UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2009 MSPB 140

Docket No. AT-0831-09-0200-I-1

Phillip Raymond Lancaster,
Appellant,
v.
Office of Personnel Management,
Agency.

OPM Claim No. CSA 3 783 252

July 27, 2009

Phillip Raymond Lancaster, Port Charlotte, Florida, pro se.

Roxann Johnson, 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 (ID) 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 ID. OPM's final decision is NOT SUSTAINED.

BACKGROUND

¶2 The appellant retired under CSRS in 1997, after 18 years of civilian service to the Department of the Navy, which had been preceded by approximately 5 years of military service in the U.S. Navy and the U.S. Air Force. IAF, Tab 1; Tab 3, Subtab 2b at 15-16.

¶3 On July 29, 2008, the Social Security Administration certified to OPM that the appellant would become eligible for a Social Security retirement annuity in January 2009. IAF, Tab 3, Subtab 2b at 2. On December 17, 2008, OPM notified the appellant that his retirement benefits under CSRS were being reduced from $1456 to $1109 a month, effective January1, 2009. IAF, Tab 3, Subtab 2a. OPM advised the appellant that the reduction was required because the appellant had been credited for military service after 1956, but he had not paid a 7% deposit before his retirement to retain retirement benefits for his military service under both CSRS and the Social Security retirement system. *Id.*

¶4 The appellant appealed to the Board. IAF, Tab 1. He waived a hearing, but submitted additional material in support of his allegations that he was misled by his employing agency's retirement counselor and that he was under extreme financial and personal pressure at the time that he was required to make the election regarding the deposit. IAF, Tabs 4, 7. In the ID, the administrative judge (AJ) concluded that the appellant was on notice of the consequences of failing to make a deposit for his prior military service, had failed to show administrative error, and was not entitled to make a belated deposit for his post-1956 military service. IAF, Tab 8.

¶5 The appellant filed a petition for review and an additional statement prior to the close of the record on petition for review. Petition for Review File (PFRF), Tabs 1, 3. OPM filed a response in opposition. PFRF, Tab 5.

ANALYSIS

¶6 In his petition for review, the appellant argues that he was misled by his employing agency's retirement counselor, who told him, in response to his question about how much his annuity would be reduced if he did not make the deposit, that the reduction would be "a fraction of [his] annuity." PFRF, Tab 1 at 1. The appellant further argues that he interpreted "fraction" to mean a small, essentially inconsequential, amount on the order of $25 to $50. *Id*. He also argues that because he was experiencing financial hardship that would make paying the deposit difficult, he relied upon the retirement counselor's statement in concluding that making the deposit would have no substantial effect on his annuity. *Id*. We find that the appellant has established an administrative error that entitles him to a new opportunity to make the required deposit for his prior military service.*

Legal Standard

¶7 An annuitant who retires after September 7, 1982, is entitled to receive credit for active duty military service performed after 1956 under both CSRS and the Social Security system if he deposits an amount equal to 7% of his total post-1956 military pay with the Civil Service Retirement and Disability Fund. 5 U.S.C. §§ 8332(j), 8334(j); *Hooper v. Office of Personnel Management*, 108 M.S.P.R. 614, ¶ 7 (2008). Employees who retire on or after October 1, 1983, must make the deposit before their separation from service upon which title to an annuity is based. *Hooper*, 108 M.S.P.R. 614, ¶ 7. If an annuitant fails to make a deposit, OPM must recompute the annuity payments when the annuitant first becomes eligible for Social Security benefits to exclude credit for the post-1956

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* The appellant also raises new arguments that he may have actually paid the deposit with certain gambling winnings and that the OPM forms appear to have been altered. PFRF, Tab 3. Neither of these contentions was raised below and neither is based upon new evidence, so we need not consider them. *See Banks v. Department of the Air Force*, 4 M.S.P.R. 268, 271 (1980).

military service. 5 U.S.C. § 8332(j)(1); *Taylor v. Office of Personnel Management*, 108 M.S.P.R. 12, ¶ 9 (2008). The Board will order OPM to allow an individual to make a post-separation deposit to his retirement account to receive retirement credit for post-1956 military service pursuant to 5 U.S.C. §§ 8332(j) and 8334(j) only if the individual shows that OPM or his employing agency made an administrative error that caused his failure to timely make the deposit. 5 C.F.R. §§ 831.2104(a), 831.2107(a)(1); *Taylor*, 108 M.S.P.R. 12, ¶ 9.

¶8 OPM has not defined the term "due to administrative error," *Thomas v. Office of Personnel Management*, 107 M.S.P.R. 334, ¶ 14 (2007), but the Board has found administrative error where the agency provides material misinformation regarding the deposit, or the consequences of failing to make the deposit, to the employee prior to separation, *Gilliam v. Office of Personnel Management*, 91 M.S.P.R. 352, ¶ 14 (2002). In addition, if an employee, at the time of election, affirmatively asks for information regarding the amount of the military deposit or the consequences of failing to make a deposit, the government commits administrative error 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. *See McCrary v. Office of Personnel Management*, 459 F.3d 1344, 1349 (Fed. Cir. 2006). The appellant has the burden of proving that an administrative error took place by a preponderance of the evidence. *Thomas*, 107 M.S.P.R. 334, ¶ 15.

The Initial Decision

¶9 The AJ gave decisive weight to the fact that the appellant completed and signed the 1990 version of Standard Form 2801, Application for Immediate Retirement, and OPM Form 1515, Military Service Deposit Election, which the AJ concluded provided adequate notice regarding the deposit. IAF, Tab 8 at 4-5; *see also* IAF, Tab 3, Subtab 2b at 6-17. The AJ also held that the retirement counselor's statement about the annuity being reduced by a "fraction" was merely

ambiguous, the appellant was free to seek clarification of the retirement counselor's statement if he was confused, and the appellant lacked the resources to make the deposit in any event. *Id*. at 5.

¶10 The AJ is correct that the Board has held that the 1990 version of SF 2801 provides sufficient notice of the opportunity to make a deposit and of the consequences of not making the deposit. *See Thomas*, 107 M.S.P.R. 334, ¶ 16. But that does not end the analysis. If the appellant received other misleading information from the agency, the appellant may still establish administrative error despite having completed these forms. *See Hendricks v. Office of Personnel Management*, 109 M.S.P.R. 179, ¶ 9 (2008); *Thomas*, 107 M.S.P.R. 334, ¶ 17.

¶11 Here, the retirement counselor's answer was sufficiently vague to be misleading. There is nothing idiosyncratic or illogical about the appellant's interpretation of the word "fraction" as meaning a small amount, which the appellant notes is the word's dictionary meaning. PFRF, Tab 1. In this respect, this case is much like *McCrary*, where the agency responded "a lot" to the appellant's question of how large the deposit would be, when the actual amount was only $560. *McCrary*, 459 F.3d at 1345. The court noted that this response left the dollar amount unsettled, and "it left the implication that the deposit amount was not worth paying." *Id*. at 1350. In this case, the term "fraction" left the actual amount of the annuity reduction unspecified, but also gave the appellant the reasonable impression that the amount of the reduction would be very small. Significantly, the annuity was actually reduced by $347 (or approximately 25%), IAF, Tab 3, Subtab 2a, which the appellant properly notes is not de minimis. *See Sutcliff v. Office of Personnel Management*, 86 M.S.P.R. 101, ¶ 9 (2000) (a $134 reduction in the annuity was material).

¶12 In addition, the Board has found administrative error when an agency provides similarly vague responses to an appellant's request for deposit information (yielding comparable unexpected reductions in annuities). *See Gilliam*, 91 M.S.P.R. 352, ¶¶ 13-18 (the agency misinformed the appellant that

his Social Security benefits would be "about the same" as the reduction in his CSRS annuity when the actual net reduction in his CSRS annuity was $372); *Sutcliff*, 86 M.S.P.R. 101, ¶ 9 (administrative error found when the agency told the appellant that reduction in annuity would be "not much," when in fact it was $134 a month); *see also McCrary*, 459 F.3d at 1349-50 (collecting Board cases on this point). Thus, the AJ erred in holding that the retirement counselor's answer that the annuity would decrease by a "fraction" was merely ambiguous rather than misleading. IAF, Tab 8 at 5.

¶13 The AJ also erred in placing the burden on the appellant to seek clarification of the retirement counselor's statements, if he was confused. IAF, Tab 8 at 5. An appellant's failure to ask for clarification does not excuse the agency's misleading response or foreclose the appellant from obtaining a waiver of the deadline to make the required deposit. *See McCrary*, 459 F.3d at 1350.

¶14 The AJ also concluded that the appellant could not have paid the deposit, even if he wanted to, because of his dire financial condition at the time of his retirement. IAF, Tab 8 at 5. The AJ is correct that the appellant acknowledged that he was in financial distress and stated: "I expressed to the [retirement counselor] my desire to pay it but didn't have the money . . . ." IAF, Tab 4 at 2. But pro se litigants are not expected to plead issues with the precision of attorneys, *see Gilliam*, 91 M.S.P.R. 352, ¶ 17, and his other statements suggest a different conclusion.

¶15 Notably, after the statement about not having money to pay the deposit, the appellant goes on to state that the retirement counselor said he would have a second chance to pay later and that he anticipated making the payment at that time. IAF, Tab 4 at 2. The appellant also states that he was contemplating making the deposit until the retirement counselor's statement that the annuity would be reduced by a "fraction." IAF, Tab 7. That the appellant was currently without funds is also not as significant as the AJ assumes; the appellant specifically stated that he used credit cards for necessary purchases when short of

cash. IAF, Tab 4 at 1. Thus, the more logical reading of the appellant's representations is not that he could not pay the deposit under any circumstances due to financial distress, but that he was carefully considering the benefits of making the deposit because of his financial distress. *See Youngblood v. Office of Personnel Management*, 108 M.S.P.R. 278, ¶ 9 (2008) (pro se pleadings are to be liberally construed).

¶16 Accordingly, we conclude that the appellant has established an administrative error and is entitled to another opportunity to make the deposit for his prior military service. OPM's final decision is not sustained.

ORDER

¶17 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.

¶18 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 that 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).

¶19 No later than 30 days after OPM tells the appellant that 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).

¶20 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 Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

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