UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 226

Docket No. SF-0353-10-0033-I-1

Marilyn V. Bolton,

Appellant,

v.

United States Postal Service,

Agency.

November 17, 2010

Morris N. Thompson, Valley Village, California, for the appellant.

Kris Ashman, 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 the Board's own motion under 5 C.F.R. § 1201.118, VACATE the initial decision, and REMAND the appeal for further consideration consistent with this Opinion and Order.

BACKGROUND

¶2 The appellant was a non-preference eligible Mail Handler at the agency's Los Angeles Network Distribution Center (Los Angeles NDC). Initial Appeal File (IAF), Tab 4 at 103. The appellant suffered a work-related injury in 1998. *Id.* at 107. As of September 2008, she was performing in a limited duty position as a Label Room Clerk for 8 hours per day, 40 hours per week. *Id.* at 106-07.

¶3 In 2009, the Los Angeles District, of which the Los Angeles NDC is a part, began to participate in a Phase 2 Pilot of the agency's National Reassessment Process (NRP). *Id.* at 9. 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. *Id.* at 97.

¶4 Through its assessments as part of the NRP, the agency determined that, while the appellant's tasks continued to be operationally necessary, they could be performed in 24 hours per week instead of 40. *Id.* at 24. On July 1, 2009, the agency met with the appellant and issued her an Offer of Modified Assignment, providing her with 8 hours of work for 3 days per week. *Id.* at 93. On July 2, 2009, the agency gave the appellant an "Employee Leave Information Letter, Complete Day," informing her that the agency had been unable to identify enough available operationally necessary tasks within her medical restrictions to provide her with work on Wednesdays and Thursdays, and that she could use leave or file for workers' compensation for those days. *Id.* at 92. The appellant filed an appeal with the Board, asserting that the agency denied her restoration and discriminated against her on the basis of her disability.[1] IAF, Tab 1; *id.*, Tab 7 at 1. She requested a hearing. IAF, Tab 1.

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[1] In a November 5, 2009 order, the administrative judge noted that because the appellant asserted without rebuttal that she was not informed of her Board appeal rights, the time deadline for filing with the Board "must be waived." IAF, Tab 5 at 3 n.*.

¶5 After the parties submitted evidence and argument, the administrative judge dismissed the appeal for lack of jurisdiction. IAF, Tab 16, Initial Decision at 5. The administrative judge found that the appellant nonfrivolously alleged that she suffered a compensable injury, that she was absent from work due to her compensable injury, and that she returned to work in a modified position. *Id.* at 3-4. The administrative judge also found that the appellant was appealing only the details or circumstances of her restoration and thus she failed to nonfrivolously allege that the agency denied her restoration. *Id.* at 5. The administrative judge therefore found that the appellant's restoration to a limited duty position for 24 hours per week was not so unreasonable as to amount to a denial of restoration. *Id.* The administrative judge did not address the appellant's disability discrimination claim, finding that such a claim was beyond the Board's jurisdiction absent an otherwise appealable action. *Id.*

¶6 The appellant has filed a timely petition for review. Petition for Review (PFR) File, Tab 1. The agency has filed a response in opposition. *Id.*, Tab 3.

ANALYSIS

¶7 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; *Sanchez v. U.S. Postal Service*, 114 M.S.P.R. 345, ¶ 9 (2010); *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. *Delalat v. Department of the Air Force*, 103 M.S.P.R. 448, ¶ 17 (2006); 5 C.F.R. §§ 353.102, 353.301(d).

¶8 "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) She was absent from her position due to a compensable injury; (2) she 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 her; (3) the agency denied her 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).

¶9 Here, the appellant has clearly satisfied the first two elements of the jurisdictional test. She has been both absent from her official position due to a compensable injury and able to return to duty in a position with less demanding physical requirements. *See* IAF, Tab 4 at 106-07.

¶10 Regarding the third jurisdictional element, 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 v. U.S. Postal Service*, 113 M.S.P.R. 6, ¶ 9 (2009). We have 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 of Board jurisdiction under 5 C.F.R. part 353. *Kinglee v. U.S. Postal Service*, 114 M.S.P.R. 473, ¶ 11 (2010).

¶11 The administrative judge found that the appellant failed to make a nonfrivolous allegation that she was denied restoration when the agency reduced her work hours because her allegations related only to the details or circumstances of her restoration. Initial Decision at 5. In light of the Board's recent decision in *Kinglee*, this finding is incorrect. *See Kinglee*, 114 M.S.P.R. 473, ¶ 14. Here, the agency has partially eliminated previously afforded limited

duty by reducing the number of work hours assigned to the appellant. As in *Kinglee*, 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. *Kinglee*, 114 M.S.P.R. 473, ¶ 14. This case therefore falls within the Board's jurisdictional parameters, where the other elements of the jurisdictional test are met. *Id.*

¶12 The final jurisdictional element requires the appellant to nonfrivolously allege that the denial of restoration was arbitrary and capricious. *Sanchez*, 114 M.S.P.R. 345, ¶ 10. Because he found that the appellant failed to nonfrivolously allege that the agency denied her restoration, the administrative judge did not reach the question of whether the appellant nonfrivolously alleged that the agency acted arbitrarily and capriciously.

¶13 In *Sanchez*, the Board held that an appellant may satisfy this final jurisdictional requirement where the record shows that the agency did not examine the entire local commuting area in determining the available work under the NRP, as required under 5 C.F.R. § 353.301(d). 114 M.S.P.R. 345, ¶¶ 12-14 (the agency's documentary submissions may render nonfrivolous the appellant's allegation that the denial of restoration was arbitrary and capricious). "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 v. U.S. Postal Service*, 73 M.S.P.R. 189, 193 (1997). 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. *Sanchez*, 114 M.S.P.R. 345, ¶ 13.

¶14 Here, the record shows that the agency established the local commuting area as a 50 mile radius around the Los Angeles NDC. *See* IAF, Tab 13 at 14. The agency submitted evidence listing the facilities outside the Los Angeles District that are within that 50 mile radius and asserted that it was in the process of searching those facilities for operationally necessary tasks within the appellant's medical restrictions. *Id.* at 7, 14, 16-24. By e-mail, the agency notified four individuals in other facilities that they were "receiving this e-mail because some of your facilities in your districts, the Santa Ana, Sierra Coastal, and San Diego Districts, respectively, are within the 50 mile Local Commuting Area . . ." *Id.*, Tab 14 at 9, 11. The e-mails instructed the recipients to review the attached information regarding the appellant, including her medical restrictions, and "indicate if you have work for each employee listed within their medical restrictions/limitations." *Id.* While the agency submitted two e-mail responses claiming that no operationally necessary tasks exist within the appellant's medical restrictions in the Sierra Coastal and the Santa Ana Districts, it failed to submit evidence confirming that a search of the entire local commuting area was actually conducted or that no operationally necessary tasks were found within the appellant's medical restrictions in the San Diego District. *See id.* at 9-12. Further, in its February 22, 2010 submission to the administrative judge, the agency noted only that no available operationally necessary tasks were found in the portions of the Sierra Coastal and Santa Ana Districts that fall within the 50 mile local commuting area. *Id.* at 4. Moreover, in a declaration dated February 18, 2010, the Los Angeles District's District Assessment Team Leader stated that the agency was still "in the process" of searching for available operationally necessary work for the appellant within a 50 mile radius of her facility, and that the search results were not currently available because approximately 229 stations within the 50 mile radius had to be searched. IAF, Tab 13 at 14-15.

¶15 Additionally, in conducting its search for positions for the appellant, the agency asserted that the "search . . . reference[d] only the days that Appellant is not currently scheduled to work" and that such parameters "ma[de] the search . . . much more difficult to complete." *Id.*, Tab 13 at 7. Similarly, in a written declaration, the Los Angeles District's District Assessment Team Leader stated that the agency was in the process of looking for operationally necessary tasks that are "(1) outside the Los Angeles District, but within a 50 mile radius of [the appellant's] facility; (2) within [the appellant's] work restrictions; and (3) available on the days [the appellant] is currently not working." *Id.* at 12, 14. In its response to the appellant's petition for review, the agency again noted that it "undertook a local commuting area search for available [operationally necessary tasks] within Appellant's physical restrictions, *for the two work days that Appellant was not currently scheduled*." PFR File, Tab 3 at 3 (emphasis added).

¶16 The initial decision does not address the agency's obligation to consider the entire local commuting area or define the local commuting area relevant to the appellant's restoration claim. *Mubdi v. U.S. Postal Service*, 114 M.S.P.R. 559, ¶ 12 (2010). Therefore, we are remanding the appeal for supplemental proceedings and issuance of a new initial decision. On remand, the administrative judge shall oversee further development of the record by the parties on this issue, including the opportunity for discovery and a hearing. *Id.* On remand, the administrative judge should consider the agency's potential failure to fully search the local commuting area and the limitation of its search to operationally necessary tasks in other facilities that are available on the two work days that the appellant is not currently scheduled to work, rather than also searching for such tasks that would provide the appellant a 40 hour work week.

¶17 As discussed in *Sanchez*, 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. 114 M.S.P.R. 345, ¶ 18. 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.*

¶18 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. *Mubdi*, 114 M.S.P.R. 559, ¶ 17; *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. *Mubdi*, 114 M.S.P.R. 559, ¶ 17. "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." *Id.* (quoting *Collins v. U.S. Postal Service*, 100 M.S.P.R. 332, ¶ 11 (2005)).

ORDER

¶19 Accordingly, we VACATE the initial decision and REMAND the appeal to the Western Regional Office for further consideration consistent with this Opinion and Order and issuance of a new initial decision.

FOR THE BOARD:

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