UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
NEW YORK FIELD OFFICE

HEE SOOK YOO,
Appellant,

v.

UNITED STATES POSTAL SERVICE,
Agency.

DOCKET NUMBER
NY-0353-09-0224-I-1

DATE: March 8, 2010

Chungsoo J. Lee, Feasterville, Pennsylvania, for the appellant.

Leslie L. Rowe, Esq., New York, New York, for the agency.

BEFORE
JoAnn M. Ruggiero
Administrative Judge

INITIAL DECISION

INTRODUCTION

In an appeal filed on May 12, 2009, Ms. Yoo, a non-preference eligible, alleged that the agency violated her restoration-to-duty rights. *See* Initial Appeal File (IAF), Tab 1. The Board has jurisdiction over the appeal. *See* 5 C.F.R. § 353.304(c). At the appellant's request, I held a hearing. *See* IAF, Tab 42. For the reasons explained below, the agency's action is REVERSED.

ANALYSIS AND FINDINGS

General legal principles

The Federal Employees' Compensation Act and its corresponding regulations at 5 C.F.R. Part 353 provide that federal employees who sustain

compensable injuries have certain rights to be restored to employment. *See* 5 U.S.C. § 8151; *Urena v. United States Postal Service*, MSPB Docket No. SF-0353-09-0650-I-1, slip op. at 3-4 (Dec. 14, 2009). A compensable injury is an injury that the Office of Workers' Compensation Programs (OWCP) of the United States Department of Labor accepts as job related and for which medical monetary benefits are payable from the Employees' Compensation Fund. *See Norwood v. United States Postal Service*, 100 M.S.P.R. 494, 496 (2005).

Employees of the Postal Service are among those who have restoration rights. *See Urena*, slip op. at 4.[1]

The specific obligation of an employing agency under 5 C.F.R. Part 353, Subpart C and the extent of the Board's jurisdiction over restoration claims depend on the extent of the individual's recovery and the amount of time that recovery took. *See Deblock v. United States Postal Service*, 107 M.S.P.R. 90, 93 (2007).

An employee who fully recovers from a compensable injury within one year from the date eligibility for workers' compensation benefits began is entitled to be restored immediately and unconditionally to his or her former position or an equivalent one. *See* 5 U.S.C. § 8151(b)(1); 5 C.F.R. § 353.301(a).

The term "fully recovered" means that workers' 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 the duties of an equivalent one. *See* 5 U.S.C. § 353.102.

An employee whose recovery takes longer than one year from the date eligibility for workers' compensation benefits began is entitled to priority consideration, agencywide, for restoration to the position he or she left or an

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[1] A Postal Service employee who lacks 5 U.S.C. Chapter 75 adverse action appeal rights may have a right of appeal to the Board pursuant to 5 C.F.R. Part 353, Subpart C. *See Norwood*, 100 M.S.P.R. at 496; *Chen v. United States Postal Service*, 97 M.S.P.R. 527, 532 (2004).

equivalent one provided that he or she applies for reappointment within thirty days of cessation of compensation. Priority consideration is accorded by entering the individual's name on the agency's reemployment list. *See* 5 U.S.C. § 8151(b)(2); 5 C.F.R. § 353.301(b).

The term "physically disqualified" means that: (1)(i) for medical reasons, the employee is unable to perform the duties of the position he or she formerly held or an equivalent one or (ii) there is a medical reason to restrict the individual from some or all essential duties because of possible incapacitation or because of risk of health impairment. (2) The condition is considered permanent with little likelihood for improvement or recovery. *See* 5 C.F.R. § 353.102.

An individual who is physically disqualified for the former position or an equivalent one because of a compensable injury is entitled to be placed in another position for which he or she is qualified that will provide him or her with the same status and pay or the nearest approximation thereof consistent with the circumstances in each case. This right is agencywide and applies for a period of one year from the date eligibility for compensation begins. After one year, the individual is entitled to the rights accorded individuals who fully or partially recover, as applicable. *See* 5 C.F.R. § 353.301(c).

The term "partially recovered" refers to an injured employee who—though not ready to resume the full range of his or her regular duties—has recovered sufficiently to return to part-time or light duty or to another position with less demanding physical requirements. Ordinarily, it is expected that a partially recovered employee will fully recover eventually. *See* 5 C.F.R. § 353.102.

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. *See* 5 C.F.R. § 353.301(d).

A request for restoration does not have to be in writing. *See Gerdes v. Department of the Treasury*, 89 M.S.P.R. 500, 504 (2001); *Larsen v. Department of the Interior*, 36 M.S.P.R. 669, 671 (1988).

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. *See* 5 C.F.R. § 353.304(c).

An individual who has been restored to duty after a partial recovery may not appeal the details or circumstances of his or her restoration. *See Urena*, slip op. at 5; *Brehmer v. United States Postal Service*, 106 M.S.P.R. 463, 469 (2007). Under certain circumstances, however, a restoration may be deemed so unreasonable as to amount to a denial of restoration that is within the Board's jurisdiction. *See Gallagher v. United States Postal Service*, 96 M.S.P.R. 677, 680 (2004).

A decision as to the suitability of an offered assignment is within the exclusive domain of OWCP; it is OWCP—not the Board or the employing agency—that has the requisite expertise to evaluate whether the offered assignment is suitable given an employee's particular medical condition. *See McLain v. United States Postal Service*, 82 M.S.P.R. 526, 530 (1999).

An agency's delay in restoring a partially recovered employee may constitute a denial of restoration. *See Taylor v. United States Postal Service*, 69 M.S.P.R. 479, 483 (1996). An agency's rescission of restoration rights that were previously granted may constitute a denial of restoration. *See Urena*, slip op. at 5; *Brehmer*, 106 M.S.P.R. at 469.

An appellant bears the burden of proving by a preponderance of the evidence[2] that the Board has jurisdiction over an appeal of an alleged denial of

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[2] "Preponderance of the evidence" is the degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue. *See* 5 C.F.R. § 1201.56(c)(2).

restoration rights. *See McDonnell v. Department of the Navy*, 84 M.S.P.R. 380, 383-84 (1999).

To establish Board jurisdiction over a restoration claim as a partially recovered employee, an appellant must allege facts that, if proven, would show 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 a position with less demanding physical requirements than those previously required of her; (3) the agency denied her request for restoration; and (4) the denial was arbitrary and capricious. *See Barrett v. United States Postal Service,* 107 M.S.P.R. 688, 690 (2008).

An appellant bears the burden of proving the merits of her restoration claim by a preponderance of the evidence. *See Smith v. United States Postal Service,* MSPB Docket No. SF-0353-09-0202-I-1, slip op. at 4 (Dec. 11, 2009).

Background

The appellant began working for the agency in October 1998. *See* IAF, Tab 5, Subtab 4I. In 2004, she was assigned to the Dominick V. Daniels (DVD) Processing and Distribution Center in Kearney, New Jersey. *See* Hearing Tape (HT) 2A. She was assigned to the position of Mail Processing Clerk, PS-6. *See* IAF, Tab 5, Subtab 4I.

A copy of the position description is in evidence. *Id.,* Tab 36.[3] The duties involve sorting outgoing and/or incoming mail using the appropriate sort program or manual distribution scheme; loading mail onto automated equipment; culling out non-processable items; entering a sort plan and starting the equipment; monitoring the flow of mail to ensure continuous feed; sweeping separated mail

[3] The agency submitted a copy of the description of the PS-5 Mail Processing Clerk position. *See* IAF, Tab 36. Neither party was able to locate a copy of a description for the PS-6 Mail Processing Clerk position, but the parties stipulated that the duties were the same. *See* HT 1A.

from bins/stackers; stopping the equipment when the distribution run or operation is completed; running machine reports; clearing jams in equipment; preparing the work area; removing sorted mail from bins or separations; placing mail into appropriate trays or containers; and carrying out related functions. *See* IAF, Tab 36.

The appellant filed a claim for workers' compensation benefits in 2005. *Id.*, Tab 14. The record indicates that she underwent an MRI (magnetic resonance imaging) of the cervical and lumbar spine on August 25, 2005. She was found to have disc herniations at C4-C5 and C5-C6 and empty sella. *Id.*, Tab 5, Subtab 4J. On September 13, 2005, she underwent an electromyogram and nerve conduction studies. She was found to have bilateral carpal tunnel syndrome and right C6 radiculopathy consistent with double crush syndrome. *Id.*

By letter dated November 16, 2005, OWCP informed the appellant that it accepted the claim for bilateral carpal tunnel syndrome and brachial neuritis/radiculitis. OWCP determined the "date of injury" to be August 1, 2005. *Id.*, Tab 14.

On February 15, 2006, a supervisor named Mary Hughes completed PS Form 2499X "Offer of Modified Assignment (Limited Duty)" for the appellant. The form indicates that the appellant was being assigned manual duties as a full-time clerk in "MMP Letters" (the Manual Mail Processing unit) in the DVD facility. On February 21, 2006, the appellant signed the form and indicated that she accepted the modified assignment. *Id.*, Tab 11, Exhibit 5-7.

In 2007, the agency's National Reassessment Program (NRP) was underway. The purpose of the NRP was to ensure that employees on limited duty were doing work that was operationally necessary as opposed to "make work." *See* HT 5B.

In conjunction with the NRP, a PS Form 2499X was completed for each employee who was on limited duty. *Id.* On April 6, 2007, a supervisor named Arnold Zaffos completed PS Form 2499X for the appellant. The form indicates

that the appellant was being assigned manual duties as a full-time clerk in MMP Letters at DVD. On April 10, 2007, the appellant signed the form and indicated her acceptance of the modified assignment. *See* IAF, Tab 5, Subtab 4L.

On September 6, 2007, the appellant commenced treatment with Hong Sik Pak, M.D. who specializes in physical medicine, rehabilitation, and pain management. On a Form CA-17 "Duty Status Report" dated September 6, 2007, Dr. Pak noted that the appellant complained of hand pain and tingling, neck pain, and shoulder pain. He determined that she was able to work full time, but she had restrictions as to activities such as pushing/pulling, twisting, and reaching above her shoulders. On the form, he stated that the agency should provide her a chair with a back support. *Id.,* Subtab 4A.

On CA-17 forms dated November 6, 2007; February 4, 2008; March 5, 2008; March 17, 2008; and May 15, 2008, Dr. Pak stated that the chair also had to be height adjustable. *Id.*

The appellant testified that due to the severity of her pain and because some of the cases into which she had to pitch mail were very high, she needed a chair with a high back support. *See* HT 2A. It turns out that on her tour (Tour 3), a few of the other limited duty employees in the MMP Letters unit also required "special" chairs. *See* HT 1A.

The appellant testified that from September 2007 to April 2008, she was given the type of chair that she needed. She testified that thereafter, only one special chair was in the MMP Letters unit. She testified that Mr. Zaffos (one of the supervisors) could usually obtain a chair for her from another area, but there were times when she and other limited duty employees were told by supervisors to go to the swing room (the employees' break room) because the special chairs were not available. *See* HT 2A.

In June 2008, the shortage of special chairs led to an altercation between the appellant and an employee named JoAnne Williams. The altercation in turn

resulted in the appellant's non-duty status; the appellant testified that she was "expelled" from the DVD facility. *See* HT 1B, 2A, 2B, 3B, 4A, 4B.

According to the appellant, there was no chair for her on June 16, 2008. The appellant testified that the only appropriate chair—a blue chair with a high back—was being used by Ms. Williams, a limited duty employee in the MMP Letters unit who required a chair with a high back. The appellant testified that Arvester Henry, who was then the manager of Distribution Operations, located a gray chair and told her (the appellant) that she could either use the gray chair or take sick leave. She testified that the gray chair could not provide the support she needed and so she took five hours and thirty-five minutes of sick leave. She testified that she used the gray chair on a previous occasion and had back pain radiating down to her legs. *See* HT 2A.

As the story goes, the appellant arrived early for work on June 17, 2008 and began using the blue chair. She testified that she was unable to locate her time card and requested to have her time entered manually by an acting supervisor. She testified that Ms. Williams confronted her about having "taken" the blue chair. She testified that she (the appellant) was directed to Mr. Henry's office. She testified that Mr. Henry and his secretary, Veronica Sanders, told her that there was no chair for her; there was no work for her; and she would have to leave the building right away. She testified that Mr. Henry denied her request for a union representative and took her identification badge from her. She testified that she asked him when she could return to work and he replied that management would call her when there was work for her. She testified that he said that if she did not leave, he would call the Postal Service police. *Id.*

As she testified, the appellant cried and described having felt humiliated by the way Mr. Henry treated her. She testified that he followed her to the door as she left. *Id.*

Mr. Henry's version of what occurred differed from the appellant's version. According to him, there was no incident on June 17, 2008. He testified that

on June 16, 2008, he heard noise outside his office and became aware of a "commotion." He testified that he saw the appellant and that she was loud and boisterous. He testified that he then learned there was only one special chair in the MMP Letters unit and that two employees (the appellant and Ms. Williams) required special chairs. He testified that he believed that Ms. Williams got the chair because she "punched in" first that day. He testified that his staff could not locate a chair for the appellant, but then he found the gray chair in the security guard shack and had the gray chair brought to the MMP Letters unit. He testified that he and a union representative, Melissa Wembly Jones, reviewed the appellant's Duty Status Reports and concluded that the gray chair was appropriate for the appellant. He testified that the appellant rejected the gray chair. He acknowledged that he did not ask her why. He testified that he told her that she could either use the gray chair or take sick leave and she filled out a form for sick leave. He acknowledged that he took her identification badge and walked her to the door. *See* HT 4A and 4B.

Mr. Henry testified that he took the appellant's badge to prevent her from reentering the building that day so she would not get into "trouble." He testified that his secretary had called Security and that if security guards would have come, he would have had to suspend her. He testified that he had his secretary cancel the call to Security. He testified that as he walked the appellant out of the building, he advised her that if she needed a certain type of chair, her physician should submit a request to the facility's Injury Compensation office. *Id.*

According to Mr. Henry, he did not know that the appellant continued to be in a non-duty status. He testified that a short time after the June 16, 2008 incident, his assignment on Tour 3 was changed and he was no longer involved in the MMP Letters unit. He testified that he did not learn of the appellant's continued absence until he had to appear at a "redress meeting" in February 2009. *See* HT 4A.

Ms. Williams testified that there were not enough chairs for the limited duty employees. She testified that she did not recall the date of the incident that led to the appellant's non-duty status, but there was a dispute about a chair. Ms. Williams testified that she asked the appellant why she had taken the blue chair, and the appellant replied that it was available. Ms. Williams testified that the appellant became "very nasty." *See* HT 1B.

On June 21, 2008, Dr. Pak submitted a CA-17 Duty Status Report to the Injury Compensation office. *See* IAF, Tab 5, Subtab 4A. In a letter dated July 25, 2008, Dr. Pak stated that he diagnosed the appellant as having "posttraumatic persistent cervical and lumbar back pain secondary to disc herniations, cervical sprain, and cervical radiculopathy." He stated that her treatment plan included physical therapy, ultrasound, therapeutic exercises and activities, manual therapy, and the use of non-steroidal medication. He expressed the view that she had permanent injuries which would have a serious impact on her life, but he believed that she could resume a full-time limited duty assignment with the use of "an up and down high back chair." *Id.,* Subtab 4J.

Edgar Brown, the Injury Compensation specialist for DVD, testified that until the appellant filed a claim of recurrence (CA-2a form) dated August 4, 2008, he did not know that she was not working. *See* HT 5A.

The appellant testified that her husband who works at DVD obtained the CA-2a form for her. *See* HT 2B. On the CA-2a form, she did not refer to the altercation that culminated in her non-duty status. *See* IAF, Tab 5, Subtab 4K.

In a letter dated August 20, 2008, Dr. Pak indicated that in addition to the cervical and lumbar back pain, the appellant had bilateral carpal tunnel syndrome, possible lumbosacral radiculopathy, and posttraumatic cephalalgia (headaches). He stated that her hand grip was poor; she had difficulty with hand and finger controls; and she had difficulty with activities such as feeding herself, grooming, and dressing. He stated that the impact on her life and health was serious and he reiterated his view that she sustained permanent injuries. *Id.*, Subtab 4J.

At the request of OWCP, the appellant was examined on October 21, 2008 by Jeffrey Lakin, M.D., an orthopedic surgeon. In a report dated October 21, 2008, Dr. Lakin stated that he diagnosed the appellant's condition as cervical radiculitis and that it appeared to be a direct cause of her August 1, 2005 injury. He stated that she could not perform the regular duties of a Mail Processing Clerk, but she could work full time on limited duty. On a form labeled "Work Capacity Evaluation," he indicated that she had a lifting limit of ten pounds and had restrictions as to pushing, pulling, squatting, kneeling, and reaching above her shoulders. *See* IAF, Tab 19.

On November 14, 2008, OWCP denied the appellant's claim of recurrence. *Id.*, Tab 5, Subtab 4H. However, the denial was reversed in July 2009. *Id.*, Tab 17.

By letter dated December 2, 2008, the appellant sought assistance from Rep. Steven Rothman. She informed Rep. Rothman that she had been on limited duty, but Mr. Henry sent her home on June 16, 2008 and told her there was no work for her. She stated that she wanted to be returned to her limited duty job; she wanted action to be taken against DVD managers and union representatives for discrimination; and she wanted six months of back pay. *Id.*, Tab 11, Exhibit 7.

On December 30, 2008, the appellant filed PS Form 2564-A ("Information for Pre-Complaint Counseling") with the agency's Equal Employment Opportunity (EEO) Contact Center in Tampa, Florida. She alleged discrimination on the basis of her race. She stated that on June 16, 2008, Mr. Henry and Ms. Sanders told her there was no work for her and threatened to call the Postal Service police when she tried to ask about her rights. She stated that Mr. Henry took her identification badge, but no other limited duty employees were sent home. *See* IAF, Tab 11, Exhibit 8.

On January 2, 2009, Dr. Pak submitted a CA-17 form and stated that the agency must provide the appellant a height adjustable chair with a high back support. *Id.*, Exhibit 6-3.

In early January 2009, management at DVD finally realized there was a problem involving the appellant. Anne Caldwell, who served as a team leader for the NRP, testified that she questioned supervisors as to where the appellant was, but did not get any answers. Ms. Caldwell testified that she checked to see if the appellant was receiving "Code 49" pay, i.e., pay through OWCP, and learned that the appellant was instead in a leave without pay status. Ms. Caldwell testified that a new supervisor, Michelle Moore, inquired about the appellant and then sent the appellant a "letter of availability." *See* HT 5B.

At the hearing, the agency submitted a copy of the "letter of availability" which is dated January 7, 2009. In that letter, Ms. Moore stated that the appellant was absent from duty since June 16, 2008. Ms. Moore directed the appellant to submit a leave request to her within five calendar days of receipt of the letter. *See* IAF, Tab 41, Exhibit 3.

The appellant testified that she met with Ms. Moore and a union representative in January 2009 and received an offer of a modified assignment in February 2009. *See* HT 2B.

The offer was prepared by Ms. Caldwell on January 14, 2009. Some of the duties of the proposed assignment required the use of equipment such as the flat sorting machine; some duties involved "belts and racks." *See* IAF, Tab 5, Subtab 4F. On February 2, 2009, Mr. Brown of the Injury Compensation office forwarded the offer to the appellant. *See* IAF, Tab 11, Exhibit 5. In a letter dated February 4, 2009, Dr. Pak stated that he reviewed the offer and determined that the assignment would aggravate the appellant's symptoms and be detrimental to her overall physical and mental health. He requested that she be given her previous limited duty assignment. *Id.*, Tab 5, Subtab 4G. The appellant declined the offer. *Id.*, Subtab 4F. It appears that OWCP did not determine whether the proposed assignment was suitable for her.

On February 9, 2009, the appellant sent a letter to Postmaster General John Potter. She informed him that she had been without pay for eight months.

She stated that Mr. Henry told her on June 16, 2008 there was no work for her; Mr. Henry threatened to call the Postal Service police; and Mr. Henry confiscated her badge. She also informed Mr. Potter that she believed that Asian-American employees at DVD were discriminated against; she could not afford not to work; and she wanted to have her previous limited duty assignment. *See* IAF, Tab 5, Subtab 4B.

In a February 11, 2009 memorandum to a manager named Pamela Zuczek, Mr. Henry provided an explanation of the incident that led to the appellant's non-duty status. He stated that she did not like the chair that he provided. He stated that she caused "a scene" in the office; he gave her the option of using the chair or taking sick leave; she chose to take sick leave; and he advised her that if she needed a specific type of chair, her physician would have to submit a request to the Injury Compensation office. He denied that her race had any role in what happened. *Id.*, Subtab 4E.

On February 20, 2009, the appellant, her daughter, Mr. Henry, and the agency's attorney met with a mediator in connection with the appellant's informal EEO complaint. In a brief handwritten agreement, it was stated that Mr. Henry would facilitate getting the Duty Status Report form appropriately filled out so that the appellant could provide appropriate medical documentation detailing her restrictions; he would assist her in filling out "the appropriate paperwork" for the Department of Labor; upon her submission of updated medical documentation, he would follow up with the Injury Compensation specialist to see if she could receive a new "job offer;" and a meeting with the District Reasonable Accommodation Committee (DRAC) would be scheduled within two weeks. *Id.*, Subtab 4C.

On March 16, 2009, the appellant met with the DRAC. According to her, she requested to be returned to her previous limited duty assignment, but she was not given a response. *Id.*, Tab 11, Exhibit 2.

On April 7, 2009, Fred Hrinuk, the manager of the agency's Human Resources office for the Northern New Jersey district, sent the appellant a letter. Mr. Hrinuk's letter was a response to the letter that the appellant sent Mr. Potter. A review of Mr. Hrinuk's letter indicates that he accepted Mr. Henry's version of how the appellant came to be in a non-duty status and that he (Mr. Hrinuk) did not believe the appellant was discriminated against. He also claimed that she was no longer a limited duty employee; he stated: "You are currently in a light duty status, which means that you have medical restrictions due to a non-job related illness or injury." *See* IAF, Tab 5, Subtab 4B.

On April 29, 2009, the appellant had a hearing with OWCP in connection with her appeal of the denial of her claim of recurrence. At that hearing, she was represented by an attorney. *Id.*, Tab 17.

On May 12, 2009, the appellant filed the instant appeal with the Board's New York Field Office. She stated that June 17, 2008 was the effective date of the action she was appealing and that the agency did not inform her of a right to appeal to the Board. She stated that she had recently learned about the Board from a co-worker. *Id.*, Tab 1.

While the appeal was pending, Jan Miller, Hearing Representative for the director of OWCP, rendered a decision regarding the claim of recurrence. Ms. Miller reversed the November 16, 2008 decision. She stated:

> After review of the medical evidence, I find that it establishes that the cervical radiculitis condition was precipitated by the claimant's employment and should be accepted as a work-related condition. Consequently, the agency should attempt to accommodate the claimant's restrictions with a modified limited duty position, as recommended by Dr. Lakin. In addition, as the medical evidence establishes that the claimant suffered an additional medical condition and a change in the nature and extent of the accepted work-related conditions, the claimant has satisfied her burden of proof that she sustained a recurrence of disability, on or after September 6, 2007 as claimed.

Id., Tab 17.

On August 26, 2009, Mr. Brown sent the appellant an offer of a limited duty assignment. Some of the duties of the proposed assignment required the use of machinery; some duties involved "belts and racks." *See* IAF, Tab 19. On September 4, 2009, the appellant declined the offer on the ground that she would exceed her physical restrictions if she performed the duties. *Id.* OWCP subsequently indicated that the assignment was suitable. *Id.,* Tab 24. However, the appellant requested OWCP to reconsider its determination. She stated that she believed that OWCP made its determination without having certain medical reports she submitted to Mr. Brown. *Id.,* Tab 26.

Mr. Brown testified that OWCP then decided not to act on the proposed assignment because one year had passed since Dr. Lakin issued his report and so OWCP scheduled the appellant for a new examination by Dr. Lakin and an examination by a neurosurgeon. Mr. Brown testified that those examinations were to take place after the hearing in this appeal, and OWCP would then obtain a new report from Dr. Lakin and a report from the neurosurgeon. *See* HT 5A.

Mr. Brown testified that he provided forms for the appellant to file with OWCP for compensation for the period covering her non-duty status. He testified, and the record indicates, that he sent those forms to the attorney who represents the appellant in the OWCP claim. *Id.;* IAF, Tab 41, Exhibit 2.

Ms. Caldwell testified that if the June 2008 incident had not occurred, the appellant would have continued with the same limited duty assignment that she had since 2007. *See* HT 5B. Ms. Williams testified that between June 2008 and the time of the hearing in this appeal, there was no change in the work in the MMP Letters unit. *See* HT 1B.

<u>The agency's argument that the appeal should be dismissed lacks merit</u>.

The agency argued that because the appellant filed an EEO complaint in December 2008, she does not have a right of appeal to the Board. *See* IAF, Tab 5, Subtab 1. I disagree. The EEO complaint was <u>not</u> a formal complaint. *Id.,* Tab 11,

Exhibit 8. Moreover, the agency failed to give the appellant notice of a right to appeal to the Board pursuant to 5 C.F.R. Part 353. Therefore, her filing of the EEO complaint cannot be considered a valid, informed election to go the EEO route.

I further find that there is good cause to waive the Board's thirty-day limit for the filing of an appeal. *See* 5 C.F.R. § 1201.22(c). The agency did not give the appellant notice of the deadline. As I indicated, the agency did not inform her that she even had a right of appeal to the Board.

When she filed her appeal, the appellant stated that she had recently learned of the Board from a co-worker. *See* IAF, Tab 1. Her statement stands unrebutted.

The agency had reason to know that it should provide the appellant with notice of a right of appeal to the Board. She gave credible testimony that she asked Mr. Henry when he escorted her out of DVD when she could return to work and he replied that management would call her. *See* HT 2A. A request for restoration does not have to be in writing. *See Gerdes*, 89 M.S.P.R. at 504. Mr. Henry knew that the appellant wanted to return to her limited duty assignment, but he did nothing. Mr. Henry did not consult with Mr. Brown or any supervisor about the matter. Mr. Henry admitted in his testimony that he did not discuss the matter with anyone at DVD or keep in communication with the appellant. *See* HT 4A. Moreover, even after she wrote to Mr. Potter, the agency did not see fit to inform her that she might have a 5 C.F.R. Part 353 right of appeal to the Board.

<u>The appellant proved by preponderant evidence that her rights as a partially recovered employee were violated.</u>

An agency's delay in restoring a partially recovered employee may constitute an arbitrary and capricious denial of restoration. *See* Taylor, 69 M.S.P.R. at 483. Moreover, 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(c). *See Brehmer,* 106 M.S.P.R. at 469. In the instant appeal, I find that the agency acted arbitrarily and capriciously in denying the appellant restoration.

In a letter dated July 25, 2008, Dr. Pak advised the agency that he believed the appellant could resume a full-time limited duty assignment with the use of "an up and down high back chair." *See* IAF, Tab 5, Subtab 4J. However, months passed. Mr. Henry did not confer with anyone. *See* HT 4A. It was not until January 2009 that a new supervisor, Ms. Moore, began asking questions, and Ms. Caldwell became involved. Ms. Caldwell testified that she questioned supervisors about what occurred, but did not get any answers. *See* HT 5B. It was not until February 2, 2009 that an offer of a limited duty assignment was made to the appellant. *See* IAF, Tab 11, Exhibit 5. In the February 20, 2009 mediation agreement, the agency in effect conceded that the offer was not a viable one. *Id.,* Tab 5, Subtab 4C.

The agency made another offer to the appellant on August 26, 2009. *Id.,* Tab 19. OWCP initially found that offer to be suitable, but then determined that new medical information was necessary. *See* HT 5A. The appellant was still in a non-duty status at the time of the hearing in this appeal. *Id.*

Affirmative defenses

The appellant asserted the affirmative defense of disability discrimination based on a failure to accommodate her condition. She also alleged that the agency discriminated against her on the bases of race and national origin. She stated that she is Asian-American and was born in South Korea. *See* IAF, Tab 11. I informed the parties of the methods by which discrimination can be established. I also informed the parties of their burdens of proof. *Id.,* Tab 28.

Where the record is complete and a hearing has been held, the Board determines whether the appellant has proven her discrimination claim by

preponderant evidence. *See Smith v. Department of the Interior*, 112 M.S.P.R. 173, 181 (2009).

A. *Disability discrimination*

In a disability discrimination case based on a failure to accommodate, the appellant's *prima facie* case consists of a showing that she is a disabled person and that the action being appealed was based on her disability and—to the extent possible—she must articulate a reasonable accommodation under which she believes that she could perform the essential duties of her position or of a vacant funded position to which she could be reassigned. *See Henson v. United States Postal Service*, 110 M.S.P.R. 624, 627 (2009).

Once the agency submits evidence to rebut the appellant's *prima facie* showing of discrimination, the *prima facie* case drops from the case and the appellant bears the ultimate burden of proving that she was the victim of prohibited discrimination. *Id.*

In addressing the ultimate question, the appellant must show that she is a "qualified individual with a disability" before the Board can find that the agency discriminated against her on the basis of a disability. *Id.* at 627-28.

A qualified individual with a disability is an individual with a disability who satisfies the requisite skill, experience, education, and other job requirements of the position she holds and who—with or without reasonable accommodation—can perform the essential functions of such position. *See* 29 C.F.R. § 1630.2(m). Where an employee has performed a modified position for an extended period of time, it is that position which is considered for the purpose of determining whether the employee is a qualified individual with a disability. *See McConnell et al. v. United States Postal Service*, EEOC Appeal No. 0720080054 (Jan. 14, 2010).

A disabled person is one who has a physical or mental impairment that substantially limits one or more of her major life activities or who has a record of

such an impairment or who is regarded as having such an impairment. *See* 29 C.F.R. § 1630.2(g).

The term "major life activities" means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. *See* 29 C.F.R. § 1630.2(i); *Smith,* 112 M.S.P.R. at 181.

A person who is "substantially limited" in a major life activity is unable to perform a major life activity that the average person in the general population can perform or is significantly restricted as to the condition, manner, or duration under which she can perform that major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity. *See* 29 C.F.R. § 1630.2(j)(1).

An agency does not have to provide an accommodation that would cause an undue hardship. *See* 29 C.F.R. § 1630.2(p). In determining whether an accommodation would cause an undue hardship to an agency, the Board considers: (1) the overall size of the agency's program with regard to the number of employees, the number and type of facilities, and size of the budget; (2) the type of agency operation including the nature and composition of the workforce; and (3) the nature and cost of the accommodation. *See Henry v. Department of Veterans Affairs,* 108 M.S.P.R. 458, 463 (2008).

I find that the appellant is substantially limited in the major life activity of performing manual tasks. She testified that because of her condition, she does not cook or do any gardening and had difficulty with items such as buttonholes and with opening jars. She testified, however, that with a chair that has a high back support and is height adjustable, she could continue the limited duty assignment she was given in 2007. The essential function of that assignment was to put mail into letter cases. *See* HT 2A and 2B; IAF, Tab 5, Subtab 4L. In addition to his July 25, 2008 letter, Dr. Pak indicated in Duty Status Reports of July 31, 2008; November 26, 2008; January 2, 2009; February 25, 2009; and May 9, 2009 that

the appellant could perform a limited duty assignment. *See* IAF, Tab 11, Exhibit 6.

Based on my review of the record, I find that the appellant proved that she is a qualified individual with a disability. Moreover, the agency did not show or even allege that providing the type of chair that the appellant requested would have posed an undue burden.

I find that the appellant established her claim of disability discrimination.

B. *Discrimination based on race and national origin*

The appellant is a member of a protected group, but she did not establish that the agency discriminated against her because of her race or national origin. She testified that the agency "kicked out" two Asian-American employees. She testified that Jyoti Shah who had been on limited duty in the MMP Letters unit was placed in another unit and was eventually "kicked out." She also testified that a mail handler named Yi was changed from limited duty to light duty and was eventually "kicked out." *See* HT 2B. The appellant did not call either of those employees to testify. Nor did she present a written statement from either of them.

It turns out that the appellant did not base her claim on any information from either of those employees. The appellant testified that she merely repeated something that she heard from a friend of Ms. Shah and the brother of Ms. Yi. The appellant did not show or even allege that Mr. Henry or anyone else who was involved in her situation had anything to do with the situations involving Ms. Shah or Ms. Yi.

The appellant has pointed out that Mr. Henry and his secretary, Ms. Sanders, are African-American as is Ms. Williams, the employee with whom the appellant had the altercation on June 16, 2008. I do not find, however, that the June 16, 2008 incident and what happened thereafter resulted from discrimination based on the appellant's race or national origin. Rather, I find that

it was the result of a lack of knowledge and a lack of attention to detail. Mr. Henry was not well versed in the issue of restoration rights. He was in the process of having his assignment changed; he did not follow up on the MMP Letters unit; and he did not see to it that anyone else did. Ms. Caldwell testified that the appellant would have remained in her limited duty assignment if the June 16, 2008 incident had not taken place.

DECISION

The agency's action is REVERSED.

ORDER

The agency is hereby directed to restore the appellant to a modified limited duty assignment as a PS-6 Mail Processing Clerk retroactive to June 17, 2008.

I **ORDER** the agency to pay appellant by check or through electronic funds transfer for the appropriate amount of back pay and to adjust benefits with appropriate credits and deductions as required by Postal Service regulations, no later than 60 calendar days after the date this initial decision becomes final. I **ORDER** the appellant to cooperate in good faith with the agency's efforts to compute the amount of back pay and benefits due and to provide all necessary information requested by the agency to help it comply.

If there is a dispute about the amount of back pay due, I **ORDER** the agency to pay appellant by check or through electronic funds transfer for the undisputed amount no later than 60 calendar days after the date this initial decision becomes final. Appellant may then file a petition for enforcement with this office to resolve the disputed amount.

I **ORDER** the agency to inform appellant in writing of all actions taken to comply with the Board's Order and the date on which it believes it has fully complied. If not notified, appellant should ask the agency about its efforts to comply before filing a petition for enforcement with this office.

For agencies whose payroll is administered by either the National Finance Center of the Department of Agriculture (NFC) or the Defense Finance and Accounting Service (DFAS), two lists of the information and documentation necessary to process payments and adjustments resulting from a Board decision are attached. I **ORDER** the agency to timely provide DFAS or NFC with all documentation necessary to process payments and adjustments resulting from the Board's decision in accordance with the attached lists so that payment can be made within the 60-day period set forth above. The checklists are also available on the Board's webpage at http://www.mspb.gov/mspbdecisionspage.html.

INTERIM RELIEF

If a petition for review is filed by either party, I **ORDER** the agency to provide interim relief to the appellant in accordance with 5 U.S.C. § 7701(b)(2)(A). The relief shall be effective as of the date of this decision and will remain in effect until the decision of the Board becomes final.

As part of interim relief, I **ORDER** the agency to restore the appellant to a modified limited duty assignment as a PS-6 Mail Processing Clerk. The appellant shall receive the pay and benefits of this position while any petition for review is pending, even if the agency determines that the appellant's return to or presence in the workplace would be unduly disruptive.

Any petition for review or cross petition for review filed by the agency must be accompanied by a certification that the agency has complied with the interim relief order, either by providing the required interim relief or by satisfying the requirements of 5 U.S.C. § 7701(b)(2)(A)(ii) and (B). If the appellant challenges this certification, the Board will issue an order affording the agency the opportunity to submit evidence of its compliance. If an agency petition or cross petition for review does not include this certification, or if the agency does not provide evidence of compliance in response to the Board's order,

the Board may dismiss the agency's petition or cross petition for review on that basis.

FOR THE BOARD: _____/S/_____
JoAnn M. Ruggiero
Administrative Judge

NOTICE TO PARTIES CONCERNING SETTLEMENT

The date that this initial decision becomes final, which is set forth below, is the last day that the administrative judge may vacate the initial decision in order to accept a settlement agreement into the record. *See* 5 C.F.R. § 1201.112(a)(5).

NOTICE TO APPELLANT

This initial decision will become final on **April 12, 2010** unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if you prove that you received this initial decision more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. You must establish the date on which you received it. The date on which the initial decision becomes final also controls when you can file a petition for review with the Equal Employment Opportunity Commission (EEOC) or with a federal court. The paragraphs that follow tell you how and when to file with the Board, the EEOC, or the federal courts. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition for review must state your objections to the initial

decision, supported by references to applicable laws, regulations, and the record. You must file your petition with:

The Clerk of the Board
Merit Systems Protection Board
1615 M Street, NW
Washington, DC 20419

A petition for review may be filed by mail, facsimile (fax), personal or commercial delivery, or electronic filing. A petition for review submitted by electronic filing must comply with the requirements of 5 C.F.R. § 1201.14, and may only be accomplished at the Board's e-Appeal website (https://e-appeal.mspb.gov).

If you file a petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. Your petition must be filed with the Clerk of the Board no later than the date this initial decision becomes final, or if this initial decision is received by you more than 5 days after the date of issuance, 30 days after the date you actually receive the initial decision. If you claim that you received this decision more than 5 days after its issuance, you have the burden to prove to the Board the date of receipt. You may meet your burden by filing evidence and argument, sworn or under penalty of perjury (*see* 5 C.F.R. Part 1201, Appendix 4) to support your claim. The date of filing by mail is determined by the postmark date. The date of filing by fax or e-mail is the date of submission. The date of filing by personal delivery is the date on which the Board receives the document. The date of filing by commercial delivery is the date the document was delivered to the commercial delivery service. Your petition may be rejected and returned to you if you fail to provide a statement of how you served your petition on the other party. If the petition is filed by e-mail, and the other party has elected e-Filing, including the party in the address portion of the e-mail constitutes a certificate of service.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION REVIEW

If you disagree with the Board's final decision on discrimination, you may obtain further administrative review by filing a petition with the EEOC no later than 30 calendar days after the date this initial decision becomes final. The address of the EEOC is:

Office of Federal Operations
Equal Employment Opportunity Commission
P.O. Box 19848
Washington, D.C. 20036

JUDICIAL REVIEW

If you do not want to file a petition with the EEOC, you may ask for judicial review of both discrimination and nondiscrimination issues by filing a civil action. If you are asserting a claim under the Civil Rights Act or under the Rehabilitation Act, you must file your appeal with the appropriate United States district court as provided in 42 U.S.C. § 2000e-5. If you file a civil action with the court, you must name the head of the agency as the defendant. *See* 42 U.S.C. § 2000e-16(c). To be timely, your civil action under the Civil Rights Act, 42 U.S.C. § 2000e-16(c) must be filed no later than 30 calendar days after the date this initial decision becomes final. If you are asserting a claim under the Age Discrimination in Employment Act, your claim must be filed with the appropriate United States district court as provided in 29 U.S.C. § 633a(c). In some, but not all districts you may have up to 6 years to file such a civil action. *See* 28 U.S.C. § 2401(a).

If you choose not to contest the Board's decision on discrimination, you may ask for judicial review of the nondiscrimination issues by filing a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW
Washington, DC 20439

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be received by the court no later than 60 calendar days after the date this initial decision becomes final.

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.

ENFORCEMENT

If, after the agency has informed you that it has fully complied with this decision, you believe that there has not been full compliance, you may ask the Board to enforce its decision by filing a petition for enforcement with this office, describing specifically the reasons why you believe there is noncompliance. Your petition must include the date and results of any communications regarding compliance, and a statement showing that a copy of the petition was either mailed or hand-delivered to the agency.

Any petition for enforcement must be filed no more than 30 days after the date of service of the agency's notice that it has complied with the decision. If you believe that your petition is filed late, you should include a statement and evidence showing good cause for the delay and a request for an extension of time for filing.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

DFAS CHECKLIST

INFORMATION REQUIRED BY DFAS IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT CASES OR AS ORDERED BY THE MERIT SYSTEMS PROTECTION BOARD

AS CHECKLIST: INFORMATION REQUIRED BY IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT CASES

CIVILIAN PERSONNEL OFFICE MUST NOTIFY CIVILIAN PAYROLL OFFICE VIA COMMAND LETTER WITH THE FOLLOWING:

1. Statement if Unemployment Benefits are to be deducted, with dollar amount, address and POC to send.
2. Statement that employee was counseled concerning Health Benefits and TSP and the election forms if necessary.
3. Statement concerning entitlement to overtime, night differential, shift premium, Sunday Premium, etc, with number of hours and dates for each entitlement.
4. If Back Pay Settlement was prior to conversion to DCPS (Defense Civilian Pay System), a statement certifying any lump sum payment with number of hours and amount paid and/or any severance pay that was paid with dollar amount.
5. Statement if interest is payable with beginning date of accrual.
6. Corrected Time and Attendance if applicable.

ATTACHMENTS TO THE LETTER SHOULD BE AS FOLLOWS:

1. Copy of Settlement Agreement and/or the MSPB Order.
2. Corrected or cancelled SF 50's.
3. Election forms for Health Benefits and/or TSP if applicable.
4. Statement certified to be accurate by the employee which includes:
   a. Outside earnings with copies of W2's or statement from employer.
   b. Statement that employee was ready, willing and able to work during the period.
   c. Statement of erroneous payments employee received such as; lump sum leave, severance pay, VERA/VSIP, retirement annuity payments (if applicable) and if employee withdrew Retirement Funds.
5. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.

USDA UNITED STATES DEPARTMENT OF AGRICULTURE

NATIONAL FINANCE CENTER CHECKLIST FOR BACK PAY CASES

Below is the information/documentation required by National Finance Center to process payments/adjustments agreed on in Back Pay Cases (settlements, restorations) or as ordered by the Merit Systems Protection Board, EEOC, and courts**.**

1. Initiate and submit AD-343 (Payroll/Action Request) with clear and concise information describing what to do in accordance with decision.

2. The following information must be included on AD-343 for Restoration:

a. Employee name and social security number.
b. Detailed explanation of request.
c. Valid agency accounting.
d. Authorized signature (Table 63)
e. If interest is to be included.
f. Check mailing address.
g. Indicate if case is prior to conversion. Computations must be attached.
h. Indicate the amount of Severance and Lump Sum Annual Leave Payment to be collected. (if applicable)

Attachments to AD-343

1. Provide pay entitlement to include Overtime, Night Differential, Shift Premium, Sunday Premium, etc. with number of hours and dates for each entitlement. (if applicable)

2. Copies of SF-50's (Personnel Actions) or list of salary adjustments/changes and amounts.

3. Outside earnings documentation statement from agency.

4. If employee received retirement annuity or unemployment, provide amount and address to return monies.

5. Provide forms for FEGLI, FEHBA, or TSP deductions. (if applicable)

6. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.

7. If employee retires at end of Restoration Period, provide hours of Lump Sum Annual Leave to be paid.

NOTE: If prior to conversion, agency must attach Computation Worksheet by Pay Period and required data in 1-7 above.

The following information must be included on AD-343 for Settlement Cases: (Lump Sum Payment, Correction to Promotion, Wage Grade Increase, FLSA, etc.)

a. Must provide same data as in 2, a-g above.
b. Prior to conversion computation must be provided.
c. Lump Sum amount of Settlement, and if taxable or non-taxable.

If you have any questions or require clarification on the above, please contact NFC's Payroll/Personnel Operations at 504-255-4630.