



U.S. Merit Systems Protection Board

CASE REPORT

DATE: November 30, 2007

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BOARD DECISIONS

- ▶ **Appellant: Meta Ilene Ivey**
Agency: Office of Personnel Management
Decision Number: [2007 MSPB 272](#)
Docket Number: DC-0831-07-0239-I-1
Issuance Date: November 27, 2007
Appeal Type: CSRA Retirement - Other Than Initial
Action Type: Retirement/Benefit Matter

Retirement **- Survivor Annuity**

The appellant petitioned for review of an initial decision that affirmed OPM's reconsideration decision, which denied the appellant's application for a former spouse survivor annuity. Following the appellant's divorce from her husband in 2004, which incorporated a June 2004 settlement agreement, the Clerk of the Circuit Court entered a "Qualifying Court Order (CSRS)" in January 2005 awarding the appellant a former spouse survivor annuity. After her former husband's death in March 2006, the appellant applied for a former spouse annuity. OPM denied the application on the ground that the January 2005 Qualifying Court Order was a prohibited modification of the first order dividing the marital property. The issue was whether the June 2004 settlement agreement provided for a former spouse annuity. The administrative judge (AJ) agreed with OPM that it did not do so.

Holdings:

1. Under [5 U.S.C. § 8341\(h\)\(1\)](#), a former spouse of a deceased employee is entitled to a survivor annuity "if and to the extent expressly provided for . . . in the terms of any decree of divorce or annulment or any court order or court-approved property settlement agreement incident to such decree." When words such as "CSRS survivor annuity" are used in the decree or approved property settlement agreement, the "expressly provided for" requirement will obviously be satisfied.

Nevertheless, “magic words” such as these are not required. In the absence of magic words, the adjudicating tribunal must first determine whether the order contains a pertinent clause regarding a survivor annuity. If so, the tribunal must then inquire whether the operative terms in that clause can fairly be read as awarding the annuity. If so, then it must examine any evidence introduced concerning the marriage parties’ intent and the circumstances surrounding the execution of the document to interpret the clause. If such evidence dictates that the clause refers to a CSRS survivor annuity, it is legal error to conclude that the document has not “expressly provided for” the award of a survivor annuity.

2. Applying this mode of analysis to the language of the June 2004 settlement agreement, the Board found a pertinent clause regarding a survivor annuity, that the clause can fairly be read as awarding such an annuity, which interpretation was supported by all extrinsic evidence regarding the parties’ intent, which included the terms of the decedent’s Last Will and Testament, and declaration under penalty of perjury of the decedent’s sister, the executrix of the estate. Accordingly, the Board reversed the initial decision and ordered OPM to grant the appellant’s application for a former spouse survivor annuity.

► **Appellant: Ruben Cano**

Agency: United States Postal Service

Decision Number: [2007 MSPB 273](#)

Docket Number: AT-0752-07-0528-I-1

Issuance Date: November 28, 2007

Appeal Type: Adverse Action by Agency

Action Type: Constructive Adverse Action

Jurisdiction

- Resignation/Retirement

The appellant, a former preference-eligible City Carrier, filed an appeal alleging that his immediate retirement was involuntary. In August 2005, the agency’s Associate Medical Director, pursuant to the result of a fitness-for-duty examination performed by another doctor, determined that the appellant would not be allowed to operate a motorized vehicle for 12 months and would need to be medically cleared by the agency’s medical unit before he could resume driving. Later that month, the appellant applied to retire, and did so effective September 30, 2005. The appellant filed a discrimination complaint in October 2005, and filed an appeal with the Board in March 2007, following a determination by an EEOC judge that he had raised a mixed-case complaint. Based on the parties’ written submissions, the AJ determined that the appellant’s retirement was “clearly” voluntary.

The Board vacated the initial decision and remanded the appeal for further adjudication.

Holdings:

1. In determining whether a retirement was coerced, and thus a constructive removal, the test is whether, under all the circumstances, working conditions were made so difficult by agency that a reasonable person in the appellant’s position

would have felt compelled to retire. When an appellant raises allegations of discrimination in connection with an involuntariness claim, evidence of discrimination may be considered only in terms of the standard for voluntariness in a particular situation – not whether such evidence meets the test for proof of discrimination or reprisal under Title VII.

2. An initial decision must identify all material issues of fact and law, summarize the evidence, resolve issues of credibility, including the AJ's conclusions of law and his legal reasoning. Here, the AJ failed to address whether any of the appellant's allegations constituted a nonfrivolous allegation that his retirement was involuntary and entitled him to a jurisdictional hearing. Under the totality of the circumstances, the Board found that the appellant had raised nonfrivolous allegations that his working conditions became so difficult that a reasonable person would have felt compelled to retire, and he was therefore entitled to a jurisdictional hearing.

- a. The appellant alleged that he was harassed by agency officials and treated disparately compared to other employees. He claimed that agency managers repeatedly followed him on his route, incorrectly told him his was wasting his time, and unreasonably denied his requests for annual and sick leave.
- b. The appellant asserted that other employees, who had more debilitating medical conditions than him, were not required to undergo fitness-for-duty examinations, and that he was restricted to indoor duty for a full year even though his personal physician wrote several letters stating that his medical condition was under control and that he was able to return to work. He alleged that these letters were not forwarded to the Associate Medical Director.
- c. The appellant asserted that the agency did not provide him with enough work, and that this led to a decrease in his pay that ultimately contributed to his decision to retire. "Deliberate idling" by an agency is a factor that may cause working conditions to become so difficult that a reasonable person would feels compelled to resign or retire.

3. On remand, the AJ must afford the parties an opportunity to address whether the appellant posed a "direct threat" to the health or safety of himself or others.

► **Appellant: Linda A. Taylor**

Agency: Department of Homeland Security

Decision Number: [2007 MSPB 276](#)

Docket Numbers: DC-0353-07-0608-I-1; DC-0752-07-0319-I-1

Issuance Date: November 28, 2007

Appeal Type: Restoration to Duty

Action Type: Restoration from Compensable Injury

Miscellaneous Agency Actions

- **Restoration to Duty**

Discrimination

- **Physical Disability - Accommodation**

The appellant was removed from her position as a WG-6 materials handler for physical inability to perform the duties of her position. It was undisputed that she had partially recovered from an on-the-job injury she suffered in 2004, which left her with permanent medical restrictions. The appellant filed an appeal contesting her removal, and also alleged that the agency acted arbitrarily and capriciously in failing to restore her to an appropriate position following her removal. The AJ issued an initial decision sustaining the appellant's removal and finding that the Board lacked jurisdiction over the appellant's restoration claim. On PFR, the appellant raises no specific objections to the AJ's findings regarding the removal action, but contends that the agency failed to give her proper consideration for assignment to supply technician positions it advertised following her removal.

Holdings:

1. Because the appellant is a partially recovered individual, the agency was obligated, under [5 C.F.R. § 353.301](#)(d) to "make every effort" to restore her in the local commuting area, and in so doing, to treat her "substantially the same as other handicapped individuals under the Rehabilitation Act of 1973." Under the Rehabilitation Act regulations, [29 C.F.R. § 1630.2](#)(o), the agency must make reasonable accommodation of an employee's disability through means such as modifying or adjusting the duties of the position at issue, or reassigning the employee to a vacant position whose duties the employee can perform. The agency's obligation to offer reasonable accommodation does not entitle the employee to a position at a higher grade level. As applied to this case, that means the appellant was entitled to consideration for positions at the GS-06 level, but not at the GS-07 level.

2. It was undisputed that there were 3 supply technician positions advertised at the GS-05/06/07 levels. The AJ only considered the appellant's qualifications for 1 of those positions, as 2 positions were filled at the GS-07 level. This was error; if the appellant qualified for any of those 3 positions, she was entitled, under [5 C.F.R. § 353.301](#)(d), to be placed in one of them.

3. Because the AJ did not consider the appellant's qualifications for all 3 positions, and because the AJ did not address whether the appellant's medical impairments

could be accommodated in those positions, a remand was necessary for further adjudication.

► **Appellant: Sheila Desai**

Agency: Environmental Protection Agency

Decision Number: [2007 MSPB 271](#)

Docket Numbers: CH-0752-07-0091-I-1; CB-1205-07-0011-U-1

Issuance Date: November 27, 2007

Appeal Types: Adverse Action by Agency; Request for Regulation Review

Action Type: Reduction in Grade/Rank/Pay; Original Jurisdiction Case

Jurisdiction

- Reduction in Pay

Board Procedures/Authorities

- Joinder/Consolidation

Miscellaneous Topics

- Regulation Review

The appellant petitioned for review of an initial decision that affirmed her reduction in pay based on OPM regulations that implemented the Federal Workforce Flexibility Act of 2004 (FWFA). She also sought Board review of those regulations. The Board consolidated the two matters on its own motion.

Holdings:

1. Although a reduction in an employee's rate of basic pay is appealable to the Board, an exception is when an agency reduces an employee's basic pay from a rate that is contrary to law or regulation. Under the law in effect at the time of the appellant's promotion from GS-11, Step 2 to GS-12, Step 3, a special rate could not be used "for any purpose" if an employee was "entitled to a higher rate of basic pay under any other provision of law" such as locality pay under 5 U.S.C. § 5304. It is undisputed that the appellant was entitled to higher locality rate in her GS-11 position than the special rate that was applicable to her position, so the agency was prohibited by law from using the underlying special rate for her promotion. The agency was therefore required by law to reduce her pay in accordance with FWFA, and this reduction in pay is not appealable to the Board.

2. Since the agency's action was required by law, it is unnecessary to determine the validity of OPM's regulations implementing that law.

- **Appellant: Daniel C. Russo**
Agency: United States Postal Service
Decision Number: [2007 MSPB 277](#)
Docket Number: PH-0752-00-0011-X-1
Issuance Date: November 28, 2007
Appeal Type: Adverse Action by Agency
Action Type: Removal

Compliance

In this enforcement proceeding, the appellant alleged that the agency failed to comply with a final Board decision that ordered the agency to cancel the appellant's removal and substitute in its place a demotion to the next lower-graded nonsupervisory position for which he is qualified with the least reduction in grade or pay. The AJ issued a Recommendation finding the agency in compliance with some of its obligations, but not with others.

Holdings:

- 1. Regarding back pay issues, the Board found that: (a) the agency must process a disputed amount of back pay, despite the lack of the appellant's signature on an agency form; (b) the agency did not err in calculating overtime back pay to which the appellant is entitled; and (c) the agency has not explained why the appellant is not entitled to pay for holidays worked for the entire back pay period.**
- 2. As to whether the appellant was reinstated to the proper position, the Board found that the agency had not shown that the appellant's qualifications are limited to the maintenance craft; it had an obligation to consider all positions for which he could become qualified without undue interruption of the agency's mission. The agency's conclusory affidavits do not establish that it did this.**

The case was remanded to the regional office for further adjudication.

- **Appellant: William Jarosz**
Agency: Department of the Air Force
Decision Number: [2007 MSPB 275](#)
Docket Number: DE-0752-07-0445-I-1
Issuance Date: November 28, 2007
Appeal Type: Adverse Action by Agency
Action Type: Removal

Board Procedures/Authorities

- Withdrawal of Appeal

The AJ issued an initial decision dismissing the appellant's appeal of his removal pursuant to the terms of a negotiated settlement agreement. On PFR, the appellant points out that the settlement agreement provided that he could revoke the agreement if he did so within 7 days of the execution of the agreement, and he has provided evidence that he timely revoked the agreement.

Holdings:

1. The appellant revoked his acceptance of the settlement agreement according to its terms. Accordingly, the Board vacated the initial decision, and reopened and reinstated the appeal for adjudication.
2. On PFR, the appellant alleged that the agency violated USERRA when it suspended his civilian security clearance, which prevented him from meeting his annual military obligations. The Board forwarded this claim for processing as a new appeal.

► **Appellant: David M. Shipp**

Agency: Department of Health and Human Services

Decision Number: [2007 MSPB 270](#)

Docket Number: SF-0432-07-0279-I-1

Issuance Date: November 21, 2007

Appeal Type: Performance

Action Type: Removal

Timeliness

Board Procedures/Authorities

- Remands/Forwards

The appellant petitioned for review of an initial decision that dismissed his appeal of the agency's removal action as settled.

Holding: The Board dismissed the petition for review as untimely filed (by 36 days) without good cause shown for the delay. The appellant's assertions regarding the agency's alleged noncompliance with the settlement agreement are inapposite to the issue of timeliness. Nevertheless, the Board forwarded the appellant's allegations of noncompliance to the regional office for docketing as a petition for enforcement.

► **Appellant: Jay A. Gondek**

Agency: Department of the Army

Decision Number: [2007 MSPB 274](#)

Docket Number: CH-0432-03-0299-X-1

Issuance Date: November 28, 2007

Compliance

- Dismissal on Proof

In the merits proceeding, the Board reversed the appellant's removal and ordered the agency to reinstate him with full benefits. In this enforcement proceeding, the appellant alleged that the agency was in noncompliance as to 3 matters. The AJ issued a Recommendation finding that the agency was in compliance with respect to 1 of these matters, but that its evidence of compliance was insufficient as to the other 2.

Holding: Based on evidence submitted to the Board following the AJ's Recommendation, the Board found that the agency was now in full compliance with its obligations.

COURT DECISIONS

- **Petitioner: Phyllis M. Vanieken-Ryals**
Agency: Office of Personnel Management
Docket Number: [2006-3260](#)
Issuance Date: November 26, 2007

Retirement **- Disability Retirement**

The petitioner asked for review of the initial decision, which became the Board's final decision, that affirmed OPM's denial of her application for disability retirement benefits. The petitioner was a long-time employee at the Department of Veterans Affairs, who applied for disability retirement on the bases of several alleged psychological disorders, including major depression and anxiety disorder. The evidence before the Board include the appellant's own statements and testimony, several letters, medical reports, and related documentation from her treating psychologist, Dr. Nichols, and from her treating psychiatrist, Dr. Rummler. In addition, the petitioner, her husband, and Dr. Nichols testified on her behalf. Both OPM and the Board found the appellant's evidence insufficient to entitle her to disability retirement benefits.

Finding that OPM and the Board applied an erroneous legal standard in evaluating the evidence, the court vacated the Board's decision and remanded the case for further adjudication.

Holding: Both OPM and the Board improperly predicated their determinations based on the view that "objective" medical evidence is required to prove disability. OPM and the Board's adherence to this view was arbitrary, capricious, and contrary to law. In so holding, the court made the following observations and stated the following propositions of law:

1. Although factual determinations on "questions of disability and dependency" are unreviewable by the court, issues of law regarding decisions on disability applications are reviewable. The court must be discerning and cannot be satisfied by opinions that invoke the trappings of factual analysis, e.g., by vaguely describing broad swaths of evidence as "insufficient" or as failing to carry the claimant's burden, or simply asserting that all record evidence was considered, but when read closely and carefully, reveal that absolutely no weight was given to certain evidence solely because it can generally be classified as "subjective" and not because of any specific identifiable defect.
2. A review of OPM's initial and reconsideration decisions and the AJ's initial decision show that all were predicated on the view that "objective" medical evidence is required to prove disability. For example, OPM indicated it was giving

Dr. Nichols' several reports no weight because "she provided no details concerning any mental status evaluation," and "she does not provide copies of any formal cognitive testing." Similarly, the AJ pointed to OPM's finding that the petitioner had provided "little objective medical evidence . . . to demonstrate that [she] is disabled," and further noted that "OPM also points out that the bulk of the appellant's evidence . . . is Dr. Nichol's [sic] reports of what the appellant told her," concluding that Dr. Nichols' reports were necessarily immaterial since they were "subjective" in nature.

3. Although the court is not bound by the Board's case precedent, it agreed with the Board's ruling in *Chavez v. Office of Personnel Management*, 6 M.S.P.R. 404, 418-23 (1981), that objective medical evidence is not a prerequisite to entitlement to disability retirement benefits. OPM must consider all of an applicant's competent medical evidence, and an applicant may prevail based on medical evidence that, as here, consists of a medical professional's conclusive diagnosis, even if based primarily on his/her analysis of the applicant's own descriptions of symptoms and other indicia of disability. As stated in *Chavez*, subjective evidence—i.e., testimony or written statements, regarding symptoms that is submitted by the applicant—"may be entitled to great weight on the matter of disability, especially when such evidence is uncontradicted in the record." It stands to reason that qualified medical opinions based on the same types of information must therefore be afforded at least comparable, if not greater, probative weight. The court noted that the problem with a requirement of "objective" tests is particularly pronounced when the alleged disability arises from purely psychological, as opposed to physical, disorders, as no laboratory tests or physical examinations exist, or are even known to be possible, to diagnose some psychological disorders.

4. OPM and the Board may give only limited weight to seemingly strong medical evidence only in the face of factors such as doubts about professional competence, contrary medical evidence, failure of the professional to consider relevant factors, lack of particularity in relating diagnosis to nature and extent of disability, etc. But here, OPM and the Board did not cite such factors in discounting the medical evidence.

5. When, as here, the medical evidence indicates physical or mental incapacity so severe as to clearly establish an inability to perform the tasks of any job—such as inability to leave home, drive, or accomplish even basic life tasks—the medical evidence need not enumerate what specific job tasks are rendered unfeasible by the disability.

Non-Precedential Decisions

The Court of Appeals for the Federal Circuit issued other, nonprecedential decisions that reviewed Board decisions, which can be accessed at the court's [website](#).