66 FLRA No. 42

UNITED STATES
DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
AUSTIN, TEXAS
(Agency)

and

NATIONAL TREASURY
EMPLOYEES UNION
(Union)

0-AR-4060

_____

DECISION

September 30, 2011

_____

Before the Authority: Carol Waller Pope, Chairman, and Thomas M. Beck and Ernest DuBester, Members

I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator Marsha Kelliher filed by the Agency under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Union filed an opposition to the Agency's exceptions.[1]

The Union filed a grievance alleging that the Agency failed to provide a reasonable accommodation for the grievant's disability. The Arbitrator sustained the grievance and ordered the Agency to pay attorney fees and compensatory damages, and to restore any leave that the grievant took as a result of the Agency's failure to provide a reasonable accommodation. For the following reasons, we deny the Agency's exceptions.

[1] The Union also filed a motion to dismiss the Agency's opposition. As the Union failed to request leave under 5 C.F.R. § 2429.26 of the Authority's Regulations to file this supplemental submission, we do not consider the motion. *See AFGE, Council 215*, 66 FLRA 137, 137 n.1 (2011) (rejecting motion to dismiss where moving party failed to request permission to file under § 2429.26).

II. Background and Arbitrator's Award

A. Background

The grievant has been employed by the Agency for over twenty years. Award at 1. The grievant has amblyopia, which has rendered her legally blind in one eye. *Id.* Although the grievant's vision can be corrected with glasses, her vision is at times blurred and lacks depth perception. *Id.* The grievant is sensitive to light and has difficulty reading small print. *Id.* at 9.

The grievance arose out of the grievant's duties as a Peripheral Equipment Operator (Scanner Operator). *Id.* at 1. Scanner Operators in the Agency's Service Center Recognition Image Processing System (SCRIPS) Unit are responsible for transferring the data from taxpayers' documents into the Agency's computer databases. *Id.* This is done by either scanning or transcribing the documents into the Agency's system. Scanner Operators alternatively perform scanning and transcription duties every other day. *Id.* On scanning days, Scanner Operators scan tax documents into the Agency's computer system and review the scanned documents on a SCRIPS terminal for accuracy. *Id.* at 2. On transcription days, Scanner Operators work in the Agency's Integrated Submission Remittance Processing (ISRP) Unit where they manually enter data from tax returns into a computer.

Opportunities to perform scanning work decreased dramatically in 2001. *Id.* Accordingly, Scanner Operators were required to begin performing more data entry and transcription work and other types of work that had not previously been their responsibility. *Id.* The grievant informed her manager that she could not perform the data entry work because it caused her headaches that affected her ability to function during off-duty hours. Although the grievant was given alternative work, she was required to perform the data entry and transcription work when no other work was available. *Id.*

At least two different doctors reviewed the grievant's medical condition. The grievant's doctor provided the grievant with a note in January 2001 so that she could formally notify the Agency of her medical condition. In August of that same year, the grievant's doctor notified the Agency that the grievant was "unable to go to ISRP," which is where the transcription work is performed. *Id.* at 3. In November 2001, the grievant's doctor completed a "Form 238" stating that the grievant requires a job that does not involve "data entry or repeated reading of small print or small size" and that she is "unable to do repetitive, long or close work . . . ." *Id.*

An Agency doctor also provided advice to the Agency. In December 2001, the Agency's doctor suggested that a vocational rehabilitation professional evaluate the grievant's working conditions to determine whether any magnification devices could help her perform her duties. *Id.* at 4. However, a professional evaluation was not done until 2003. *Id.* at 4-6.

To assist the grievant, the Agency provided the grievant with several temporary accommodations during the 2002 and 2003 tax seasons. During the 2002 tax season, the Agency excused the grievant from data entry and transcription work. The grievant was required to return to such work in May 2002. *Id.* at 4-5. During the 2003 tax season, the Agency again exempted the grievant from data entry and transcription work. *Id.*

In March 2003, over two years after receiving notification of the grievant's medical condition, the Agency invited the Texas Commission for the Blind (the Commission) to perform an evaluation of the grievant's working conditions. *Id.* at 5. The Commission found that the grievant had difficulty reading very small print and handwriting, and entering information on the computer screen, and that this activity resulted in significant eyestrain and headaches. *Id.* Consequently, the Commission recommended that the grievant be placed on a non-measured work assignment and that the Agency buy adaptive equipment, including closed circuit televisions, magnifying software, and a nineteen-inch "flat panel LCD monitor" to reduce the grievant's eyestrain and headaches. *Id.* at 5-6.

Some of the accommodations suggested by the Commission arrived in September 2003, with mixed results. Some of the equipment caused the grievant dizziness. *Id.* at 6. Other equipment did not work. *Id.* at 6-7. In addition, some recommended adaptive equipment was not provided. *Id.* at 7. The magnification software called Zoom Text, which was intended to enhance the grievant's ability to use the SCRIPS system, was incompatible with SCRIPS. *Id.* at 23-24. Thus, in October 2003, the grievant was still using the SCRIPS system without any type of magnification. *Id.* When the Commission conducted its follow-up visit in February 2004, it determined that the grievant still had not been provided adaptive equipment at the grievant's SCRIPS workstation and that the SCRIPS screen had "very poor contrast with small, difficult to read text." *Id.* At arbitration, the grievant testified that the resulting eyestrain caused her headaches severe enough to require her to "retreat to a dark room." *Id.* at 9. The grievant further testified that, for periods lasting from one day up to a week, her headaches rendered her unable to sleep, clean the house, go to events with her family, or read to her children. *Id.*

Based on the Commission's 2004 follow-up report, the Agency took the grievant off duties using the SCRIPS system, allowed her extra scan time, permitted her to perform transcription work in two hour increments using adaptive equipment, and allowed her to perform alternative work when there was no other transcription work available. *Id.* at 7.

The grievant obtained a new position as a Tax Examiner in May 2004. *Id.* at 23. At that time, she raised her vision problem with her new supervisor. All accommodations recommended by the Commission were finally provided in May 2005. *Id.* at 9.

The grievance alleged that the Agency did not make reasonable, effective, or timely accommodations for the grievant's alleged disability and that the accommodations that were attempted were contrary to medical recommendations.

B. Arbitrator's Award

As relevant here, the issue to be decided by the Arbitrator was whether the Agency discriminated against the grievant by failing to reasonably accommodate her disability in violation of the Rehabilitation Act of 1973, 29 U.S.C. § 701 (2000). *Id.* at 19.[2]

In deciding the issue, the Arbitrator first rejected the Agency's contention that the grievant did not make a prima facie case of discrimination by failing to demonstrate that she has a disability within the meaning of the Rehabilitation Act.[3] *Id.* at 20-22. Rather, the

[2] Other issues resolved by the Arbitrator were: (1) Whether the grievance was filed within forty-five days of a "triggering event?" (2) Whether allegations of discrimination that occurred after the grievant was hired into a new position are substantially arbitrable? (3) Whether the Agency discriminated against the grievant by creating a hostile work environment? (4) Whether the Agency discriminated against the grievant by improperly disclosing her medical information? Award at 18-19. The Arbitrator determined that the grievance was timely filed within forty-five days of a triggering event. *Id.* at 18. She further found that allegations of discrimination that occurred after the grievant was hired into a new position were substantially arbitrable. *Id.* at 19. In addition, the Arbitrator determined that the record evidence did not support the grievant's hostile work environment claim. *Id.* at 25-26. The Arbitrator also found that the Union did not show that the Agency discriminated against the grievant by improperly disclosing her medical information. *Id.* at 24-25.

[3] The Arbitrator noted that the Agency failed to argue that the grievant was not disabled within the meaning of the Rehabilitation Act prior to arbitration, and that Article 41 of the parties' agreement prohibits parties from raising new issues at arbitration that were not raised at Step 2 of the grievance process. Award at 21. However, the Arbitrator made no formal finding that Article 41 precluded the Agency from making the claim. As the Agency does not except to this part of the award, we will not address it further.

Arbitrator concluded that the Agency had not presented any basis for contesting the Union's evidence concerning the grievant's disability. *See id.* at 22. The Arbitrator found that "the Agency, through its actions and admissions, established the [g]rievant was a person with a disability who was entitled to accommodation under the Act." *Id.* Finding that "[a]s a result, an analysis of the evidence and arguments proffered by the Union . . . would be redundant," *id.*, the Arbitrator credited the uncontested evidence as presented by the Union to demonstrate that the grievant is disabled within the meaning of the Rehabilitation Act. *See id.*

This evidence included the grievant's own testimony about her difficulty seeing and headaches affecting her life as a result of performing data entry and transcription work. *Id.* at 3, 9. In addition, the grievant's husband testified that the transcription work caused the grievant to suffer from headaches two or three times per week, which caused her to become irritable and affected "their intimacy, ability to relate as spouses, ability to go out, and their ability to entertain." *Id.* at 3. The grievant's husband further testified that, when the grievant had headaches, she did not cook, clean the house, attend her children's sporting events, or sleep. *Id.* Further, the record reflected that both the grievant's and the Agency's doctors recommended that the grievant spend as much time as possible on the scanning work while limiting her performance of data entry or transcription work, which required repeated reading of small print size. *Id.* at 3-4. Other witnesses provided corroborating testimony. *See id.* at 9, 11, 14, 16.

The Arbitrator next considered whether the Agency provided the grievant with a reasonable accommodation under the Rehabilitation Act. The Arbitrator concluded that the Agency's delay in providing the grievant with a reasonable accommodation violated the Act. Specifically, the Arbitrator found unreasonable the Agency's delay in: (1) providing the grievant with more scanning time; (2) evaluating the grievant's worksite to determine whether adaptive equipment was needed; and (3) installing the adaptive equipment. *Id.* at 22-23. Consequently, the Arbitrator determined that, although each of these incidents, as discrete events, may not have risen to the level of a violation of the Rehabilitation Act, the Agency's actions "when viewed in their entirety reflect a failure to reasonably accommodate the [g]rievant . . . ." *Id.* at 23.

The Arbitrator also found that the Agency was required to comply with Section 508 of the Rehabilitation Act.[4] Section 508 requires agencies to ensure that employees with disabilities have equal access to, and use of, information and data communicated through electronic and information technology (EIT). The Arbitrator found that Section 508 applies to contracts awarded on or after Section 508's June 2001 effective date. *Id.* Undisputed record testimony, which the Arbitrator did not discredit, demonstrated that, although the Agency began using SCRIPS technology well before Section 508's effective date, the Zoom Text adaptive equipment to be used with SCRIPS was ordered in 2003, after Section 508's effective date. *Id.* at 6, 23. Further, the Arbitrator found that "it took years before Zoom Text and SCRIPS became compatible and that the incompatibility affected at least one other employee who was visually impaired." *Id.* at 24. The Arbitrator concluded that, although the Agency knew that it needed to comply with Section 508, it did not take measures to do so until after much delay. Accordingly, due to the Agency's failure to make both SCRIPS and Zoom Text operational for the grievant's use for years, the Arbitrator determined that the Agency violated Section 508. *Id.*

The Arbitrator awarded the grievant a remedy under the Rehabilitation Act. The Arbitrator directed the Agency to pay the grievant $35,000 in compensatory damages and restore her leave where it was taken as a result of the Agency's failure to provide a reasonable accommodation and the need for a reasonable accommodation was substantiated by medical documentation. *Id.* at first unnumbered page, 27-28. The Arbitrator concluded that the Union was entitled to attorney fees under Section 508 and the parties' agreement and ordered the Agency to pay 75% of those fees. *Id.* at 26.

III. Positions of the Parties

A. Agency's Exceptions

The Agency's exceptions present three arguments. First, the Agency argues that the Arbitrator erred because she failed to require the grievant to make a prima facie case of discrimination by demonstrating that she has an actual disability within the meaning of the Rehabilitation Act. Exceptions at 12. According to the Agency, "without a finding that the [g]rievant in fact

[4] Section 508 provides, in pertinent part:

> When developing, procuring, maintaining, or using electronic and information technology, each Federal department or agency, . . . shall ensure, unless an undue burden would be imposed on the department or agency, that the electronic and information technology allows, regardless of the type of medium of the technology--
>
> (i) individuals with disabilities who are Federal employees to have access to and use of information and data that is comparable to the access to and use of the information and data by Federal employees who are not individuals with disabilities[.]

29 U.S.C. § 794d (2000).

suffers from a qualifying disability, there is no legal basis for a finding that the Agency failed to reasonably accommodate the [g]rievant." *Id.* at 13.

Specifically, the Agency contends that the Arbitrator did not require the grievant to demonstrate that her "visual impairment" substantially limited her in a major life activity. *Id.* at 15. The Agency claims that the grievant has not shown that she is limited in the major life activities of "working" and/or "seeing." *Id.* at 15, 21. With regard to the major life activity of "working," the Agency contends that the grievant did not show that she is "'significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities.'" *Id.* at 21-22 (quoting 29 C.F.R. § 1630.2(j)(3)[i]). According to the Agency, the grievant merely demonstrated that she is limited "in a small percentage of her overall job position" and not that she is unable to perform a broad range of jobs. *Id.* at 22. With regard to the major life activity of "seeing," the Agency contends that the facts in the record do not indicate that the grievant's impairment prevents or severely restricts the use of her eyesight in comparison with persons without the impairment. *Id.* at 17-21. As such, in the Agency's view, the grievant is not substantially limited in the major life activities of working and/or seeing and failed to demonstrate that she is a qualified individual with a disability.

Second, the Agency claims that the Arbitrator mistakenly based her determination that the grievant is entitled to a reasonable accommodation on a finding that the grievant was "regarded as" having a disability by the Agency within the meaning of the Rehabilitation Act. *Id.* at 3, 13, 23-30. The Agency argues that the Arbitrator erred in making this determination because it is based on the Agency's "attempts at providing the [g]rievant with accommodations for her medical conditions[.]" *Id.* at 24. According to the Agency, just because it attempted to accommodate the grievant does not mean that the grievant was legally "regarded as" disabled under the Rehabilitation Act. *Id.* at 24-27. Moreover, the Agency argues, employers do not need to provide a reasonable accommodation in "regarded as" cases. *Id.* at 27-30.

Third, the Agency claims that the Arbitrator erred in finding that it is not in compliance with Section 508 of the Rehabilitation Act. According to the Agency, it is not required to comply with Section 508 because: (1) to bring a claim under Section 508, an individual must have a disability and the grievant is not disabled; and (2) Section 508 only applies to EIT that is procured not less than six months after the date Section 508 became enforceable and SCRIPS was procured well before Section 508 went into effect. *Id.* at 31-32. Based on the foregoing, the Agency requests that the Authority reverse the Arbitrator's award of compensatory damages, attorney fees, and the restoration of the grievant's leave. *Id.* at 34.

B. Union's Opposition

In its opposition, the Union asserts that the Agency's exceptions constitute mere disagreement with the Arbitrator's factual findings and legal determinations. The Union presents two arguments. The Union contends that the Arbitrator cited the correct legal standard in finding that the grievant is a qualified individual with a disability and, based upon uncontradicted evidence in the record, properly held that the Agency failed to reasonably accommodate the grievant. Opp'n at 2-6 (citing Award at 19-22). The Union states that the Agency does not rebut the evidence relied upon by the Arbitrator showing that the grievant is a qualified individual with a disability because she is substantially limited in one or more major life activities. *Id.* at 6-7. The Union also argues that, contrary to the Agency's claim, the Arbitrator did not mistakenly determine that the grievant is entitled to an accommodation merely because she was "regarded as" having a disability by the Agency under the Rehabilitation Act. *Id.* at 6.

IV. Analysis and Conclusions

The Agency claims that the award is contrary to law because the Arbitrator: (1) failed to require the Union to establish a prima facie case of discrimination by demonstrating that the grievant has an actual disability within the meaning of the Rehabilitation Act, Exceptions at 12-22; (2) mistakenly determined that the grievant is entitled to a reasonable accommodation because she was "regarded as" having a disability by the Agency under the Rehabilitation Act, *id.* at 23-30; and (3) erred in finding that the Agency violated Section 508 of the Rehabilitation Act, *id.* at 31-34.

When exceptions involve an award's consistency with law, the Authority reviews any question of law raised by the exceptions and the award de novo. *See NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)). In applying the standard of de novo review, the Authority assesses whether an arbitrator's legal conclusions are consistent with the applicable standard of law. *See U.S. Dep't of Def., Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998) (*Army*). In making that assessment, the Authority defers to the arbitrator's underlying factual findings. *See id.*

A. The Arbitrator's determination that the grievant is a qualified individual with a disability under Section 504 of the Rehabilitation Act is not contrary to law.[5]

To establish a prima facie case of discrimination under the Rehabilitation Act, a grievant must show that he or she: (1) has a disability within the meaning of the Rehabilitation Act; (2) is qualified to perform the essential functions of the position in question, with or without a reasonable accommodation; and (3) was discriminated against because of his or her disability.[6] *See U.S. Dep't of the Army, Corps of Engr's, Huntington Dist., Huntington, W. Va.*, 59 FLRA 793, 797 (2004) (citing *U.S. Dep't of the Treasury, Internal Revenue Serv., Austin Serv. Ctr.*, 58 FLRA 546, 547-48 (2003)).

At the time relevant to this case,[7] the Rehabilitation Act defined an "individual with a disability" as "any person who -- (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities[.]" 29 U.S.C. § 705(20)(B)(i). In the Agency's view, the grievant did not demonstrate that her medical condition substantially limited her in the major life activity of working and/or seeing. Accordingly, the Agency argues, as one of the three elements required to establish a prima facie case of discrimination has not been met, the Agency should not be required to provide the grievant with a reasonable accommodation. Exceptions at 12-13.

1. The Arbitrator appropriately found that the grievant has a physical or mental impairment which substantially limits one or more of her major life activities under the Rehabilitation Act.

There is no dispute concerning what is required under the Rehabilitation Act to demonstrate that an individual is substantially limited in a major life activity. Under 29 C.F.R. § 1630.2(j), an impairment is "substantially limit[ing]" 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. An 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.* Whether a grievant is "substantially limited in a major life activity" is dependent upon "(i) [t]he nature and severity of the impairment; (ii) [t]he duration . . . of the impairment; and (iii) [t]he permanent or long[-]term impact . . . of[,] or resulting from[,] the impairment." 29 C.F.R. § 1630.2 (j)(2). "Major life activities" include caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. 29 C.F.R. § 1630.2(i). A grievant is substantially limited in the major life activity of "working" when he or she is "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities." 29 C.F.R. § 1630.2(j)(3)(i). The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working. *Id*.

[5] Chairman Pope agrees to deny this exception, but for reasons different from the majority's. In this regard, Chairman Pope notes the Arbitrator's findings that: (1) Article 41 of the parties' agreement "prohibits the parties from raising new issues at arbitration that were not raised at Step 2 of the grievance procedure unless they have agreed to do so"; (2) "[a]t no time during the grievance process did the Agency assert that the [g]rievant was not a 'qualified individual with a disability'"; and, consequently, (3) "[t]o now argue that the Agency has not conceded that the [g]rievant had a disability . . . lacks credibility." Award at 21. In Chairman Pope's view, these findings constitute a procedural-arbitrability determination that the Agency failed to timely raise a claim that the grievant is not a qualified individual with a disability. *See, e.g., AFGE, Local 3438*, 65 FLRA 2, 3 (2010) (an arbitrator's timeliness determination is a procedural-arbitrability ruling). As this determination provides a separate and independent basis for the award, and the Agency has not demonstrated that this determination is deficient, Chairman Pope would deny the exception on that basis. *See, e.g., AFGE, Local 3428*, 66 FLRA 156, 157-58 (2011). Chairman Pope also notes that this case is distinguishable from the U.S. Court of Appeals for the D.C. Circuit's recent decision in *Federal Bureau of Prisons v. FLRA*, No. 10-1089, 2011 WL 2652437 (D.C. Cir. July 8, 2011), *granting petition for review of United States Department of Justice, Federal Bureau of Prisons, Washington, D.C.*, 64 FLRA 559 (2010) (*BOP*). There, the court rejected the Authority's conclusion that an award was based on separate and independent grounds, finding that the award made no distinction between "the purportedly 'separate' statutory and contractual grounds for the award." *BOP* at *6. Here, by contrast, the Arbitrator clearly distinguished the different rationales on which she based her award. *See* Award at 21.

[6] The standards required to determine the existence of a violation under the Rehabilitation Act are the same as those established under the American with Disabilities Act (ADA). *See* 29 U.S.C. §§ 791(g), 794(d); 42 U.S.C. § 12112. Accordingly, regulations that implement the ADA also apply in Rehabilitation Act cases. *See* 29 C.F.R. pt. 1630. On September 25, 2008, Congress amended the ADA (ADA Amendments of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008)), effective January 1, 2009. Courts have concluded that such amendments cannot be applied retroactively to conduct that preceded the effective date. *See Moran v. Premier Educ. Group*, 599 F. Supp. 2d 263, 271 (U.S. D. Conn. 2009) (citing *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994) and *Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 37 (2006)). As the conduct in this case preceded the ADA amendments, those amendments do not apply here.

[7] *See supra* note 6.

The Union's evidence as set forth at arbitration, which was not contested by the Agency or discredited by the Arbitrator, forms the basis for the Arbitrator's conclusion that the grievant has a disability within the meaning of the Rehabilitation Act. *See* Award at 22. The testimonial evidence provided by the grievant and other witnesses explained the extent and impact of the limitations that the grievant's impairment has on her major life activity of working. *Id.* at 2. The evidence identified by the Arbitrator and included in the award shows that, as a result of performing data entry and transcription work, which at any given time comprised at least half of the grievant's duties, the grievant suffered from headaches, eyestrain, and dizziness that substantially limited her ability to perform her job. *Id.* at 3, 5, 6, 9.

Moreover, both the grievant's and the Agency's doctors recommended that the grievant spend as much time as possible on scanning work while limiting her duties performing data entry or transcription work, which required repeated reading of small print size. Specifically, the grievant's doctor recommended that the Agency limit the grievant's time spent performing transcription and data entry work. *Id.* at 3. The Agency's doctor recommended that the Agency modify the grievant's work so that she could "spend as much time scanning as possible." *Id.* at 4. The record does not show that other employees with comparable training, skills, and abilities experienced similar limitations restricting them from performing the transcription and data entry work.

In sum, as found by the Arbitrator, the facts demonstrate that the grievant's symptoms that resulted from her performing data entry and transcription work "significantly restricted" her ability "to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities."[8] *See* 29 C.F.R. § 1630.2(j)(3)(i). Accordingly, as we defer to arbitrators' factual findings, *see Army*, 55 FLRA at 40, we find that the Agency has failed to establish that the Arbitrator erred when she found that the grievant has a disability within the meaning of the Rehabilitation Act.

2. The Arbitrator did not mistakenly determine that the grievant is entitled to a reasonable accommodation because she was "regarded as" having a disability by the Agency under the Rehabilitation Act.

The Agency also claims that the Arbitrator mistakenly determined that the grievant is entitled to a reasonable accommodation because she was "regarded as" having a disability by the Agency. Exceptions at 23-30. The Agency argues that employers are not required to provide a reasonable accommodation in "regarded as" cases. *Id.* at 28. As discussed in section V.A.1., *supra*, the Arbitrator based her conclusion that the grievant is entitled to a reasonable accommodation on evidence of the grievant's disability. In this regard, the Arbitrator determined that the grievant has a physical or mental impairment that substantially limits one or more of her major live activities under 29 U.S.C. § 705(20)(B)(i). Because this determination is a legally sufficient basis for the award, we find that it is unnecessary to resolve the Agency's claim that the award is deficient because employers are not required to provide a reasonable accommodation merely because an individual is "regarded as" having a disability.

B. The Arbitrator's conclusion that the Agency violated Section 508 of the Rehabilitation Act is not contrary to law.

Section 508 requires agencies to ensure that employees with disabilities have equal access to, and use of, information and data communicated through EIT, when the agencies procure, develop, maintain or use that EIT. *See* 29 U.S.C. § 794d(a)(1)(A).[9] Section 508 only applies to EIT that is "procured by a Federal department or agency not less than six months after the date" Section 508 became enforceable. 29 U.S.C. § 794d(f)(1)(B).[10]

The Agency claims that Section 508's requirements do not apply to SCRIPS technology because SCRIPS was procured before Section 508 became effective in 2001. However, even assuming this to be true, the undisputed facts in the record demonstrate that, in order for the grievant to adequately perform her work

[8] As the Rehabilitation Act requires only that there be a substantial limitation in one major life activity, we decline to address the Agency's claim that the grievant did not show that she is substantially limited in the major life activity of "seeing."

[9] 29 U.S.C. § 794d(a)(1)(A) is set forth in pertinent part *supra* note 4.

[10] 29 U.S.C. § 794d(f)(1)(B) provides, in pertinent part: "This subsection shall apply only to electronic and information technology that is procured by a Federal department or agency not less than 6 months after the date of publication by the Access Board of final standards described in subsection (a)(2) of this section."

using SCRIPS, she needed adaptive equipment. Award at 6. Section 508 requires an agency to ensure that its procurement of EIT allows employees with disabilities to "have access to and use of information and data that is comparable to the access to and use of the information and data by Federal employees who are not individuals with disabilities." 29 U.S.C. § 794d(a)(1)(A). Accordingly, the Agency's Section 508 liability is not necessarily limited to SCRIPS, but also includes any EIT that would provide the grievant with access to SCRIPS that is comparable to that of employees without disabilities. Such EIT would include adaptive equipment.

The Arbitrator found that in 2003, approximately two years after Section 508's effective date, the Agency ordered adaptive equipment necessary for the grievant to access and use SCRIPS. *See* Award at 6, 23. This adaptive equipment included the Zoom Text magnification software. Because of the date it was procured, there is no issue that this magnification software is subject to the requirements of Section 508.

However, the Agency failed to satisfy Section 508's requirements with regard to the Zoom Text software. The Arbitrator found that the Agency ordered Zoom Text in 2003, but that this software did not become compatible with SCRIPS for years after the grievant first attempted to use it. *Id.* at 23. These findings are undisputed. As this adaptive equipment was needed for the grievant to "have access to and use of information and data that is comparable to the access to and use of the information and data by Federal employees who are not individuals with disabilities," 29 U.S.C. § 794d(a)(1)(A), and as the Agency failed to timely meet Section 508's requirements, the Agency has failed to establish that the Arbitrator's determination under Section 508 is deficient.[11] Accordingly, we find that the Agency has not established that the Arbitrator erred in finding that the Agency violated Section 508.[12]

V. Decision

The Agency's exceptions are denied.

[11] As the Arbitrator's finding regarding Zoom Text is undisputed, we find it unnecessary to address whether her finding regarding SCRIPS is deficient.

[12] As we find above that the Agency has failed to establish that the Arbitrator erred when she found that the grievant is a qualified individual with a disability within the meaning of the Rehabilitation Act, we also reject the Agency's claim that the Arbitrator's award under Section 508 is in error on that same basis.