UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 153

Docket Nos. SF-0353-09-0520-I-1
SF-0752-09-0519-I-1

David Kinglee,

Appellant,

v.

United States Postal Service,

Agency.

July 23, 2010

Frederick D. Brown, Sr., Los Angeles, California, for the appellant.

Parin Patel, 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 petitions for review of the initial decisions, issued August 14, 2009, which dismissed his restoration to duty and constructive suspension appeals for lack of jurisdiction. We join these appeals for adjudication, pursuant to 5 C.F.R. § 1201.36(a)(2). We also find that the petitions do not meet the criteria for review set forth at 5 C.F.R. § 1201.115, and we, therefore, DENY them. We REOPEN this case on our own motion under 5 C.F.R. § 1201.118, however, REVERSE the initial decisions, and remand the joined appeals for further adjudication.

BACKGROUND

¶2 The appellant is a preference eligible City Letter Carrier at the agency's Brundage Station, Bakersfield Post Office, in Bakersfield, California, working in a limited duty capacity because of a compensable injury. Suspension Appeal File (SAF), Tab 1 at 1, 8, Tab 8 at 11; Restoration Appeal File (RAF), Tab 8 at 11, 54, Tab 9 at 14-15. On February 6, 2009, the appellant submitted updated medical documentation indicating that his ability to perform tasks involving simple grasping was limited to ninety minutes per shift, and that he could not drive more than two hours per shift. SAF, Tab 4 at 7; RAF, Tab 8 at 19. On March 24, 2009, the agency informed the appellant that, because his medical restrictions precluded him from performing the full range of duties for his position, it was reassigning him to an Unassigned Regular Letter Carrier position. SAF, Tab 4 at 6; RAF, Tab 9 at 6. The appellant, however, continued working eight hours per day and was paid for working eight hours even though the agency believed that it did not have enough productive work for him. SAF, Tab 8 at 21; RAF, Tab 8 at 21.

¶3 On April 21, 2009, the agency issued the appellant a letter informing him that, as part of the National Reassessment Process (NRP),[1] it had conducted a search at the Brundage Station for operationally necessary tasks within his regular tour of duty and that met his medical restrictions. SAF, Tab 8 at 56; RAF, Tab 8 at 56. The letter stated that the agency was unable to find enough available operationally necessary tasks within the appellant's medical restrictions for him to complete a full day of work. SAF, Tab 8 at 56; RAF, Tab 8 at 56. It further informed him that he could select continuation of pay, if eligible, leave, or "LWOP-IOD," for the remainder of his workday, and that he should report back for duty at his normal reporting time on his next scheduled workday. *Id*.

[1] The NRP is a nationwide agency initiative to provide updated and operationally necessary tasks for employees with medical restrictions. SAF, Tab 8 at 51.

¶4 Accordingly, on April 21, 2009, the agency offered, and the appellant accepted, an assignment casing mail on Route 718 for 90 minutes per day. SAF, Tab 4 at 5; RAF, Tab 9 at 5. Subsequently, on May 9, 2009, the agency offered, and the appellant accepted, an assignment casing mail on Auxiliary Route 724 for 90 minutes per day. SAF, Tab 8 at 54; RAF, Tab 8 at 54.

¶5 The appellant filed two appeals regarding the agency's action. One appeal alleged that the reduction in his work hours constituted a violation of his restoration to duty rights after partial recovery from a compensable injury. The appellant requested a hearing and also raised the affirmative defense of disability discrimination. RAF, Tabs 1, 9, 11, 15. Following the submission of evidence and argument regarding the Board's jurisdiction over the appeal, the administrative judge dismissed the appeal for lack of jurisdiction without holding a hearing, finding that the appellant failed to make a nonfrivolous allegation that his restoration to a modified City Letter Carrier position for 90 minutes per work day was so unreasonable as to amount to a denial of restoration. Restoration Initial Decision (RID) at 4, 7-8. The administrative judge also found that, absent jurisdiction over the underlying appeal, the Board lacked jurisdiction over the appellant's discrimination claim. *Id.* at 8.

¶6 In his other appeal, the appellant contended that the reduction in his work hours constituted an appealable constructive suspension. SAF, Tabs 1, 4, 9. He again requested a hearing and alleged disability discrimination. SAF, Tab 1 at 2. The administrative judge then again dismissed the appeal for lack of jurisdiction without holding a hearing, finding that the appellant failed to make a nonfrivolous allegation that he was subjected to an appealable constructive suspension. Specifically, the administrative judge found that the agency had not placed the appellant in a non-pay status for more than 14 consecutive days and, therefore, the action was not appealable. Suspension Initial Decision (SID) at 3-5. The administrative judge also found that, absent jurisdiction over the underlying appeal, the Board lacked jurisdiction to adjudicate the appellant's disability discrimination claim. *Id.* at 5.

¶7 The appellant has filed the identical petition for review in both appeals. Suspension Petition for Review File, Tab 1; Restoration Petition for Review File, Tab 1. In the petitions, the appellant reiterates his claim that the agency constructively suspended him, and requests to be returned to an eight-hour per day schedule and be restored all leave effective April 22, 2009. *Id*.

ANALYSIS

Restoration to Duty

¶8 We find that the appellant has presented a nonfrivolous allegation that his restoration claim is within the Board's jurisdiction, and that he is, therefore, entitled to his requested hearing and a decision on both the merits and his discrimination claim. The regulations governing an agency's restoration to duty obligations provide that a partially recovered employee is one who cannot resume the full range of regular duties but has recovered sufficiently from a compensable injury to return to part-time or light duty, or to another position with less demanding physical requirements. 5 C.F.R. § 353.102; *see Urena v. U.S. Postal Service*, 113 M.S.P.R. 6, ¶ 8 (2009).

¶9 The Office of Personnel Management's (OPM) regulations afford restoration rights to a partially recovered employee. These rights require the agency to make every effort to restore in the local commuting area a partially recovered employee who can return to limited duty, according to the circumstances in each case. 5 C.F.R. § 353.301(d).

¶10 A partially recovered employee's right to file a Board appeal over a violation of these rights also derives from OPM's regulations. *Urena*, 113 M.S.P.R. 6, ¶ 9. These 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. 5 C.F.R. § 353.304(c); *see also Urena*, 113 M.S.P.R. 6, ¶ 9. To establish Board jurisdiction over a restoration claim as a partially recovered employee, the appellant must make nonfrivolous allegations that the agency violated his

restoration rights. *Urena*, 113 M.S.P.R. 6, ¶ 10. This requires the appellant to allege facts that would show, if proven, 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; (3) the agency denied his request for restoration; and (4) the denial was arbitrary and capricious. *Id*.; *see also Sanchez* v. *U.S. Postal Service*, 2010 MSPB 121, ¶ 10.

¶11 In determining the parameters of this jurisdictional test, the Board has held that a partially-recovered individual who has been restored to duty may not challenge the details or circumstances of the restoration. *Urena*, 113 M.S.P.R. 6, ¶ 9. It has also found, however, that an agency's rescission of a previously provided restoration may constitute an appealable denial of restoration. Id. Similarly, the discontinuation of a limited duty position may constitute a denial of restoration for purposes or Board jurisdiction under 5 C.F.R. part 353. *Sanchez*, 2010 MSPB 121, ¶ 11.

¶12 Here, the appellant has clearly satisfied the first two elements of the jurisdictional test. He has been both absent from his official position due to a compensable injury and able to return to part-time duty (90 minutes per day) in a position with less demanding physical requirements. SAF, Tab 1 at 1, 8, Tab 4 at 5-7, Tab 8 at 11, 54; RAF, Tab 8 at 11, 19, 54, Tab 9 at 5-6, 14-15.

¶13 The next question concerns whether the appellant has presented a nonfrivolous allegation that the agency's decision to reduce his limited duty from eight hours to 90 minutes per day pursuant to its NRP constitutes a restoration denial within the meaning of the third element of the jurisdictional test. The Board has already analyzed this element of the jurisdictional test with respect to the agency's complete elimination of afforded limited duty to other partially recovered employees under its NRP. The Board found that the decision under the NRP to completely eliminate work previously afforded constitutes a nonfrivolous allegation of a restoration denial satisfying this third element of the test. *See Sanchez*, 2010 MSPB 121, ¶¶ 2-4, 11; *Urena*, 113 M.S.P.R. 6, ¶¶ 2-4, 11.

¶14 We see no reason to reach a different conclusion here, where the agency has partially eliminated previously afforded limited duty, because the appellants' circumstances and the agency's actions are essentially the same in all NRP cases. Specifically, the NRP appellants are all partially recovered employees whom the agency afforded limited-duty work. Pursuant to its NRP, the agency then decided that it lacked full-time work within the appellants' medical restrictions and reduced the number of work hours. Consistent with *Sanchez* and *Urena*, this is not a case where an appellant is challenging the details or circumstances of the restoration but is instead a situation where the agency is rescinding a previously provided restoration. *See Barachina v. U.S. Postal Service*, 113 M.S.P.R. 12, ¶ 6 n.2 (2009). This matter, therefore, falls within the Board's jurisdictional parameters, where the other elements of the jurisdictional test are met.[2] *Id.* In reaching this conclusion with respect to this third element of the jurisdictional test, we express no view regarding whether affording part-time restoration in circumstances other than the agency's reduction of hours pursuant to its NRP constitutes a denial of restoration.

¶15 The final jurisdictional element requires the appellant to nonfrivolously allege that the denial was arbitrary and capricious. In *Sanchez*, the Board held that an appellant satisfies this requirement where the record shows that the agency did not examine the entire commuting area in determining the available work under the NRP, as required under 5 C.F.R. § 353.301(d). 2010 MSPB 121, ¶¶ 12-14. Here, the record establishes that the agency searched for work within the appellant's medical restrictions only at the Brundage Station. SAF, Tab 8 at 56; RAF, Tab 8 at 56. Because the record does not show that the agency searched throughout the proper commuting area, it establishes a nonfrivolous allegation

[2] To the extent our decision in *Zysk v. U.S. Postal Service*, 108 M.S.P.R. 520, ¶¶ 5-6 (2008), suggests otherwise, it is hereby modified.

that the agency's restoration denial was arbitrary and capricious.[3] *Sanchez*, 2010 MSPB 121, ¶ 14. The appellant has, therefore, satisfied all the elements of the jurisdictional test, and is entitled to an adjudication of the merits of his restoration and disability discrimination claims.

Constructive Suspension

¶16 As stated above, the appellant contended that the reduction in his work hours constituted an appealable constructive suspension. SAF, Tabs 1, 4, 9. The administrative judge provided the appellant with notice of his jurisdictional burden of proof regarding this claim. SAF, Tabs 2, 7. Specifically, the administrative judge correctly explained that a suspension is defined as the placing of an employee, for disciplinary reasons, in a temporary status without duties and pay, and that a suspension of more than fourteen days is an adverse action within the Board's jurisdiction. SAF, Tab 7 at 2; 5 U.S.C. §§ 7501(2), 7511(a)(2), 7512(2), 7513(d).

¶17 The administrative judge also correctly explained that, an employee's absence from work without pay may sometimes be considered an appealable constructive suspension. SAF, Tab 2 at 2; Tab 7 at 3. Constructive suspension claims may arise in two situations: when an agency places an employee on enforced leave pending an inquiry into his ability to perform, or when an employee who is absent from work for medical reasons asks to return to work with altered duties, and the agency denies the request. *Rutherford v. U.S. Postal Service*, 112 M.S.P.R. 570, ¶ 9 (2009). If an employee absent due to medical restrictions requests work within those restrictions, and the agency is bound by policy, regulation or contract to offer available light-duty work, the employee's continued absence due to the agency's failure to offer available light-duty work constitutes a constructive suspension. *Id*. The dispositive issue in determining

[3] This conclusion does not preclude a showing that a denial of restoration under the NRP may be arbitrary and capricious for other reasons that may exist in a particular case.

whether a constructive suspension occurred is who initiated the absence. If the appellant initiated the absence, the agency has not constructively suspended him, and the appellant has the burden of establishing that his absence was involuntary. *Id.*, ¶ 10.

¶18 Here, the administrative judge found that the appellant failed to make a nonfrivolous allegation that he was subjected to an appealable constructive suspension because the agency had not placed him in a non-pay status for more than 14 consecutive days. SID at 3-5. The administrative judge, therefore, concluded that the action was not appealable to the Board. *Id.*

¶19 We find, however, that the circumstances at issue in this appeal do not give rise to a constructive suspension claim. Instead, we find that the appellant's rights and remedies regarding the portion of his workday for which the agency has not assigned him work are subsumed in the restoration appeal process.

¶20 As explained above, the appellant's absence, even if deemed to be agency-initiated, stemmed from the agency's determination that it lacked operationally necessary tasks within the appellant's medical restrictions. SAF, Tab 8 at 56. Whether the agency acted properly in making this determination constitutes the merits of his restoration appeal. Specifically, because the appellant is a partially-recovered employee, the agency must make every effort to restore him in the local commuting area, according to the circumstances in his case. 5 C.F.R. § 353.301(d). We have now found that the Board has jurisdiction to determine here whether the agency arbitrarily and capriciously denied the appellant restoration by offering him the 90 minutes of work at the Brundage Station. *Id.*; 5 C.F.R. § 353.304(c). If the appellant prevails on the merits of this claim, he would be entitled to relief that would address the agency's failure to provide him with the proper hours of work each day.

¶21 If the Board determines on the merits, however, that the agency afforded the appellant the restoration rights to which he is entitled, it would be illogical to then hold that the agency's proper restoration could constitute an improper constructive suspension. Indeed, the unique circumstances presented by the NRP

would preclude the agency from properly taking such an action. When the agency provides a partial day of work under the NRP, it must make a daily assessment about whether it has sufficient work within the appellant's medical restrictions. SAF, Tab 8 at 57; RAF, Tab 8 at 57. If it does not have sufficient work for that day, it directs the employee to leave the duty station but to return to work at his next scheduled shift, when it again makes this determination. SAF, Tab 8 at 56; RAF, Tab 8 at 56. Because the agency makes a daily determination regarding work availability, it could not provide the appellant with the required 30 days notice to properly propose and effect an appealable suspension -- it may not know whether it will have sufficient work for a day that is 30 days in the future when it is reassessing its work on a daily basis. Whether the agency is, in fact, following this procedure is a question regarding the merits of the appellant's restoration claim - specifically, whether the agency is making every effort to restore the appellant according to the circumstances in his case and whether its failure to carry out this requirement is arbitrary and capricious. 5 C.F.R. §§ 353.301(d), 353.304(c).

¶22 We also note that viewing the appellant's constructive suspension claim as subsumed by the restoration claim is consistent with the principle of excluding other avenues of relief where a comprehensive scheme exists regarding the rights and remedies at issue. *See United States v. Fausto*, 484 U.S. 439 (1988). Here, pursuant to congressional authority, OPM has promulgated a comprehensive scheme that identifies the rights and remedies for individuals who partially or fully recover from compensable injuries. 5 C.F.R. part 353; *see McFarlane v. U.S. Postal Service*, 110 M.S.P.R. 126, ¶ 12 (2008). These procedures are sufficient to redress all of the appellant's claims with respect to the NRP.[4] *See Sanchez*, 2010 MSPB 121, ¶ 18 (reference to the Rehabilitation Act in the

[4] To the extent prior decisions resolving NRP cases with constructive suspension issues have implied otherwise, they are hereby modified. *See e.g.*, *Sanchez*, 2010 MSPB 121, ¶ 21.

restoration regulations must be interpreted in light of the overall scheme of the restoration regulations). Finally, we find that our conclusion that the constructive suspension claim is subsumed in the restoration appeal also applies to an analogous claim that a partial-day absence under the NRP could constitute a furlough.[5]

ORDER

¶23 Accordingly, we REMAND this appeal for an adjudication of the merits of the appellant's restoration and discrimination claims. No further action is required with respect to the constructive suspension allegation because that issue is subsumed in the restoration claim.

FOR THE BOARD:

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

[5] A furlough is defined as the placement of an employee in a nonduty, nonpay status for non-disciplinary reasons. 5 U.S.C. § 7511(a)(5); *Miller v. Department of Transportation*, 109 M.S.P.R. 463, ¶ 12 (2008); *Deloach v. Department of the Treasury*, 58 M.S.P.R. 574, 578 (1993). Furloughs of less than 30 days are appealable as adverse actions. 5 U.S.C. §§ 7512, 7513(c); C.F.R. § 1201.3. Furloughs for more than 30 days must be effected under the reduction in force regulations and are appealable under those regulations. *Lowmack v. Department of the Navy*, 80 M.S.P.R. 491, ¶ 14 (1999).