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UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
2009 MSPB 227

Docket No. SF-0353-09-0554-I-1

Elfreda M. Barachina,
Appellant,

v.

United States Postal Service,
Agency.

December 14, 2009

Elfreda M. Barachina, Chino Hills, California, pro se.

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 July 24, 2009 initial decision that dismissed her restoration appeal for lack of jurisdiction. For the reasons set forth below, we DENY the petition, REOPEN the case on our own motion under 5 C.F.R. § 1201.118, REVERSE the initial decision, and REMAND for further adjudication consistent with this Opinion and Order.

BACKGROUND

¶2 The appellant, a non-preference eligible, is employed as a Mail Processing Clerk at the Pasadena Processing and Distribution Center (P&DC). Initial Appeal

File (IAF), Tab 1. On February 6, 1998, she suffered a work-related injury to her right ankle and foot, and on August 21, 2000, the Office of Workers' Compensation Programs accepted her claim for right ankle tendonitis. IAF, Tab 8, Ex. 2. The appellant subsequently returned to work on a limited duty basis. *Id.*, Ex. 5. Her most recent modified assignment, which she accepted in February 2008, included casing mail, performing quality checks on express mail, processing mail on a DBPS¹ machine, and assisting with manual mail dispatches. *Id.*, Ex. 6; IAF, Tab 9, Ex. C. On March 16, 2009, the appellant's examining physician, Duc Thai Ngo, M.D., completed an Industrial Work Status Report finding that the appellant had reached Maximum Medical Improvement (permanent and stationary), and was restricted to standing or walking for no more than 45 minutes at a time, for a total of 4 hours per day, and no climbing, squatting, bending, or twisting. IAF, Tab 8, Ex. 4.

¶13 In early 2009, the agency's Los Angeles, Santa Ana, and Sierra Coastal Districts initiated a National Reassessment Process 2 Pilot Program (NRP 2). IAF, Tab 9, Ex. G. As part of the NRP 2, the agency conducted an evaluation to identify the necessary and productive work in each facility that was not already being performed through a funded position, and then assigned that work to employees with job-related injuries based on their updated medical restrictions. *Id.* Employees who could not be provided with such work were sent home until such work could be identified or their medical restrictions changed. *Id.* Pursuant to the NRP 2 process, the Pasadena P&DC determined that there was no necessary work available in the facility. *Id.*, Ex. H. By letter dated April 8, 2009, the agency directed the appellant not to report to duty until further notice. *Id.*, Ex. I; IAF, Tab 8, Ex. 7. The letter stated, in relevant part:

[A] search for operationally necessary tasks meeting your medical restrictions within your regular hours of duty (tour) and this

¹ We cannot determine from the record what the initials "DBPS" stand for.

office/facility was completed. Based on this search, we were unable to identify any available operationally necessary tasks within your medical restrictions[.]

Id. The agency did not indicate that it had searched for available work elsewhere in the appellant's commuting area.

¶14 On May 7, 2009, the appellant filed this appeal. IAF, Tab 1. The administrative judge (AJ) notified the appellant of the standard for establishing jurisdiction under 5 C.F.R. § 353.304(c), and ordered her to submit evidence and argument on the issue. IAF, Tab 2. In her response, the appellant argued that the NRP 2 process was inconsistent with a 2002 arbitration decision in which the arbitrator interpreted provisions of the agency's Employee and Labor Relations Manual and collective bargaining agreement with the American Postal Workers Union, and found that limited duty rehabilitation assignments were not created for the purpose of meeting the agency's operational needs. IAF, Tab 8, Ex. 10A. The agency moved for dismissal, and also moved to consolidate the appeal with other cases involving similarly situated employees at the Pasadena P&DC. IAF, Tabs 9, 10. The AJ denied the motion to consolidate and dismissed the appeal for lack of jurisdiction, finding that the appellant had failed to make a non-frivolous allegation that the agency acted arbitrarily and capriciously in denying her restoration rights. IAF, Tab 12 (Initial Decision, July 24, 2009).

ANALYSIS

¶15 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), *abrogated on other grounds*, *Garcia v. Department of Homeland Security*, 437 F.3d 1322 (Fed. Cir. 2006); *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 her local commuting area. 5 C.F.R. §§ 353.102, 353.301(d).

¶16 An individual who is partially recovered from a compensable injury may appeal to the Board 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 allege facts that would show, if proven, 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;² and (4) the denial was "arbitrary and capricious." *Tat*, 109 M.S.P.R. 562, ¶ 12; *Barrett v. U.S. Postal Service*, 107 M.S.P.R. 688, ¶ 5 (2008); *Chen v. U.S. Postal Service*, 97 M.S.P.R. 527, ¶ 13 (2004). If an employee makes all the requisite non-frivolous allegations needed to establish Board jurisdiction over her partial restoration appeal, then she is entitled to adjudication of the merits of the appeal, including a hearing if she so requests.³ *Tat*, 109 M.S.P.R. 562, ¶ 12; *Barrett*, 107 M.S.P.R. 688, ¶ 8.

¶17 The record reflects that the appellant has satisfied the first three criteria. Thus, the remaining jurisdictional issue is whether the appellant has made a non-frivolous allegation that the agency's denial of restoration was arbitrary and capricious. We agree with the AJ that the appellant's challenge to the NRP 2 process in general does not constitute a non-frivolous allegation that the agency

² The Board has held that the rescission of restoration rights that were previously granted may constitute a denial of restoration within the meaning of 5 C.F.R. § 353.304. *Brehmer v. U.S. Postal Service*, 106 M.S.P.R. 463, ¶ 9 (2007).

³ In this case, the appellant has withdrawn her request for a hearing. IAF, Tab 6.

acted arbitrarily and capriciously in her particular case. However, the documentary evidence submitted by both parties indicates that the agency searched only the Pasadena P&DC facility for available work, and did not look elsewhere within the appellant's commuting area, as required under 5 C.F.R. § 353.301(d). See IAF, Tab 9, Ex. I; IAF, Tab 8, Ex. 7. Although the appellant has not squarely addressed the issue, we find that the agency's failure to comply with that regulation is sufficient to render non-frivolous her allegation that the agency acted arbitrarily and capriciously in denying her restoration. We therefore conclude that the appellant has met her burden of proof on jurisdiction and is entitled to adjudication on the merits of her restoration appeal. *Id.*; *Tat*, 109 M.S.P.R. 562, ¶ 19; *Barrett*, 107 M.S.P.R. 688, ¶ 8.

ORDER

¶8 Accordingly, we reverse the initial decision and remand the appeal to the Western Regional Office for adjudication of the merits of the appellant's restoration appeal consistent with this Opinion and Order.

FOR THE BOARD:

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

