UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 136

Docket No. SF-0353-09-0586-I-1

David Hunt,

Appellant,

v.

United States Postal Service,

Agency.

July 15, 2010

Mattie L. Evans, Bell, 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 his 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 the Board's 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 The appellant is a non-preference eligible Mail Processing Clerk at the agency's Los Angeles Bulk Mail Center (LA BMC). Initial Appeal File (IAF), Tab 2 at 2, Tab 8 at 10. On November 10, 1997, the appellant suffered a compensable injury and thereafter began work in a series of limited duty assignments,[1] most recently in an assignment in which he performed various inspection, filing, and clerical functions. IAF, Tab 7 at 7-13.

¶3 In 2009, the Los Angeles District, of which the LA BMC is a part, began to participate in the agency's National Reassessment Process (NRP) 2 Pilot Program. IAF, Tab 8 at 6. Under the NRP, the agency reviews the assignments of employees performing limited duty to ensure that the assignments are consistent with the employees' medical restrictions and contain only "operationally necessary tasks." *Id*. at 27. If the agency is unable to identify any operationally necessary tasks available within the employee's medical restrictions, the employee will be sent home until such work becomes available or his medical restrictions change. *Id*. During the employee's absence, he will account for work hours through the use of approved leave, leave without pay, or a continuation of pay.[2] *Id*. at 27, 37.

¶4 The agency evaluated the appellant's current limited duty assignment and determined that it did not meet the criteria of the NRP. IAF, Tab 11 at 5. The agency searched for alternative assignments within the appellant's medical

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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 right to continuation of pay is governed by 20 C.F.R. part 10, subpart C.

restrictions, but determined that there were none available.[3] IAF, Tab 8 at 6, 28-36, Tab 11 at 5-6, 8-12. On April 9, 2009, the agency issued the appellant a letter stating in relevant part that, because there was no operationally necessary work available for the appellant within his medical restrictions and within his regular duty hours at the LA BMC, the appellant should not report again for duty unless he was informed that such work had become available. IAF, Tab 8 at 37. During this absence, the agency directed the appellant to account for his work hours through the use of leave or continuation of pay. *Id*.

¶5 The appellant filed a Board appeal of the agency's action and requested a hearing. IAF, Tab 2 at 3. He alleged that the agency improperly placed him on enforced leave due to his compensable injury. *Id*. at 4, 6. The administrative judge construed the appellant's allegation as a restoration claim. He notified the appellant of his jurisdictional burden in a restoration appeal as a partially recovered employee and ordered the appellant to file evidence and argument on the issue. IAF, Tab 3 at 2. The appellant responded, addressing the pertinent issues, IAF, Tab 7 at 2-3, Tab 10 at 2-5, and the agency moved to dismiss the appeal for lack of jurisdiction, IAF, Tab 8 at 4-9, Tab 11 at 4-7.

¶6 The administrative judge issued an initial decision dismissing the appeal for lack of jurisdiction. IAF, Tab 12, Initial Decision (ID) at 1, 6. He found that, although the appellant made nonfrivolous allegations satisfying the first three jurisdictional criteria for a restoration appeal as a partially recovered employee, the appellant failed to make a nonfrivolous allegation that the agency's discontinuation of his limited duty assignment was an arbitrary and capricious denial of restoration. ID at 4-6.

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[3] The agency identified four vacant positions within the appellant's medical restrictions, but determined that three of those positions should go to other displaced limited duty employees, and that the appellant was not qualified to encumber the fourth position. IAF, Tab 11 at 5-6, 8-10, 27-29.

¶7 The appellant filed a petition for review, arguing that the administrative judge erred in finding that he failed to make a nonfrivolous allegation that the agency's discontinuation of his limited duty assignment constituted an arbitrary and capricious denial of restoration. Petition for Review File (PFR File), Tab 1 at 4. Specifically, he argues that the administrative judge incorrectly weighed evidence regarding the alleged decline in mail volume at the LA BMC. *Id*. The appellant also submits, for the first time on review, a statement from a coworker who alleges that the appellant's former duties are still being performed, but by a different employee. *Id*. at 4, 8. The agency has not filed a response.

ANALYSIS

Denial of restoration

¶8 The Federal Employees' Compensation Act and its corresponding regulations at 5 C.F.R. part 353 provide that federal employees who suffer compensable injuries enjoy 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). 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 his medical restrictions and within the local commuting area.[4] *Delalat v. Department of the Air Force*, 103 M.S.P.R. 448, ¶ 17 (2006); 5 C.F.R. §§ 353.102, 353.301(d).

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[4] The undisputed documentary evidence shows that the conditions underlying the appellant's medical restrictions are permanent and that the appellant is therefore "physically disqualified" as that term is defined under 5 C.F.R. § 353.102. IAF, Tab 7 at 7. However, because more than 1 year has passed since the appellant was first eligible for workers' compensation, the administrative judge correctly found that he is

¶9 "An individual who is partially recovered from a compensable injury may appeal to the MSPB for a determination of whether the agency is acting arbitrarily and capriciously in denying restoration." 5 C.F.R. § 353.304(c). To establish Board jurisdiction over a restoration claim as a partially recovered employee, an appellant must make a nonfrivolous allegation that: (1) He was absent from his position due to a compensable injury; (2) he 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 him; (3) the agency denied his request for restoration; and (4) the agency's 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 For the reasons explained in the initial decision, the appellant made nonfrivolous allegations satisfying the first three jurisdictional criteria. ID at 4; *see Brehmer v. U.S. Postal Service*, 106 M.S.P.R. 463, ¶ 9 (2007) (discontinuation of a limited duty assignment may constitute a denial of restoration for purposes of Board jurisdiction under 5 C.F.R. part 353). The appellant's allegations are supported by documentary evidence, IAF, Tab 7 at 7-13, Tab 8 at 37, and the agency has not challenged the administrative judge's findings on review. Thus, the first three jurisdictional criteria for the appellant's restoration claim as a partially recovered employee are satisfied. *See Chen*, 97 M.S.P.R. 527, ¶ 13; 5 C.F.R. § 353.304(c).

¶11 Regarding the fourth jurisdictional criterion, we agree with the administrative judge that the appellant's submissions themselves fail to raise a nonfrivolous allegation that the agency's denial of restoration was arbitrary and capricious, ID at 5-6, and we find that the appellant's petition for review provides no basis to disturb the administrative judge's findings, PFR File, Tab 1 at 4, 8.

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entitled to the restoration rights of a partially recovered employee. ID at 3; *see Kravitz v. Department of the Navy*, 104 M.S.P.R. 483, ¶ 5 (2007); 5 C.F.R. § 353.301(c), (d).

The appellant's argument that the administrative judge misconstrued evidence regarding the alleged decline in mail volume at the LA BMC constitutes mere disagreement with the initial decision. PFR File, Tab 1 at 4; ID at 5-6; *see Weaver v. Department of the Navy*, 2 M.S.P.R. 129, 133-34 (1980) (mere disagreement with the administrative judge's findings and credibility determinations does not warrant full review of the record by the Board), *review denied*, 669 F.2d 613 (9th Cir. 1982) (per curiam). The statement that the appellant submitted on review alleging that his former duties are now being performed by someone else is a mere repetition of the arguments that he made below and the administrative judge found unpersuasive. IAF, Tab 2 at 6, Tab 7 at 3; ID at 5. It is undisputed that the appellant's former duties are still being performed by other agency employees, IAF, Tab 11 at 5, 8, but as the administrative judge correctly found, the agency has the authority to economize its operations by consolidating the tasks being performed by limited duty employees and reassigning them to the non-limited duty employees who would be otherwise performing them, ID at 5-6.

¶12 Nevertheless, the agency's documentary 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 has made a nonfrivolous allegation of Board jurisdiction). The Office of Personnel Management's (OPM) regulations provide:

> 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. At a minimum, this would mean treating these employees substantially the same as other handicapped individuals under the Rehabilitation Act of 1973, as amended.

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 him 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); *see also Sanchez*, 2010 MSPB 121, ¶ 13.

¶13 In this case, all of the evidence shows that the agency searched for a suitable position for the appellant only at the LA BMC. IAF, Tab 8 at 6, 28-36, Tab 11 at 5-6, 8-12. Unless the LA BMC is the only agency facility in the local commuting area, the applicable regulation requires a more extensive search. *See* 5 C.F.R. § 353.301(d). Because the agency's search for available work was apparently limited to a single facility, it appears that the agency failed to search the entire local commuting area as required by OPM's regulation. *See* 5 C.F.R. § 353.301(d). 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). We therefore find that the appellant has met all of the criteria to establish Board jurisdiction over

his restoration appeal, which entitles him to adjudication on the merits. *See Barrett v. U.S. Postal Service*, 107 M.S.P.R. 688, ¶ 8 (2008).

¶14 Although the documentary evidence suggests that the agency failed to search the entire local commuting area, the evidence in the record is insufficient for the Board to determine the extent of the local commuting area on review. Therefore, in the interest of justice, we reopen the record for further development on this issue, including the opportunity for further discovery by the parties. *See Sapp*, 73 M.S.P.R. at 193-94 (the Board remanded the appeal for further development of the record regarding what constituted the "local commuting area" and whether the agency's job search properly encompassed that area).

Constructive suspension

¶15 We find that the appellant's claim that the agency improperly placed him on enforced leave could be construed as a constructive suspension claim. IAF, Tab 2 at 4. The administrative judge, however, made no finding on this issue and did not inform the appellant of his jurisdictional burden in a constructive suspension appeal. *See Burgess v. Merit Systems Protection Board*, 758 F.2d 641, 643-44 (Fed. Cir. 1985) (an appellant must receive explicit information on what is required to establish an appealable jurisdictional issue); *Spithaler v. Office of Personnel Management*, 1 M.S.P.R. 587, 589 (1980) (an initial decision must identify all material issues of fact and law, summarize the evidence, resolve issues of credibility, and include the administrative judge's conclusions of law and his legal reasoning, as well as the authorities on which that reasoning rests).

¶16 A Postal Service employee may file a Board appeal of an adverse action under 5 U.S.C. chapter 75 only if he is covered by 39 U.S.C. § 1005(a) or 5 U.S.C. § 7511(a)(1)(B). 5 U.S.C. § 7511(b)(8). Thus, to appeal an adverse action under chapter 75, a Postal employee (1) must be a preference eligible, a management or supervisory employee, or an employee engaged in personnel work in other than a purely nonconfidential clerical capacity, and (2) must have completed 1 year of current continuous service in the same or similar positions.

Paige v. U.S. Postal Service, 106 M.S.P.R. 299, ¶ 11 (2007). Based on the record evidence below, it appears that the appellant would be unable to establish Board jurisdiction under this standard because he lacks veterans' preference status, and he does not appear to be a manager, supervisor, or employee engaged in personnel work. IAF, Tab 2 at 2, Tab 8 at 10; *see Coe v. U.S. Postal Service*, 95 M.S.P.R. 629, ¶¶ 2, 4 (2004). Nevertheless, as explained above, the appellant did not have an adequate opportunity to address the issue below. Therefore, if the appellant wishes to pursue a constructive suspension claim on remand, the administrative judge shall notify him of his jurisdictional burden and afford the parties an opportunity to submit evidence and argument on the issue. *See Brehmer*, 106 M.S.P.R. 463, ¶ 7.

ORDER

¶17 Accordingly, we reverse the initial decision and remand the appeal to the Western Regional Office for further adjudication of the appellant's restoration appeal consistent with this Opinion and Order. On remand, the administrative judge shall afford the appellant his requested hearing. *See* Barrett, 107 M.S.P.R. 688, ¶ 8.

FOR THE BOARD:

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