

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

2009 MSPB 102

Docket No. NY-844E-08-0287-I-1

**Jackie Confer,
Appellant,**

v.

**Office of Personnel Management,
Agency.**

OPM Claim No. CSA 8 341 849

June 8, 2009

Anthony C. Darienzo, Esquire, Huntington Station, New York, for the appellant.

Charlretta T. McNeill, 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 an initial decision (ID) that affirmed the final decision of the Office of Personnel Management (OPM) denying her application for disability retirement under the Federal Employees' Retirement System (FERS). For the reasons discussed below, we DENY the petition under [5 C.F.R. § 1201.115](#)(d), REOPEN the case on our own motion under [5 C.F.R. § 1201.118](#), REVERSE in part, VACATE in part, and REMAND the case for further adjudication consistent with this Opinion and Order.

BACKGROUND

¶2 The appellant was employed as a GS-5 Licensed Practical Nurse (LPN) in the nursing home component of a Department of Veterans Affairs Medical Center (VAMC). She held the position from August 22, 2004 until she resigned on July 24, 2006, and thus had 23 months of federal service. Appeal File (AF), Tab 7, Subtab II-E; Hearing Tape (HT) (the appellant). Her resignation came 6½ months after an assault by a patient, which caused her to experience post-traumatic stress disorder (PTSD) relating to a rape that had occurred 16 years before. AF, Tab 5, Exhibit (Exh.) A; Tab 7, Subtab II-D at 2-3, 10-11, 13-14.

¶3 The appellant filed an application for disability retirement benefits under FERS in June 2007. She cited as the basis for her application both PTSD and neck and back injuries she suffered in an automobile accident that occurred on December 27, 2006, 6 months after her resignation. AF, Tab 7, Subtab II-D at 2-4; Subtab II-E at 4-6. OPM issued initial and reconsideration decisions denying the appellant's application for disability retirement. *Id.*, Tab 7, Subtabs II-A, II-C. The appellant filed an appeal of OPM's final decision with the Board and requested a hearing. AF, Tab 1. After holding the appellant's requested hearing, the AJ issued an ID that affirmed OPM's decision, finding that the appellant did not show her PTSD was a disabling medical condition and thus that she did not become disabled while employed in a position subject to FERS. *Id.*, Tab 9 (ID). He concluded that the appellant became disabled by the physical injuries she received in the automobile accident after her resignation. *Id.* The AJ also held that the appellant was disqualified from a FERS disability annuity because she declined a reasonable offer of reassignment to a vacant position at the VAMC. *Id.*

¶4 At the time of the issuance of the ID, the Social Security Administration (SSA) had denied the appellant's application for Social Security disability insurance benefits, but her appeal of that denial was still pending. AF, Tab 6. The appellant has filed a PFR in which she submits as new evidence an SSA

decision granting her disability insurance benefits and a copy of a personal statement she submitted to SSA in support of her application. Petition for Review File (RF), Tab 1 at 8-20. OPM did not file a response to the PFR.

ANALYSIS

¶5 The Board may grant a PFR when there is new and material evidence which, despite due diligence, was not available when the record closed. [5 C.F.R. § 1201.115\(d\)](#). The appellant asserts that her application to SSA encompassed both her physical and psychological conditions, and she asks the Board to weigh SSA's determination and grant her FERS disability retirement benefits. RF, Tab 1 at 5. The record in this appeal closed at the end of the hearing on September 11, 2008. HT. The SSA determination submitted by the appellant is dated November 1, 2008. RF, Tab 1 at 8. Therefore, it was not available with due diligence prior to the close of record and is new evidence. *See Avansino v. U.S. Postal Service*, [3 M.S.P.R. 211](#), 214 (1980). However, the appellant's personal statement, which is dated August 17, 2007, prior to the close of record, is not new evidence.

¶6 The Board has consistently held that an award of SSA benefits is relevant, but not dispositive, in a FERS disability retirement appeal if the conditions underlying both applications are the same. *See Givens v. Office of Personnel Management*, [95 M.S.P.R. 120](#), ¶ 9 (2003), *citing Trevan v. Office of Personnel Management*, [69 F.3d 520](#), 526 (Fed. Cir. 1995). Where "there is no indication as to the basis for SSA's determination," however, "it is not a significant factor in deciding the disability retirement question[.]" *Guthrie v. Office of Personnel Management*, [105 M.S.P.R. 530](#), ¶ 5 (2007). Such is the case here. The SSA determination of November 1, 2008, states that the appellant meets the medical requirements for SSA disability benefits. RF, Tab 1 at 8. It does not, however, identify the condition or conditions that were the basis for SSA's decision or explain why she was determined to be disabled. *Id.* Therefore, we find that the

SSA determination is not significant or useful evidence in deciding the appellant's FERS disability retirement appeal. *See Burckley v. Office of Personnel Management*, [80 M.S.P.R. 617](#), ¶ 10 (1999). Accordingly, while new, it is not material evidence. *See Boyd-Casey v. Department of Veterans Affairs*, [62 M.S.P.R. 530](#), 532 (1994) (evidence is material if it would warrant an outcome different from that of the initial decision).

¶7 Therefore, the appellant's petition does not meet the criteria of [5 C.F.R. § 1201.115](#)(d) and must be denied. Nevertheless, we reopen the case under [5 C.F.R. § 1201.118](#), because we find that the AJ erred in finding that the appellant was not disabled from useful and efficient service by PTSD.¹ We also find that the record is not sufficiently developed to determine if the appellant declined a reasonable offer of reassignment and that the case, therefore, must be remanded for further proceedings.

The appellant was disabled from useful and efficient service by PTSD.

¶8 In an appeal from an OPM decision denying a voluntary disability retirement application, the appellant bears the burden of proof by preponderant evidence. *Chavez v. Office of Personnel Management*, [6 M.S.P.R. 404](#), 417 (1981); [5 C.F.R. § 1201.56](#)(a)(2). To be eligible for a disability retirement annuity under FERS, an employee must show that: (1) She completed at least 18 months of creditable civilian service; (2) while employed in a position subject to FERS, she 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

¹ Because we find that the appellant was disabled based on the present record, it is not necessary to remand this issue to permit her to submit all the evidence that was considered by SSA in granting her disability benefits, as in *Brown v. Office of Personnel Management*, [106 M.S.P.R. 251](#), ¶ 6 (2007) (citing *Lynum v. Office of Personnel Management*, [103 M.S.P.R. 426](#) ¶ 9 (2006)).

is expected to continue for at least one year from the date that the application for disability retirement benefits was filed; (4) accommodation of the disabling medical condition in the position held is unreasonable; and (5) the employee did not decline a reasonable offer of reassignment to a vacant position. [5 U.S.C. § 8451](#) (a); *Yoshimoto v. Office of Personnel Management*, [109 M.S.P.R. 86](#), ¶ 8 (2008); *Thorne v. Office of Personnel Management*, [105 M.S.P.R. 171](#), ¶ 5 (2007); [5 C.F.R. § 844.103](#)(a). To be timely, a disability retirement application must be filed before, or within one year after, an individual's separation from service. 5 C.F.R. § 844.201(a)(1).

¶9 A determination on eligibility for disability retirement should take into account all competent medical evidence, including qualified medical opinions based on the applicant's symptoms. *See Vanieken-Ryals v. Office of Personnel Management*, [508 F.3d 1034](#), 1041 (Fed. Cir. 2007) (citing *Chavez*, 6 M.S.P.R. at 418-23). Objective clinical findings are to be considered if available, but objective evidence is not required. *Vanieken-Ryals*, [508 F.3d at 1041](#). The determination should also include consideration of the applicant's own subjective evidence of disability and any other evidence of the effect of her condition on her ability to perform in the position she last occupied. *Id.* at 1041-42; *Henderson v. Office of Personnel Management*, [109 M.S.P.R. 529](#), ¶ 12 (2008).

¶10 There is no dispute that the appellant's application was timely, that she met the 18-month service requirement, and that her medical conditions have lasted more than one year since her application. The appellant claimed to be disabled by both PTSD and by back and neck injuries received in the December 2006 automobile accident. Insofar as her physical injuries are concerned, the timing of her accident is dispositive. It occurred after the appellant's resignation; therefore, even if her injuries were disabling, the appellant did not become disabled by them while in a position subject to FERS. *See* [5 C.F.R. § 844.103](#)(a)(2). Thus, she fails to meet one of the eligibility criteria for FERS disability retirement in relation to her neck and back condition. The outcome of

the appeal therefore turns on whether the appellant was disabled by her psychological condition, PTSD, prior to her resignation, whether she could be accommodated in her position, and whether she refused a reasonable offer of reassignment.

¶11 The AJ held that the appellant did not show that she had a disabling medical condition but rather that her condition was “situational.” ID at 11. In reaching that determination, the AJ found that (1) the appellant’s subjective evidence regarding her condition was not credible, (2) the appellant did not comply with a recommendation to obtain regular psychotherapy, and (3) the opinions of two psychiatrists that PTSD rendered the appellant disabled from her position were entitled to little weight. *Id.* at 7-11. We disagree with the AJ on each of these issues and find that the AJ erred in determining that the appellant did not show that her PTSD was a disabling medical condition.

The appellant’s subjective evidence of disability is credible.

¶12 The patient assault on the appellant occurred when a male patient whom she was bathing grabbed her crotch. AF, Tab 5, Exh. A; HT (the appellant).² The appellant had been raped at knifepoint in 1990 at age 27. AF, Tab 5, Exh. A; Tab 7, Subtab II-D at 10, 13. During the rape, her assailant also grabbed the appellant’s crotch in order to remove her pants. *Id.*, Tab 5, Exh. A.

¶13 The appellant stated in her disability retirement application that she became unable to work in her LPN position at the VAMC because of PTSD and that the condition caused insomnia, nightmares, anxiety, depression, and an inability to deal with stress and daily pressures. AF, Tab 7, Subtab II-D at 2-4. In her hearing testimony, the appellant stated that after the assault, she had a hard time

² The patient was known to have the potential for committing an assault, including a sexual assault, and was designated as someone whom a nurse or attendant should never treat alone. HT (the appellant); AF, Tab 5, Exh. A. The appellant had been left alone with the patient when a male aide was called away in an emergency. *Id.*

sleeping, had nightmares, was exhausted and not clear-headed on the job, and that she feared and dreaded going to work. HT. She testified that she was “very uncomfortable” when she had to bathe male patients. *Id.* She had an anxiety attack at work that caused her to go to the emergency room. *Id.* In addition, the appellant developed a case of shingles,³ which her treating physician concluded was at least partly stress related and which caused her to lose 2 weeks of work. *Id.*; AF, Tab 7, Subtab II-B at 18; II-D at 10-11.

¶14 The AJ rejected the appellant’s depiction of her condition as disabling in large part because she stated in her hearing testimony that she worked for several months starting in September 2006 as a home health care supervisor and would still be working were it not for her automobile accident. ID at 8. We find that the AJ’s credibility determination on this point is incorrect. “The general rule is that the Board is free to substitute its judgment for that of one of its administrative judges,” with the exception of overturning a demeanor-based credibility determination. *Leatherbury v. Department of the Army*, [524 F.3d 1293](#), 1304 (Fed. Cir. 2008); *Lizzio v. Department of the Army*, [110 M.S.P.R. 442](#), ¶ 9 (2009). The Board must give deference to an AJ’s credibility determination when it is based, explicitly or implicitly, on the demeanor of a witness. *Leatherbury*, 524 F.3d at 1304 (citing *Haebe v. Department of Justice*, [288 F.3d 1288](#), 1301 (Fed. Cir. 2002)). In this case, the AJ’s determination was not based on the appellant’s demeanor but on logic; i.e., whether it was believable that she was disabled from her LPN position at the VAMC when she subsequently held a home health care position.

¶15 The appellant must show that, because of her psychiatric condition, she was disabled from performing her position prior to her resignation. See [5 U.S.C. §](#)

³ We take administrative notice that shingles is an infection caused by the dormant chickenpox virus, and that it is characterized by a painful rash with blisters. See www.mayoclinic.com/health/shingles/DS00098.

[8451\(a\)\(1\)\(B\)](#); *Hardy v. Office of Personnel Management*, [98 M.S.P.R. 323](#), ¶¶ 11, 16 (2005); [5 C.F.R. § 844.103\(a\)\(2\)](#). The appellant's position description indicates that an LPN at the VAMC provides direct nursing care through duties such as bathing, feeding, and turning/positioning patients, collecting specimens, performing procedures such as catheterizations, dressing wounds, caring for tracheal and feeding tubes, and checking emergency equipment and initiating emergency care. AF, Tab 7, Subtab II-D at 18-19. In the home health care position, by contrast, the appellant conducted criminal background checks on nurses' aides and did home visits to review their work. HT (the appellant). She also visited several mentally challenged patients weekly to divide their medications into daily dosages. *Id.* The appellant testified that she was never alone with a patient in this job. *Id.*

¶16 Subsequent work history is relevant to whether an individual's condition is confined to a single work environment. *See Yoshimoto*, [109 M.S.P.R. 86](#), ¶ 9; *Wilkey-Marzin v. Office of Personnel Management*, [82 M.S.P.R. 200](#), ¶ 14 (1999). Thus, one is not entitled to a disability retirement annuity where one's medical condition is based on a single work environment, e.g., because it grew out of a personal conflict with a supervisor, *see Cosby v. Office of Personnel Management*, [106 M.S.P.R. 487](#), ¶ 10 (2007), or resulted from a perceived hostile work environment due to workload or understaffing, *see Musser v. Office of Personnel Management*, [102 M.S.P.R. 18](#), ¶ 10 (2006). This is not such a case. Moreover, the appellant's home health care position entailed very different responsibilities from her LPN job at the VAMC. Therefore, we find that the appellant's employment in home health care after her resignation does not undermine her testimony that she was unable to work in her LPN position.

¶17 The AJ also contrasted the appellant's ability to work as a home health care aide with assertions in her retirement application and hearing testimony that she was not functional in daily life. ID at 7-8. In her disability retirement application, the appellant cited numerous effects that had developed in her

personal life at that time (11 months after her resignation), including being reluctant to leave the house, avoiding people, and having difficulties in her family relationships. AF, Tab 7, Subtab II-D at 2-4. She testified at the hearing that she seldom leaves the house unaccompanied, feels overwhelmed by everyday chores, and avoids people. HT. Her retirement application and testimony, however, relate such symptoms in the present tense; the appellant did not describe herself that way immediately after the incident or at the time of her resignation. Rather, the record indicates that her condition has worsened over time. AF, Tab 5, Exh. A; Tab 7, Subtab II-D at 14; HT (Dr. George Fairey, MD). Therefore, we do not find that the appellant's later statements about her general inability to function are logically inconsistent with her ability to work as a home health care aide shortly after her resignation, and these statements do not undermine her credibility. *Leatherbury*, 524 F.3d at 1304; *Lizzio*, [110 M.S.P.R. 442](#), ¶ 9; *see also Hardy*, [98 M.S.P.R. 323](#), ¶ 14 (finding AJ's reliance on testimony relating to a time period following the appellant's separation from federal service misplaced).

The appellant's subjective evidence is supported by competent medical evidence.

¶18 An appellant's subjective evidence of disability must be seriously considered when it is supported by competent medical evidence, i.e., qualified medical opinions based on reported symptoms. *See Vanieken-Ryals*, 508 F.3d at 1041-42 (citing *Chavez*, 6 M.S.P.R. at 418-23); *see also Craig v. Office of Personnel Management*, [92 M.S.P.R. 449](#), ¶ 15 (2002). One may prevail in a disability retirement application based on medical evidence that "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." *Vanieken-Ryals*, 508 F.3d at 1041. In this appeal, the appellant sought assistance from a clinical psychologist in February 2006, shortly after her assault. The psychologist diagnosed the appellant with PTSD based on her reports of "chronic difficulty sleeping, severe nightmares with themes of violence

and powerlessness, irritable and anxious mood, hypervigilance, and an avoidance of thoughts and things associated with the incident.” AF, Tab 7, Subtab II-D at 10. The psychologist’s report, which was issued 4 months prior to the appellant’s resignation, did not state that she was disabled at that time, but recommended weekly psychotherapy “to restore her functioning to an optimally healthy level.” *Id.* at 11.

¶19 After her resignation, the appellant later consulted two psychiatrists, John C. Luke, M.D., whose report was submitted with her disability retirement application, and George G. Fairey, M.D., whose report and testimony were provided on appeal. Both psychiatrists confirmed the diagnosis of PTSD and concluded that the appellant was not able to work in her LPN position at the VAMC nursing home at the time she resigned. AF, Tab 5; Tab 7, Subtab II-D at 13-14; HT (Dr. Fairey). Dr. Fairey testified at the hearing that he had treated numerous PTSD patients. HT. He explained that the appellant reacted as she did to the assault by the patient because of the similarity to what occurred during her rape, i.e., being grabbed in the crotch in both incidents. *Id.* Dr. Fairey stated that the appellant exhibited “classic PTSD symptoms” in response to the assault i.e., emotional numbing, nightmares, and anxiety. *Id.* He concluded that, as she continued to go to work, the appellant felt increasingly anxious and fearful and her condition worsened. *Id.* In his written report, he stated the appellant became hypervigilant and experienced inability to focus, concentrate or finish a task. AF, Tab 5, Exh. A. He stated that she did not get relief from beginning therapy and taking medication, that she became unable to function and that she felt she had no choice but to resign. *Id.*

¶20 The AJ rejected the psychiatrists’ opinions because each had only met with the appellant once and so did not have long familiarity with her. ID at 10-11. However, a longstanding treatment relationship, while significant, is not the only factor to be considered in determining the probative value of medical evidence. Other considerations include the competence and qualifications of the medical

expert and whether the medical opinion considered relevant factors, is sufficiently specific, is based on established diagnostic criteria, and is consistent with generally accepted professional standards. *See Henderson*, [109 M.S.P.R. 529](#), ¶ 19 (2008) (citing *Vanieken-Ryals*, 508 F.3d at 1042-43); *Rapp v. Office of Personnel Management*, [108 M.S.P.R. 674](#), ¶ 11 (2008). Another factor is whether there is any contrary or conflicting medical evidence. *Henderson*, [109 M.S.P.R. 529](#), ¶ 19; *Rapp*, [108 M.S.P.R. 674](#), ¶ 11. In this case, there is no challenge to the competence of the physicians who diagnosed the appellant, both of whom were board certified in psychiatry, or the completeness and quality of their opinions. Nor is there any medical evidence contradicting their conclusions that the appellant had PTSD as the result of the patient assault and was disabled from working as an LPN. We find that the fact that neither psychiatrist had an ongoing treatment relationship is not, by itself, sufficient to disregard their conclusions.

The appellant did not fail to obtain recommended treatment.

¶21 It is well settled that to prove entitlement to disability retirement, an applicant must show that the medical condition at issue cannot be controlled by medication, therapy or other reasonable means. *See, e.g., Shanoff v. Office of Personnel Management*, [103 M.S.P.R. 549](#), 553 (2006); *Bray v. Office of Personnel Management*, [97 M.S.P.R. 209](#), ¶ 18 (2004). The Board has held that one does not qualify for disability retirement benefits if the individual refuses to get recommended psychological therapy or take a prescribed antidepressant. *Craig*, [92 M.S.P.R. 449](#), ¶ 17. Just as when one does not seek appropriate treatment for a physical ailment, this is a situation where an individual's disability is held to result not from a medical condition but from the voluntary failure to take advantage of treatment that could ameliorate the condition. *Id.*

¶22 After the patient assault, the appellant was referred to the Employee Assistance Program (EAP) by her supervisor and by a physician at the employee health clinic. AF, Tab 7, Subtab II-B at 20; HT (the appellant). The appellant

saw an EAP counselor, who recommended further treatment, and so in February 2006, the appellant consulted a psychologist. AF, Tab 7, Subtab II-D at 10; HT (the appellant). The AJ held that the appellant did not comply with her psychologist's recommendation for regular psychotherapy. ID at 9. The AJ also held that this was not due to lack of insurance, since she stopped seeing the psychologist for therapy in March 2006, several months before she resigned. *Id.* at 10. The ID, however, did not address the appellant's hearing testimony that she stopped because the therapist was "out of network and I couldn't afford it." HT. That is, the therapist did not accept her insurance. She also stated that she could not find anyone in her insurance provider's network. *Id.* There is no evidence to contradict the appellant's testimony.⁴ The Board will not find that an individual has refused treatment where the evidence shows she cannot afford it. *See Smedley v. Office of Personnel Management*, [108 M.S.P.R. 31](#), ¶ 25 (2008) (citing *Craig*, [92 M.S.P.R. 449](#), ¶ 18 n.8.)

¶23 Furthermore, although she stopped seeing the therapist, the appellant continued to see a physician to monitor the drugs that she had been prescribed, Lexapro and Cymbalta for depression and Ambien for sleeplessness. HT. The appellant testified that Lexapro made her feel nauseated, so she was switched to Cymbalta which she later stopped taking because it made her feel dizzy. *Id.* The Board has accepted appellants' arguments that side effects prevented taking their prescribed medication and has not denied disability retirement when drugs are no longer taken for this reason. *See Bray*, [97 M.S.P.R. 209](#), ¶ 18; *Treziok v. Office of Personnel Management*, [89 M.S.P.R. 361](#), ¶ 23 (2001).

¶24 Under the circumstances of this case, we find that the evidence does not show that the appellant refused to follow treatment recommendations. The AJ

⁴ We also note that the therapist charged \$140 per session, and the appellant, a GS-5, had an outstanding bill for their sessions at the time of the psychologist's March 17, 2006 report. AF, Tab 7, Subtab II-D at 11.

therefore erred in determining that the appellant should be denied disability retirement benefits on this basis.

The appellant's condition was incompatible with useful and efficient service or retention in her position.

¶25 An applicant for disability retirement must show either that she is disabled because of a medical condition that resulted in a deficiency in performance, conduct or attendance, or, if there is no such deficiency, that the disabling medical condition is incompatible with either useful and efficient service or retention in the position. *Thieman v. Office of Personnel Management*, [78 M.S.P.R. 113](#), 116 (1998); *Gometz v. Office of Personnel Management*, [69 M.S.P.R. 115](#), 121 (1995); [5 C.F.R. § 844.103](#)(a)(2).

¶26 The appellant testified that her supervisor criticized her work after the assault. HT. Her EAP referral also said her performance needed to improve. AF, Tab 7, Subtab II-B at 20. However, given the timing of the referral letter, which was issued only 1 day after the assault, we do not find that it has probative value in showing that there was a service deficiency attributable to the appellant's PTSD.⁵ Moreover, the Supervisor's Statement in the retirement application said neither the appellant's performance nor her conduct was unsatisfactory and that the question about attendance deficiencies was not applicable since she had resigned. *Id.*, Subtab II-D at 6. In addition, the appellant's progress review of June 7, 2006, does not reflect performance deficiencies but only that she had resigned with notice. *Id.* at 24-25. Therefore, we find that no service deficiency

⁵ The appellant testified that prior to the patient assault in January 2006, she had no problems with her supervisor and her ratings were acceptable. HT. The AJ, however, found that she had performance deficiencies before the assault based on the statement in the EAP referral letter. ID at 3 (citing AF, Tab 7, Subtab II-B at 20). Without some further evidence explaining the basis for the statement in the letter, we do not find it more probative than the appellant's testimony. In any case, the issue to be decided is whether the appellant had a performance, conduct or attendance deficiency due to PTSD after the assault or whether her condition was incompatible with useful and efficient service or retention in her position.

has been established and that the appellant's entitlement to disability retirement should be determined under the second prong of the test set forth above, i.e., whether her condition was incompatible with useful and efficient service or retention in her position. As explained below, the appellant's condition meets this standard.

¶27 An individual can prove that a medical condition is incompatible with useful and efficient service by showing that the condition is inconsistent with performing assigned duties. *See Thieman*, 78 M.S.P.R. at 120-21 (chronic depression, which negatively affected concentration, memory and judgment, was incompatible with useful and efficient service or retention in the position of medical officer); *Gometz*, 69 M.S.P.R. at 121 (pinched nerve affecting both hands was incompatible with working as a mechanic).

¶28 As discussed above, the appellant's position description indicates that she was responsible for a wide variety of duties involving direct patient contact, minor medical procedures, and emergency action when necessary. AF, Tab 7, Subtab II-D at 18-19. It is beyond cavil that an individual performing such duties must be calm and focused. By contrast, the appellant's medical evidence and her testimony regarding the effects of her PTSD reflect that she was anxious, hypervigilant, suffering from lack of sleep, and often unable to concentrate. HT; AF, Tab 7, Subtab II-D at 10, 13-14; Tab 5, Exh. A. As a result, two psychiatrists concluded she was unable to function in her position as an LPN. AF, Tab 5, Exh. A; Tab 7, Subtab II-D at 13-14. We therefore find that the appellant's testimony, corroborated by competent medical evidence, shows that her psychological medical condition rendered her incapable of performing her LPN duties and was therefore incompatible with useful and efficient service or retention in her position. *See Thieman*, 78 M.S.P.R. at 120.

The appellant could not be accommodated in her position.

¶29 Under FERS, an individual is not eligible for disability retirement benefits if there is a reasonable accommodation for the disabling condition in the position

held. [5 U.S.C. § 8451\(a\)](#); *Gooden v. Office of Personnel Management*, [471 F.3d 1275](#), 1279 (Fed. Cir. 2006); [5 C.F.R. § 844.103\(a\)\(4\)](#). The ID did not make a finding on this issue. However, we find that the record is sufficiently developed so that we can make a determination on this issue. The evidence of record shows the appellant could not be accommodated in her position. “[A]ccommodation is defined as ‘a reasonable adjustment made to an employee’s job or work environment that enables the employee to perform *the duties of the position . . .*.’” *Id.* (citing [5 C.F.R. § 844.102](#)). That is, “accommodation requires adjustments that allow an employee to continue to perform her official position.” *Id.* Accommodations may include, e.g., modifications of the worksite, schedule adjustments, job restructuring, and changes in equipment. 5 C.F.R. § 844.102.

¶30 The only accommodation attempt by the VAMC shown on the Agency Certification in the appellant’s retirement application was an offer of reassignment. AF, Tab 7, Subtab II-E at 15-16. Further, there is no evidence in the record from the VAMC, OPM or the appellant identifying adjustments to the job or to the work environment that would have permitted her to continue to perform the duties of her position. The only effort made in this regard appears to have been a directive not to assign the appellant to care for the patient who assaulted her or to work in the location where it occurred (the “pink hallway”). *Id.*, Subtab II-B at 19; HT (the appellant). Despite the directive, the record reflects, the appellant continued to receive some assignments on that hallway, and on occasion was required to care for the patient who assaulted her. HT (the appellant); AF, Tab 7, Subtab II-B at 18, 22-26; II-D at 3. The appellant testified that this usually occurred on the weekends and that when she objected, she was told, “Stop being a baby.” HT. She also testified that the Assistant Director of Nursing stated to her, “Everyone has had a boob grabbed or something at one time or another. Just get over it.” *Id.* Dr. Fairey’s testimony reflects that the appellant’s condition was aggravated by the negative response from VAMC management. HT. His report stated that this caused her to mistrust people and

feel her managers were trying to get rid of her. AF, Tab 5, Exh. A. This is confirmed by the appellant's testimony, which indicates that she perceived a change in her supervisor's treatment of her after she reported the assault. HT. She stated that afterward, the supervisor was "always on my back about something," and "it seemed like every day something else went wrong," which caused to her be more sensitive and wary. *Id.* The appellant resigned after a scheduling dispute for which she was issued a disciplinary letter. *Id.*

¶31 Considering all the above evidence, we find that the VAMC did not provide appropriate adjustments to the appellant's duties or work environment. There is also no evidence that any adjustment would have been sufficient to accommodate her condition and permit her to perform her duties as an LPN in the VAMC nursing home. Therefore, we find the record shows that the appellant could not have been accommodated in her position.

The record is not sufficiently developed to determine if the appellant declined a reasonable offer of reassignment to a vacant position.

¶32 One is ineligible for disability retirement under FERS if she has refused a reasonable offer of reassignment to a vacant position for which she is qualified. [5 U.S.C. § 8451\(a\)\(2\)\(A\)](#); *Gooden*, 471 F.3d at 1281; *Anthony v. Office of Personnel Management*, [58 F.3d 620](#), 623 (Fed. Cir. 1995); *Craig*, [92 M.S.P.R. 449](#), ¶ 15; [5 C.F.R. § 844.103\(a\)\(5\)](#). The position must be at the same grade or pay level, within the employee's commuting area, and must be one in which the employee would be able to render useful and efficient service. 5 U.S.C. § 8451(a)(2)(A).

¶33 In this case, the appellant declined an offer of reassignment to another position at the VAMC on April 25, 2006. AF, Tab 7, Subtab II-D at 17. The document reflecting the offer shows only that it was made; it does not identify the location to which the appellant would have been transferred or any other information about the position, including the title, grade or pay. *Id.* The

appellant testified that it was a position in the medical-surgical unit of the VAMC. HT.

¶34 The record shows that the appellant gave several reasons for declining the position. On the written offer, she wrote that she did not want to go to the medical-surgical unit. AF, Tab 7, Subtab II-D at 17. At the hearing, the appellant explained that most of her work experience was in geriatrics and that she did not have a medical-surgical background. HT. In addition, the appellant testified that she would not have been comfortable in the medical-surgical unit because she would still have been working with a mostly male patient population, which had made her anxious about going to work after her assault. *Id.* In her request for reconsideration and at the hearing, the appellant also stated that the reassignment would have meant moving from a day shift to a night shift, that she was a single mother, and that she would have had to arrange for after-school and evening child care for her 14-year-old son. AF, Tab 7, Subtab B at 13; HT.⁶

¶35 The position to which the appellant was offered reassignment was in the same commuting area, since it was at the same facility. The record, however does not establish whether it was an LPN position or whether it was at the same grade and pay. The appellant expressed reservations regarding the reassignment because of her lack of experience in a medical-surgical service, yet the record contains no probative evidence as to the qualifications for the position or whether the appellant met them. The appellant also stated she would have been uncomfortable continuing to work with a predominantly male population, yet the record does not show whether the patients were predominantly male or whether the appellant would have been performing the same duties, including intimate patient care, that she did in the VAMC nursing home. Further, the record does not show whether either of her psychiatrists expressed an opinion on whether the

⁶ The AJ concluded that the reasons given by the appellant were inconsistent. ID at 12. We find them to be cumulative.

appellant could have worked in this position at the VAMC. *See Harrison v. Office of Personnel Management*, [76 M.S.P.R. 442](#), 445-46 (1997) (finding that an appellant is precluded from disability retirement for refusing an offer of reassignment where her treating physician approved the position).

¶36 Because of the above evidentiary deficiencies, we find that the record in this appeal is insufficiently developed to determine whether the offer of reassignment which the appellant declined was reasonable and whether the position offered was one in which she could have rendered useful and efficient service. Therefore, the appeal must be remanded. The AJ shall reopen the record for further evidence regarding the reasonableness of the reassignment that the appellant declined and shall issue a new determination as to whether the appellant declined a reasonable offer after the parties have had an opportunity to fully develop the record on this issue.

ORDER

¶37 Accordingly, we remand this case to the New York Field Office for further proceedings consistent with this Opinion and Order.

FOR THE BOARD:

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