

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

2010 MSPB 42

Docket No. SF-0752-09-0163-I-1

**Guillermo Mojarro,
Appellant,**

v.

**United States Postal Service,
Agency.**

February 25, 2010

Steve Millard, Covina, California, for the appellant.

Carla Ceballos, 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 filed a petition for review of the initial decision that found that he was constructively suspended and ordered cancellation of that action. For the reasons discussed below, we find that the petition does not meet the criteria for review set forth at [5 C.F.R. § 1201.115](#), and we therefore DENY it. However, we REOPEN this case on our own motion under [5 C.F.R. § 1201.118](#), VACATE the initial decision, and REMAND the appeal to the Western Regional Office for further adjudication consistent with this Opinion and Order.

BACKGROUND

¶2 The appellant, a preference eligible Mail Processing Clerk at the agency's Upland Post Office in Upland, California, filed a December 14, 2008 appeal with the Board that alleged, inter alia, that: the agency improperly terminated his medical and life insurance benefits; improperly denied a 2007 travel expense claim; failed to restore him to duty; committed whistleblower reprisal; denied him his rights under the Veterans Employment Opportunities Act of 1998 (VEOA); and failed to provide him a reasonable accommodation of a medical condition. Initial Appeal File (IAF), Tab 1 at 2, 5-10, 14-15, 17-21. The appellant designated a union official as his representative and requested a hearing in his appeal. *Id.* at 3, IAF, Tab 3 at 1.

¶3 Because it was not clear what actions the appellant was appealing to the Board, the administrative judge issued a show cause order that informed the appellant of his burden and the elements to establish that the Board has VEOA jurisdiction or jurisdiction under the Uniformed Services Employment and Reemployment Rights Act of 1994 (codified at [38 U.S.C. §§ 4301-4333](#)) (USERRA) over his various allegations. IAF, Tab 2 at 2-4. The appellant was also instructed to file evidence, if any, of the nature and status of an Office of Workers' Compensation Programs (OWCP) claim that could give rise to a restoration appeal. *Id.* at 2. The appellant responded to the administrative judge's show cause order. IAF, Tabs 5-6, 9-10, 12-13. In one of those responses, the appellant asserted for the first time that he had been constructively suspended for more than fourteen days because the agency denied his December 9, 2008 request to return to work. IAF, Tab 10 at 7.

¶4 The administrative judge issued a February 4, 2009 Order Regarding Jurisdiction finding that the appellant failed to establish Board jurisdiction over his claims as a restoration appeal, a USERRA appeal, or a VEOA appeal, or over his allegations that the agency: failed to afford him reasonable accommodation; demanded that he pay health benefit premiums and denied him health and life

insurance benefits; and defrauded him of \$500. IAF, Tab 14 at 1. However, based on the appellant's assertion that the agency had not yet returned him to duty despite his December 9, 2008 request, the administrative judge found that the appellant had made a nonfrivolous allegation that the agency had constructively suspended him. *Id.* at 2-3. The administrative judge found that, based on the appellant's nonfrivolous allegation, the Board has adverse action jurisdiction over the constructive suspension appeal, and the administrative judge instructed the agency to submit its file. *Id.* at 3.

¶5 The agency submitted its response file and moved to dismiss the alleged constructive suspension appeal based on its assertion that the appellant failed to make a nonfrivolous allegation of jurisdiction. IAF, Tab 22. The agency subsequently filed a motion to dismiss the appeal as moot, asserting that it had placed the appellant on paid administrative leave retroactively to December 8, 2008. IAF, Tab 34. The administrative judge denied the agency's motion to dismiss the appeal as moot based on his finding that: the retroactive placement of an appellant on administrative leave for the period of a suspension does not return an employee to the status quo ante; a determination of whether the Board has jurisdiction over an appeal is required before considering whether an agency's attempted rescission sufficiently makes the appeal moot; and it is necessary to adjudicate the jurisdictional issue given that the ultimate question in a constructive suspension appeal is whether the Board has jurisdiction. IAF, Tab 35 at 1. The administrative judge informed the appellant of his burden to establish by preponderant evidence that his alleged constructive suspension was involuntary, and the administrative judge scheduled the appellant's requested hearing. *Id.* at 1-2. In an order summarizing the telephonic prehearing conference, the administrative judge stated that the sole issues to be adjudicated were the appellant's constructive suspension and disability discrimination claims. IAF, Tab 42.

¶6 At the commencement of the hearing, the administrative judge stated that the Board has jurisdiction over the appeal and that, under Board case law, it is clear that, under the circumstances, the appellant's absence after December 9, 2008, constituted a constructive suspension. Hearing Compact Disc (HCD), Track 1. The administrative judge informed the parties that the hearing was primarily intended to address the appellant's disability discrimination claim. *Id.*

¶7 Thereafter, the administrative judge issued an initial decision finding that the Board has adverse action jurisdiction over the appeal because the appellant made a nonfrivolous allegation that he was constructively suspended for more than fourteen days. IAF, Tab 46, Initial Decision (ID) at 2-3. The administrative judge found that the appellant's absence from duty from June 14, 2007, through December 9, 2008, was voluntary because the appellant initiated the absence as a result of his anxiety and depressive disorders, but that the appellant's absence after December 9, 2008, when he requested to return to duty, through March 24, 2009, was involuntary and constituted a constructive suspension because the agency denied, for more than fourteen days, the appellant's request to return to work. ID at 3-6. The administrative judge found that the appellant's constructive suspension ended on March 24, 2009, when he failed to cooperate with the agency in obtaining medical documentation to support his request to return to duty.¹ ID at 7. Thus, the administrative judge found that the appellant was constructively suspended for the period of December 9, 2008, through March 24, 2009, and he ordered cancellation of that action for failure to provide the

¹ After the June 5, 2009 initial decision was issued, the appellant filed a new, June 11, 2009 Board appeal claiming that he has been subjected to another constructive suspension because the agency removed him from a paid administrative leave status as of March 25, 2009, the date on which the administrative judge found, in the initial decision in this appeal, that the appellant's absence became voluntary. The administrative judge has dismissed that appeal without prejudice to refiling pending the Board's decision in this appeal. *Mojarro v. U.S. Postal Service*, MSPB Docket No. SF-0752-09-0694-I-1, slip op. at 1, 4 (Initial Decision, Oct. 26, 2009).

appellant with the procedural protections of [5 U.S.C. § 7513\(b\)](#). ID at 6-7. The administrative judge found that the appellant did not prove that the agency's actions were a pretext for disability discrimination. ID at 7-10. The initial decision informed the parties that it would become the final decision of the Board unless one of the parties filed a petition for review prior to or on July 10, 2009. ID at 12.

¶8 The appellant filed an August 5, 2009 petition for review and numerous supplements to his petition for review, including several after the record closed on October 12, 2009.² Petition for Review File (PFRF), Tabs 1-3, 5-14, 16-18. The agency has filed a new designation of representative but has not filed a petition for review or a cross petition for review and it has not responded to the appellant's petition for review. PFRF, Tab 15.

ANALYSIS

¶9 The appellant's petition for review does not establish that new and material evidence is available that, despite due diligence, was not available when the record closed, or that the decision of the administrative judge is based on an erroneous interpretation of statute or regulation. Thus, the appellant's petition for review fails to meet the criteria for review under [5 C.F.R. § 1201.115\(d\)](#), and

² The appellant has filed hundreds of pages of documents on PFR, many of which are duplicative of other documents he has filed on PFR. The Board need not consider these documents because many are part of the record below and/or the appellant has not shown that they were unavailable below despite his due diligence. *See Meier v. Department of the Interior*, [3 M.S.P.R. 247](#), 256 (1980); *Avansino v. U.S. Postal Service*, [3 M.S.P.R. 211](#), 214 (1980). Moreover, the appellant has not shown that the documents dated after the ID was issued on June 5, 2009, pertaining mostly to correspondence between him and the agency and/or physicians concerning his psychiatric fitness-for-duty examination, are material to the outcome of this appeal. *See Russo v. Veterans Administration*, [3 M.S.P.R. 345](#), 349 (1980) (the Board will not grant a PFR based on new evidence absent a showing that it is of sufficient weight to warrant an outcome different from that of the ID).

we therefore deny it.³ See *Tedesco v. Department of the Air Force*, [90 M.S.P.R. 367](#), ¶ 6 (2001). However, we reopen the appeal on our motion, pursuant to [5 C.F.R. § 1201.118](#), to address the administrative judge's finding that the Board has jurisdiction over this appeal because the appellant raised a nonfrivolous allegation that he was constructively suspended for more than fourteen days. See *Giove v. Department of Transportation*, [89 M.S.P.R. 560](#), ¶ 8 (2001) (the issue of jurisdiction is always before the Board and may be raised at any time by either party or sua sponte by the Board), *aff'd*, 50 F. App'x 421 (Fed. Cir. 2002).

¶10 The Board's jurisdiction is not plenary; it is limited to those matters over which it has been given jurisdiction by law, rule or regulation. *Maddox v. Merit Systems Protection Board*, [759 F.2d 9](#), 10 (Fed. Cir. 1985). An employee's absence for more than fourteen days that results in a loss of pay may be a constructive suspension appealable under [5 U.S.C. §§ 7512\(2\)](#) and 7513(d). *Hamiel v. U.S. Postal Service*, [104 M.S.P.R. 497](#), ¶ 4 (2007). Constructive suspension claims generally arise in two situations: (1) when an agency places an employee on enforced leave pending an inquiry into his ability to perform; or (2) when an employee who is absent from work for medical reasons asks to return to work with altered duties, and the agency denies the request. *Sage v. Department of the Army*, [108 M.S.P.R. 398](#), ¶ 5 (2008); *Hamiel*, [104 M.S.P.R. 497](#), ¶ 4. The key question for jurisdictional purposes is whether the employee or the agency initiated the absence; if the absence is involuntary, i.e., at the direction of the agency, then the employee has been constructively suspended, but a voluntary absence is not a constructive suspension. *Mills v. U.S. Postal Service*, [106 M.S.P.R. 441](#), ¶ 6 (2007); *Baker v. U.S. Postal Service*, [71 M.S.P.R. 680](#), 691-92 (1996). However, a voluntary absence that exceeds fourteen days may become a

³ In light of our finding that the appellant's petition for review does not meet the criteria for review under [5 C.F.R. § 1201.115\(d\)](#), we need not address the apparent untimeliness of the appellant's petition for review.

constructive suspension, if an employee who is absent because of a medical condition asks to return to work with altered duties and the agency is legally obligated to offer the employee work within his restrictions. *Tardio v. Department of Justice*, [112 M.S.P.R. 371](#), ¶ 24 (2009); *Johnson v. U.S. Postal Service*, [110 M.S.P.R. 679](#), ¶ 9 (2009). Such an obligation could arise under an agency policy, a regulation, a collective bargaining agreement, or the Rehabilitation Act. *Mills*, [106 M.S.P.R. 441](#), ¶ 6; *Baker*, 71 M.S.P.R. at 692.

¶11 In constructive adverse action appeals, nonfrivolous allegations do not establish jurisdiction; rather, the appellant must prove by preponderant evidence that the action was involuntary to establish Board jurisdiction. *Garcia v. Department of Homeland Security*, [437 F.3d 1322](#), 1325 (Fed. Cir. 2006) (en banc); *Heath v. U.S. Postal Service*, [107 M.S.P.R. 366](#), ¶ 6 (2007). If an appellant raises a nonfrivolous allegation that he was constructively suspended for more than fourteen days, then he is entitled to a hearing, if requested, at which he must prove jurisdiction over his appeal by preponderant evidence. *Sage*, [108 M.S.P.R. 398](#) ¶ 9; *Dones v. U.S. Postal Service*, [107 M.S.P.R. 235](#), ¶ 10 (2007).

¶12 Here, the record shows that the administrative judge issued conflicting findings on the jurisdictional issue. The administrative judge issued a February 4, 2009 order finding that the Board has adverse action jurisdiction over the appeal because the appellant nonfrivolously alleged that he was able to work within certain restrictions, that he communicated his willingness to work to the agency, and that the agency prevented him from returning to work. IAF, Tab 14 at 2-3. However, the administrative judge's April 24, 2009 order indicated that the jurisdictional issue had not yet been decided, but it failed to direct the appellant to submit evidence and argument raising a nonfrivolous allegation that he was constructively suspended for more than fourteen days that would entitle him to a hearing at which he must prove jurisdiction over the appeal by a preponderance of the evidence. IAF, Tab 35. In the May 22, 2009 summary of

the telephonic prehearing conference, the administrative judge made no reference to the issue of Board jurisdiction or to the appellant's burden and the elements to establish jurisdiction over his alleged constructive suspension appeal. IAF, Tab 42.

¶13 Then, at the beginning of the June 4, 2009 telephonic hearing, the administrative judge informed the parties that, as he "previously indicated," the Board has jurisdiction over the appeal and that, under the Board's case law, it is "clear" from the documentary record that the appellant's absence after December 9, 2008, constitutes a constructive suspension; the administrative judge further stated that, based on this finding, the purpose of the hearing was to receive testimony on the appellant's disability discrimination claim. HCD, Track 1. Finally, in the initial decision, the administrative judge found that: the Board has adverse action jurisdiction over the appeal because the appellant made a nonfrivolous allegation of jurisdiction; the appellant was constructively suspended during the period of December 9, 2008 through March 24, 2009; and the appellant was not constructively suspended after March 24, 2009, when he failed to cooperate with the agency in participating in a psychiatric fitness-for-duty (FFD) examination. ID at 6-7.

¶14 Because a nonfrivolous allegation of a constructive suspension does not establish Board jurisdiction over an appeal, the administrative judge erred in finding that the appellant raised a nonfrivolous allegation of a constructive suspension that established jurisdiction over his appeal. *See Garcia*, 437 F.3d at 1325; *Heath*, [107 M.S.P.R. 366](#), ¶ 6. Further, although a finding that an appellant proved by preponderant evidence that his absence from duty was involuntary would establish Board jurisdiction over an appeal of a constructive suspension for more than fourteen days, we find that the record, as currently developed, is insufficient to support the administrative judge's finding that the appellant proved that he was constructively suspended from December 9, 2008, through March 24, 2009.

¶15 Additionally, the administrative judge found that the appellant failed to prove that he was constructively suspended after March 24, 2009, when he failed to cooperate with the agency in a psychiatric FFD examination. ID at 7. Because it appears that the administrative judge made this finding based on the written record, and because the appellant was not specifically afforded an opportunity at his requested hearing to prove jurisdiction over his alleged constructive suspension claim, the administrative judge committed prejudicial error. *See Freeman v. U.S. Postal Service*, [78 M.S.P.R. 665](#), ¶ 6 (1998) (an appellant who makes a nonfrivolous allegation of Board jurisdiction over his alleged constructive suspension appeal is entitled to a jurisdictional hearing if the jurisdictional issue cannot be decided based on the documentary evidence of record and the appellant has requested a hearing).

¶16 In sum, we find that the administrative judge erred by failing to provide the appellant adequate notice and an opportunity to submit evidence and argument that raises a nonfrivolous allegation of an appealable constructive suspension, and by finding that the appellant established Board jurisdiction over his appeal by raising a nonfrivolous allegation and failing to afford the appellant his right to prove, at his requested hearing, that he was constructively suspended. For these reasons, we vacate the initial decision and remand the appeal to the administrative judge for further proceedings as explained below.

¶17 To make a nonfrivolous allegation of jurisdiction over his alleged constructive suspension appeal, the appellant, who was absent from duty from June 2007-December 2008⁴ as a result of anxiety disorder and depressive disorder, must nonfrivolously allege that he: was able to work within certain restrictions; he communicated to the agency his willingness to work; and the

⁴ The appellant asserted below that his absence since June 14, 2007, was caused by the agency and that his “disabilities” were the result of the agency’s “attacks” on him and his family. IAF, Tab 41 at 5, 7.

agency prevented him from returning to work. *See Tardio*, [112 M.S.P.R. 371](#), ¶ 24. The appellant asserted below that, on or about December 8, 2008, he requested to return to duty, but the agency has not allowed him to return to work and it has not disclosed its reason for disallowing his return. IAF, Tab 10 at 7. In support of his assertion, the appellant submitted copies of three letters from Harry Lewis, M.D., dating December 24, 2008, through January 15, 2009, and stating, inter alia, that: he had released the appellant as of December 24, 2008, to return to work without restrictions; the appellant has been treated for depressive disorder; and his prognosis is “good.” IAF, Tab 12 at 2-4.

¶18 The agency asserted below that the appellant did not make a nonfrivolous allegation that he could return to work. IAF, Tab 22 at 9-11. In support of its assertion, the agency submitted documentation showing that, on December 9, 2008, the appellant faxed a letter to the Upland Post Office, his duty station, requesting that he be returned to work in a “[s]tress free, [s]afe, [a]nd [h]umane [w]orking [e]nvironment” at the Ontario Post Office, which he followed with a December 30, 2008 letter stating that he is “ready to return to work” within the “known restriction” for his “foot problems.”⁵ *Id.* at 26-27. The agency asserted that the appellant’s requests regarding his ability to return to work and supporting documentation, including the December 24 and 31, 2008 letters from Dr. Lewis, were inconsistent; additionally, the agency asserted that the appellant’s request to return to duty was submitted shortly after he asserted, in a November 13, 2008 affidavit submitted in support of a civil action he brought against the agency, that he “cannot return to work anywhere within the Postal Service” and that he is “permanently disabled . . . due to an anxiety/depression disorder.” *Id.* at 6-11, 37-38. The agency also submitted the

⁵ The record shows that, on July 30, 2002, the Office of Workers’ Compensation Programs accepted the appellant’s claim for heel spurs and plantar facitis. IAF, Tab 6 at 6.

results of a January 2009 FFD examination it conducted to determine whether the appellant was capable of performing the duties of his position, which revealed, inter alia, that the appellant believes that: he is still disabled and suffers from the same symptoms that necessitated him being absent from work since 2007; after being denied disability retirement,⁶ he has no alternative but to go back to work at the agency; and he would not “last over one week” if he went back to work. *Id.* at 14-24.

¶19 We find that the appellant’s assertions below constitute a nonfrivolous allegation of jurisdiction because he has asserted facts which, if proven, could establish that he was constructively suspended for more than fourteen days when the agency denied his December 2008 request to return to duty. *See Tedesco*, [90 M.S.P.R. 367](#), ¶ 9. Although the agency’s documentation appears to contradict the appellant’s assertions and medical documentation that he was able to return to duty at all or, at least, with or without restrictions, we may not weigh evidence and resolve conflicting assertions of the parties in determining whether an appellant has made a nonfrivolous allegation of jurisdiction entitling him to a hearing, and the agency’s evidence may not be dispositive. *See Ferdon v. U.S. Postal Service*, [60 M.S.P.R. 325](#), 329 (1994). Therefore, because the appellant has made a nonfrivolous allegation of jurisdiction over his alleged constructive suspension of more than fourteen days, it is necessary to remand the appeal to afford the appellant with an opportunity to prove jurisdiction by preponderant evidence.

⁶ On December 1, 2008, the administrative judge issued an initial decision affirming the Office of Personnel Management’s final decision denying the appellant’s November 2007 application for a disability retirement. IAF, Tab 22 at 28-36. That initial decision became the final decision of the Board on March 27, 2009, when the Board denied the appellant’s petition for review. *Mojarro v. Office of Personnel Management*, [111 M.S.P.R. 107](#) (2009) (Table).

¶20 On remand, the administrative judge must inform the appellant of the elements and his burden to establish jurisdiction over his alleged constructive suspension appeal by preponderant evidence. *See, e.g., Tardio*, [112 M.S.P.R. 371](#), ¶¶ 24, 27-29 (where the appellant voluntarily absented himself from duty and then requested to return to duty with specific medical restrictions, the administrative judge erred in finding that the agency placed the appellant on enforced leave pending an inquiry into his ability to perform; instead, the proper inquiry was whether, once the appellant communicated his willingness to work within certain restrictions and the agency denied that request, the agency showed either that there was no work available within the appellant's restrictions, or that it offered such work and the appellant declined it, and if the agency meets that burden, then the appellant must present sufficient rebuttal evidence to meet his overall burden of persuasion). The appellant must be provided with an opportunity to submit evidence and argument on the jurisdictional issue and he must be afforded a jurisdictional hearing at which he must prove jurisdiction over his alleged constructive suspension appeal by preponderant evidence. Given the conflicting information that the appellant submitted to the agency regarding his request to return to duty, the administrative judge must determine whether the appellant is asserting that he is able to perform his position of record with or without restrictions or whether he is asserting that he has requested light duty as a result of his medical restrictions. *See, e.g., Rutherford v. U.S. Postal Service*, [112 M.S.P.R. 570](#), ¶ 20 (2009) (finding it unclear whether the appellant claimed that she could return to perform her position of record or her former light duty position and noting that such an issue is critical because, if the appellant claimed that she could only perform her light duty position and the agency had no light duty work available, then the appellant's absence would not be considered involuntary and the Board would lack jurisdiction over the appellant's alleged constructive suspension appeal); *Dones*, [107 M.S.P.R. 235](#), ¶ 12 (the appellant was not constructively suspended where the agency declined his requests for light

duty because he had failed to submit the medical documentation required by the applicable collective bargaining agreement for requesting a light duty position).

¶21 To ultimately prevail on his constructive suspension claim, the appellant must prove that he was able to perform the full duties of his position of record or that the agency improperly failed to accommodate him with a light-duty assignment.⁷ See, e.g., *Hamiel*, [104 M.S.P.R. 497](#), ¶ 7. If the administrative judge finds that the appellant has met his burden to prove jurisdiction over his appeal, the administrative judge shall adjudicate any affirmative defenses raised by the appellant.

ORDER

¶22 Accordingly, we remand this appeal for further adjudication consistent with this Opinion and Order.

FOR THE BOARD:

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

⁷ In that regard, we note that the agency stated below that it is bound by an applicable collective bargaining agreement “to provide light duty assignments for employees recuperating from an illness or injury” when the requirements for the grant of such request are met. IAF, Tab 22 at 8-9.