

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

2010 MSPB 187

Docket No. AT-0353-08-0838-I-2

**Paul Dean,
Appellant,**

v.

**United States Postal Service,
Agency.**

September 14, 2010

Paul Dean, Cape Coral, Florida, pro se.

Jeffrey L. Sheldon, Esquire, Tampa, Florida, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The appellant has filed a petition for review of the initial decision that dismissed his 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](#), and AFFIRM the initial decision as MODIFIED by this Opinion and Order, still DISMISSING the appeal for lack of jurisdiction.

BACKGROUND

¶2 The appellant was an EAS-17 Supervisor of Distribution Operations at the agency's Rochester, New York Processing and Distribution Center (P&DC). Initial Appeal File (IAF), Tab 1 at 1, Tab 3, Subtab 4B. On December 14, 2002, the appellant began suffering from a psychological condition related to derogatory comments that Rochester P&DC employees had made about his fiancée. IAF, Tab 3, Subtab 4P, Tab 7 at 13. The appellant absented himself from work, and the Office of Workers' Compensation Programs (OWCP) ruled the condition compensable. IAF, Tab 3, Subtab 4G at 2, Subtab 4O. The appellant moved to Fort Myers, Florida, in early 2004. IAF, Tab 1 at 27, Tab 7 at 13-14. It is undisputed that the appellant is capable of performing the full range of duties of his position in a location other than the Rochester P&DC; the only work restriction that the appellant has is that he must work in a congenial environment away from the Rochester P&DC. IAF, Tab 7 at 10, 18-21, 24.

¶3 On February 3, 2004, the agency offered the appellant an EAS-17 Supervisor of District Operations position at the Utica, New York P&DC. IAF, Tab 7 at 10. The appellant declined the job offer and OWCP terminated his benefits. IAF, Tab 1 at 36, Tab 7 at 13-14, Tab 9 at 10-11. The appellant appealed the decision to the Employees' Compensation Appeals Board (ECAB), which reversed OWCP's decision and reinstated the appellant's benefits. IAF, Tab 7 at 12, 16. The ECAB found that the agency was aware that the appellant was in the process of relocating to Fort Myers when it offered him the position in Utica, and that the agency was therefore obligated to find him suitable employment in the Fort Myers area, if possible. *Id.* at 15-16.

¶4 On March 30, 2004, the appellant requested restoration to duty in Florida, IAF, Tab 7 at 29, but the agency denied the request on April 28, 2004, stating, "Because you are [a] current employee it does not appear that 'restoration rights' apply in your situation," IAF, Tab 1 at 20. The agency advised the appellant to apply for reassignment instead. *Id.* On October 17, 2004, the appellant again

requested restoration in Florida and explained that he could not avail himself of the agency's electronic reassignment program because he was an EAS employee. IAF, Tab 7 at 30. The record does not contain any agency response.

¶5 It appears that the appellant requested restoration to duty in Florida again in 2007. IAF, Tab 3, Subtab 4N. This request resulted in a job offer on July 10, 2008, at the Fort Myers P&DC, *id.*, Subtab 4L, which the appellant accepted on July 23, 2008, *id.*, Subtab 4K. However, the agency never followed through with the appointment. IAF, Tab 1 at 5. According to the agency, the job offer was in error because "all of Florida was under withholding¹ because of the excessing of bargaining unit positions." IAF, Tab 9 at 7 & n.5.

¶6 On September 9, 2008, the appellant filed a Board appeal, claiming that the agency had improperly denied him restoration.² IAF, Tab 1 at 3, 5. The appellant did not request a hearing. *Id.* at 2. The administrative judge issued an order notifying the appellant of his jurisdictional burden in a restoration appeal as an employee fully recovered after 1 year and as a partially recovered employee. IAF, Tab 6 at 2-3. The parties filed evidence and argument on the issue. IAF, Tabs 3, 7, 9.

¶7 The administrative judge issued an initial decision dismissing the appeal for lack of jurisdiction on the basis that the appellant failed to establish Board jurisdiction over his appeal as an employee fully recovered after 1 year. Refiled Appeal File, Tab 8, Initial Decision (ID) at 1, 4-5. The administrative judge

¹ The agency explained that "withholding" meant no hiring or transfers were possible at the time. IAF, Tab 3, Subtab 1 at 1.

² The appellant also claimed that the agency's action constituted a violation of the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) (codified at [38 U.S.C. §§ 4301-4333](#)). IAF, Tab 1 at 7, 9. However, the appellant subsequently withdrew this claim. IAF, Tab 4 at 3, Tab 6 at 2. The appellant mentions USERRA in his petition for review, but in context, it does not appear that he is attempting to revive his USERRA claim at this time. Petition for Review (PFR) File, Tab 1 at 6.

found that, because the appellant declined the job offer at the Utica P&DC, he failed to make a nonfrivolous allegation that the agency violated his right to priority consideration by hiring another individual. ID at 5.

¶8 The appellant has filed a petition for review, arguing that the Utica, New York, job offer was not in the Fort Myers, Florida, commuting area. PFR File, Tab 1 at 4-5. He argues that there were positions available within the Fort Myers commuting area notwithstanding the alleged “withholding” of bargaining unit positions. *Id.* at 5-7. The appellant has submitted documentary evidence in support of his arguments. *Id.* at 9-16. The agency has not filed a response.

ANALYSIS

¶9 Under regulations issued by Office of Personnel Management (OPM), an employee’s right to file a restoration appeal with the Board differs depending on the extent and timing of his recovery from his compensable injury. *Smith v. U.S. Postal Service*, [81 M.S.P.R. 92](#), ¶ 7 (1999); *see* [5 C.F.R. § 353.304](#); *see also* [5 U.S.C. § 8151\(b\)](#). An employee who fully recovers from his compensable injury more than 1 year after eligibility for compensation begins may appeal to the Board the agency’s failure to afford him priority reconsideration in reemployment. *McFarlane v. U.S. Postal Service*, [110 M.S.P.R. 126](#), ¶¶ 15, 20 (2008); [5 C.F.R. §§ 302.501](#), 353.304(b). An employee who partially recovers from his compensable injury, or who is “physically disqualified”³ and requests restoration more than 1 year after eligibility for compensation begins, may appeal to the Board “for a determination of whether the agency is acting arbitrarily and capriciously in denying restoration.” 5 C.F.R. §§ 353.301(c)-(d), 353.304(c); *see*

³ “Physically disqualified” means that for medical reasons, the employee is unable to perform the duties of his former position or an equivalent one, or there is a medical reason to restrict the employee from some or all essential duties due to possible incapacitation or risk of health impairment, and the condition is considered permanent with little likelihood for improvement or recovery. [5 C.F.R. § 353.102](#).

Bynum v. U.S. Postal Service, [112 M.S.P.R. 403](#), ¶ 8 (2009), *aff'd*, No. 2010-3055, 2010 WL 2600805 (Fed. Cir. June 14, 2010).

¶10 We find that the administrative judge erred in analyzing this case as one involving an employee fully recovered after 1 year. ID at 3-5. Under OPM's regulations, "*Fully recovered* means compensation payments have been terminated on the basis that the employee is able to perform all the duties of the position he or she left or an equivalent one." [5 C.F.R. § 353.102](#). The appellant does not fit this definition because OWCP has not terminated his compensation payments. See *Kravitz v. Department of the Navy*, [98 M.S.P.R. 443](#), ¶ 9 (2005) ("The requirement that OWCP first find an individual to be fully recovered is a prerequisite to a Board finding that an individual is fully recovered."), *overruled on other grounds by Jinn v. Department of Justice*, [106 M.S.P.R. 305](#) (2007), and *Steinmetz v. U.S. Postal Service*, [106 M.S.P.R. 277](#) (2007), *aff'd*, 283 F. App'x 805 (Fed. Cir. 2008). The record contains a letter issued by OWCP after the appellant filed the instant appeal, stating that the appellant continues to suffer from the condition that prevents him from returning to work in the Rochester P&DC and his benefits "will continue on the same basis as in the past." IAF, Tab 3, Subtab 4E.

¶11 Although the record shows that the appellant has not fully recovered from his condition, the medical evidence does not indicate whether he is "partially recovered" or "physically disqualified," i.e., whether he is likely to recover fully from his condition in the future. IAF, Tab 7 at 18-21, 24; see [5 C.F.R. § 353.102](#). Nevertheless, because the appellant first requested restoration more than 1 year after the date his eligibility for compensation began, IAF, Tab 3, Subtab 4O, Tab 7 at 29, he is entitled to the restoration rights accorded partially recovered individuals under [5 C.F.R. § 353.301](#)(d), see *Kravitz v. Department of the Navy*, [104 M.S.P.R. 483](#), ¶ 5 (2007); [5 C.F.R. § 353.301](#)(c) (after 1 year from the date eligibility for compensation begins, a physically disqualified individual is entitled to the restoration rights accorded to individuals who fully or partially recover, as

applicable). Therefore, no matter whether the appellant is partially recovered or physically disqualified, he may appeal to the Board only for a determination of whether the agency is acting arbitrarily and capriciously in denying him restoration.⁴ See *Bynum*, [112 M.S.P.R. 403](#), ¶ 8; *Hankerson v. U.S. Postal Service*, [93 M.S.P.R. 452](#), ¶ 7 (2003); 5 C.F.R. § 353.304(c).

¶12 To establish Board jurisdiction over a restoration claim under [5 C.F.R. § 353.304\(c\)](#), an appellant must make a nonfrivolous allegation 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 of him; (3) the agency denied his 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).

¶13 The record shows that the first three jurisdictional criteria in this case are met. The appellant was, and continues to be absent from his EAS-17 Supervisor of Distribution Operations position due to a compensable injury. IAF, Tab 3, Subtab 4E. He has also recovered sufficiently to return to work within certain limitations. *Id.*, Subtabs 4E, 4H. Furthermore, it is undisputed that the agency has twice denied the appellant's requests for restoration.⁵ IAF, Tab 1 at 5, 20,

⁴ Upon reemployment, a partially recovered employee may also appeal to the Board "the agency's failure to credit time spent on compensation for purposes of rights and benefits based on length of service." [5 C.F.R. § 353.304\(c\)](#); see [5 U.S.C. § 8151\(a\)](#). This basis for appeal is not implicated in the instant appeal.

⁵ To the extent that the appellant is attempting to appeal the April 28, 2004 denial of his request for restoration, his September 9, 2008 appeal appears to be untimely. IAF, Tab 1 at 20; see *Cranston v. U.S. Postal Service*, [106 M.S.P.R. 290](#), ¶ 8 (2007); [5 C.F.R. § 1201.22\(b\)](#) (an appeal must be filed within 30 days of the effective date of the action being appealed or 30 days after the receipt of the agency's decision, whichever is later). However, the appellant never received notice and an opportunity to present evidence and argument to show that the appeal is timely or that good cause existed for the delay. See *Wright v. Department of Transportation*, [99 M.S.P.R. 112](#), ¶ 12 (2005) (an appellant is entitled to clear notice of the precise timeliness issue and a full and fair

Tab 9 at 7 n.5. The remaining question, therefore, is whether the appellant made a nonfrivolous allegation that the denials were arbitrary and capricious.

¶14 The appellant's several requests for restoration, and his rejection of the Utica, New York, job offer, indicated that he was interested only in positions in Florida. IAF, Tab 3, Subtab 4M, Tab 7 at 29-32, Tab 9 at 10-11.⁶ However, for the following reasons, we find that OPM's regulations do not require the agency to attempt restoration outside the appellant's former Rochester, New York, commuting area.

¶15 OPM's regulations set forth the agency's obligation to find work within the appellant's medical restrictions:

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.⁷

opportunity to litigate it). Moreover, the record does not reflect that the agency notified the appellant of his Board appeal rights when it denied his restoration request even though OPM's regulations required it to do so. *See Nevins v. U.S. Postal Service*, [107 M.S.P.R. 595](#), ¶ 20 (2008); [5 C.F.R. § 353.104](#). Under similar circumstances, the Board has found good cause to waive the filing deadline. *E.g.*, *Nevins*, 107 M.S.P.R. 595, ¶ 20; *Cranston*, [106 M.S.P.R. 290](#), ¶¶ 9-14. However, in light of our finding that the appellant has failed to carry his jurisdictional burden, we need not reach the timeliness issue. *See Tardio v. Department of Justice*, [112 M.S.P.R. 371](#), ¶ 30 (2009).

⁶ The Board takes administrative notice that, after he filed the instant appeal, the agency offered the appellant a position in Rochester, New York. That offer is the subject of a separate appeal. *Dean v. U.S. Postal Service*, MSPB Docket No. NY-0353-09-0171-I-1, Initial Appeal at 6-7, 9-11 (Mar. 12, 2009).

⁷ The current version of the Rehabilitation Act may require an agency to search for positions outside the local commuting area. However, notwithstanding this reference to the Rehabilitation Act, an agency's obligation to restore an employee under [5 C.F.R. § 353.301](#)(d) remains limited to the local commuting area. *Sanchez v. U.S. Postal Service*, [114 M.S.P.R. 345](#), ¶¶ 14-18 (2010).

[5 C.F.R. § 353.301](#)(d) (emphasis added). The plain language of the regulation indicates that the “local commuting area” is determined by the location of the individual’s former duty station, rather than by the location of the individual’s current residence. *See generally Lengerich v. Department of the Interior*, [454 F.3d 1367](#), 1370 (Fed. Cir. 2006) (a regulation should be interpreted according to its plain language). Specifically, the regulation refers to “*the* local commuting area.” [5 C.F.R. § 353.301](#)(d) (emphasis added). This language suggests that there is only one local commuting area in a given case, thus implying a fixed location for that commuting area. If OPM intended to make the location of the commuting area contingent upon the location of the individual’s residence at a given time, it would more likely have provided that the agency must attempt restoration “in the *individual’s* local commuting area,” or something to that effect.

¶16 In addition, the Board has “recognized that there is a hierarchy in the area of restoration rights according to the extent of an employee’s recovery,” and that “the geographic area of consideration is greater for fully recovered employees than for partially recovered employees.” *Farrell v. Department of Justice*, [50 M.S.P.R. 504](#), 511 (1991), *overruled on other grounds by Leach v. Department of Commerce*, [61 M.S.P.R. 8](#) (1994). Under [5 C.F.R. § 353.301](#)(b), individuals fully recovered after 1 year are entitled to priority consideration agencywide only if the agency is unable to restore them in their “former commuting area.” To require an agency to attempt to restore a partially recovered individual outside the former local commuting area would afford that individual greater restoration rights than an individual fully recovered after 1 year, and would be inconsistent with the regulatory scheme as a whole. *Lengerich*, 454 F.3d at 1370 (regulations should be interpreted according to their plain language and must be read as a whole).

¶17 Furthermore, in defining the “local commuting area” under [5 C.F.R. § 353.301](#)(d), the Board has found instructive the definition of “local commuting area” found in OPM’s reduction-in-force (RIF) regulations at 5 C.F.R. § 351.203:

Local commuting area means the geographic area that usually constitutes one area for employment purposes. It includes any population center (or two or more neighboring ones) and the surrounding localities in which people live and can reasonably be expected to travel back and forth daily to their usual employment.

See *Sapp v. U.S. Postal Service*, [73 M.S.P.R. 189](#), 193 & n.1 (1997). For purposes of OPM's part 351 RIF regulations, the "local commuting area" is determined with respect to the location of the agency facility in question rather than to the location of the residences of the individual employees who work there. See [5 C.F.R. § 351.402](#)(b) (a RIF competitive area is determined in terms of *the agency's* geographical location and the minimum competitive area is a subdivision of the agency under separate administration within the local commuting area). In *Sapp*, a restoration appeal in which the Board used the RIF regulation's definition of local commuting area, the Board remanded the case for findings on whether "the Santa Ana District [where the appellant had once worked] geographically encompasses the entire local commuting area or whether the local commuting area includes localities outside the Santa Ana District from which the appellant could have commuted to her *former duty station*." *Sapp*, 73 M.S.P.R. at 193-194 (emphasis supplied). Thus, in *Sapp*, the local commuting area was based upon the location of the individual's former duty station.

¶18 In addition, [5 C.F.R. § 353.301](#)(b) refers to 5 C.F.R. part 302 for guidance on how restoration of individuals in the excepted service who have fully recovered after 1 year should be accomplished. The regulatory language in that part indicates that the "commuting area" is determined relative to the agency's facilities – not to individuals' residences. See [5 C.F.R. § 302.303](#)(b)(3) (individuals seeking restoration after compensable injury under this part are "considered in the commuting area *where they last served*") (emphasis supplied); see also *Farrell*, 50 M.S.P.R. at 510-11 (referring to OPM's reemployment priority regulations for guidance on determining the geographical scope of an agency's obligation to search for positions for partially recovered individuals).

¶19 Because the agency was not required to attempt to restore the appellant in his new Florida commuting area, we find that the appellant's arguments on review that the Utica job offer was outside that area and that there were positions available for him in Florida do not establish that the agency's denials of restoration were arbitrary and capricious. PFR File, Tab 1 at 4-7. We also find, for the same reason, that the documentary evidence accompanying the petition for review has no bearing on whether the agency's denials of restoration were arbitrary and capricious. *Id.* at 9-16.

¶20 We acknowledge that the agency's stated reason for denying the appellant's March 30, 2004 restoration request was erroneous, i.e., that because the appellant was not separated from service, restoration rights did not apply to him. IAF, Tab 1 at 20, Tab 7 at 29. It is well settled that an individual need not be separated from federal employment for restoration rights to attach. *See Fitzsimmons v. U.S. Postal Service*, [99 M.S.P.R. 1](#), ¶ 10 (2005); *Wilson v. U.S. Postal Service*, [98 M.S.P.R. 679](#), ¶ 9 & n.* (2005). Nevertheless, because the agency was not required to attempt to restore the appellant to duty outside the local commuting area surrounding his former duty station, its stated reason for not doing so is immaterial to the jurisdictional analysis under the particular facts of this case.

¶21 We also acknowledge a disparity between OPM's restoration regulations at [5 C.F.R. § 353.301\(d\)](#) and the Department of Labor's (DOL) regulations at [20 C.F.R. § 10.508](#) regarding a compensably injured employee's return to work. As explained above, [5 C.F.R. § 353.301\(d\)](#) requires an agency only to attempt to restore a partially recovered individual within the former local commuting area. However, as the ECAB found in the appellant's workers' compensation appeal, [20 C.F.R. § 10.508](#) states that "[i]f possible, the employer should offer suitable reemployment in the location where the employee currently resides." IAF, Tab 7 at 15-16 & n.3. Nevertheless, we find that [20 C.F.R. § 10.508](#) does not affect the geographic area in which an agency is required to attempt restoration under [5 C.F.R. § 353.301\(d\)](#). DOL's regulations pertain to whether an agency has

offered a compensably injured employee suitable work that would warrant the reduction or termination of OWCP benefits. *See* [20 C.F.R. §§ 10.508, .517](#). They do not pertain to an agency’s restoration obligations per se, which are found in a separate set of regulations issued by OPM. 5 C.F.R. part 353, subpart C; *see* [5 U.S.C. § 8151\(b\)](#) (authorizing OPM to issue regulations governing restoration to duty after absence due to compensable injury). Because the appellant has failed to make a nonfrivolous allegation that the denial of restoration was arbitrary and capricious according to the requirements of 5 C.F.R. part 353, subpart C, he has failed to establish Board jurisdiction over his appeal. We therefore affirm the administrative judge’s finding that the Board lacks jurisdiction over the appellant’s restoration appeal.⁸ *See Chen*, [97 M.S.P.R. 527](#), ¶ 20.

ORDER

¶22 This is the final decision of the Merit Systems Protection Board. Title 5 of the Code of Federal Regulations, section 1201.113(c) ([5 C.F.R. § 1201.113\(c\)](#)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit

⁸ Although the appellant does not specifically allege he has been “constructively suspended,” his allegations, broadly construed, could be viewed as raising the issue. For reasons explained in the Board’s recent decision in *Kinglee v. U.S. Postal Service*, [114 M.S.P.R. 473](#), ¶ 22 (2010), we find that any such constructive suspension claim is subsumed in the appellant’s restoration claim. The comprehensive scheme regarding the rights and remedies established by OPM for individuals who partially or fully recover from compensable injuries is sufficient to redress all of the appellant’s restoration claims. *Id.*; *see United States v. Fausto*, [484 U.S. 439](#) (1988).

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The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, [931 F.2d 1544](#) (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 ([5 U.S.C. § 7703](#)). You may read this law, as well as review the Board's regulations and other related material, at our website, <http://www.mspb.gov>. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's [Rules of Practice](#), and Forms [5](#), [6](#), and [11](#).

FOR THE BOARD:

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