

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

2009 MSPB 72

Docket No. SF-0831-07-0721-I-1

**Steven L. Frank,
Appellant,**

v.

**Office of Personnel Management,
Agency.**

OPM Claim No. CSF 1 026 552

April 24, 2009

Steven L. Frank, Hollywood, California, pro se.

Neale N. Ainsfield, Washington, D.C., for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant has filed a petition for review of the initial decision that affirmed the Office of Personnel Management's (OPM) reconsideration decision denying his request for a survivor annuity. For the reasons stated below, the Board GRANTS the petition for review, VACATES the initial decision, and REMANDS this case for further proceedings.

BACKGROUND

¶2 The appellant's father, the decedent in this case, was employed by the Department of the Army at the time of his death in 1975. Initial Appeal File (IAF), Tab 4, Subtabs II-B at 6, II-E at 9. His employment was subject to the Civil Service Retirement System (CSRS). *See id.*, Subtab II-E at 9. Following his death, CSRS survivor benefits were paid to the decedent's widow, who was the appellant's mother. *See, e.g.*, IAF, Tab 4, Subtab II-D at 28. Until about 1983, those payments included benefits for the appellant, who was 12 years old at the time of the decedent's death. *See id.*, Subtab II-D at 15, 35; *id.*, Subtab II-E at 3, 7. In the early 1980s, however, OPM terminated benefits for the appellant on the ground that he was over the age of 18 and had not been shown to be a full-time student. *Id.*, Subtab II-D at 20-21.

¶3 Several years later, the appellant submitted to OPM a request for a CSRS survivor annuity as a disabled dependent. IAF, Tab 4, Subtab II-D at 3-4; *see id.* at 16-18 (earlier inquiring about benefits). He stated therein that he was mentally retarded, that he had been receiving Social Security Disability Insurance (SSDI) payments since 1993, but that he had been unable to obtain his SSDI or school records to support his claim. *Id.* at 3-4. OPM denied the appellant's request, and it thereafter issued a final decision upholding its denial on the grounds that he "failed to submit medical documentation, Social Security Records and school records to show that [he was] incapable of self support because of a mental or physical disability that incurred [sic] before age 18." IAF, Tab 4, Subtab II-A at 1; *id.*, Subtab II-C at 1-3.

¶4 This appeal followed. IAF, Tab 1. On appeal, the appellant claimed that he was "a mental[ly] disabled child," who was "incapable of self-support," that he was homeless, that he had no telephone, and that he had been unable to obtain relevant records to support his claim. *Id.* at 1, 3-4. He further stated that he did not want to hire an attorney because he was concerned about paying legal fees, and requested that the Board contact the Social Security Administration (SSA) on

his behalf to obtain his SSDI records. *Id.* at 3. The appellant did not request a hearing.

¶5 The administrative judge to whom the appeal was assigned scheduled a status conference and a close of record conference with the parties, both by telephone, to address the applicable law and relevant evidence. IAF, Tabs 6, 7. In the order by which she scheduled the latter conference, she urged the appellant “to make efforts to obtain access to a telephone through a nonprofit organization or other assistance,” and stated that this would make it possible to discuss the law and facts relevant to his appeal and to discuss whether a dismissal without prejudice would be appropriate to allow him additional time to obtain supporting evidence. IAF, Tab 7 at 1-2. The appellant did not appear for either teleconference. *See* IAF, Tab 9, Initial Decision (ID) at 3-4. He also did not comply with the administrative judge’s order to provide responses to the agency’s discovery request, and submitted no further evidence or argument in support of his claim. *See* ID at 4; IAF, Tab 7 at 2.

¶6 Based on the written record, the administrative judge affirmed OPM’s reconsideration decision, finding that the appellant failed to carry his burden of proving that he was incapable of self-support because of a mental or physical disability incurred before age 18. ID at 1, 6-7; *see* [5 U.S.C. § 8341\(a\)\(4\)\(B\)](#). As a threshold matter, the administrative judge found that there was no assertion or evidence that the appellant was presently incompetent, such that the Board would be required to consider whether it was appropriate to arrange pro bono representation for him pursuant to *French v. Office of Personnel Management*, [810 F.2d 1118](#) (Fed. Cir. 1987). ID at 5 n.5. She also denied the appellant’s request that the Board contact the SSA to obtain his SSDI records. ID at 6 n.7.

¶7 The appellant subsequently filed a document with the Board’s Western Regional Office requesting reopening of his case. Petition for Review File (PFRF) Tab 1 at 2-117. The submission was forwarded to the Clerk of the Board, who served a copy of it on OPM and notified the appellant that his filing would

be considered a petition for review of the initial decision.¹ PFRF, Tab 2.² OPM has not responded to the appellant's submission.

ANALYSIS

¶8 An unmarried dependent child of a deceased federal employee who is incapable of self-support because of a mental or physical disability incurred before the age of 18 may be entitled, regardless of his current age, to a survivor annuity based on the federal service of his deceased parent. [5 U.S.C. § 8341\(a\)\(4\)\(B\), \(e\)\(3\)\(A\)](#).

¶9 On review, the appellant reiterates his claims that he is “disabled + [h]andicapped,” that he is homeless, that he has been receiving SSDI benefits since 1993, that he has not had a job in 15 years, and that he “just give[s] up with [his] condition.” PFRF, Tab 1 at 2. He attaches to his petition for review medical records which indicate that, as early as February 1979, he was diagnosed as suffering from “Manic Depressive Illness – Circular Type.” *Id.* at 97-99. In 1993, the appellant was again diagnosed with manic depressive illness as well as “borderline personality disorder.” *Id.* at 28. The appellant's examining physician described him as “extremely dysfunctional,” and suffering from “multiple severe psychiatric illnesses” that “could certainly be expected to last longer than a year,” and which “make[] him dysfunctional in multiple spheres.” *Id.* at 29. The

¹ See *Valdez v. Office of Personnel Management*, [103 M.S.P.R. 88](#), ¶ 4 (2006) (when an initial decision becomes final after neither party files a timely petition for review, and when a party subsequently requests reopening of the case, the Board treats the request as an untimely filed petition for review).

² The appellant's petition for review was untimely filed, and it includes documents that are dated well before the record closed below. See PFRF, Tab 1; *Avansino v. U.S. Postal Service*, [3 M.S.P.R. 211](#), 214 (1980) (under [5 C.F.R. § 1201.115](#), the Board will not consider evidence submitted for the first time with the petition for review absent a showing that it was unavailable before the record was closed despite the party's due diligence). In light of the circumstance described below, however, we find good cause for the untimeliness, and we have considered the documents included with the petition.

appellant was also diagnosed as suffering from bipolar disorder and “[c]hronic mental illness” in January 2000, *id.* at 15-18, and his records document a history of hospitalization for psychiatric disorders, *see, e.g., id.* at 16, 27; IAF, Tab 4, Subtab II-D.

¶10 In the *French* case to which the administrative judge referred, the court instructed the Board to establish procedures for obtaining representation for appellants in some cases involving entitlement to disability retirement benefits. 810 F.2d at 1120. According to the court, if there is “an apparently nonfrivolous claim of past incompetence by one presently incompetent,” the Board and OPM must take an “active role” in ensuring that the apparently incompetent appellant not be “charged with the task of establishing his case [alone].” *Id.* The *French* procedures should be invoked when: (1) there is a showing that the appellant is mentally incompetent, and (2) he is proceeding “entirely pro se.” *Engler v. Office of Personnel Management*, [81 M.S.P.R. 582](#), ¶ 5 (1999). The court’s standard for mental incompetence is an inability to handle one’s personal affairs because of either physical or mental disease or injury. *Rapp v. Office of Personnel Management*, [483 F.3d 1339](#), 1341 (Fed. Cir. 2007). “An applicant may be ‘one having some minimal capacity to manage his own affairs, and not needing to be committed. The claimant is not required to have been a raving lunatic continuously.’” *Id.* (quoting *French*, 810 F.2d at 1120).

¶11 As we have indicated above, *French* involved a claim of entitlement to disability retirement benefits. Strictly speaking, the case now before us does not involve such a claim. Instead, it involves a claim of entitlement to survivor benefits. The court decision that preceded our decision in *French*, however, indicates that the considerations supporting the use of *French* procedures may be applicable in a case such as the one now before us. In its decision, the court stated that it would be “patently unreasonable and fundamentally unfair to require or allow an incompetent to act as an advocate” for himself in a situation in which he was “required to establish or allowed to attempt to show his own

incompetency for many years in the past.” *French*, 810 F.2d at 1119; *see Hall v. Office of Personnel Management*, [85 M.S.P.R. 371](#), ¶¶ 9-10 (2000) (citing the court’s decision in *French* in waiving a time limit based on a showing of incompetence). Like the appellant in *French*, the appellant here is proceeding entirely pro se. If the appellant shows that he is presently incompetent, and if he makes “an apparently nonfrivolous claim of past incompetence,” we discern no reason why the *French* procedures should not be applied here. *Cf. Rapp*, 483 F.3d at 1342 (noting that the Board “has vacated initial decisions and remanded appeals for new adjudications when an appellant was unrepresented in the lower proceeding and there were indications below that the appellant was suffering from a psychiatric disorder that was likely to have affected his or her ability to adequately represent him or herself”).

¶12 Although the appellant’s medical records do not document his mental condition after 2000, they nonetheless document a history of chronic mental illness spanning more than 20 years. We find, under the circumstances of this case, that these records are sufficient to call into doubt the appellant’s mental competency to prosecute his appeal pro se. Where a party is diagnosed with a medical condition that is by its nature permanent or progressive in severity, it will be assumed to continue to exist after the date of diagnosis absent evidence to the contrary. *Pyles v. Merit Systems Protection Board*, [45 F.3d 411](#), 415 (Fed. Cir. 1995). Moreover, the appellant’s repeated statements that he has been unable to obtain the necessary documents to establish his claim, and his request that the Board assist him in doing so, suggest that he may be unable to represent himself. Accordingly, the Board remands this case so that the administrative judge may determine whether *French* procedures should be invoked. *See Rapp*, 483 F.3d at 1340 (remanding case for proceedings to determine whether appointment of counsel was warranted); *Barnett v. Office of Personnel Management*, [88 M.S.P.R. 95](#), ¶ 15 (2001) (case remanded to regional office with instructions to conduct an inquiry to determine whether *French* procedures should

be invoked); *Woods v. Office of Personnel Management*, [59 M.S.P.R. 1](#), 2 (1993) (statements of the appellant's attorney that the appellant was a very sick man whose thought processes were in disarray and that the appellant was unable to present a cogent argument when he prosecuted his appeal pro se were sufficient to raise the issue of whether he was competent to proceed).

ORDER

¶13 The Board vacates the initial decision and remands this appeal to the regional office. The administrative judge shall provide the parties an opportunity to submit evidence and argument on the appellant's mental competence. Based on those submissions, she shall decide whether, on the basis of preponderant evidence, the appellant is mentally competent to present his case before the Board. *See Barnett*, [88 M.S.P.R. 95](#), ¶ 16. If the administrative judge finds that the appellant is not capable of representing himself, she shall make diligent efforts to obtain appropriate representation for the appellant. If she obtains capable representation for the appellant, she should adjudicate the appeal on the merits, including a hearing if the appellant requests one. If capable representation cannot be obtained despite the administrative judge's diligent efforts or if the appellant refuses to allow himself to be represented by a capable representative, the administrative judge shall not enter an adverse order against him; rather, if necessary, she should dismiss the case without prejudice to reinstatement of the action under circumstances conducive to fair adjudication. *See Harris v. Department of Veterans Affairs*, [142 F.3d 1463](#), 1471 (Fed. Cir. 1998); *Barnett*, [88 M.S.P.R. 95](#), ¶ 16. If the administrative judge finds that the appellant was competent to pursue his appeal pro se, she may reinstate her December 3, 2007 initial decision on the merits and include in it the reasons for finding that *French* procedures need not be invoked. In the alternative, the administrative judge may find that the appellant was competent to pursue his appeal pro se, reconsider circumstances which prevented the appellant from

submitting his medical documentation in a timely manner, and if appropriate, permit him to proceed on the merits. *Barnett*, [88 M.S.P.R. 95](#), ¶ 16.

FOR THE BOARD:

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