

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

**2007 MSPB 75**

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Docket No. AT-844E-06-0227-I-1

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**Thomas F. Thorne,  
Appellant,**

**v.**

**Office of Personnel Management,  
Agency.**

OPM Claim No. CSA 8 274 795

March 19, 2007

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Dean T. Albrecht, Esquire, Dunedin, Florida, for the appellant.

Camela Green-Brown, Washington, D.C., for the agency.

**BEFORE**

Neil A. G. McPhie, Chairman  
Mary M. Rose, Vice Chairman  
Barbara J. Sapin, Member

**OPINION AND ORDER**

1. The appellant petitions for review of an initial decision that affirmed an Office of Personnel Management (OPM) reconsideration decision denying his application for disability retirement benefits under the Federal Employees' Retirement System (FERS). For the reasons set forth below, we GRANT the petition for review under 5 C.F.R. § 1201.115, REVERSE the initial decision, and DO NOT SUSTAIN OPM's reconsideration decision.

## BACKGROUND

¶2 The appellant filed an application for disability retirement benefits, dated June 20, 2005, asserting that depression, anxiety incident to severe stress, and Gastroesophageal Reflux Disease (GERD) prevented him from performing his duties as a City Letter Carrier with the U.S. Postal Service. Initial Appeal File (IAF), Tab 3, Subtab IID at 1-3. OPM denied the appellant's application, finding that the medical evidence he submitted was insufficient to establish a disabling medical condition. *Id.*, Subtab IIC. The appellant requested reconsideration, *id.*, Subtab IIB at 6-20, and OPM issued a final decision still denying the appellant's application, finding that, although the appellant showed that he suffered from stress, anxiety, and depression, there was no evidence that he suffered from GERD, severe psychiatric disease, or deterioration that would render him eligible for a disability retirement annuity, *id.*, Subtab IIA.

¶3 The appellant appealed to the Board. IAF, Tab 1. After holding the requested hearing, the administrative judge affirmed OPM's reconsideration decision, finding that the appellant did not show that his severe depression and severe anxiety would not improve under aggressive treatment or that his conditions prevented him from performing useful and efficient service, IAF, Tab 7 at 7-9, and that the appellant's symptoms were limited to his workplace situation and were not general in nature, *id.* at 9.

¶4 The appellant has filed a petition for review, arguing that he met his burden of proof by showing that he suffers from a disabling condition and that the administrative judge misinterpreted the medical evidence and testimony. Petition for Review File (PFRF), Tab 1.\* OPM has not responded to the petition for review.

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\* The appellant attaches to his petition for review an April 1, 2006 letter from Dr. Walter E. Afield, the appellant's psychiatrist, that summarizes his treatment of the appellant and his belief that the administrative judge improperly weighed the medical evidence, as well as Dr. Afield's resume. PFRF, Tab 1 at 13-19. The appellant has not

### ANALYSIS

¶5 In an appeal from an OPM decision on a voluntary disability retirement application, the appellant bears the burden of proof by preponderant evidence. 5 C.F.R. § 1201.56(a)(2). To be eligible for a disability retirement annuity under FERS, an employee must show that: (1) He completed at least 18 months of creditable civilian service; (2) while employed in a position subject to FERS, he became disabled because of a medical condition, resulting in a deficiency in performance, conduct or attendance, or, if there is no such deficiency, the disabling medical condition is incompatible with either useful and efficient service or retention in the position; (3) the disabling medical condition must be expected to continue for at least 1 year from the date that the application for disability retirement benefits was filed; (4) accommodation of the disabling medical condition in the position held must be unreasonable; and (5) he did not decline a reasonable offer of reassignment to a vacant position. 5 U.S.C. § 8451(a); 5 C.F.R. § 844.103(a); *Laus v. Office of Personnel Management*, 91 M.S.P.R. 369, ¶ 6 (2002).

¶6 Here, the record shows that, at the time he filed his application, the appellant had completed at least 18 months of creditable civilian service, IAF, Tab 3, Subtab IIE, his medical conditions had continued for more than 1 year from the date his application was filed, *id.*, Subtab IID, and he had not declined a reasonable offer of reassignment, *id.* Subtab IID at 5, 14. The appellant's entitlement, therefore, depends on whether his mental condition renders him unable to render useful and efficient service in his position. For the reasons explained below, we find that the medical evidence of record shows that, while employed in his City Letter Carrier position, the appellant has become disabled

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shown, however, that the information contained in the documents was not available before the close of the record below. In addition, the documents largely repeat the evidence already in the record. Thus, we have not considered the submissions. See *Grassell v. Department of Transportation*, 40 M.S.P.R. 554, 564 (1989).

because of his severe depression and severe anxiety, and that accommodation of the appellant's depression and anxiety is unreasonable.

¶7 In support of his application for disability retirement benefits, the appellant submitted extensive medical evidence developed by Dr. Walter E. Afield, his treating psychiatrist. IAF, Tab 3, Subtab IID. This evidence shows that the appellant first sought treatment at The Neuropsychiatric Institute in April 2005 as a result of the stress and anxiety he was experiencing at work. *Id.*, Subtab IID at 10-12. The appellant explained that he had been employed by the Postal Service as a letter carrier for 20 years and that, until a year and a half earlier, he had never been disciplined. However, according to the appellant, he had become the target of harassment and abuse by Postal Service managers and was being given reprimands for things such as not being able to sort the mail, a task he had been doing for many years. He believed he was in jeopardy of losing his job. *Id.* at 10-11.

¶8 In the report of his April 11, 2005 evaluation of the appellant, Dr. Afield noted that the appellant was severely depressed, "emotionally labile and crying[.]" IAF, Tab 3, Subtab IID at 11. He described the appellant as being potentially suicidal, fearful of losing his job and the economic well being of his family. According to Dr. Afield, the appellant wanted to continue working but he did not think the appellant could do so without becoming even more anxiety prone. Dr. Afield was concerned that the appellant would deteriorate and he prescribed Paxil and Xanax and additional psychotherapy sessions. He also noted that he wanted the appellant to undergo psychological testing to determine his ability to continue to work. *Id.* at 11-12.

¶9 In progress notes of a psychotherapy session conducted on April 25, 2005, Dr. Afield noted an incident that occurred at work that had upset the appellant and commented, "I do not know how he is doing it." IAF, Tab 3, Subtab IID at 9. Dr. Afield further observed, "[The appellant] is very angry and very upset. He has become extremely paranoid with regard to his work and the need to be perfect

at everything he does. The man needs to leave the Post Office. He is not able in his current condition to function. However, he wants to continue. I think it is only a matter of time before we are going to have to take him out.” *Id.*

¶10 In the notes of his May 9, 2005 session with the appellant, Dr. Afield remarked that the appellant had had a very difficult time since he had last seen him. He recounted two more incidents that had upset the appellant and stated, “He is angry at his bosses and he could strike back. I am taking him off of work and we will take another look at him in 30 days. But, this individual is really stressed to the limit at this point. Our job will be to try to keep him out of the hospital.” IAF, Tab 3, Subtab IID at 8; Hearing Tape (HT). He, accordingly, recommended that the appellant take a leave of absence from his position, and the appellant has not returned to the workplace since. HT.

¶11 It is clear that, by June 2005, Dr. Afield’s concern that the appellant would deteriorate if he continued to work had been well-founded. In progress notes of his June 7 session with the appellant, Dr. Afield observed, “[He was] just not getting any better. . . . He claims the Post Office has taken pictures of him while he is cutting hedges around his house. . . . He has gotten to the point where he is completely paranoid about the situation in his work place. . . . If we cannot get his anxiety reduced, he may end up being hospitalized.” IAF, Tab 3, Subtab IIB at 16. On July 7, 2005, Dr. Afield further observed that the appellant “is very paranoid still, thinking that the Post Office will do anything to hurt him; . . . and *he cannot bring himself to go inside the building for fear that he may hurt somebody.*” *Id.* at 17 (emphasis added).

¶12 In the report of the Indepth Neurobehavioral Assessment also completed on July 7, 2005, Dr. Afield described the appellant, stating as follows: “Severe depression, somatic concern, fatigability, and irritability are present. Repression and denial make intervention difficult. . . . Suspiciousness, distrust, brooding and resentment are present. He has negative expectancies regarding his future. These results are indicative of a post traumatic stress disorder. Symptomatology

includes anxious arousal and dissociation.” IAF, Tab 3, Subtab IIB at 15. On August 19, 2005, Dr. Afield noted that the appellant was no longer taking detailed notes and had met with family members. Dr. Afield observed that the appellant continued to be very depressed, however, and had serious problems with anxiety and dissociation, i.e, loss of touch with reality. He concluded by observing that “this gentleman has really suffered seriously from the treatment he says he received from the post office and [that] it is very difficult for him.” *Id.* at 18.

¶13 Dr. Afield testified that his most recent psychotherapy session with the appellant had been on March 3, 2006, 10 days prior to the hearing. He testified that he had prescribed Risperdal, an antipsychotic medication, at that time because the appellant had begun having suicidal ideation and continued to have paranoid delusions, such as his belief that the Postal Service sent people to spy on him. He also testified that he believed that the appellant cannot work in any Postal Service position because he is “absolutely obsessed” with the Postal Service and poses a danger to anyone associated with it. Dr. Afield further testified that, despite continued treatment, the appellant’s condition had deteriorated since his initial evaluation of him in March 2005. HT.

¶14 In *Widmer v. Office of Personnel Management*, 103 M.S.P.R. 363 (2006), the Board granted the appellant’s application for disability retirement benefits in circumstances very similar to those present here. There, the appellant, also a Postal Service employee, was diagnosed as suffering from a delusional disorder, persecutory type, and post traumatic stress disorder. The disorder resulted in paranoid, hostile behavior that prompted the appellant to carry a weapon and caused him to be a danger to his colleagues at work. *Id.*, ¶¶ 13-17 Citing *Peterson v. Office of Personnel Management*, 81 M.S.P.R. 211, ¶ 5 (1999), the Board noted that, in determining whether an employee is capable of performing useful and efficient service, it is appropriate to consider whether the appellant is a danger to himself or others. Because it was apparent that returning the

appellant to work would have entailed a high risk to other agency employees, the Board concluded that he had demonstrated his entitlement to disability retirement benefits by preponderant evidence. *Widmer*, 103 M.S.P.R. 363, ¶ 19.

¶15 Like the appellant in *Widmer*, it is undisputed that the appellant in this case is angry, severely depressed, and anxious and that he suffers from post traumatic stress disorder. It is also undisputed that the appellant is subject to suicidal ideation as well as psychosis. As Dr. Afield testified, the appellant is absolutely obsessed with the Postal Service and poses a threat to his colleagues if he is returned to the workplace. HT. Dr. Afield further testified that it was not safe for the appellant to drive, thereby posing a threat to the general public. HT. Since the record demonstrates that the appellant's psychiatric condition was precipitated and thereafter exacerbated by job-related stress to the point that it became disabling, it is clear that he can no longer perform useful and efficient service in his former position as a City Letter Carrier. *See Kimble v. Office of Personnel Management*, 102 M.S.P.R. 604, ¶ 14 (2006); *Marucci v. Office of Personnel Management*, 89 M.S.P.R. 442, ¶ 7 (2001); *Marczewski v. Office of Personnel Management*, 80 M.S.P.R. 343, ¶ 7 (1998).

¶16 Accordingly, we find that the appellant has demonstrated his entitlement to a disability retirement annuity by preponderant evidence.

#### ORDER

¶17 We ORDER OPM to award the appellant a disability retirement annuity. OPM must complete this action no later than 20 days after the date of this decision.

¶18 We also ORDER OPM to tell the appellant promptly in writing when it believes it has fully carried out the Board's Order and to describe the actions it took to carry out the Board's Order. We ORDER the appellant to provide all necessary information OPM requests to help it carry out the Board's Order. The

appellant, if not notified, should ask OPM about its progress. See 5 C.F.R. § 1201.181(b).

¶19 No later than 30 days after OPM tells the appellant it has fully carried out the Board's Order, the appellant may file a petition for enforcement with the office that issued the initial decision on this appeal if the appellant believes that OPM did not fully carry out the Board's Order. The petition should contain specific reasons why the appellant believes OPM has not fully carried out the Board's Order, and should include the dates and results of any communications with OPM. See 5 C.F.R. § 1201.182(a).

¶20 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT  
REGARDING YOUR RIGHT TO REQUEST  
ATTORNEY FEES AND COSTS

You may be entitled to be paid by the agency for your reasonable attorney fees and costs. To be paid, you must meet the requirements set out at Title 5 of the United States Code (5 U.S.C.), sections 7701(g), 1221(g), or 1214(g). The regulations may be found at 5 C.F.R. § § 1201.201, 1201.202 and 1201.203. If you believe you meet these criteria, you must file a motion for attorney fees WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION. You must file your attorney fees motion with the office that issued the initial decision on your appeal.

NOTICE TO THE APPELLANT REGARDING  
YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. 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 your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, <http://www.mspb.gov>. Additional information is available at the court's website, <http://fedcir.gov/contents.html>. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

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Bentley M. Roberts, Jr.  
Clerk of the Board  
Washington, D.C.