Id.* at 7-10.

¶6 The appellant has filed a PFR in which he asserts that the AJ denied him the opportunity to prove discrimination by refusing to allow him to question an agency witness using the investigative file in his mixed case EEO complaint. Petition for Review File (RF), Tab 1. The appellant also reiterates his assertions on appeal that he was able to return to work with restrictions, that the agency did not attempt to find him work within those restrictions, and that it delayed his return to work in order to remove him under the ELM provision permitting removal after a 1-year absence. *Id.* The agency has responded in opposition to the PFR. RF, Tab 3.

ANALYSIS

¶7 The appellant's PFR fails to establish any error by the AJ and is therefore denied. 5 C.F.R. § 1201.115(d). We reopen the appeal on our own motion under 5 C.F.R. § 1201.118, however, to clarify the ID's analysis of the appellant's claims of disability discrimination in relation to his alleged constructive suspension and his removal.

The appellant did not show that he could have been accommodated and, thus, that he was constructively suspended or that his removal constituted disability discrimination.

¶8 As a federal employee, the appellant's claim arises under the Rehabilitation Act of 1973. However, the regulatory standards for the Americans with Disabilities Act (ADA) have been incorporated by reference into the Rehabilitation Act, and we apply them to determine whether there has been a Rehabilitation Act violation. 29 U.S.C. § 791(g); *Pinegar v. Federal Election Commission*, 105 M.S.P.R. 677, ¶ 36 n.3 (2007); 29 C.F.R. § 1614.203(b). Further, the ADA regulations superseded the Equal Employment Opportunity Commission's (EEOC's) regulations under the Rehabilitation Act. *Collins v. U.S. Postal Service*, 100 M.S.P.R. 332, ¶¶ 7-8 (2005) (stating that 29 C.F.R. § 1614.203(g) and other portions of the regulations at 29 C.F.R. § 1614.203 were repealed on June 20, 2002, and the ADA regulations at 29 C.F.R. part 1630 were made applicable to cases under the Rehabilitation Act); 29 C.F.R. § 1614.203(b).

¶9 In this appeal, the AJ found that the appellant was not a qualified individual with a disability within the meaning of the Rehabilitation Act. ID at 9. Further, in addressing the agency's accommodation obligation, the AJ cited regulations under 29 C.F.R. § 1614.203 that are no longer in effect. For the reasons explained below, we find that the appellant is a person with a disability, but that he did not prove he was denied reasonable accommodation.

The appellant is a person with a disability.

¶10 The ADA Amendments Act of 2008 (ADAAA or Amendments), which liberalized the definition of disability, became effective on January 1, 2009. *See* P.L. 110-325, 122 Stat. 3553 (2008), codified at 42 U.S.C. 12101 *et seq*. Thus, in the appellant's appeal of his removal, effective March 8, 2009, the ADAAA definition is applicable. However, his alleged constructive suspension, beginning on or about November 7, 2007, *see* ID at 3, was prior to the effective date of the ADAAA. Thus, the constructive suspension appeal presents the issue of whether the Amendments are retroactive and what definition of disability applies. Neither the Board nor its reviewing court has yet decided the retroactivity question.[1] We need not resolve the question now, however, since, for the reasons discussed below, we find that the appellant is a person with a disability, even under the more restrictive pre-2009 standard, due to the limitations resulting from his back condition.

¶11 Under the ADA, a disability is defined, in relevant part, as a physical or mental impairment that substantially limits one or more major life activities. 42 U.S.C. § 12102(1)(A).[2] EEOC's pre-ADAAA regulations provide that a person is substantially limited in a major life activity,[3] and thus has a disability,

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[1] *But see Lytes v. DC Water and Sewer Authority*, 572 F.3d 936, 939-942 (D.C. Cir. 2009) (finding that the ADAAA is not to be applied retroactively); *see also* EEOC Questions and Answers on the Notice of Proposed Rulemaking for the ADA Amendments Act of 2008, www.eeoc.gov/policy/docs/qanda_adaaa_nprm.html (stating at question one that the ADAAA does not apply to alleged discriminatory acts that occurred prior to January 1, 2009).

[2] Prior to the ADAAA, the definition was located at 42 U.S.C. § 12102(2)(A) (2008). The statutory definition itself, however, did not change under the Amendments. *Compare* 42 U.S.C. § 12102(2)(A) (2008) and 42 U.S.C. § 12102(1)(A) (2009).

[3] Prior to the ADAAA, EEOC regulations defined the term "major life activity" to include functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, working, sitting, standing, lifting, and reaching. 29 C.F.R. § 1630.2(i); Appendix to 29 C.F.R. part 1630, discussing 29 C.F.R. § 1630.2(i). The Amendments added such activities as eating, sleeping, reading,

if he is unable to perform the activity or is significantly restricted in doing so compared to the average person. 29 C.F.R. § 1630.2(j); *Clemens v. Department of the Army*, 104 M.S.P.R. 362, ¶ 7 (2006). Prior to the passage of the Amendments, the ADA was held "to create a demanding standard for qualifying as disabled." *Toyota Motor Mfg., Kentucky, Inc., v. Williams*, 534 U.S. 184, 197 (2002); *Pinegar*, 105 M.S.P.R. 677, ¶ 36. The ADAAA rejected the U.S. Supreme Court's interpretation in *Toyota Motor Manufacturing* and stated that EEOC's regulation was inconsistent with congressional intent by expressing too high a standard. P.L. 110-325, § 2(a)(7), (a)(8), codified at 42 U.S.C. § 12101 Note.

¶12 As discussed above, the appellant's original modified clerk position had a 20-pound lifting limitation and entailed standing for no more than 1 hour. IAF-1, Tab 10, Subtab 4 at 109; HCD (testimony of the appellant). His physician released him to return to work with limitations of lifting no more than 10 pounds and standing no more than 15 minutes, as well as a prohibition on customer contact. IAF-1, Tab 10, Subtab 4 at 94-96. The physician who performed the FFD examination in October 2008 determined that, due to his degenerative disc disease, the appellant was limited to lifting 15 pounds and sitting and standing for up to 2 hours each intermittently during an 8-hour day. *Id.* at 59. By November 2008, a new physician for the appellant had determined that he had a permanent lifting limitation of no more than 5 to 7 pounds and could sit for only 45 minutes at a time before standing for 10-15 minutes. *Id.* at 23.[4] This evidence establishes that the appellant was substantially limited in the major life activities of lifting, sitting, and standing at all times relevant to these appeals. Therefore, we find

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concentrating, thinking, communicating and bending to the non-exhaustive list. 42 U.S.C. § 12102(2)(A).

[4] The reasons for the deterioration in the appellant's condition are not explained in the record. The appellant did not testify regarding this matter.

that the appellant was a person with a disability even under the pre-ADAAA definition, based on the limitations resulting from his back condition. *See Clark v. U.S. Postal Service*, 74 M.S.P.R. 552, 561 (1997) (finding that a mail processor who had a 20-pound lifting limitation and was unable to sit or stand for more than 1 hour or bend repetitively, due to degenerative disc disease, was disabled because he was substantially limited in the major life activities of lifting, sitting, standing and bending); *Turtle v. U.S. Postal Service*, EEOC Appeal No. 0720080025 at 7 (March 3, 2009) (stating the Commission has determined that a 20-pound lifting restriction is sufficient to constitute substantial impairment in the major life activity of lifting).

¶13 The ADAAA did not change the statutory provision regarding reasonable accommodation relevant herein. Pub. L. No. 110-325, § 6(h). An agency must provide reasonable accommodation to the known limitations of a qualified individual with a disability unless to do so would create an undue hardship. 42 U.S.C. §§ 12112(a), (b)(5)(A); *Paris v. Department of the Treasury*, 104 M.S.P.R. 331, ¶ 11 (2006); 29 C.F.R. § 1630.9. A qualified individual with a disability is a person with the skills, training and experience to perform the essential functions of a position, with or without reasonable accommodation. 42 U.S.C. § 12111(8); *Paris*, 104 M.S.P.R. 331, ¶ 11; 29 C.F.R. § 1630.2(m). Reasonable accommodation may entail modifications to the individual's current position or reassignment to a vacant position. 42 U.S.C. § 12111(9); *Aka v. Washington Hospital Center*, 156 F.3d 1284, 1301-05 (D.C. Cir. 1998) (en banc); 29 C.F.R. § 1630.2(o).

¶14 The ID stated that to be a qualified individual with a disability, an individual was required to show that he could perform the essential functions of the position in question without endangering his health and safety or that of

others, citing 29 C.F.R. § 1614.203(a)(6). ID at 8-9.[5] However, the health and safety showing is no longer part of the definition of a qualified individual with a disability and, thus, is not part of the appellant's burden of proof. *See* 42 U.S.C. § 12111(8); *Paris*, 104 M.S.P.R. 331, ¶ 11; 29 C.F.R. § 1630.2(m). Rather, under ADA standards, an agency may defend against a claim of discrimination by asserting that an individual poses a direct threat[6] to the health or safety of himself or others in the workplace. *Cano v. U.S. Postal Service*, 107 M.S.P.R. 284, ¶ 14 (2007); *Boots v. U.S. Postal Service*, 105 M.S.P.R. 500, ¶¶ 5-6 (2007); 29 C.F.R. § 1630.15(b)(2). This situation may arise, e.g., where an agency asserts that an individual fails to meet the medical standards established for a position. *See Boots*, 105 M.S.P.R. 500, ¶ 2; *McAlexander v. Department of Defense*, 105 M.S.P.R. 384, ¶ 2 (2007). In this case, however, the agency did not assert or show that the appellant failed to meet a medical or other qualification standard because he was a direct threat to the health or safety of himself or others.

The appellant did not show that he was denied reasonable accommodation.

¶15 An agency constructively suspends an employee when it fails to return the employee to work within his medical restrictions, when he requests it, for more than 14 days, where it is bound to do so by policy, regulation, or the accommodation obligation under the Rehabilitation Act. *Mills v. U.S. Postal Service*, 106 M.S.P.R. 441, ¶ 6 (2007); *Okleson v. U.S. Postal Service*, 90 M.S.P.R. 415, ¶ 16-17 (2001). Similarly, a removal action is unlawful if it is based on a prohibited personnel practice, including a violation of the

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[5] The ID also found that the appellant was not constructively suspended because he did not provide the medical certification requested by the agency that he could perform the essential functions of his job without posing a hazard to himself or others. ID at 7.

[6] Direct threat means a significant risk of substantial harm to health or safety that cannot be reduced by reasonable accommodation. 29 C.F.R. § 1630.2(r). An employer may require, as a qualification standard, that an individual not pose a direct threat to himself or others. Appendix to 29 C.F.R. part 1630, discussing 29 C.F.R. § 1630.2(r).

Rehabilitation Act. 5 U.S.C. § 7701(c)(2)(B); 5 U.S.C. § 2302; *Lloyd v. Small Business Administration*, 96 M.S.P.R. 518, ¶ 6, *review dismissed*, 110 F. App'x 127 (Fed. Cir. 2004).

¶16 The appellant made a reasonable accommodation request when he asked to return to work within his medical restrictions. *See Paris*, 104 M.S.P.R. 331, ¶ 17 (an employee need only let his employer know in general terms that he needs accommodation for a medical condition); *EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*, www.eeoc.gov/policy/docs/accommodation.html, at 5 (to make an accommodation request, an individual need only let the employer know that he needs an adjustment or change at work for a reason related to a medical condition and need not use the words "reasonable accommodation"). Having done so, the agency was required to engage in an interactive process to determine an appropriate accommodation. *Paris*, 104 M.S.P.R. 331, ¶ 17; 29 C.F.R. § 1630.2(o)(3); *see also EEOC Enforcement Guidance* at 6. The appellant, however, was also required to cooperate in the interactive process. "Both parties … have an obligation to assist in the search for an appropriate accommodation, and both have an obligation to act in good faith in doing so." *Collins*, 100 M.S.P.R. 332, ¶ 11 (citing *Taylor v. Phoenixville School District*, 184 F.3d 296, 312 (3rd Cir. 1999)).

¶17 The Postal Service requires return to work medical clearance for absences due to an illness or injury when it has reasonable belief that the employee may not be able to perform the essential functions of his position or may pose a direct threat to the health or safety of himself or others. Thus, when the appellant first sought to return to work, the agency sought updated information about his orthopedic conditions as well as other conditions mentioned in his medical documentation (depression, hypertension, bilateral carpel tunnel syndrome and sleep apnea) to determine if he could return to work in his prior position. IAF-1, Tab 10, Subtab 4 at 93. The agency also repeatedly sought medical clearance for

other conditions noted in his documentation - Alzheimer's symptoms, gastric bypass and, again, sleep apnea – to no avail. *Id.* at 29, 76, 80, 86. The appellant, however, failed to clearly respond to the agency's requests. In addition, at no time from when the appellant requested to return to duty until he was removed did he explain how he could perform his prior Modified Mail Processing Clerk position with additional restrictions, nor did he suggest any position whose essential functions he could have performed with or without accommodation. Conversely, the deciding official on the appellant's removal, Postmaster Joel Smith, testified that he looked for a position for the appellant in each of the five facilities under his jurisdiction but there was no work within the appellant's limitations. HCD (testimony of Smith).

¶18 Therefore, we conclude that the evidence shows the agency engaged in good faith in the required interactive process to determine an accommodation, but that the appellant was not responsive to the agency's requests for medical information and never articulated a reasonable accommodation, including identifying any position to which he could have been reassigned. Under these circumstances, we find that the appellant did not prove that he was denied reasonable accommodation and, accordingly, did not show that the agency constructively suspended or unlawfully removed him. *See Taylor,* 184 F.3d at 317 ("an employer cannot be faulted if after conferring with the employee to find possible accommodations, the employee then fails to supply information that the employer needs"); *Beck v. University of Wisconsin, Board of Regents,* 75 F.3d 1130, 1137 (7th Cir. 1996) ("where, as here, the employer makes multiple attempts to acquire the needed information, it is the employee who appears not to have made reasonable efforts"); *Conaway v. U.S. Postal Service*, 93 M.S.P.R. 6, ¶ 37 (2002) (the agency was not liable for failure to provide a reasonable accommodation where it participated in good faith in the interactive process and the appellant did not respond to the agency's repeated requests for clear and objective medical evidence), *review dismissed,* 55 F. App'x 565 (Fed. Cir. 2003).

Accordingly, the ID dismissing the appellant's constructive suspension claim and sustaining his removal is affirmed, as modified herein.

ORDER

¶19 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:

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