UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 135

Docket No. SF-0353-09-0647-I-1

Paula White,

Appellant,

v.

United States Postal Service,

Agency.

July 15, 2010

Omar Gonzalez, Burlingame, California, for the appellant.

Carla Ceballos, 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 petitioned for review of the initial decision that dismissed her restoration appeal for lack of jurisdiction. For the reasons set forth below, we DENY the petition for failure to meet the Board's review criteria under 5 C.F.R. § 1201.115(d), REOPEN the appeal on our own motion under 5 C.F.R. § 1201.118, REVERSE the initial decision, and REMAND the appeal for further adjudication consistent with this Opinion and Order.

BACKGROUND

¶2 At the time this matter arose, the appellant was a PS-06 Mail Processing Clerk at the Los Angeles International Service Center (ISC). Initial Appeal File (IAF), Tab 1 at 2; Tab 3, Subtab 5. She suffered injuries on two occasions, bilateral wrist tendonitis and right epicondylitis in 1990 and left knee strain, left ankle sprain and left lateral meniscus tear in 2005, which the Office of Workers' Compensation Programs determined to be compensable. *Id.*, Tab 3, Subtab 1. The appellant accepted a limited duty[1] assignment on October 9, 2008, at the ISC. The duties of the assignment were to case letter mail intermittently, place letter trays and tables in a rack, hand stamp letters, and determine postage due. *Id.*, Subtab 2; Tab 9 at 45.[2]

¶3 On April 23, 2009, the agency issued a letter to the appellant informing her that there were no operationally necessary tasks within her medical restrictions on her tour of duty at her facility. IAF, Tab 1 at 8; Tab 9 at 54. The letter stated that the appellant should leave work and not return until further notice. *Id.* The agency stated that it was taking this action pursuant to its National Reassessment Process (NRP) 2 Pilot Program. *Id.* Under the NRP, the agency's Los Angeles District undertook an initiative to provide updated and operationally necessary job offers to all limited duty employees. IAF, Tab 9 at 6, 44.

¶4 On May 27, 2009, the appellant filed this appeal, alleging that the agency violated her rights to restoration after a compensable injury. IAF, Tab 1. She also alleged disability discrimination, i.e., failure to provide reasonable accommodation. *Id.* at 4, 6. The administrative judge issued an initial decision

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[1] 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. *Simonton v. U.S. Postal Service*, 85 M.S.P.R. 189, ¶ 8 (2000).

[2] The record evidence does not identify the appellant's medical restrictions.

(ID) holding that the appellant failed to make a nonfrivolous allegation that the agency's action was arbitrary and capricious and, therefore, did not establish Board jurisdiction over the restoration appeal. IAF, Tab 12 at 6-7. The ID did not address the timeliness of the appeal or the pendent discrimination claim, because of the finding that there was no Board jurisdiction. *Id.* at 1, 7.

¶5 The appellant has filed a petition for review (PFR) in which she asserts that the agency acted in an arbitrary and capricious way by failing to look outside her facility for work within her limitations and by applying the "operationally necessary" test to determine if work was available for her. PFR File, Tab 1. The agency did not respond to the PFR.

ANALYSIS

Denial of Restoration

¶6 The Federal Employees Compensation Act and the Office of Personnel Management's (OPM's) implementing regulations at 5 C.F.R. part 353 provide that federal employees who experience compensable injuries have certain rights to be restored to their previous or comparable positions. 5 U.S.C. § 8151; *Walley v. Department of Veterans Affairs*, 279 F.3d 1010, 1015 (Fed. Cir. 2002); *Tat v. U.S. Postal Service*, 109 M.S.P.R. 562, ¶ 9 (2008). Employees of the U.S. Postal Service are among those with rights to restoration. *See* 5 C.F.R. § 353.102; *Chen v. U.S. Postal Service*, 97 M.S.P.R. 527, ¶ 12 (2004). In the case of a partially recovered employee, i.e. one who cannot resume the full range of regular duties but has recovered sufficiently to return to part-time or light duty or to another position with less demanding physical requirements, an agency must make every effort to restore the individual to a position within her medical restrictions and within the local commuting area. *Delalat v. Department of the Air Force*, 103 M.S.P.R. 448, ¶ 17 (2006); 5 C.F.R. §§ 353.102, 353.301(d).

¶7 Board appeal rights in restoration cases derive from OPM's regulations. *Foley v. U.S. Postal Service*, 105 M.S.P.R. 307, ¶ 10 (2007); 5 C.F.R. § 353.304.

The regulations provide that a partially recovered employee may appeal to the Board only for a determination of whether the agency is acting in an "arbitrary and capricious" way in denying restoration. *Zysk v. U.S. Postal Service*, 108 M.S.P.R. 520, ¶ 6 (2008); *Delalat*, 103 M.S.P.R. 448, ¶ 17; 5 C.F.R. § 353.304(c). An individual who has been restored to duty may not challenge the details or circumstances of the restoration. *Foley v. U.S. Postal Service*, 90 M.S.P.R. 206, ¶ 6 (2001). The Board has held, however, that an agency's discontinuation of a limited duty assignment may be an appealable denial of restoration. *Brehmer v. U.S. Postal Service*, 106 M.S.P.R. 463, ¶ 9 (2007).

¶8 To establish Board jurisdiction over a restoration claim as a partially recovered employee, the appellant must make a nonfrivolous allegation that the agency violated her restoration rights. *Chen*, 97 M.S.P.R. 527, ¶ 12. To do so, she 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 in 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*, 97 M.S.P.R. 527, ¶ 13; *see* 5 C.F.R. § 353.304(c).

¶9 The administrative judge correctly held that the appellant met prongs (1)-(3) above.[3] Whether there is Board jurisdiction, therefore, turns on whether the appellant made a nonfrivolous allegation that the agency's action in rescinding her limited duty assignment was arbitrary and capricious. We find that she did so.

¶10 OPM's regulations state as follows:

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[3] We note that the administrative judge held that the third criterion was met because the appellant filed a grievance requesting restoration to her limited duty position and the agency denied this request. IAF, Tab 12 at 5. However, the agency's discontinuation of the appellant's limited duty position itself constituted a nonfrivolous allegation of a denial of restoration. *See Brehmer*, 106 M.S.P.R. 463, ¶ 9.

> Agencies 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. . . .

5 C.F.R. § 353.301(d). The Board has interpreted this regulation as requiring agencies to search within the local commuting area for vacant positions to which an agency can restore a partially recovered employee and to consider the employee for any such vacancies. *See Sanchez v. U.S. Postal Service*, 2010 MSPB 121, ¶ 12; *Sapp v. U.S. Postal Service*, 73 M.S.P.R. 189, 193-94 (1997). "For restoration rights purposes, the local commuting area is the geographic area in which an individual lives and can reasonably be expected to travel back and forth daily to his usual duty station." *Hicks v. U.S. Postal Service*, 83 M.S.P.R. 599, ¶ 9 (1999). It includes any population center, or two or more neighboring ones, and the surrounding localities. *Sapp*, 73 M.S.P.R. at 193. The question of what constitutes a local commuting area is one of fact. The extent of a commuting area is ordinarily determined by factors such as common practice, the availability and cost of public transportation or the convenience and adequacy of highways, and the travel time required to go to and from work. *See Beardmore v. Department of Agriculture*, 761 F.2d 677, 678 (Fed. Cir. 1985) (defining "local commuting area" in the context of a reassignment). Evidence that the agency failed to search the entire local commuting area as required by 5 C.F.R. § 353.301(d) constitutes a nonfrivolous allegation that the agency acted arbitrarily and capriciously in denying restoration. *See Barachina v. U.S. Postal Service*, 113 M.S.P.R. 12, ¶ 7 (2009); *Urena v. U.S. Postal Service*, 113 M.S.P.R. 6, ¶ 13 (2009).

¶11 In this case, the agency's evidence shows only that it searched within the appellant's facility, the Los Angeles ISC, and not within her local commuting area, as required by OPM regulations at 5 C.F.R. § 353.301(d). Thus, although the appellant's submissions are insufficient to satisfy the fourth jurisdictional criterion, the agency's submissions are sufficient to render nonfrivolous the

appellant's allegation that the denial of restoration was arbitrary and capricious. *See Baldwin v. Department of Veterans Affairs*, 109 M.S.P.R. 392, ¶¶ 11, 32 (2008) (the Board may consider the agency's documentary submissions in finding that an appellant had made a nonfrivolous allegation of Board jurisdiction). We therefore find that the appellant has met all of the criteria to establish Board jurisdiction over the merits of her restoration appeal. *Barachina*, 113 M.S.P.R. 12, ¶ 7; *Urena*, 113 M.S.P.R. 6, ¶ 13.

¶12 In so holding, we do not rely on the appellant's assertion that the agency improperly used an "operationally necessary" standard under the NRP in determining if work was available within her medical restrictions. It is axiomatic that an agency must determine what work is necessary and available to accomplish its mission. Further, in *Ancheta v. Office of Personnel Management*, 95 M.S.P.R. 343, ¶ 11 (2003), the Board stated that, pursuant to a Postal Service Employee and Labor Relations Manual, a limited duty assignment is "determined based on whether adequate 'work' or 'duties' are available" within the employee's restrictions, craft and current facility or at a different facility if there is no work at her own. That is, "limited duty or rehabilitation assignments of current employees are dependent on the extent to which adequate 'work' exists within the employees' work limitation tolerances." *Id.; see also Okleson v. U.S. Postal Service*, 90 M.S.P.R. 415, ¶ 11 (2001) (duties assigned to those in a limited duty capacity "often do not constitute an actual position, but are made up of work available that meets the employee's restrictions").

Disability Discrimination

¶13 Because the Board has jurisdiction over the restoration appeal, the Board also has jurisdiction to consider the appellant's disability discrimination claim. *See* U.S.C. § 7701(a)(1); *Barrett v. U.S. Postal Service*, 107 M.S.P.R. 688, ¶ 8 (2008). We note that the agency in this case moved for dismissal of the appeal in part on the grounds that the appellant's disability discrimination claim was subsumed in the equal employment opportunity class complaint in *McConnell v.*

Potter, EEOC Hearing No. 520-2008-00053X (May 30, 2008). IAF, Tab 9 at 11-12. The class complaint was subsequently certified by the Equal Employment Opportunity Commission's (EEOC's) Office of Federal Operations and remanded to the agency with instructions that it request that an administrative judge be appointed to hear the certified class action claim. EEOC DOC 0720080054, 2010 WL 332083 (January 14, 2010). The jurisdictional issue raised in the agency's motion is addressed fully in the Board's Opinion and Order in *Luna v. U.S. Postal Service*, 2010 MSPB 124, ¶¶ 14-15. The Board found therein that *McConnell* is not a mixed case and, therefore, that the appellant's alleged membership in the *McConnell* class does not divest the Board of jurisdiction over any aspect of her appeal. *Id.*, ¶ 15. The same is true in this case.

¶14 Further, with regard to the appellant's disability discrimination claim, we note that the Board found in *Sanchez*, 2010 M.S.P.R. 121, ¶ 18, that the reassignment obligation under the Rehabilitation Act of 1973, which mandates reasonable accommodation for persons with disabilities, is not necessarily confined geographically to the local commuting area. Under the restoration regulation at 5 C.F.R. § 353.301(d), however, an agency's responsibility in the restoration context is limited to the local commuting area. *Id.*

¶15 We make no determination as to the scope of the agency's reassignment obligation under the Rehabilitation Act in this case. Rather, the administrative judge should address this issue on remand in the context of the appellant's disability discrimination claim. *Cf. Sapp v. U.S. Postal Service*, 82 M.S.P.R. 411, ¶¶ 13-15 (1999) (finding that the appellant's restoration rights and right to reassignment under disability discrimination law are not synonymous and require separate adjudication) (clarifying *Sapp*, 73 M.S.P.R. at 194-95). The administrative judge should take into consideration the results of the interactive process required to determine an appropriate accommodation. *See Paris v. Department of the Treasury*, 104 M.S.P.R. 331, ¶ 17 (2006); 29 C.F.R. § 1630.2(o)(3); *see also Equal Employment Opportunity Commission*

Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act (2002) at 6. "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 v. U.S. Postal Service*, 100 M.S.P.R. 332, ¶ 11 (2005) (citing *Taylor v. Phoenixville School District*, 184 F.3d 296, 312 (3d Cir. 1999)).

Timeliness

¶16 Prior to adjudicating the appellant's restoration appeal and disability discrimination claim, the administrative judge shall make a determination as to the timeliness of the appeal. As noted above, the appellant received the notice discontinuing her limited duty assignment on April 23, 2009, and did not file her appeal until May 27, 2009, i.e., 34 days later. To be timely, an appeal must generally be filed within 30 days after the effective date of the action being appealed or 30 days after the appellant's receipt of the agency's decision, whichever is later. 5 C.F.R. § 1201.22(b). The appellant bears the burden of proving either that her appeal was timely, or that good cause existed for the delay. *Harrison v. Department of Veterans Affairs*, 96 M.S.P.R. 571, ¶ 5 (2004); 5 C.F.R. § 1201.56(a)(2)(ii).

¶17 The agency was required by regulation to notify the appellant of her Board appeal rights when it discontinued her limited duty assignment. 5 C.F.R. § 353.104. However, the letter of April 23, 2009, contains no such notice. IAF, Tab 1 at 8; Tab 9 at 54. Because the agency did not provide the required notice in the April 23, 2009 letter, the untimeliness of the appeal may be excused if the appellant acted diligently in filing her appeal after she actually learned of her appeal rights. *See Nevins v. U.S. Postal Service*, 107 M.S.P.R. 595, ¶ 20 (2008); *Cranston v. U.S. Postal Service*, 106 M.S.P.R. 290, ¶¶ 9-14 (2007); 5 C.F.R. § 353.104.

¶18 The record is not sufficiently developed for the Board to decide the timeliness issue on review. For example, the record does not contain evidence of

when the appellant actually became aware of her Board appeal rights. We also find that the appellant was not afforded adequate notice below of the precise timeliness issues involved in a case where the agency has failed to give required notice of Board appeal rights. IAF, Tabs 1, 7. An appellant is entitled to clear notice of the precise timeliness issue and a full and fair opportunity to litigate it. *See Wright v. Department of Transportation*, 99 M.S.P.R. 112, ¶ 12 (2005). Therefore, on remand, the administrative judge shall notify the appellant of the relevant legal standard regarding timeliness and afford the parties an opportunity to submit further evidence and argument on the matter.

ORDER

¶19 Accordingly, we reverse the initial decision and remand the appeal to the Western Regional Office for further adjudication consistent with this Opinion and Order.

FOR THE BOARD:

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