UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2009 MSPB 161

Docket No. CH-0831-08-0716-B-1

Willie L. Lamb,

Appellant,

v.

Office of Personnel Management,

Agency.

OPM Claim No. CSA 4 239 364

August 27, 2009

Willie L. Lamb, Cincinnati, Ohio, 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 filed a petition for review (PFR) of a remand initial decision (RID) that affirmed the final decision of the Office of Personnel Management (OPM) reducing his Civil Service Retirement System (CSRS) annuity to eliminate credit for his post-1956 military service. For the reasons set forth below, we GRANT the PFR and REVERSE the RID. OPM's final decision is NOT SUSTAINED.

BACKGROUND

¶2 The appellant retired from the U.S. Postal Service under the CSRS effective February 3, 2005 at age 59 after more than 27 years of federal civilian service. MSPB Docket No. CH-0831-08-0716-I-1 (I-1 File), Tab 7, Subtab 4 at 8, 8c, 9-9c. He also served in the U.S. Army from 1965 to 1971. *Id.*, Subtab 4 at 8a, 10. The appellant did not make a deposit for his post-1956 military service before he retired. *Id.*, Subtab 4 at 8a, 9. When he turned 62, he was notified by OPM that his CSRS annuity had been recomputed to exclude credit for his years of military service because he did not make a deposit for the service prior to his retirement. I-1 File, Tab 1; Tab 7, Subtab 2. The recomputation resulted in a deduction in the gross monthly amount of the appellant's CSRS annuity from $2552 to $2042. *Id.*

¶3 The appellant appealed to the Board from OPM's decision to reduce his annuity, asserting he had been led to believe he could make the deposit after he retired. I-1 File, Tab 1. A Board administrative judge (AJ) dismissed the appeal as untimely filed without a showing of good cause for the delay. *Id.*, Tab 8. On PFR, the Board reversed the dismissal and remanded the appeal for further adjudication. *Lamb v. Office of Personnel Management*, 110 M.S.P.R. 415 (2009). On remand, after holding the hearing requested by the appellant, the AJ issued a remand initial decision that affirmed OPM's final decision. MSPB Docket No. CH-0831-08-0716-B-1 (B-1 File), Tab 10 (RID).

¶4 The appellant's hearing testimony indicates that he was given conflicting information by his former employing agency, the U.S. Postal Service. HT. He testified that he was told by a retirement counselor that he was supposed to pay the deposit before he retired and also that he could pay it until February 14, 2005, i.e., some 10 days after the effective date of his retirement. *Id.* The Postal Service retirement counselor, Jean Almond, did not testify at the hearing, because the appellant could not locate her. *Id.* Subsequently, the appellant produced Almond for a conference call at which her advice to the appellant was discussed.

B-1 File, Tab 8. The AJ reopened the record for the parties' stipulation, consistent with Almond's statement during the call, that if called to testify she would say she told the appellant he was not required to pay the deposit for his post-1956 military service prior to the date of his retirement and that he could pay it until OPM's adjudication of his retirement application. *Id.*[1]

¶5 The appellant testified that although he signed the retirement form -- on which the box was checked stating he had not made the deposit -- and was counseled that it was supposed to be made before retirement, he also was told that he could pay the deposit later. HT. He stated that although he was aware of the deadline, what he was told about being allowed to pay later was more important and he relied on it. *Id.* The appellant stated that he did not have the money for the deposit prior to his retirement, "but if I thought that they would not have given me time I would have gotten the money some kind of way. I would have borrowed the money." *Id.* The amount of the deposit would have been $4743 on February 14, 2005. B-1 File, Tab 3 at B-3. The appellant testified that on that date, he still did not have the lump sum to pay the deposit, although he had been trying to raise it. HT. He also stated that Almond had told him that OPM would permit him to make the deposit after February 14, 2005, even though it was late. *Id.*[2] He asserted that OPM officials he then spoke to told him he could make the deposit until age 62. *Id.*

¶6 The AJ held that the appellant failed to make the post-1956 military service deposit because of lack of financial resources, rather than because of any reliance on Almond's incorrect advice that he could pay it after he retired. RID at 4. For

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[1]The record indicates February 14, 2005, was the date on which OPM processed the appellant's retirement application. I-1 File, Tab 7, Subtab 4 at 5; B-1 File, Tab 3 at B-3.

[2]Almond's statement in the conference call and the parties' stipulation did not address this. B-1 File, Tab 8.

this reason, and because the appellant completed the retirement application form, SF-2801, which informs retirees about the deposit, the AJ concluded that there was no administrative error. *Id.*

¶7 The appellant has filed a PFR in which he reiterates his argument that he was misled as to when he could make the deposit. Petition for Review File (RF), Tabs 1, 3. He argues for the first time that while he signed the retirement application form, he did not fill it out or have possession of it. *Id.*, Tab 1. In addition, the appellant has submitted a copy of an envelope in which he says the Postal Service sent him a copy of the application to make a post-1956 military deposit after he retired. *Id.* He says he did not think to submit this before. *Id.* The agency has responded in opposition to the PFR. RF, Tab 5.

ANALYSIS

¶8 The Board may grant a PFR when there is new and material evidence not previously available or when an AJ makes an adjudicatory error affecting the outcome of the appeal. 5 C.F.R. § 1201.115(d). Neither the statement by the appellant that he did not fill out the retirement application, nor the envelope that he says transmitted the application form for the military deposit after his retirement is new and material evidence. This is because there is no showing that this testimony or the document was unavailable with due diligence prior to the close of record. Therefore, neither will be considered. *See Avansino v. U.S. Postal Service*, 3 M.S.P.R. 211, 214 (1980). We grant the appellant's PFR, however, because we find that he has shown that there was administrative error by his former employing agency and that his failure to make the deposit was due to that error.

¶9 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, plus interest, 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). Those 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. The Board will order OPM to permit a post-separation deposit, however, if there was administrative error by the individual's employing agency or OPM and the failure to make the deposit prior to retirement was the product of that administrative error. *King v. Office of Personnel Management*, 97 M.S.P.R. 307, ¶¶ 4, 15 (2004), *aff'd sub nom. Grant v. Office of Personnel Management*, 126 F. App'x 945 (Fed. Cir. 2005); 5 C.F.R. § 831.2107(a)(1).

¶10 The Board may find administrative error and waive the deposit deadline in the following situations: (1) "the employee can show that he relied on misinformation in electing not to make the deposit," (2) "an application package contains obvious errors or internal inconsistencies," in which case "OPM or the employing agency has an obligation to investigate and resolve the problem before processing the application," or (3) an employee elected to make the deposit and the paperwork is in order, but neither the employing agency nor OPM followed through to ensure the deposit was made. *King*, 97 M.S.P.R. 307, ¶ 12, n.2.

¶11 With regard to the first scenario, 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.*

¶12 In this appeal, the record reflects both that the retirement application and the retirement counselor for the appellant's former employing agency stated that the deposit should be paid prior to his retirement. However, the retirement counselor went on to provide additional inaccurate information, i.e., that the deposit could also be paid even after the appellant retired. This constitutes administrative error. *See Hendricks v. Office of Personnel Management*, 109 M.S.P.R. 179, ¶ 9 (2008); *Hooper v. Office of Personnel Management*, 108 M.S.P.R. 614, ¶¶ 9-10 (2008); *Taylor v. Office of Personnel Management*, 108 M.S.P.R. 12, ¶ 12 (2008).[3] This is precisely the type of situation envisioned by OPM when it issued regulations to permit some post-separation deposits. *See Thomas v. Office of Personnel Management*, 107 M.S.P.R. 334, ¶ 15 (2007) (OPM gave as an example of administrative error justifying a late deposit mistaken advice by an employing agency that an employee could make the deposit after retirement) (citing *King*, 97 M.S.P.R. 307 ¶ 15, quoting Notice of Interim Military Service Deposit Regulations, 49 Fed. Reg. 20,631 (May 16, 1984)).

¶13 We also find that the appellant's failure to make the deposit was due to administrative error, i.e., the misinformation by his retirement counselor. The

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[3] The appellant testified that he spoke with two OPM representatives on or about February 14, 2005, who told him he could make the deposit before he turned age 62. HT. One of the two, who testified at the hearing, stated that she did not recall talking with the appellant. *Id.* The other OPM official was deceased. *Id.* The appellant also testified that he called OPM again about paying the deposit shortly before he turned 62 and learned then that he could not make the deposit. HT. However, because the issue in the appeal is whether there was administrative error that caused the appellant not to make the deposit before his retirement, we need not consider the content of conversations he had with these OPM representatives after his retirement.

AJ's reliance on the fact the appellant did not have the money to make the deposit on the day he retired, February 3, 2005, or on February 14, 2005, is misplaced. It is clear from the appellant's testimony that he intended to make the deposit, was seeking the funds to do so, and believed, based on the retirement counselor's statement, that there was flexibility in the time frame available to him. His testimony also shows that if he had been given accurate, rather than conflicting, information and had known that he was required to make the deposit prior to retirement, he would have taken the steps necessary to obtain the deposit amount. Under the particular circumstances of this case, therefore, we find that the appellant's failure to make the deposit was due to the administrative error by his former employing agency. *See Hooper*, 108 M.S.P.R. 614, ¶ 10; *Taylor*, 108 M.S.P.R. 12, ¶ 12. The appellant, therefore, is entitled to make a post-separation deposit under 5 C.F.R. § 831.2107(a)(1).

ORDER

¶14 We ORDER the Office of Personnel Management (OPM) to set a time limit under 5 C.F.R. § 831.2107(a)(1) before 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.

¶15 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).

¶16 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 on 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).

¶17 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:

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