UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 139

Docket No. SF-0353-09-0550-I-1

Dana R. Brunton,

Appellant,

v.

United States Postal Service,

Agency.

July 15, 2010

Dana R. Brunton, Duarte, California, pro se.

Geraldine O. Rowe, 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 Pasadena Processing and Distribution Center (P&DC). Initial Appeal File (IAF), Tab 1 at 1, Tab 8, Subtab 5. On May 19, 1990, the appellant suffered a compensable injury. IAF, Tab 8, Subtab 4. Thereafter, the appellant began work in a series of limited duty assignments,[1] most recently in an assignment in which he was required to perform various casing and internal mail processing functions. *Id*., Subtabs 2-4.

¶3 In 2009, the Sierra Coastal District, of which the Pasadena P&DC is a part, began to participate in the agency's National Reassessment Process (NRP) 2 Pilot Program. IAF, Tab 9 at 7-8. Under the NRP, supervisors and managers of employees performing limited duty review those employees' assignments to ensure that they are consistent with the employees' medical restrictions and contain only "operationally necessary tasks." IAF, Tab 9 at 10-12, Tab 10 at 55. If a limited duty assignment does not meet these criteria, the NRP prescribes procedures for identifying and offering alternative limited duty assignments that do meet the criteria. IAF, Tab 9 at 12-15. If the supervisor or manager is unable to identify any operationally necessary tasks available within the employee's medical restrictions, the employee will be placed on leave until such work becomes available or his medical restrictions change. *Id*. at 13-14, 16. 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 13.

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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.

¶4 On April 10, 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 Pasadena P&DC, the appellant should not report again for duty unless he was informed that such work had become available. IAF, Tab 8, Subtab 6. During this absence, the agency directed the appellant to account for his work hours through the use of leave or continuation of pay. *Id*. The agency later expanded its search for operationally necessary tasks within the appellant's medical restrictions to all facilities in the Sierra Coastal District within 50 miles of the Pasadena P&DC, but found that none were available. IAF, Tab 16 at 10.

¶5 The appellant filed a Board appeal of the agency's action, alleging that the agency improperly denied him restoration and that the agency's action constituted a "violation of the Federal Disability Act and the Rehab Act." IAF, Tab 1 at 2-3. The administrative judge issued an acknowledgment order notifying the appellant of his jurisdictional burden in a restoration appeal as a partially recovered employee and ordering him to file evidence and argument on the issue. IAF, Tab 2 at 2. The appellant responded, addressing the pertinent issues, IAF, Tab 8 at 1-5, Tab 17 at 1-4, and the agency moved to dismiss the appeal for lack of jurisdiction, IAF, Tab 10 at 4-13. The appellant waived his right to a hearing. IAF, Tab 11.

¶6 The administrative judge issued an initial decision dismissing the appeal for lack of jurisdiction. IAF, Tab 19, Initial Decision (ID) at 2, 7. 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. Because the administrative judge found that the Board lacks jurisdiction over the appellant's restoration claim, he declined to consider the appellant's disability discrimination claim. ID at 6-7.

¶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 3-4. Specifically, he argued that the administrative judge erred in considering the agency's alleged fiscal difficulties, and that the NRP's criteria for limited duty assignments are impermissible under a 2002 arbitration decision. *Id*. The appellant also reasserted his allegation of disability discrimination, submitting for the first time on review some documents relating to his request for reasonable accommodation. *Id*. at 3-4, 8, 10. The agency filed a response, briefly arguing that the petition for review provides no basis to disturb the initial decision. PFR File, Tab 3 at 4-5.

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.[3] *Delalat v. Department of the Air Force*, 103 M.S.P.R. 448, ¶ 17 (2006); 5 C.F.R. §§ 353.102, 353.301(d).

¶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 4-5; IAF, Tab 8 at 1-5; *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 8, Subtabs 1-6, and the agency has not challenged the administrative judge's findings on review. Thus, the first three jurisdictional criteria for the appellant's

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[3] The undisputed documentary evidence shows that the conditions underlying the appellant's medical restrictions are "permanent and stationary," and that the appellant is therefore "physically disqualified" as that term is defined under 5 C.F.R. § 353.102. IAF, Tab 8 at 3-4, Subtab 2. 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 entitled to the restoration rights of a partially recovered employee. ID at 3-4; *see Kravitz v. Department of the Navy*, 104 M.S.P.R. 483, ¶ 5 (2007); 5 C.F.R. § 353.301(c), (d).

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 arguments on review provide no basis to disturb the administrative judge's finding, PFR File, Tab 1 at 3-4. The arbitration decision cited by the appellant addressed whether a limited duty assignment provided to a partially recovered letter carrier in Phoenix, Arizona, was subject to bidding under the collective bargaining agreement. PFR File, Tab 1 at 3-4; IAF, Tab 8 at 5; *In re Arbitration between U.S. Postal Service and American Postal Workers Union*, Case No. E90C-4E-C 95076238 at 1-2 (2002) (Das, Arb.). The cited decision, which involves a different issue and different employee, does not compel a finding in favor of the appellant herein. *See Horner v. Schuck*, 843 F.2d 1368, 1378 (Fed. Cir. 1988) (the Board is not required to defer to an arbitration decision involving other employees or other union contracts); *Romano v. U.S. Postal Service*, 49 M.S.P.R. 319, 324 n.6 (1991). Moreover, the decision states only that the agency is not required to allow other employees to bid for a position created to accommodate a compensably injured employee when that position would not otherwise exist. *American Postal Workers Union* at 18-23. It does not address the standards that the agency must use in deciding whether to create such a position. The appellant is also incorrect that the agency's allegations of fiscal difficulties are immaterial to its obligation to offer him a limited duty assignment. PFR File, Tab 1 at 3; IAF, 10 at 4-6, 14-54. Although the agency's alleged fiscal difficulties have no effect on the appellant's restoration rights per se, they may well affect whether the agency has any available work to offer him. *See Taber v. Department of the Air Force*, 112 M.S.P.R. 124, ¶ 14 (2009) (an agency is not required to assign a partially recovered employee limited duties that are not an essential function of

his position or that do not comprise a complete and separate position); 5 C.F.R. § 353.301(d).

¶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, the agency's documentary submissions show that its job search encompassed "all installations in the Sierra Coastal District within 50 miles of the Pasadena P&DC." IAF, Tab 16 at 10, 14, 17-19. Because the agency's search for available work was apparently limited to a single district, whether the agency searched the entire local commuting area remains an unanswered question of material fact. 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 In the initial decision, the administrative judge did not address the agency's obligation to consider the entire local commuting area. Therefore, the record closed without exploring whether the local commuting area encompassed areas outside the Sierra Coastal District. 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).

Disability Discrimination

¶15 Where an appellant raises a claim of disability discrimination in connection with an otherwise appealable action, the Board generally has jurisdiction to decide both the discrimination issue and the appealable action. 5 U.S.C. § 7702(a)(1); *Hardy v. U.S. Postal Service*, 104 M.S.P.R. 387, ¶ 29, *aff'd*, 250

F. App'x 332 (Fed. Cir. 2007). In this case, however, the agency argued that the Board should not consider the appellant's disability discrimination claim because that claim is covered under *McConnell v. Potter*, EEOC Hearing No. 520-2008-00053X (May 30, 2008), a class complaint pending before the Equal Employment Opportunity Commission (EEOC). IAF, Tab 10 at 11-13. Specifically, the agency argued that the appellant fits the definition of a *McConnell* class member,[4] the appellant cannot opt out of the class, and the appellant should therefore be deemed to have made a binding election to proceed with his claim through the equal employment opportunity (EEO) process rather than through the Board. *Id*. The administrative judge found that the agency failed to establish that the appellant must be deemed to have elected the EEO process because the agency provided no "evidence as to whether the EEOC [administrative judge's] recommendation [of class certification] was adopted and implemented, modified, or entirely rejected by the Postal Service." IAF, Tab 15 at 4-5. However, during the pendency of the appellant's petition for review, the EEOC Office of Federal Operations issued a decision certifying the class as defined in the EEOC administrative judge's recommended decision. *McConnell v. Potter*, EEOC DOC 0720080054, 2010 WL 332083 at *9-*10 (Jan. 14, 2010); *see generally* 29 C.F.R. §§ 1614.204, .403-.405.

¶16 Nevertheless, as explained in *Luna v. U.S. Postal Service*, 2010 MSPB 124, ¶ 15, *McConnell* is not a mixed case complaint. Therefore, even though the *McConnell* class is now certified, the appellant's alleged membership in that class does not divest the Board of jurisdiction over any aspect of his Board appeal. *See id; Coleman v. Department of the Treasury*, 22 M.S.P.R. 519, 520-21 (1984)

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[4] The EEOC administrative judge recommended defining the *McConnell* class as "[a]ll permanent rehabilitation employees and limited duty employees at the Agency who have been subjected to the NRP from May 5, 2006 to the present, allegedly in violation of the Rehabilitation Act of 1973." *McConnell*, EEOC Hearing No. 520-2008-00053X at 23.

(because the appellant's EEO complaint did not pertain to any action appealable to the Board, it was not a mixed case complaint sufficient to divest the Board of jurisdiction over the appeal under 5 C.F.R. § 7702(a)(2)). Because the Board has jurisdiction over the appellant's restoration claim, 5 U.S.C. § 7702(a)(1) requires that the administrative judge adjudicate the appellant's disability discrimination claim on remand.[5] *See Barrett*, 107 M.S.P.R. 688, ¶ 8.

¶17 As discussed in *Sanchez*, 2010 MSPB 121, ¶ 18, 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*. 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. IAF, Tab 2 at 6-7; *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

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[5] We find that the documents that the appellant has submitted for the first time on review relating to his request for reasonable accommodation provide no basis to grant the petition for review because they are immaterial to the issues decided in the initial decision. PFR File, Tab 1 at 8, 10; *see Russo v. Veterans Administration*, 3 M.S.P.R. 345, 349 (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). Although the appellant asserts that information in the documents was unavailable before the July 27, 2009 close of the record date, PFR File, Tab 1 at 3; IAF, Tab 15 at 1, the appellant came into possession of them well before the administrative judge issued the initial decision, PFR File, Tab 1 at 8, 10; ID at 1, and the appellant has not explained why he failed to submit them to the administrative judge when they first became available. Nevertheless, because the initial decision did not reach the disability discrimination issue, and because excluding the evidence on remand would be unduly harsh to this pro se appellant, the administrative judge should consider it in rendering his new initial decision.

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)).

ORDER

¶18 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.

FOR THE BOARD:

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