UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 203

Docket No. AT-0752-09-0732-I-1

James Brown,

Appellant,

v.

United States Postal Service,

Agency.

October 15, 2010

David H. Brown, Jacksonville, Florida, for the appellant.

Richard S. Kessler, Esquire, Memphis, Tennessee, 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 alleged constructive suspension appeal for lack of jurisdiction. For the reasons set forth below, we GRANT the appellant's petition, VACATE the initial decision, and REMAND the appeal for further adjudication.

BACKGROUND

¶2 The appellant, a preference eligible, is a full-time Mail Processing Clerk at the Jacksonville Processing and Distribution Center in Jacksonville, Florida. Initial Appeal File (IAF), Tab 5, Subtab 4F. On February 22, 2007, the appellant

was admitted to the hospital with congestive heart failure. *Id.*, Subtab 4H. He was released on February 27, 2007, and successfully applied for leave under the Family and Medical Leave Act (FMLA) for February 22-28, 2007. *Id.* In support of the application for FMLA leave, the appellant's physician certified that the appellant had a chronic condition but no incapacitation, and was able to resume full-time duty. *Id.*

¶3 Effective April 25, 2009, the agency involuntarily reassigned the appellant to a full-time unassigned regular position due to the abolishment of his bid position in the manual section. *Id.*, Subtab 4F; *see also id.*, Subtab 4D. The agency instructed the appellant to work in the automation section of the Jacksonville General Mail Facility, under the supervision of Robbin Whitehead. *Id.*, Subtab 4G; Hearing CD (appellant). The appellant began training on the Delivery Bar Code Sorter (DBCS) machines, and within an hour he began experiencing chest pain.[1] IAF, Tab 5, Subtabs 4B, 4C. On May 4, 2009, the appellant obtained a note from his physician, Ronald Stephens, M.D., who indicated that the appellant's reassignment to automation had "increased his physical activity requirements" and "caused a significant adverse change in his cardiovascular status." *Id.*, Subtab 4B at 11. Dr. Stephens requested that the agency allow the appellant to return to his previous job "to maintain his cardiac and metabolic stability." *Id.* When questioned about his medical restrictions, the appellant explained to his supervisors that he could not work on the DBCS

[1] It is unclear from the record when this incident occurred. The administrative judge gives the date as May 12, 2009, while the appellant's prehearing submission inexplicably gives two dates, April 25, 2009, and May 5, 2009. Initial Decision at 4; IAF, Tab 15 at 1, 3. In addition, the May 4, 2009 note from Dr. Stephens states that the appellant's reassignment to automation "has caused" an adverse change to the appellant's cardiovascular status, which seems to imply that the incident had already occurred. IAF, Tab 5, Subtab 4B at 11.

machines but could work in the manual section.[2] *Id*., Subtabs 4C, 4D. He also stated that he would not see his doctor again until June 5, 2009. *Id*, Subtabs 4C, 4E. Michael Willard, Lead Manager of Distribution Operations, informed the appellant that he could not be accommodated. *Id*., Subtabs 4C, 4D. According to the appellant, Willard informed him that the union was threatening to file a grievance if he was permitted to work in the manual section. *Id*., Subtab 4C. On May 12, 2009, the appellant reported to work and was sent home, with instructions to apply for light duty. *Id*.; IAF, Tab 11 at 3 (appellant's declaration); IAF, Tab 15, Exhibit D (admission #1).

¶4 By notice dated May 26, 2009, Whitehead proposed to place the appellant on enforced leave until he was able to furnish medical documentation demonstrating that he was able to perform the duties of an unencumbered mail processing clerk assigned to automation. IAF, Tab 5, Subtab 4D. The notice explained that mail volume had been reduced to the point that there was no longer necessary work within his restrictions. *Id*. In particular, the agency noted that manual operations had been consolidated, and employees with bid positions had been excessed from manual operations into automation. *Id*. The appellant filed a written response, and on June 8, 2009, he met with the deciding official, Janet Mills. *Id*., Subtabs 4A, 4C. At the meeting, the appellant submitted two forms signed by Dr. Stephens, one for the manual section and another for the automated section, each indicating a different set of restrictions. *Id*., Subtab 4B at 9-10. On June 24, 2009, Mills notified the appellant that because his medical restrictions prevented him from performing his core duties in automation, and no manual work was available for a light duty assignment, he would be placed on enforced

[2] In her request for disciplinary action, Whitehead stated that the appellant submitted the medical documentation on May 12, 2009. IAF, Tab 5, Subtab 4E. However, the appellant's response to the notice of proposed enforced leave indicates that he submitted the note from Dr. Stephens no later than May 9, 2009. *Id*., Subtab 4C.

leave effective June 29, 2009. *Id.*, Subtab 4A. The decision letter included notice of Board appeal rights. *Id.*

¶5 In his Board appeal, the appellant alleged that he had been subject to a constructive suspension from May 12, 2009, until July 20, 2009, when he returned to full-time duty in a Window Clerk position. IAF, Tabs 1, 13, 15. Citing *Carmack v. U.S. Postal Service*, 98 M.S.P.R. 128 (2005), the agency moved to dismiss the appeal for lack of jurisdiction, on the grounds that no light-duty work was available. IAF, Tab 5, Subtab 1. However, the appellant responded that *Carmack* was inapplicable, and that the agency's obligation to provide available light-duty work was not at issue. IAF, Tab 6. He argued that, contrary to the agency's understanding, his medical restrictions did not arise from his pre-existing heart condition, but were the result of an aggravation to that condition caused by his brief stint in automation. IAF, Tabs 13, 15. Thus, the appellant explained, the agency should have provided him with a Form CA-1 (Federal Employee's Notice of Traumatic Injury and Claim for Continuation of Pay/Compensation), and notified him of his option to file a claim with Office of Workers' Compensation Programs and seek continuation of pay or limited duty.[3] IAF, Tab 18. Instead, he alleged, the agency "actively deceived him into applying for light duty rather than for limited duty, and imposed immediate suspension on him in furtherance of that deception." IAF, Tabs 13, 15. In the alternative, the appellant argued that, even if his medical condition was not job-related, the agency's failure to provide light duty pursuant to the collective bargaining agreement was arbitrary and capricious. *Id.*

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[3] In the U.S. Postal Service, the term "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 non-work-related injuries. *Simonton v. U.S. Postal Service*, 85 M.S.P.R. 189, ¶ 8 (2000).

¶6 Following a jurisdictional hearing, the administrative judge dismissed the appeal, finding that the appellant did not suffer an appealable constructive suspension. IAF, Tab 20 (Initial Decision, Feb. 17, 2010). The administrative judge found that during the period from May 12, 2009, through June 28, 2009, the appellant "was faced with the unpleasant alternative of returning to work with duties outside his medical restrictions or requesting leave," but that his decision not to return to his regular duties in automation was nonetheless voluntary. Initial Decision at 6. With respect to the period from June 29, 2009, through July 20, 2009, the administrative judge found that the appellant's leave was voluntary because the agency had shown that there was no productive work within his medical restrictions. *Id.*

ANALYSIS

¶7 It is well-settled that an appellant must receive explicit information on what is required to establish an appealable jurisdictional issue. *Burgess v. Merit Systems Protection Board*, 758 F.2d 641, 643-44 (Fed. Cir. 1985). Prior to the initial decision, however, the administrative judge provided no written notice of the appellant's burden of proof on jurisdiction. Furthermore, the appellant did not receive notice through the agency's pleadings, which, apart from a vague reference to *Carmack*, do not include any statement of the jurisdictional standard for constructive suspension appeals. At the start of the hearing, the administrative judge indicated that at the status conference and prehearing conference—neither of which was memorialized in writing—he had referred the parties to recent Board decisions, including *Rutherford v. U.S. Postal Service*, 112 M.S.P.R. 570 (2009), and *Johnson v. U.S. Postal Service*, 110 M.S.P.R. 679 (2009). Hearing CD. However, we cannot determine from the record whether the administrative judge explained the holdings of those cases in sufficient detail. *See Holden v. U.S. Postal Service*, 78 M.S.P.R. 420, 423 (1998) (notice requirement not satisfied where the administrative judge provided the appellant

with a loose definition of a constructive suspension and stated that such actions are appealable).

¶8 In any event, given the appellant's theory of the case, our decisions in *Rutherford* and *Johnson* would not have provided the appellant sufficiently clear notice of his burden of proof on jurisdiction. In both cases, the Board indicated that constructive situations "may arise in two situations": (1) when an agency places an employee on enforced leave pending an inquiry into his ability to perform, or (2) 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*, 112 M.S.P.R. 570, ¶ 9; *Johnson*, 110 M.S.P.R. 679, ¶ 9; *see also* Initial Decision at 3. However, these are not the only situations in which a constructive suspension may arise. The Board has also recognized that proof of intolerable working conditions compelling an employee to be absent may in some circumstances support a finding of constructive suspension. *Peoples v. Department of the Navy*, 83 M.S.P.R. 216, ¶ 7 (1999). In addition, we have recognized that an agency's misleading statement, upon which an employee relies to his detriment, may support a finding of constructive suspension. *Boudousquie v. Department of the Air Force*, 102 M.S.P.R. 397, ¶ 10 (2006). The last scenario is especially relevant given the appellant's claim that he was deceived into applying for light duty instead of limited duty. *See* IAF, Tabs 13, 15. On any theory, the dispositive inquiry is the same: whether the employee's absence was voluntary or involuntary. *Holloway v. U.S. Postal Service*, 993 F.2d 219, 221 (Fed. Cir. 1993).

¶9 We further note that the administrative judge misstated the second jurisdictional theory as it applies to this appeal. In *Baker v. U.S. Postal Service*, 71 M.S.P.R. 680 (1996), the Board held that when an employee requests work within his medical restrictions, and the agency is bound by policy, regulation, or contractual provision to offer available work to the employee, but fails to do so, his continued absence constitutes a constructive suspension appealable to the

Board. *Id*. at 692. Once an employee who was absent due to a medical condition makes a non-frivolous allegation that he was able to work within certain restrictions, that he communicated his willingness to work, and that the agency prevented him from returning to work, the burden of production shifts to the agency to show that there was no work available within the employee's restrictions, or that it offered such work to the employee and he declined it. *Id*. at 693. If the agency meets its burden, then the appellant must present sufficient rebuttal evidence to meet his overall burden of persuasion. *Id*. At the hearing, the administrative judge implied that the Board's jurisdiction over the case turns on whether the agency met its burden of establishing that no light duty was available. Hearing CD. However, the appellant alleged below that he suffered an on-the-job injury which may have entitled him to limited duty, as opposed to light duty. IAF, Tab 13, 15. The holding of *Baker* applies not only to the alleged denial of light duty, but also to cases in which an appellant alleges that the agency failed to provide available limited duty to which he was entitled. *See, e.g.*, *Dones v. U.S. Postal Service*, 107 M.S.P.R. 235, ¶ 13 (2007).

ORDER

¶10 Accordingly, we remand the appeal to the Atlanta Regional Office for further proceedings consistent with this Opinion and Order. On remand, the administrative judge shall provide the parties written notice of the appellant's burden of proof on jurisdiction, provide the appellant an opportunity to present

evidence and argument under any of the jurisdictional theories discussed above, and, if appropriate, conduct a supplemental hearing.

FOR THE BOARD:

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