

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

2008 MSPB 133

Docket No. AT-0831-07-0995-I-1

**Roy L. Hendricks,
Appellant,**

v.

**Office of Personnel Management,
Agency.**

OPM Claim No. CSA 4 008 102

June 20, 2008

E. Michael Ruberti, Esquire, Saint Simons Island, Georgia, for the appellant.

Patrick Jennings, Washington, D.C., for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman

OPINION AND ORDER

¶1 The appellant has petitioned for review of the initial decision that affirmed the Office of Personnel Management's (OPM's) final decision reducing his Civil Service Retirement System (CSRS) annuity to eliminate credit for post-1956 military service. For the reasons set forth below, we GRANT the appellant's petition and REVERSE the initial decision. OPM's reconsideration decision is NOT SUSTAINED.

BACKGROUND

¶2 The appellant retired under CSRS on June 2, 2001, at the age of 55. Initial Appeal File (IAF), Tab 5, Subtab 4c, Ex. 7. Because he had post-1956 military service, the appellant was provided with Form 1515, Military Service Deposit Election. *Id.*, Ex. 10. The form explained that he must make a deposit to continue receiving credit for military service upon becoming eligible for Social Security benefits, and that his CSRS annuity might be reduced after age 62 if he did not make such a deposit. *Id.* Similar notice had also been provided with the retirement application, Standard Form 2801. *See id.*, Ex. 6a-6b. The appellant elected not to make the deposit. *Id.*, Ex. 10.

¶3 By letter dated August 27, 2007, OPM advised the appellant that, because the Social Security Administration had certified that he was eligible for Social Security benefits, and he had not made a deposit for his post-1956 military service, his CSRS annuity would be recomputed accordingly. IAF, Subtab 4a. As a result, the appellant's gross monthly annuity was reduced from \$4,515 to \$3,250. *Id.* The letter indicated that the decision was final and advised him of his Board appeal rights. *Id.*

¶4 In his appeal, the appellant contended that he would have made the deposit had he known that his annuity would be reduced upon reaching the age of 62. IAF, Tabs 1, 4, 7. He conceded that he had signed Form 1515, but stated that he had relied upon the advice of a retirement counselor with his employing agency, who mistakenly informed him that he did not have to make the deposit if he did not apply for Social Security benefits. *Id.* The appellant further stated that, based on that representation, he calculated that the investment value of the money required for the deposit would outweigh the value of the Social Security benefits, and for this reason elected not to make the deposit. *Id.* He later identified the personnel specialist as one Eunice Chicks. IAF, Tab 9. However, Ms. Chicks did not appear at the hearing or provide any written statement. Following the hearing, the administrative judge (AJ) affirmed OPM's final decision, finding it

“inherently improbable” that Ms. Chicks misled the appellant, and that he had been “elaborately and unequivocally” informed of the consequences of not making the deposit. IAF, Tab 12 (Initial Decision, Jan. 10, 2008) (ID).

ANALYSIS

¶5 An annuitant who retires after September 7, 1982, is entitled to receive credit for active military service performed after 1956 under both CSRS and the Social Security system if he deposits an amount equal to 7 percent of his total post-1956 military pay with the Civil Service Retirement and Disability Fund. 5 U.S.C. § 8334(j). If the annuitant fails to make such a deposit, OPM must recalculate the annuity payments when he first becomes eligible for Social Security benefits to exclude credit for the post-1956 service. 5 U.S.C. § 8332(j)(1). Employees who retire on or after October 1, 1983, must make such a deposit before their separation from service upon which title to an annuity is based. 5 C.F.R. § 831.2104. OPM will permit a post-separation deposit, however, if an employee’s failure to make the deposit prior to retirement was the product of administrative error. 5 C.F.R. § 831.2107(a)(1).

¶6 The U.S. Court of Appeals for the Federal Circuit has held that, when an employee, at the time of election, asks for information regarding the amount of the military deposit or the consequences of failing to make a deposit, the government commits administrative error under 5 C.F.R. § 831.2107(a)(1) if its response either misrepresents the dollar amounts in question, or is so indirect, inaccurate, or incomplete as to confuse the employee as to the amount of the deposit or the effect of any failure to make the deposit on the annuity recalculation. *McCrary v. Office of Personnel Management*, 459 F.3d 1344, 1349 (Fed. Cir. 2006). In so holding, the court affirmed the Board’s longstanding policy that military veterans are entitled to expect that the government will provide them with accurate answers to questions concerning their deposit

requirements to enable them to make informed decisions on matters that may significantly affect their annuities. *Id.*

¶7 The appellant provided sworn testimony that Ms. Chicks informed him that he did not have to make a deposit for his post-1956 military service if he did not apply for Social Security benefits. He further testified that he would have made the deposit had he not received this erroneous advice. Hearing CD. The agency provided no evidence to rebut the appellant's claim. *See Hendricks v. Department of the Navy*, 69 M.S.P.R. 163, 168 (1995) (the statements of a party's representative in a pleading do not constitute evidence). Nevertheless, the administrative judge found the appellant's version of events not credible on the grounds that it was "inherently improbable" that Ms. Chicks would have provided "such blatantly wrong information." ID at 4.

¶8 Where, as here, an administrative judge's findings are not based on the observation of witnesses' demeanor, the Board is free to re-weigh the evidence and substitute its own judgment on credibility issues. *Haebe v. Department of Justice*, 288 F.3d 1288, 1302 (Fed. Cir. 2002). Contrary to the finding of the administrative judge, the appellant's version of events is not inherently unlikely. The Board has found on several occasions that an employing agency's retirement counselor misinformed an employee regarding the effect that failure to make a deposit for post-1956 military service would have on his annuity. *See, e.g., Taylor v. Office of Personnel Management*, 108 M.S.P.R. 12, ¶ 11 (2008); *Gilliam v. Office of Personnel Management*, 91 M.S.P.R. 352, ¶ 18 (2002); *Riddick v. Office of Personnel Management*, 85 M.S.P.R. 472, ¶ 9 (2000). Moreover, the absence of contradictory evidence weighs in the appellant's favor. *See Hillen v. Department of the Army*, 35 M.S.P.R. 453, 458 (1987). Based on these considerations, we find the appellant's testimony credible.

¶9 The record reflects, and the appellant concedes, that OPM provided him with specific information regarding the consequences of failing to make the deposit. However, while it is true that the appellant had access to the information

provided with Form 1515 and his retirement application, the misleading advice of his employing agency nevertheless constitutes administrative error. *See Taylor*, 108 M.S.P.R. 12, ¶¶ 2, 12; *Gilliam*, 91 M.S.P.R. 352, ¶¶ 2, 18; *Riddick*, 85 M.S.P.R. 472, ¶¶ 2, 10. Because the appellant's failure to make the deposit was due to this administrative error, he is entitled to make a post-separation deposit under 5 C.F.R. § 831.2701(a)(1).

ORDER

¶10 Accordingly, we ORDER the Office of Personnel Management (OPM) to set a time limit under 5 C.F.R. § 831.2107(a)(1) by which the appellant may make the military deposit to his former employing agency. OPM must complete this action no later than 20 days after the date of this decision.

¶11 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).

¶12 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 in 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).

¶13 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, www.cafc.uscourts.gov. 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:

William D. Spencer
Clerk of the Board
Washington, D.C.