UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 124

Docket No. SF-0353-09-0493-I-1

Patricia L. Luna,

Appellant,

v.

United States Postal Service,

Agency.

July 1, 2010

Ron Luna, South Pasadena, California, for the appellant.

Afshin Miraly, 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, 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 General Clerk at the agency's Pasadena Post Office. Initial Appeal File (IAF), Tab 2 at 4, Tab 19, Subtab B.

On October 19, 1985, 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 she was required to perform various filing, passport acceptance, and lobby direction functions. IAF, Tab 7, Subtabs 2-4.

¶3 In 2009, the Sierra Coastal District, of which the Pasadena Post Office is a part, began to participate in the agency's National Reassessment Process (NRP) Pilot Program. IAF, Tab 19, Subtab S at 1-2. Under the NRP, the 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 18 at 24-26. 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. *Id*. at 26-29. If the supervisor or manager 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 her medical restrictions change. *Id*. at 27-28, 30. During the employee's absence, she will account for work hours through the use of approved leave, leave without pay, or a continuation of pay.[2] *Id*. at 27-28.

¶4 The agency contends that it evaluated the appellant's current limited duty assignment and determined that it did not meet the criteria of the NRP. IAF, Tab 13 at 9. The agency searched for alternative positions within the appellant's medical restrictions, but determined that there were none available. IAF, Tab 13 at 9, 18-31, 59-67, Tab 21. On April 8, 2009, the agency issued the appellant a letter stating in relevant part that, because there was no operationally necessary

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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.

work available for the appellant within her medical restrictions, the appellant should not report again for duty unless she was informed that such work had become available. IAF, Tab 7, Subtab 5. During this absence, the agency directed the appellant to account for her 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 5. She argued that the discontinuation of her limited duty assignment constituted an improper denial of restoration and that the agency's action constituted a "violation of the federal employee Disability Act." *Id*. at 6. The administrative judge issued an acknowledgment order notifying the appellant of her jurisdictional burden in a restoration appeal as a partially recovered employee and ordering her to file evidence and argument on the issue. IAF, Tab 3 at 2. The appellant responded, addressing the pertinent issues, IAF, Tab 7 at 1-6, and the agency moved to dismiss the appeal for lack of jurisdiction, IAF, Tab 13 at 9-15.

¶6 The administrative judge issued an initial decision dismissing the appeal for lack of jurisdiction. IAF, Tab 25, Initial Decision (ID) at 1, 8. She 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 her limited duty assignment was an arbitrary and capricious denial of restoration. ID at 5-7. Because the administrative judge found that the Board lacks jurisdiction over the appellant's restoration claim, she declined to consider the appellant's disability discrimination claim. ID at 7-8.

¶7 The appellant filed a petition for review, arguing that the administrative judge erred in finding that she failed to make a nonfrivolous allegation that the agency's discontinuation of her limited duty assignment constituted an arbitrary and capricious denial of restoration. Petition for Review File (PFR File), Tab 1 at 3, 8-10. The appellant further argued that the agency's action constituted disability discrimination, *id*. at 3, and the administrative judge should have

afforded the appellant her requested hearing, *id.* at 7. The agency filed a response after the deadline for doing so, alleging that the response contains new and material evidence regarding its search for limited duty positions for the appellant. PFR File, Tabs 2, 3.

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 her 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) She was

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[3] It appears 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, 19, Subtabs H-I, Subtab J at 1. However, because more than 1 year has passed since the appellant was first eligible for workers' compensation, the administrative judge correctly found that she is entitled to the restoration rights of a partially recovered employee. ID at 4-5; *see Kravitz v. Department of the Navy*, 104 M.S.P.R. 483, ¶ 5 (2007); 5 C.F.R. § 353.301(c).

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).

¶10 For the reasons explained in the initial decision, the appellant made nonfrivolous allegations satisfying the first three jurisdictional criteria. ID at 5; IAF, Tab 7 at 1-4; *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, Subtabs 2-5, 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 5-7, 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, 8-10. 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 her for any such vacancies. *See 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 v. U.S. Postal Service*, 2010 MSPB 121, ¶ 13.

¶12 In this case, the agency's documentary submissions below show that its job search encompassed installations in the Sierra Coastal District within 50 miles of the Pasadena Post Office. IAF, Tab 13 at 18-31, Tab 21; PFR File, Tab 3 at 5. 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.[4] Evidence that the agency failed to search

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[4] The agency has submitted evidence and argument on review to show that, during the pendency of the instant appeal, it expanded its job search to the Los Angeles and Santa Ana Districts. PFR File, Tab 3 at 5-32. However, because this evidence and argument pertains to matters that occurred after the appellant filed her appeal, it does not affect the Board's jurisdictional analysis. *See Vidal v. Department of Justice*, 113 M.S.P.R. 254, ¶ 4 (2010) (the Board's jurisdiction is determined by the nature of an agency's

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

¶13 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

¶14 When 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 appellant's disability discrimination claim should be held in abeyance because that claim is covered under *McConnell v. Potter*, EEOC Hearing No. 520-2008-

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action against a particular appellant at the time an appeal is filed with the Board, and an agency's unilateral modification of its action after an appeal has been filed cannot divest the Board of jurisdiction unless the appellant consents to such divestiture, or unless the agency completely rescinds the action being appealed). Moreover, the agency's broadened job search is not dispositive as to whether it searched the entire local commuting area. *See Sapp v. U.S. Postal Service*, 82 M.S.P.R. 411, ¶¶ 4, 7 (1999).

00053X (May 30, 2008), a class complaint pending before the Equal Employment Opportunity Commission (EEOC). IAF, Tab 13 at 9-11. Specifically, the agency argued that the appellant fits the definition of a *McConnell* class member,[5] the appellant cannot opt out of the class, and the appellant should therefore be deemed to have made a binding election to proceed with her claim through the equal employment opportunity (EEO) process rather than through the Board. *Id*.

¶15 We find the agency's argument unpersuasive because it presumes that *McConnell* is a mixed case, which it is not. *See Hay v. U.S. Postal Service*, 106 M.S.P.R. 151, ¶ 13 (2007) (an individual who claims prohibited discrimination in connection with an action otherwise appealable to the Board, i.e., a mixed case, may pursue her claim by filing an appeal with the Board or an EEO complaint with her employing agency, but not both); 29 C.F.R. § 1614.302(b) (same). Nothing in the EEOC's certification of the class complaint discusses denial of restoration or any other action that may be otherwise appealable to the Board. *McConnell v. Potter*, EEOC DOC 0720080054, 2010 WL 332083 (January 14, 2010). Nor do the claims at issue in *McConnell*, as defined by the EEOC, encompass any such action.[6] *Id*. at *9. Furthermore, the EEOC is not processing *McConnell* as a mixed case. Upon certifying the *McConnell* class, the EEOC remanded the matter to the agency instructing it to request that an administrative judge be appointed to hear the certified class claim. *Id*. at *10. If *McConnell*

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[5] The EEOC administrative judge recommended defining the *McConnell* class as "All 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. 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 administrative judge's recommended decision. *McConnell v. Potter*, EEOC DOC 0720080054, 2010 WL 332083 at *9-*10 (January 14, 2010); *see generally* 29 C.F.R. §§ 1614.204, .403-.405.

[6] The claims at issue in *McConnell* are: (1) The NRP fails to provide a reasonable accommodation; (2) the NRP wrongfully discloses medical information; (3) the NRP creates a hostile work environment; and (4) the NRP has an adverse impact on disabled employees. *McConnell*, 2010 WL 332083 at *9.

were a mixed case, the EEOC would have remanded the matter for further proceedings before the agency without a hearing. *Compare* 29 C.F.R. § 1614.108(f) *with* 29 C.F.R. § 1614.302(d); *see also Throckmorton v. Norton*, EEOC DOC 01A03994, 2003 WL 21145345, *5 (May 6, 2003) (mixed case class complaints are processed the same as mixed case individual complaints). We therefore find that the appellant's alleged membership in the *McConnell* class does not divest the Board of jurisdiction over any aspect of her Board appeal. *See Coleman v. Department of the Treasury*, 22 M.S.P.R. 519, 520-21 (1984) (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. *See Barrett*, 107 M.S.P.R. 688, ¶ 8.

¶16 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 agency's particular 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*, 82 M.S.P.R. 411, ¶¶ 13-15 (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. *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 EEOC 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

¶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. Because the appellant has established Board jurisdiction over her appeal, on remand, the administrative judge shall afford the appellant her 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.