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Robert E. Stremcha Appellant, v. William J. Henderson, Postmaster General, United States Postal Service, Agency

Hearing No. 260-96-8156X Appeal No. 01973194 Agency No. 4-I-530-1037-96

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

1998 EEOPUB LEXIS 6232

December 11, 1998

ISSUEDBY: [*1] For the Commission by Frances M. Hart, Executive Officer, Executive Secretariat

OPINION:

DECISION

INTRODUCTION

On March 7, 1997, Robert E. Stremcha (hereinafter referred to as appellant) timely filed an appeal with the Equal Employment Opportunity Commission (Commission) from the final decision of the Postmaster General, United States Postal Service (hereinafter referred to as the agency) received on February 8, 1997, finding that it did not discriminate against him based on his disability (sesamoiditis post lift sesamoid excision of the left great toe). See § 501 of the Rehabilitation Act of 1973, as amended, *29 U.S.C. § 791* et seq. We accept appellant's appeal pursuant to EEOC Order No. 960, as amended. For the reasons that follow, the agency's decision is REVERSED. A portion of this matter is also REMANDED for a supplemental investigation.

ISSUE PRESENTED

The issue presented herein is whether the agency discriminated against appellant on the basis of his disability when beginning approximately January 14, 1995, he was not reasonably accommodated with an available position.

BACKGROUND

Appellant began his agency employment in 1983 as a Letter **[*2]** Carrier. In 1985, he sustained an on-the-job injury which led to the excision of the medial sesamoid bone of the left great toe. Afterwards, appellant had permanent limitations of 2.5 hours of standing, 3 hours of walking, and lifting of 20 pounds (while walking). n1 From 1988 to January 14, 1995, appellant was assigned to a permanent full-time day shift (7:00 a.m. to 4:00 p.m.) position which included a part-time letter carrier route in the agency's Mauston, Wisconsin facility. In January 1995, the agency created an additional full time route in that facility which eliminated appellant's route. From the date of that elimination in January 1995 until August 19, 1995, appellant reported to the Mauston facility for eight hours daily, and was paid for eight hours of work, but was assigned very few, if any, duties. Appellant testified without rebuttal that during this time period, he would ome in to work and sleep in a corner of the facility.

n1 A January 10, 1995 fitness for duty medical documentation clearly indicated that appellant's lifting restriction was in place only while walking in order to protect his foot.

[*3] Agency officials testified generally that there was insufficient work available for appellant within his limitations during this period. There is no indication that agency officials considered reassigning appellant to any specific vacant funded position during this time period. After appellant's lack of work was brought to the attention of the agency's Man-

ager of Postal Operations (MPO), on August 19, 1995, appellant was sent home to collect Office of Workers Compensation Program (OWCP) benefits for eight hours per day. On September 27, 1995, the agency offered appellant the position of Letter Carrier for two hours per day at the Elroy Post office. The agency's job offer listed the same restrictions, indicating that the lifting limitation applied only while walking. Appellant received six hours of OWCP benefits daily. As of November 6, 1995, the MPO noted that based on the geographic location and small postal operations, he had no additional ours to offer appellant. A March 6, 1996 medical evaluation indicated that appellant no longer had any lifting restrictions. The agency thereafter added 3.5 hours of custodial work to appellant's duties and on July 16, 1996, the agency offered **[*4]** appellant the position of Custodian Laborer, PS-03, working from 10:00 p.m. to 6:30 a.m. at the Portage, Wisconsin, facility, with off days of Tuesday and Wednesday, approximately 50 miles from appellant's residence. Appellant rejected the agency's job offer on July 23, 1996, asserting, inter alia, that it was not within his grade level or assigned tour of duty, and was approximately 50 miles from his residence. In light of appellant's refusal of this offer, his last working day was on October 11, 1996.

The record indicates that from January 1995 until July 1996, at least three part time flexible (PTF) clerk positions were created in the Mauston facility. From February 1995 until August 1996, several such positions were filled in other offices within commuting distance of appellant's residence in Elroy, Wisconsin.

On February 15, 1995, appellant filed a formal EEO complaint raising the aforementioned issue. The agency began an investigation, but after 180 days had elapsed, and prior to its completion, appellant requested an administrative hearing. An EEOC Administrative Judge (AJ) conducted the hearing and subsequently issued recommended findings of fact and conclusions of law **[*5]** (RD) finding disability discrimination. In her RD, the AJ found that appellant was an individual with a disability based upon his demonstration that two prior surgeries on his left foot (which included the excision of a medial sesamoid bone resulting in a loss of movement of his big toe) had caused him to sustain permanent restrictions which amounted to a substantial limitation on the major life activity of walking. The AJ found that appellant had continued loss of movement, pain and swelling which became worse with walking and could no longer engage in sporting (roller skating, bwling, volley ball or tennis) or other activities (walking through a mall with his family n2) which required walking for sustained periods of time.

n2 Appellant also cited grocery shopping.

The AJ noted that since appellant could no longer perform the essential functions of his letter carrier position, the agency should have considered reassignment to one of several clerk positions that were vacated after January 1995 in appellant's postal **[*6]** facility and other facilities in the surrounding area. The AJ held that the agency failed to properly consider such reassignments, instead, inappropriately asserting after the fact that such a reassignment to these duties would not be possible because appellant was a full time regular employee, when it was clear that appellant could have been voluntarily permanently reassigned to a PTF clerk position as a reasonable accommodation. The AJ further found that the evidence did not indicate that the agency ever assessed appellant's medical condition to determine whether appellant could be reassigned to the clerk craft, and further held that the testimony provided by agency officials at the hearing t demonstrate after the fact that appellant's limitations would render him unqualified for such positions was not persuasive. The AJ relied on appellant's credible testimony and the nature of his restrictions as demonstrated by the medical evidence to implicitly find that appellant was qualified for such a reassignment. The AJ held that the agency failed to demonstrate that providing appellant with such a reassignment with the reasonable accommodation of permitting him to use a rest bar and/or **[*7]** a stool while accomplishing his duties would impose an undue hardship on its operations. Based on the foregoing, she found that the agency violated the Rehabilitation Act. As relief, she recommended that the agency offer appellant the next available PTF clerk position near his normal work facility, which he could perform with reasonable accommodation. The AJ further recommended that the agency offer appellant back pay and benefits from the time he could have been accommodated with a PTF cerk position until the date that he rejected a reasonable offer of employment with the agency (The Portage, Wisconsin position). Finally, the AJ recommended that appellant receive compensatory damages in an amount to be determined by the parties.

Thereafter, the agency issued its final agency decision (FAD) which rejected the AJ's finding of disability discrimination on the grounds addressed below. It is from this decision that appellant now appeals. On appeal, appellant asserts that the AJ's decision should be upheld, except for the limitation on his back pay. He argues that the agency's job offer to the Portage facility was not a reasonable one and that, therefore, he was not required to accept **[*8]** it in mitigation of

his damages herein. In response to appellant's appeal, the agency asserts that its final decision fully states the agency's position in this matter.

ANALYSIS AND FINDINGS

Initially, we find that the AJ correctly held that appellant's foot impairment rose to the level of a disability under our regulations. See 29 C.F.R. § 1614.203(a)(3). While the agency asserts in its FAD that appellant's impairment does not substantially limit him in walking in comparison with an average member of the population, we disagree. An impairment is substantially limiting when it prevents an individual from performing a major life activity or when it significantly restricts the condition, manner or duration under which an individual can perform a major life activity. 29 C.F.R. § 1630.2(j). The individual's ability to perform the major life activity must be restricted as compared to the ability of the average person in the general population to perform the activity. Id.

Appellant testified at the hearing that he was substantially limited as to the condition, manner and duration under which he could perform both leisure and everyday activities in that he testified that because **[*9]** of the pain and loss of motion in his foot he could no longer participate at all in sports and leisure activities that he used to do such as roller skating, bowling, volleyball, racquetball, or tennis. The average person in the general population is able to engage to some degree in one or more of the foregoing activities. He also testified that his participation in other activities of which average members of the population are capable, such as walking in the mall with his family and grocery shopping, was severely limited because he could not be on his feet that long. Moreover, we observe that appellant's limitations are permanent in duration. Taken as a whole, we agree that appellant's impairment substantially limits him in the major lie activity of walking. See 29 C.F.R. § 1630.2(j). The agency questions the credibility of appellant's hearing testimony regarding his limitations in view of his failure and that of other witnesses to discuss them at the investigative stage. We note, however, that the agency's investigation in this matter was never completed and that the other witness statements were submitted by appellant in an effort to substantiate his request for compensatory **[*10]** damages and therefore do not address the nature of his underlying disability. We find no evidence that the AJ's credibility determinations relative to appellant are in any respect erroneous and therefore defer to such determinations. See *Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474 (1951).*

In addition, the Commission agrees with the AJ's implicit determination that appellant is a "qualified" individual with a disability. A qualified individual with a disability is one who, with or without reasonable accommodation, can perform the essential functions of the position in question. 29 C.F.R. § 1614.203(a)(6). Reassignment is a form of reasonable accommodation. In addition, the term "position in question" is not limited to the position actually held by the employee, but also includes reassignment to funded vacant positions at the employee's current grade or level, or if none, positions at the highest available grade or level below the employee's current grade or level which the employee could perform with or without reasonable accommodation. McKinney v. U.S. Postal Service, EEOC Request No. 05950523 (August 15, 1996). Dudly **[*11]** v. United States Postal Service, EEOC Request No. 05920527 (May 13, 1993). If the appellant comes forwar with plausible reasons to believe that his disability can be accommodated, the agency must show it cannot provide reasonable accommodation without incurring an undue hardship. Id., citing *Prewitt v. United States Postal Service, 662 F.2d 292, 308, 310 (5th Cir. 1981);* 29 C.F.R. § 1614.203(c)(1).

Appellant met this showing by identifying numerous PTF clerk vacancies during the time period from January 1995 until the date on which he was offered the lower pay graded Portage position. The record supports the AJ's determination that the agency improperly failed to afford appropriate consideration to appellant's request for reassignment to such positions. We are not persuaded by the agency's argument in its FAD that it provided reasonable accommodation by merely permitting appellant to report for work for approximately eight months without either providing him substantial duties to accomplish or properly considering him for reassignment to available vacancies. This agency inaction met neither the letter nor the spirit of its reasonable accommodation **[*12]** responsibilities under the Rehabilitation Act. n3 The agency further asserts that it assigned appellant to two hours of work at another facility as of September 1995, added an additional 3.5 hurs of non carrier custodial duties as of June 1996, and ultimately offered him the Portage Custodian Laborer position on July 16, 1996 in complete satisfaction of its Rehabilitation Act responsibilities. As the AJ correctly found, however, the agency did not establish that reassignment of appellant to one of the vacant PTF clerk positions which became available at various postal facilities in the same commuting area would have imposed an undue hardship on its operations.

n3 In support of this claim, the agency cites Johnson v. Dept. of Veterans Affairs, EEOC Petition No. 03960002 (July 1, 1996), a decision in which the Commission observed that relieving an individual from the essential functions of his position and temporarily reassigning him to a light duty position was a form of reasonable accommodation. In Johnson, the agency simultaneously searched for a vacant permanent position to which it could reassign the employee. The temporarily reassigned employee performed productive work in that position and was willing to continue working therein. In contrast, in the present case, no such search was being conducted and appellant was denied almost all productive work for eight months during a time period when vacant positions for which he was qualified were available. Clearly the facts herein are inapposite to those in Johnson.

[*13] The agency further claims that in noting that the Portage reassignment offer did not meet the agency's stated goal to reassign employees with minimal disruption to their craft, work hours and normal duty station, the AJ erroneously found that appellant was entitled to his choice of accommodation. Our review of the AJ's decision and the underlying record does not so indicate. That decision explicitly recognized that the agency had no such obligation. See AJ's RD, p. 10, n.4. In considering reassignment as a reasonable accommodation, the Commission requires that the agency reassign appellant to a vacant position that is equivalent in terms of pay, status, etc., if such a position is available and the appellant is qualified for it. See 29 C.F.R. part § 1630 app., § 1630.2(o) (1997). The AJ properly found that numerous PTF clerk positions were available and that appellant would have been qualified for reassignment to one of them in that e would have been able to perform its essential functions with the reasonable accommodation of a rest bar or stool when performing certain duties. Consequently, the agency's decision to instead wait until July 1996 to offer appellant a non **[*14]** equivalent status position at a pay level two grades below his own, clearly failed to satisfy its Rehabilitation Act responsibilities.

Given our finding that the agency violated the Rehabilitation Act, we next address the relief appropriate in this case. We find that an agency offer of the next available PTF clerk position within a reasonable commuting distance of appellant's residence and with the previously cited reasonable accommodation, is appropriate. We also order training for the officials involved in affording appellant accommodation concerning their Rehabilitation Act responsibilities. We further agree that a back pay and benefit award is appropriate in this case. We do not find, however, that this award is properly terminated as of the date that appellant rejected the Portage position offer. This custodian laborer position is clearly not substantially equivalent to either appellant's former letter carrier position or any of the PTF clerk positions to which he sought reassignment in terms of its grade level, status, schedule, or location. Therefore, appellant was not required to accept such an offr in order to mitigate his pay loss and other harm caused by the agency's discrimination. **[*15]** See *Ford Motor Co. v. EEOC, 458 U.S. 219, 231 (1982).* We have also ordered that the agency conduct a supplemental investigation and issue a final agency decision concerning appellant's entitlement to compensatory damages in this matter.

CONCLUSION

Based upon a review of the record, and for the foregoing reasons, it is the decision of the Commission to REVERSE the agency's finding of no discrimination based upon appellant's disability. The agency is directed to comply with the Commission's Order set forth below. A portion of this matter is also REMANDED for a supplemental investigation into compensatory damages.

ORDER

The agency is ORDERED to take the following remedial actions:

(1) The agency is ORDERED to offer appellant the next available PTF clerk position in the commuting area with reasonable accommodation for his disability and award appellant any back pay, interest, and all other benefits he would have received absent discrimination, as discussed above. The agency shall provide back pay and benefits to appellant for the time period from the date after January 14, 1995 on which the first PTF clerk position became available in the commuting area **[*16]** until the date of his entry on duty in a PTF clerk position with reasonable accommodation or the date of his declination of such an agency offer. The agency shall issue a check to appellant for the appropriate amount of back pay, interest on back pay, and other benefits, under pertinent Office of Personnel Management Regulations, no later than one hundred twenty (120) calendar days after the date this decision becomes final. The appellant is ORDERED to cooperate in the aency's efforts to compute the amount of back pay, interest, and benefits due, and to

provide all necessary information the agency requests to help it comply. If there is a dispute about the amount of back pay, interest due, and/or other benefits, the agency is ORDERED to issue a check to the appellant for the undisputed amount within one hundred twenty (120) calendar days of the date this decision becomes final. The appellant may petition for enforcement or clarification on the amount in dispute. This petition must be sent to the Compliance Officer as referenced in the implementation paragraph below.

(2) The agency shall conduct a supplemental investigation pertaining to appellant's entitlement to compensatory damages. **[*17]** The agency shall afford appellant sixty (60) days to submit additional evidence in support of his claim for compensatory damages. n4 Within thirty (30) days of its receipt of appellant's evidence, the agency shall issue a final decision determining appellant's entitlement to compensatory damages, together with appropriate appeal rights. A copy of the final decision must be submitted to the Compliance Officer, as referenced below.

n4 See, e.g., Carle v. Department of the Navy, EEOC Appeal No. 01922369 (January 5, 1993); Benton v. Department of Defense, EEOC Appeal No. 01932422 (December 10, 1993).

(3) The agency shall provide the MPO, the Senior Injury Compensation Specialist and the Postmasters of the Mauston and Elroy facilities with training regarding their responsibilities under the Rehabilitation Act to consider reassignment as a reasonable accommodation for qualified employees with disabilities.

(4) The agency is ORDERED to post at its Mauston and Elroy, Wisconsin facilities, copies of the attached **[*18]** notice. Copies of the notice, after being signed by the agency's duly authorized representative, shall be posted by the agency within thirty (30) calendar days of the date this decision becomes final, and shall remain posted for sixty (60) consecutive days, in conspicuous places, including all places where notices to employees are customarily posted. The agency shall take reasonable steps to ensure that said notices are not altered, defaced, or covered by any other material. The original signed notice is to be submitted to the Compliance Officer at the address cited in the paragraph entitled "Implementation of the Commission's Decision," within ten (10) calendar days of the expiration of the posting period.

(5) The agency is further directed to submit a report of compliance, as provided in the statement entitled "Implementation of the Commission's Decision." The report shall include evidence that the corrective action has been implemented.

LOAD-DATE: February 2, 1999