UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2009 MSPB 137

Docket No. AT-831M-08-0855-I-1

Ismael Delgado,

Appellant,

v.

Office of Personnel Management,

Agency.

OPM Claim No. CSA 3 153 650

July 21, 2009

Ismael Delgado, Miami, Florida, pro se.

Karla W. Yeakle, Washington, D.C., for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The Office of Personnel Management (OPM) petitions for review of the initial decision that reversed OPM's reconsideration decision terminating the appellant's disability retirement annuity on the basis that he was restored to earning capacity. For the reasons set forth below, we GRANT OPM's petition for review, REVERSE the initial decision of the administrative judge (AJ), and AFFIRM OPM's reconsideration decision.

BACKGROUND

¶2 In 2008, the Social Security Administration reported to OPM that the appellant's earned income for 2006 was $72,766.00, which exceeded 80% of the current rate of pay of the position occupied by the appellant immediately before his retirement. *See* Initial Appeal File (IAF), Tab 8, Subtab 2C at 1; *id.*, Subtab 2A at 1. OPM thus terminated the appellant's disability retirement annuity under the Civil Service Retirement System effective July 1, 2007, on the basis that he had been restored to earning capacity, and stated that the appellant was overpaid $8,275.48 because it continued to pay his annuity for several months beyond June 2007. *Id.*, Subtab 2A at 1. Requesting reconsideration, the appellant informed OPM that $46,538.28 of his $72,766.00 income was back pay that he received as a result of litigation following an unwarranted indefinite suspension taken against him by his former employer. *Id.*, Subtab 2B at 1-3; *see* IAF, Tab 11 at 2, 16. The appellant thus asserted that, because the balance of his income, $25,727.42, was less than 80% of the current rate of pay of the position he occupied immediately before his retirement, he should not be considered as restored to earning capacity. *Id.*, Subtab 2B at 2. On August 6, 2008, OPM issued a reconsideration decision affirming its initial decision terminating the appellant's disability retirement annuity. *Id.*, Subtab 2A at 1. The appellant filed an appeal with the Board. *Id.*, Tab 1.

¶3 The AJ reversed OPM's reconsideration decision. IAF, Tab 12, Initial Decision (ID) at 4. He found that OPM's consideration of the back pay award in determining whether the appellant was restored to earning capacity was plain error. *Id.* at 3. Relying on 5 C.F.R. § 831.1209(c)(3) and 5 C.F.R. § 831.1209(f), he found that the back pay award did not constitute "income earned from personal work efforts" but rather was an amount received in litigation for a period in which the appellant was not employed. *Id.* at 3-4. The AJ thus ordered OPM to restore the appellant's disability retirement benefits for calendar year 2006. *Id.* at 4.

¶4 OPM filed a petition for review, Petition for Review File (PFRF), Tab 1, and the appellant filed a response in opposition, *id.*, Tab 3.

ANALYSIS

¶5 On review, OPM asserts that the back pay awarded to the appellant through litigation was properly included in a calculation of his wages as it represented the lost wages he was due because of the overturning of his suspension by his former employer. PFRF, Tab 1 at 3-4. It further asserts that the back pay was income earned in the course of the appellant's trade or business and thus falls within an exception to the regulatory provision on which the AJ relied to reverse its reconsideration decision. PFRF, Tab 1 at 4; *see* 5 C.F.R. § 831.1209(f)(7). OPM also asserts that the appellant's back pay award was subject to social security and Medicare withholdings and thus was properly regarded as constituting earned income. PFRF, Tab 1 at 3-4.

¶6 An appellant bears the burden of proving by preponderant evidence his entitlement to a civil service retirement benefit. *Sanderson v. Office of Personnel Management*, 72 M.S.P.R. 311, 317 (1996), *aff'd*, 129 F.3d 134 (Fed. Cir. 1997) (Table). Under 5 U.S.C. § 8337(d), if an annuitant who is receiving a disability retirement annuity and who is under 60 years of age receives income from wages or self-employment or both in any calendar year that equals at least 80% of the current rate of pay of the position occupied immediately before retirement, the annuitant's earning capacity is deemed restored. Payment of the annuity of such an annuitant generally terminates 180 days after the end of that calendar year. 5 U.S.C. § 8337(d).

¶7 OPM's regulations provide that the total amount of income from all sources is used to determine earning capacity, that this includes income received as gross wages, and that all income that is subject to federal employment taxes (i.e., social security or Medicare taxes) constitutes earned income. 5 C.F.R. § 831.1209(c); *see Ruskin v. Office of Personnel Management*, 73 M.S.P.R. 544, 548 (1997)

(Payments "of social security and Medicare taxes are the primary indicia that income is from wages . . . ."). Those regulations also define "wages," for purposes of determining earning capacity, as "the gross amount of all remuneration for services performed by an employee for his or her employer . . . before any deductions or withholdings." 5 C.F.R. § 831.1209(d). Further,

> (1) The name by which the remuneration for services is designated is immaterial. Remuneration includes but is not limited to one-time or recurring—
>
> (i) Base salary or pay; . . . and *back pay*.

5 C.F.R. § 831.1209(d)(1)(i) (emphasis added).

¶8 The amount the appellant received as a result of litigation clearly constituted back pay, as we have indicated above. *See* ID at 3-4. As we have indicated further, OPM regulations explicitly provide that back pay constitutes remuneration. The appellant's back pay award thus constitutes wages for purposes of determining earning capacity. *See* 5 C.F.R. § 831.1209(d)(1)(i). Moreover, that award was subject to both social security and Medicare taxes, indicating that it constitutes earned income. *See* 5 C.F.R. § 831.1209(c)(1); IAF, Tab 8, Subtab 2B at 3; *see also Ruskin*, 73 M.S.P.R. at 548.

¶9 As the AJ noted, OPM's regulations explicitly provide that some types of income, including "amounts received in court actions whether by verdict or settlement, unless received in the course of their trade or business," are not considered "income" for purposes of determining whether an annuitant's earning capacity has been restored. ID at 3 (quoting 5 C.F.R. § 831.1209(f)(7)). The AJ erred, however, in finding that the back pay award "is precisely the type of 'amounts received in court actions whether by verdict or settlement,' contemplated by OPM regulations." *See* ID at 4; *see also* 5 C.F.R. § 831.1209(f)(7). We have noted above that 5 C.F.R. § 831.1209(f)(7), the provision on which the AJ relied, includes an exception for amounts received in court actions "in the course of . . . trade or business . . . ." OPM has not defined the phrase "trade or business," but has for these purposes interpreted it broadly to

relate to activities focused on one's livelihood and earning a living. *See* PFRF, Tab 1 at 4. Such an interpretation is reasonable and consistent with an interpretation recognized by courts. *See Commissioner v. Groetzinger*, 480 U.S. 23, 27 n.7 (1987) ("[T]he courts have properly assumed that the term includes all means of gaining a livelihood by work . . . ." (quoting *Trent v. Commissioner*, 291 F.2d 669, 671 (2d Cir. 1961))).

¶10 The exception in 5 C.F.R. § 831.1209(f)(7) accordingly applies here. The appellant was awarded $46,538.28 in back pay as a result of the improper indefinite suspension imposed on him by his former employer. *See* IAF, Tab 8, Subtab 2B at 3; *id.*, Tab 11 at 16. The appellant thus received the award in the course of earning his livelihood for work efforts and services that he should have been allowed to perform over the course of his improper indefinite suspension, and that he would have performed but for that suspension. Therefore, OPM properly considered the $46,538.28 back pay award as wages that constitute earned income by the appellant in determining that he was restored to earning capacity in 2006. *See* IAF, Tab 8, Subtab 2A at 3; *see also* 5 C.F.R. §§ 831.1209(c), 831.1209(d)(1)(i).

¶11 Accordingly, the initial decision is REVERSED and OPM's reconsideration decision terminating the appellant's disability retirement annuity effective July 1, 2007, is AFFIRMED.

ORDER

¶12 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 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 Practices, and forms 5, 6, and 11.

FOR THE BOARD:

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