U.S. Merit Systems Protection Board

CASE REPORT DATE: May 30, 2008

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BOARD DECISIONS

► **Appellant: Lisa S. Rapp**
Agency: Office of Personnel Management
Decision Number: 2008 MSPB 107
Docket Number: AT-844E-05-0056-M-1
Issuance Date: May 19, 2008
Appeal Type: FERS - Employee Filed Disability Retirement

Retirement
- Disability Retirement
- Mental Competence

The appellant petitioned for review of an initial decision that reaffirmed an earlier decision affirming OPM's determination to terminate her disability retirement benefits. The case was on remand from a decision by the Federal Circuit that vacated an earlier affirmance of OPM's determination, and which remanded the case for a determination whether the appellant was competent when she represented herself in the proceedings before OPM and the MSPB. *Rapp v. Office of Personnel Management*, 483 F.3d 1339 (Fed. Cir. 2007). After conducting a hearing, the administrative judge (AJ) determined that the appellant was competent during the period in question, and reaffirmed OPM's reconsideration decision terminating her disability retirement benefits.

Holdings: The Board vacated the initial decision, finding that the evidence indicates that the appellant was suffering from a psychiatric disorder that was likely to have affected her ability to adequately represent herself, and remanded the case to the regional office for a new adjudication on the merits of OPM's reconsideration decision:

1. The Board rejected the appellant's argument that the AJ erred by failing to follow the procedures described in *French v. Office of Personnel Management*, 37 M.S.P.R. 496 (1988). The Federal Circuit declined to invoke *French* because there had been no showing that the appellant was ever incompetent.

2. The evidence shows that the appellant was suffering from a psychiatric disorder during her initial appeal that was likely to have affected her ability to adequately represent herself.

a. Both of the appellant's treating medical providers, a clinical psychologist and a board-certified psychiatrist, testified that the appellant was significantly impaired during the period in question, which was consistent with the appellant's own testimony. There is no evidence suggesting that the testimony of either medical provider was not credible, and there is no countervailing expert or other professional medical testimony refuting their testimony.

b. While OPM and the MSPB may give only limited weight to seemingly strong medical evidence, it typically does so only in the face of factors such as doubts about professional competence, contrary medical evidence, failure of the professional to consider relevant factors, or lack of particularity in relating the diagnosis to the nature and extent of the disability. These factors were absent in this case, and the AJ incorrectly substituted his views for those of the medical providers as to what pattern of behavior could or could not result from the appellant's mental condition.

► **Appellant: Danette H. Groesbeck**
Agency: Office of Personnel Management
Decision Number: 2008 MSPB 108
Docket Number: DE-0831-07-0041-I-1
Issuance Date: May 28, 2008
Action Type: Retirement/Benefit Matter

Timeliness- PFR

The appellant petitioned for review of an initial decision that affirmed OPM's determination that she was not entitled to a former spouse annuity. After issuance of the initial decision, the appellant sought and received an extension of the time for filing a petition for review (PFR), until April 30, 2007. She did not file her petition until November, more than 6 months after the deadline. The appellant did not respond to a notice from the Clerk of the Board that informed her that her PFR appeared to be untimely filed and ordered her to file evidence and argument on the timeliness issue.

Holding: The Board dismissed the PFR as untimely filed without good cause shown for the delay in filing.

► **Appellant: Linda L. Hayward**
Intervenor: Jack N. Hayward
Agency: Office of Personnel Management
Decision Number: 2008 MSPB 109
Docket Number: PH-0831-07-0512-I-1
Issuance Date: May 28, 2008
Action Type: Retirement/Benefit Matter

Retirement
- Survivor Annuity

OPM and the intervenor petitioned for review of an initial decision that reversed OPM's reconsideration decision, which denied the appellant's request for a former spouse survivor annuity. Following the parties' divorce in 1986, the state court issued an order dividing their marital property in 1990. At issue was whether this court order "expressly provided for" a former spouse annuity within the meaning of 5 U.S.C. § 8341(h)(1) and 5 C.F.R. part 838. The court order stated that it was dividing property under state statute and under 10 U.S.C. § 1408, "which authorizes military retired or retainer pay to be distributed to former spouses." The order stated that it applied to the Civil Service Retirement System Pension Plan in which the intervenor is a participant, that that it was intended that the order "shall qualify as a Qualified Domestic Relations Order under the Retirement Equity Act of 1984 and Title 10 USC Section 1408." The AJ found that the state court order awarded the appellant a former spouse survivor annuity, despite its erroneous citations to statutes that apply only to military retired pay benefits.

Holdings: The Board reversed the initial decision and sustained OPM's reconsideration decision, finding that the state court order did not expressly provide for a former spouse annuity:

1. Under 5 U.S.C. § 8341(h)(1), a survivor annuity shall be paid to the former spouse of a Federal retiree "if and to the extent expressly provided for" in the terms of a court-approved property settlement agreement incident to the divorce decree. Although the "expressly provided for" provision does not require "magic words," it does require that the intent to provide the survivor annuity be clear, definite, explicit, plain, direct, and unmistakable, not dubious or ambiguous.

2. The state court order in this case was ambiguous. The state court may have intended to award the appellant a former spouse survivor annuity under CSRS while citing to incorrect statutes and mistakenly failing to refer to 5 C.F.R. part 838, or it may have intended to award the appellant survivor benefits under the intervenor's military retired pay while mistakenly referring to CSRS. Because the order is ambiguous, it does not meet the "expressly provided for" requirement.

3. The state court order also fails to award a former spouse annuity because it does not state that it is governed by part 838, as required by 5 C.F.R. § 838.803(a).

► **Appellant: Edmond R. Rivera**
Agency: Social Security Administration
Decision Number: 2008 MSPB 110
Docket Number: CH-315H-08-0062-I-1
Issuance Date: May 28, 2008

Jurisdiction
- Status Quo Ante

The appellant petitioned for review of an initial decision that dismissed his appeal for lack of jurisdiction. The agency, apparently erroneously believing that the appellant was a probationary employee, notified him on October 18, 1997, that it was terminating his employment that day. On appeal to the MSPB, the agency acknowledged that the appellant was an "employee" under 5 U.S.C. § 7511(a)(1) with adverse action appeal rights, and stated that it had rescinded the appellant's separation completely. In a subsequent phone conversation, the appellant stated that he had no objection to dismissing the appeal for the reasons given by the agency, and the AJ dismissed the appeal for lack of jurisdiction.

On PFR, the appellant asserts that the agency did not purge his file as he was led to believe, that it had proposed his suspension based on the same charges on which his separation had been based, that its rescission of his separation was incomplete, and that it had treated him improperly since his return to work.

Holdings: The Board granted the PFR, vacated the initial decision, and remanded the appeal for further adjudication:

1. An agency's rescission of the action underlying an appeal does not divest the Board of jurisdiction over the appeal unless he has received all the relief he could have received if the appeal had been adjudicated and he had prevailed.

2. If the appellant had prevailed, the agency would have ordered the agency to cancel the action, restore the appellant to his position retroactively, and pay him back pay and other benefits. There is no general requirement that an agency destroy all records relating to the alleged misconduct underlying the action. In fact, the agency may take a new disciplinary action against the appellant based on the same incidents underlying the original action. Accordingly, the agency's issuance of a suspension proposal based on incidents underlying the appellant's separation is not inconsistent with a finding that the separation was completely rescinded.

3. The appellant has asserted that his enrollment status in the Thrift Saving Plan has not been corrected to reflect that he is currently employed, and that the agency failed, after his return to work, to make appropriate deductions from his salary in payment for a loan he had received from his TSP account, causing him to be considered in default on that loan. In the absence of any agency response to these allegations, the Board was unable to determine whether the agency has taken appropriate steps to ensure compliance, necessitating a remand.

4. The appellant alleges that he has not been returned to his former duties, and that the agency has instead required him "to stand in the lobby, read books, and not answer questions." An agency's assignment of an employee to his former position, without allowing the employee to perform the full range of his former duties, does not constitute returning the employee to the status quo ante, unless the agency establishes that it has a "strong overriding interest" or "compelling" reason for placing the employee in a different position. Remand is necessary to determine the agency's compliance as to this matter.

► **Appellant: Richard Russell**
Agency: Department of Veterans Affairs
Decision Number: 2008 MSPB 111
Docket Number: CB-7121-08-0002-V-1
Issuance Date: May 28, 2008
Appeal Type: Arbitration Appeals/Grievances

Arbitration/Collective Bargaining-Related Issues

The appellant requested review of an arbitrator's decision denying his request for attorney fees. The appellant grieved his removal from his position as a prosthetics clerk. The arbitrator issued an award determining that the appellant engaged in misconduct but that the agency's penalty was too severe, and mitigated the penalty to a 14-day suspension. In a supplementary award, the arbitrator denied the appellant's request for attorney fees, finding that such an award was not warranted "in the interest of justice."

Holdings: The Board dismissed the request for review for lack of jurisdiction:

1. The Board has jurisdiction to review an arbitration decision under 5 U.S.C. § 7121(d) only when the subject matter of the grievance is one over which the Board has jurisdiction, the employee alleges discrimination as stated in 5 U.S.C. § 2302(b)(1), and a final decision has been issued by the arbitrator.

2. The record lacks any indication that the appellant alleged discrimination, either before the arbitrator or in his request for review. The Board therefore lacks jurisdiction over his request for review.

► **Appellant: Michael J. Lutz**
Agency: United States Postal Service
Decision Number: 2008 MSPB 112
Docket Number: CH-0752-03-0220-M-1
Issuance Date: May 28, 2008
Appeal Type: Adverse Action by Agency
Action Type: Reduction in Grade/Pay

Compliance

The appellant petitioned for review of a compliance decision issued after a remand from the Federal Circuit in *Lutz v. U.S. Postal Service*, 485 F.3d 1377 (Fed. Cir. 2007). The court reversed and remanded the Board's decision denying the appellant's petition

for enforcement (PFE) of the settlement agreement that resolved his appeal of the agency's demotion action. The agreement provided that the agency would take all necessary steps to cooperate and facilitate the acceptance of the appellant's application for disability retirement, and that it would not place negative statements in the supervisor's statement portion of that application. The agency breached this provision by placing negative statement in the supervisor's certification. In the original compliance proceeding, the Board found that this breach was not material. During that proceeding, the agency provided evidence that it proceeded with an attempt to cure the alleged breach by issuing a new supervisor's statement that did not contain negative information. The court reversed, finding that the breach was material, and remanded the case to the Board "to allow the Board to decide how to proceed, after giving the parties the opportunity to express their views, including their views on a remand to OPM should Mr. Lutz request that."

On remand, the appellant initially responded that, in his view, rescission "appears to be the only workable remedy in this case," and expressed his intent "to fully rescind the breached settlement agreement, enabling [him] to pursue his appeal of the agency's adverse demotion action." He later indicated, however, that he would also consider an enforcement remedy. The AJ found that the agency's issuance of the revised supervisor's statement amounted to specific performance of the settlement agreement, and denied the appellant's PFE.

Holdings: The Board reversed the initial decision, found the agency in noncompliance, rescinded the settlement agreement, and reinstated the underlying demotion appeal:

1. The AJ's finding of compliance was inconsistent the court's order. The revised supervisor's statement was part of the record before the court, which found that the agency was in material breach of the settlement agreement. The Board is bound by that finding.

2. The AJ failed to honor the appellant's right to elect rescission of the settlement agreement. When a party to a settlement agreement materially breaches the agreement, the non-breaching party may elect either to enforce the agreement or to rescind it and reinstate the appeal.

2. There is no available enforcement remedy that would cure the agency's breach. Accordingly, the appropriate action is to rescind the settlement agreement and reinstate the underlying appeal.

► **Appellant: David T. Group**
Agency: Office of Personnel Management
Decision Number: 2008 MSPB 113
Docket Number: PH-844E-07-0414-I-1
Issuance Date: May 28, 2008
Appeal Type: FERS - Employee Filed Disability Retirement

Retirement
- Recovery from Disability

The appellant petitioned for review of an initial decision that affirmed OPM's action discontinuing his disability retirement annuity on the basis that he had recovered from his disabling condition. In January 2003, OPM granted the appellant's application for disability retirement from his position as a Rural Letter Carrier on the basis that eczema caused by contact with the mail left him unable to render useful and efficient service. In 2006, OPM requested that the appellant submit current employment and medical condition so that OPM could assess his entitlement to continue receiving disability retirement benefits. The appellant responded that he was unable to return to work, and enclosed a letter from his treating physician, who stated that the appellant was currently free of his eczema, but that the "prognosis is that if [the appellant] were to return to work he would have a recurrence of his severe, disabling eczema. Therefore he cannot return to the work or similar work that he previously was involved in." Based on the physician's statement that the appellant was currently free of eczema, OPM determined that the appellant's condition was no longer disabling and terminated his disability retirement annuity. On appeal to the MSPB, the AJ affirmed, finding that "the appellant's eczema is not continuous in that he is not currently suffering from this condition," and that "the appellant has not shown that his condition will last for one year, and that he continues to be disabled."

Holdings: The Board granted the appellant's PFR, reversed the initial decision, and ordered OPM to reinstate the appellant's disability retirement annuity:

1. In the absence of fraud, misstatement of fact, or new medical evidence relating to the appellant's 2002 application for disability retirement, it was improper for the AJ to consider whether the appellant's basis would continue for a year. Once the application was approved, the only issue is whether the appellant has shown that he is currently disabled from rendering useful and efficient service in his former position.

2. The medical and other evidence establishes that the appellant's eczema continues to render him unable to perform the duties of a Rural Letter Carrier, as they establish that, if he were to return to work, the recurrence of his disabling symptoms would not be a mere possibility but rather would be a virtual certainty.