

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

HENRY C. GARZA,
Appellant,

v.

OFFICE OF PERSONNEL MANAGEMENT,
Agency,
and

UNITED STATES POSTAL SERVICE,
Intervenor.

(CSA 8 078 247)

DOCKET NUMBER
DE-844E-97-0538-R-1

DATE: August 19, 1999

Dennis Montoya, Esquire, Rio Rancho, New Mexico, for the appellant.

Earl A. Sanders, Esquire, Washington, D.C., for the agency.

Russell L. Doty, Denver, Colorado, for the intervenor.

BEFORE

Ben L. Erdreich, Chairman
Beth S. Slavet, Vice Chair
Susanne T. Marshall, Member

OPINION AND ORDER

¶1 The Director of the Office of Personnel Management (OPM) has filed a timely petition for reconsideration of the Board's September 14, 1998 final decision in the above-captioned case. For the following reasons, we DENY the petition and AFFIRM the final decision AS MODIFIED herein.

BACKGROUND

¶2 The Board's final decision in this case found that the appellant was not entitled to a disability retirement annuity because he declined a reasonable offer of reassignment to a vacant position for which he was qualified, and that the position was at the same grade level as his most recent grade level, within his commuting area, and one in which he would be able to render useful and efficient service. *See Garza v. Office of Personnel Management*, MSPB Docket No. DE-844E-97-0538-I-1, slip op. ¶¶ 6, 10-11, 13 (Sept. 14, 1998); 5 U.S.C. § 8451(a)(2)(A). The Board also denied OPM's cross petition for review. OPM argued that under 5 U.S.C. § 8451(a)(2)(C), the administrative judge should have docketed this appeal against the intervenor. The Board found that section 8451(a)(2)(C) did not require an employee to file an appeal against his employing agency, nor did it require administrative judges to join employing agencies as parties in appeals brought against OPM under 5 U.S.C. § 8461(e)(1). *Id.*, slip op. ¶ 12.

¶3 In her petition for reconsideration, the Director claims that the Board erred in interpreting 5 U.S.C. § 8451(a)(2)(C), and that the Board's decision will have a substantial impact on that civil service law and its implementing regulation, 5 C.F.R. § 844.103(b).¹ The Director asserts that the Board should modify its final decision in this appeal to find that in future Federal Employees' Retirement System (FERS) disability retirement appeals in which "an employing agency's determination that the appellant employee is able, despite disease or injury, to render useful and efficient service in a position to which he has declined reassignment under 5 U.S.C. § 8451(a)(2)(B) is at issue, the ... Board ... should docket an appeal, pursuant to 5 C.F.R. § 844.103(b), in which the employing

¹ The applicable provision of the regulation states, "[i]f an agency offers a reassignment and the individual declines the offer, the individual may appeal the agency's determination that the individual is not disabled for the position in question to the Merit Systems Protection Board under 5 U.S.C. 7701."

agency is the party respondent in a proceeding under 5 U.S.C. § 7701."

¶4 The Director argues that, assuming that section 8451(a)(2)(C) is ambiguous, OPM's interpretation of the statute is reasonable and entitled to deference. The Director asserts that Congress enacted two appellate provisions in the same legislation (5 U.S.C. § 8461(e)(1) and 5 U.S.C. § 8451(a)(2)(C)), and that OPM's interpretation is that section 8451(a)(2)(C) is the exclusive appeal route from an agency's determination regarding an employee's ability to perform the duties of an accommodation assignment. Further, the Director asserts that "[g]iven the fact that consideration for reassignment is expressly vested in the employing agency [under 5 U.S.C. § 8451(a)(2)(B)], rather than OPM, and the fact that no provision was included for *de novo* review of this determination by OPM, it again makes eminent sense that any appeal of a determination under 5 U.S.C. § 8451(a)(2) should lie against the agency rather than against OPM under 5 U.S.C. § 8461(e)(1)." The Director asserts that the provisions of the more specific statute, 5 U.S.C. § 8451(a)(2)(C), should take precedence over the more general statute, 5 U.S.C. § 8461(e)(1), and that the present case, in which the employing agency submitted new evidence on review that had a dispositive outcome on the appeal, illustrates the validity of its interpretation of section 8451(a)(2)(C).

ANALYSIS

¶5 The starting point for every case involving statutory construction must be the language of the statute itself. *Hargrove v. Department of Defense*, 77 M.S.P.R. 266, 270 (1998). Where that language is clear, it must control absent a clearly expressed legislative intention to the contrary. *Id.* Thus, "[i]f the statute is clear and unambiguous, 'that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.'" *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (citations omitted). A regulation cannot override a clearly stated statutory requirement. *Barseback Kraft AB v. United States*, 121 F.3d 1475, 1480 (Fed. Cir. 1997); *see Johnson v.*

Department of Justice, 71 M.S.P.R. 59, 67 (1996) (provisions of a statute will prevail where there is a conflict between a statute and a regulation). Only where a statute is ambiguous is the interpretation of an agency charged with administration of the statute entitled to deference. *De Jesus v. Office of Personnel Management*, 63 M.S.P.R. 586, 592 (1994), *aff'd*, 62 F.3d 1431 (Fed. Cir. 1995) (Table). Moreover, it is a basic rule of statutory construction that the whole of the statute should be considered in ascertaining its meaning. *Sterling Federal Systems, Inc. v. Goldin*, 16 F.3d 1177, 1185 (Fed. Cir. 1994).

¶6 Section 8461 of Title 5, United States Code, delineates the authority of OPM. Section 8461(c) provides that OPM "shall adjudicate all claims under the provisions of this chapter administered by" OPM. Section 8461(d) provides that OPM "shall determine questions of disability ... arising under the provisions of this chapter administered by" OPM. Under 5 U.S.C. § 8461(e)(1), an administrative action or order affecting the rights or interests of an individual under the provisions of 5 U.S.C. chapter 84 administered by OPM may be appealed to the Board under procedures prescribed by the Board.

¶7 Section 8451 of Title 5, United States Code, addresses "Disability retirement." Section 8451(a)(1)(B) provides that "[f]or purposes of this subsection, an employee shall be considered disabled only if the employee is found by [OPM] to be unable, because of disease or injury, to render useful and efficient service in the employee's position." Section 8451(a)(2) provides:

(A) Notwithstanding paragraph (1), an employee shall not be eligible for disability retirement under this section if the employee has declined a reasonable offer of reassignment to a vacant position in the employee's agency for which the employee is qualified if the position--

(i) is at the same grade (or pay level) as the employee's most recent grade (or pay level) or higher;

(ii) is within the employee's commuting area; and

(iii) is one in which the employee would be able to render useful and efficient service.

(B) An employee who is applying for disability retirement under this subchapter shall be considered for reassignment by the employee's agency to a vacant position described in subparagraph (A) in accordance with such procedures as the Office shall by regulation prescribe.

(C) An employee is entitled to appeal to the Merit Systems Protection Board under section 7701 any determination that the employee is not unable, because of disease or injury, to render useful and efficient service in a position to which the employee has declined reassignment under this section.

Thus, under section 8451(a)(2), the reassignment issue can be a pivotal factor, indeed, the dispositive factor, in determining whether an employee is eligible for disability retirement.

¶8 Despite the Director's claim that section 8451(a)(2)(C) is ambiguous and that OPM's interpretation of the statute is reasonable and entitled to deference, the statute, when considered as a whole, is perfectly clear, and does not support OPM's position that it has no role in the eligibility determination mandated by this statute. OPM "shall adjudicate all claims," and "shall determine questions of disability" under the provisions of chapter 84 administered by OPM. 5 U.S.C. § 8461(c)-(d). Nothing in 5 U.S.C. § 8451(a)(2) shifts to employing agencies OPM's unambiguous statutory responsibility to adjudicate all claims and determine questions of disability. Nor is there any indication in the statute that employing agencies, rather than OPM, are to "administer" any provisions of chapter 84. In *Treva v. Office of Personnel Management*, 69 F.3d 520, 526 (Fed. Cir. 1995), the court found that the "plain language" of the FERS statute at 5 U.S.C. § 8461(c)-(d) was consistent with the court's determination that OPM had the responsibility of determining disability independently of any disability benefits award under the Social Security Act. Here, the same plain language suggests that OPM, not employing agencies, must independently determine

whether an employee is not entitled to disability because he declined a reasonable offer of reassignment.

¶9 The only duty that 5 U.S.C. § 8451(a)(2) imposes upon employing agencies is that they "consider" employees applying for disability retirement for reassignment to certain vacant positions in accordance with such procedures as OPM by regulation prescribes. No mention is made of employing agencies making determinations, let alone exclusive determinations, that employees are not unable, because of disease or injury, to render useful and efficient service in positions to which they have declined reassignment. The statute's reference to an appeal of "any determination" includes such determinations made by OPM.² Even OPM's reconsideration and initial decisions indicate that OPM, not the employing agency, made the appealable determination in this case. Appeal File (AF), Tab 5, Subtabs IIA ("While your agency has stated that they could accommodate you and offered a modified position to you, the evidence is insufficient to show that you had a valid reason to reject this offer. ... For these reasons we find that you do not meet the criteria for eligibility for disability retirement outlined in the law and regulations.") and IIC ("This determination was made by the Disability and Special Entitlements Division after a review of all of the evidence provided by you and your agency. Our decision is based on the reports supplied to this office and on Federal employee disability retirement laws and regulations.").

¶10 Our determination is consistent with *Anthony v. Office of Personnel Management*, 58 F.3d 620 (Fed. Cir. 1995). There, as here, OPM denied a disability retirement application based on the applicant's refusal to accept a

² OPM's regulation is inconsistent with this statutory language. Although the statute provides that "any determination" that the employee is not unable, because of disease or injury, to render useful and efficient service in a position to which the employee has declined reassignment may be appealed to the Board, 5 U.S.C. § 8451(a)(2)(C), OPM interpreted the statute too narrowly by providing that only "the agency's determination" may be appealed to the Board, 5 C.F.R. § 844.103(b).

reassignment to a vacant position for which he was qualified. *Id.* at 623. The Board affirmed. On appeal to the court, OPM, despite its regulation at 5 C.F.R. § 844.103(b), did not claim, as it does here, that under 5 U.S.C. § 8451 the employing agency should have been the party respondent. The court affirmed the Board's decision, finding no substantial departure from important procedural rights, misconstruction of the governing legislation, or some like error going to the heart of the administrative determination. *Id.* at 626.

¶11 Congress authorized the Director to delegate personnel management functions to "heads of agencies in the executive branch and other agencies employing persons in the competitive service." 5 U.S.C. § 1104; *cf.* 5 C.F.R. §§ 842.801(b), 842.803(a) (delegation to "agency heads" of the authority to determine whether an employee's position is a rigorous law enforcement officer or firefighter position). Even assuming, without deciding, that 5 U.S.C. § 1104 permits the Director to delegate to employing agencies OPM's statutory responsibility to "adjudicate all claims" and "determine questions of disability," the Director has not shown or even claimed that agency heads have been delegated the responsibility of making the kinds of determinations at issue in this appeal. The only discernible determination that the appellant was ineligible for a disability retirement because he refused a valid reassignment offer is the one made by OPM in its reconsideration decision.

¶12 The Director argues that under *Chevron, U.S.A., Inc. v. Natural Resources Defense Counsel, Inc.*, 467 U.S. 837, 844 (1984), the Board must defer to OPM's interpretation that it has no role in making or defending determinations that an employee is ineligible for a disability retirement because he has refused a reasonable reassignment offer. We find that OPM's reliance on *Chevron* is not only misplaced, but is far off the mark. As indicated above, the statutory language conferring on OPM the authority to "adjudicate all claims" and "determine questions of disability" is clear and is not ambiguous. Furthermore,

OPM's new interpretation of its regulation, which was first advanced in this case, is not entitled to any deference under well-established case law interpreting *Chevron*. In *Bowen v. Georgetown University Hosp.*, 488 U.S. 204, 212-13 (1988), the Court held that it has never applied the *Chevron* principle to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice. The Court declined to defer to an agency counsel's interpretation of a statute where the agency itself articulated no position on the question, given that Congress delegated to the administrative official and not to appellate counsel the responsibility for elaborating and enforcing statutory commands. *Id.* at 212. Similarly, in *Parker v. Office of Personnel Management*, 974 F.2d 164, 168 (Fed Cir. 1992), the court did not defer under *Chevron* to OPM's interpretation of 5 U.S.C. § 8337(b) (1988) "[i]n the absence of meaningful guidance, [or] substantial evidence of a consistent policy, either internally applied or publicly announced"

¶13 Here, as in *Bowen* and *Parker*, OPM's interpretation is unsupported by regulations, rulings, or administrative practice. The Director's claim that 5 C.F.R. § 844.103(b) provides for appeals from determinations made by employing agencies is inconsistent with 5 C.F.R. § 844.203(c)(1), which was published at the same time as section 844.103(b), *see* 53 Fed. Reg. 33,433 (1988), and which provides that *OPM* "will review the documentation submitted under paragraph (a) of this section *to determine* whether the individual has met the eligibility requirements set forth in § 844.103." (emphasis added). The last eligibility requirement listed in section 844.103 is that the individual "must not have declined an offer of reassignment to a vacant position." 5 C.F.R. § 844.103(a)(5). OPM then will issue "its decision," which will include a statement of *OPM's* findings and conclusions and an explanation of the applicant's right to request reconsideration or Board review. 5 C.F.R. § 844.203(c)(1).

¶14 Similarly, the CSRS and FERS Handbook provides no indication that

employing agencies are to make such appealable determinations. Instead, it indicates that when all documentation is evaluated, OPM's Disability Division will issue the decision either allowing or disallowing the disability application. CSRS and FERS Handbook for Personnel and Payroll Offices, Chapter 60, Sections 60A6.1-2(A) and 60B4.1-1(A) (Apr. 1998). The Handbook instructs agencies to merely "notify" OPM of the employee's refusal to accept the reassignment, provide any evidence the employee submitted in support of his refusal, and then proceed with whatever personnel action is appropriate, "since OPM will not approve an application for benefits when any employee has refused a reassignment for which he or she is qualified." *Id.*, Sections 60A2.1-5(E) and 60B1.1-1(C). The Handbook further provides that for OPM to "make a determination as to the employee's capability to meet the demands of his or her current job *or any available vacant job* and the potential risks associated with his or her continued employment, the employee's position description, performance standards, critical elements, and latest performance appraisal must be submitted with the retirement application." *Id.*, Section 60B2.1-2(C) (emphasis added).

¶15 The Handbook's CSRS appeal rights section, which provides that an employee may appeal "an OPM decision" to the Board, also applies to FERS. *Id.*, Sections 60A6.1-3(B) and 60B1.1-1(C). There is no reference to appeals from employing agency decisions. Although the Director apparently believes that employees should be appealing agency determinations directly to the Board, OPM has not instructed agencies to provide employees with notice of Board appeal rights. *Compare* 5 C.F.R. Part 844 *with* 5 C.F.R. § 432.105(b) (final written decisions in performance-based actions shall inform the employee of any applicable appeal and/or grievance rights); 5 C.F.R. § 752.404(f) (agency decisions in adverse actions shall advise employees of appeal rights).

¶16 The statute's reference to an entitlement to appeal "under [5 U.S.C.] section 7701" does not, as the Director contends, require that such an appeal be docketed

against the employing agency. Section 7701 merely sets forth the procedures for actions that are appealable to the Board under any law, rule, or regulation. We read section 8451(a)(2)(C) as ensuring that when an employee's entitlement to disability retirement is denied based on a dispute over whether he could render useful and efficient service in a position other than his position of record, the appellate procedures set forth at 5 U.S.C. § 7701 shall be used. The fact that Congress took extra pains to clarify the section 7701 avenue of review in section 8451 could be read as bolstering the conclusion that Congress intended that section 7701 apply to FERS retirement appeals in general. *Cf. Bronger v. Office of Personnel Management*, 740 F.2d 1552, 1555 (Fed. Cir. 1984) ("[t]he fact that Congress took extra pains to clarify the avenue of review [section 7701] in the sensitive area of mental disability when it added subsection (d)(2) [to 5 U.S.C. § 8347] only bolsters the conclusion that Congress intended such review as well for the subsection (d)(1) nonphysical-disability retirement cases"), *rev'd on other grounds on rehearing*, 769 F.2d 756 (Fed. Cir. 1985). Alternatively, Congress may have perceived a conflict in court decisions as to whether section 7701 applied in all CSRS retirement appeals, and may have wanted to make clear that at a minimum, section 7701 procedures applied to this particular FERS issue. *Compare Simmons v. Merit Systems Protection Board*, 768 F.2d 323, 326 (Fed. Cir. 1985) ("[i]n *Bronger* ... , we ruled that an employee asking non-disability retirement proceeds before the MSPB under Sec. 7701.") *with Lindahl v. Office of Personnel Management*, 776 F.2d 276, 278 (Fed. Cir. 1985) (it is the Board, acting under 5 U.S.C. § 8347(d)(1), which has generally prescribed the procedures of section 7701 for retirement cases).

¶17 Although the Director asserts that employing agencies may have information "peculiarly within" their knowledge concerning this issue, she does not claim that OPM is unable to obtain information, such as Office of Workers' Compensation Programs decisions, from employing agencies in support of OPM's position in a

Board appeal, or that OPM is unable to request that the employing agency intervene in the Board appeal, as the employing agency did here. Employing agencies already provide information regarding accommodation efforts to OPM on disability retirement application forms. AF, Tab 5, Subtab IID. OPM's access to such information, and any other information deemed necessary by the Director, is guaranteed by statute. *See* 5 U.S.C. § 8461(h)(1) ("Each Government agency shall furnish the Director with such information as the Director determines necessary in order to administer this chapter."). Despite the Director's apparent belief that OPM's interpretation of the statute would be good policy, we are bound by the language of the statute as it is written, and if the plain language might not accord with what OPM believes is good policy, "we are not at liberty 'to rewrite [the] statute because [we] might deem its effects susceptible of improvement.'" *Commissioner v. Lundy*, 516 U.S. 235, 252-51 (1996) (citations omitted).

¶18 Given the clear language of the statute, the court's decisions in *Trevan* and *Anthony*, and the above language in OPM's regulations and Handbook, the Director's assertion that OPM's regulation at section 844.103(b) requires or creates a secondary appeal system in which employing agencies make appealable determinations that employees are ineligible for disability retirements because they have refused reasonable reassignment offers is totally unfounded. We are aware of no consistent policy, either internally applied or publicly announced by OPM, that establishes or even suggests the adjudicatory scheme the Director now proposes. OPM's Federal Register notices implementing 5 C.F.R. § 844.103(b) make no mention of such a scheme. *See* 55 Fed. Reg. 6596 (1990) (final rule); 53 Fed. Reg. 33,433 (1988) (interim rule with request for comments). In short, OPM's new interpretation of its regulation at 5 C.F.R. § 844.103(b) is not credible nor worthy of any deference because its interpretation is contradicted by OPM's entire course of administrative practice since it first published that regulation in 1988. *See Parker*, 974 F.2d at 168; *Walsh v. Office of Personnel Management*, 79

M.S.P.R. 88, 91 (1998) (declining to give effect to OPM's regulatory interpretation where OPM's purported practice was inconsistent with its long-standing guidelines in the Federal Personnel Manual and CSRS and FERS Handbook). Because OPM itself made the determination that the appellant declined a reasonable offer of reassignment, the Director's argument on reconsideration that employing agencies are supposed to be making these determinations appears to be a post-hoc rationalization that "will not create a statutory interpretation deserving of deference." *Parker*, 974 F.2d at 166.

¶19 Accordingly, OPM was the proper party in this case. To the extent that our prior decision could be interpreted as holding that an appellant may, as an alternative, file a Board appeal against his employing agency upon refusing an offer of reassignment, we clarify our prior decision: We discern no basis for employing agencies to be making appealable determinations under 5 U.S.C. § 8451, nor do we discern a basis for making employing agencies the parties respondent in future FERS disability cases that involve the issue of whether an appellant is ineligible for disability retirement because he has refused an offer of reassignment under section 8451(a)(2).

ORDER

¶20 We DENY the petition for reconsideration and AFFIRM our final decision AS MODIFIED herein. This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

NOTICE TO THE APPELLANT REGARDING FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. *See* 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals

for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.