UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2009 MSPB 203

Docket No. DC-844E-09-0520-I-1

Elizabeth M. Beeler-Smith,
Appellant,
v.
Office of Personnel Management,
Agency.

OPM Claim No. CSA 8 253 762

October 9, 2009

Eizabeth M. Beeler-Smith, Providence Forge, Virginia, pro se.

Evelyn K. Payne, Washington, D.C., for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant timely filed a petition for review (PFR) of an initial decision (ID) that affirmed the final decision of the Office of Personnel Management (OPM) to deny her application for disability retirement under the Federal Employees' Retirement System (FERS). For the reasons set forth below, we GRANT the petition, REVERSE the ID, DO NOT SUSTAIN OPM's final decision, and ORDER OPM to award the appellant disability retirement benefits.

BACKGROUND

¶2 The appellant has been employed as a Rural Carrier for the U.S. Postal Service since May 1994. Appeal File (AF), Tab 9 (affidavit of the appellant); Tab 10, Subtab II-E at 2, Subtab II-F at 5. She applied for a FERS disability retirement annuity in March 2007, citing osteoarthritis in her feet, ankles, elbows and right knee and hip. AF, Tab 10, Subtab II-D at 1.[1] OPM denied the appellant's application in a final decision dated August 15, 2007. *Id.*, Subtab II-A. On appeal, the administrative judge (AJ) affirmed OPM's decision, finding that the appellant had not established she was disabled by a medical condition that resulted in a performance, conduct or attendance deficiency or that was incompatible with useful and efficient service or retention in her position.[2]

¶3 The appellant has filed a PFR in which she asserts that the AJ was biased against her attorney and that she had a witness whose testimony was not heard by the AJ. Petition for Review File (RF), Tab 1. In addition, the appellant reiterates her arguments that she is disabled from working as a Rural Carrier by osteoarthritis. *Id.* OPM has responded in opposition to the PFR. RF, Tab 4.

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[1] This disability retirement application was the appellant's second. *See Beeler-Smith v. Office of Personnel Management*, MSPB Docket No. DC-844E-05-0478-I-1 (Initial Decision, Aug. 19, 2005). A Board AJ affirmed OPM's denial of the first application, which was based on osteoarthritis in her ankles, foot and ankle pain, and right hip pain due to fluid buildup. *Id.* Neither party filed a PFR in that appeal, and the initial decision thus became the final Board decision. 5 C.F.R. § 1201.113. In this appeal, the AJ found that the decision in the appellant's first case was res judicata only as to her entitlement to disability retirement based on a claim prior to August 19, 2005, citing *Luzi v. Office of Personnel Management*, 106 M.S.P.R. 160, ¶ 9 (2007). AF, Tab 16 at 4. The appellant may raise a claim for disability retirement with regard to a different time period than addressed in her first appeal, based on new evidence showing a worsening of her condition. *See Luzi*, 106 M.S.P.R. 160, ¶ 9.

[2] The appellant appealed on May 6, 2009, after receiving a copy of OPM's decision from her senator. AF, Tab 1. The AJ found that the appeal was untimely filed but that there was good cause for the delay. *Id.*, Tab 16 at 4. The timeliness of the appeal is not at issue on PFR.

ANALYSIS

¶4 In making a claim of bias, a party must overcome the presumption of honesty and integrity that accompanies an administrative adjudicator. *Oliver v. Department of Transportation*, 1 M.S.P.R. 382, 386 (1980). An AJ's conduct during the course of a Board proceeding warrants a new adjudication only if the AJ's comments or actions evidence "a deep-seated favoritism or antagonism that would make fair judgment impossible." *Bieber v. Department of the Army*, 287 F.3d 1358, 1362-63 (Fed. Cir. 2002) (quoting *Liteky v. United States*, 510 U.S. 540, 555 (1994)), *cert. denied*, 537 U.S. 1020 (2002). In this appeal, the appellant provides no factual support for her allegation of bias. Her assertion that she had a witness who should have been considered by the AJ is also without merit since she did not make a prehearing submission proposing any witnesses. Therefore, we find that the appellant's allegations of AJ bias or abuse of discretion regarding a witness do not meet the criteria for review under 5 C.F.R. § 1201.115(d). For the reasons set forth below, however, we grant her PFR, because we find that the appellant has shown she is entitled to a FERS disability retirement annuity because she is disabled by osteoarthritis in her knees and hips.[3]

¶5 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

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[3] In her disability retirement application, the appellant also stated that she had fibromyalgia, trochanteric bursitis (i.e., inflammation of a fluid-filled cavity in the hip joint), and myoclonus (involuntary muscle movements). AF, Tab 10, Subtab II-D at 1. Because the appellant raises only her osteoarthritis on PFR, this Opinion and Order addresses only that condition. We also find that, although the appellant asserts on PFR that she is disabled by osteoarthritis in her feet, that contention was rejected in her first disability retirement appeal, and the appellant has not submitted evidence of worsening of the condition. *See Luzi*, 106 M.S.P.R. 160, ¶ 9.

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 is expected to continue for at least 1 year from the date that the application for disability retirement benefits was filed; (4) accommodation of the disabling medical condition in the position held must be unreasonable; and (5) she 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).

¶6 It is undisputed that the appellant meets the 18-month service requirement for a FERS disability annuity and that the osteoarthritis in her knees and hips lasted at least 1 year from the date her application was filed. The Agency Certification of Reassignment and Accommodation Efforts in the appellant's disability retirement application also shows that her condition could not be accommodated in the Rural Carrier position and that the Postal Service did not make an offer of reassignment which the appellant refused. AF, Tab 10, Subtab II-D at 10-11. Where such an agency certification is unrebutted and the record supports the conclusion that accommodation and reassignment would not be possible, the Board has held that these criteria for obtaining disability retirement are met. *See Henderson v. Office of Personnel Management*, 109 M.S.P.R. 529, ¶ 20-21 (2008); *Dussault v. Office of Personnel Management*, 103 M.S.P.R. 92, ¶ 17 (2006).

¶7 Thus, the only issue remaining is whether the appellant has proven, by preponderant evidence, that she had a disabling condition that caused a deficiency in performance, conduct or attendance. A determination on this issue should take

into account all competent medical evidence, including both objective clinical findings if available and qualified medical opinions based on symptoms described by the applicant. *See Vanieken-Ryals v. Office of Personnel Management*, 508 F.3d 1034, 1041-42 (Fed. Cir. 2007) (citing *Chavez*, 6 M.S.P.R. at 418-23); *Henderson*, 109 M.S.P.R. 529, ¶ 12. 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. *Henderson*, 109 M.S.P.R. 529, ¶ 12. An appellant's subjective evidence of disability and pain must be given serious weight when it is supported by competent medical evidence. *See Vanieken-Ryals*, 508 F.3d at 1041-42; *Henderson;* 109 M.S.P.R. 529, ¶ 12; *Craig v. Office of Personnel Management*, 92 M.S.P.R. 449, ¶ 15 (2002).[4]

The appellant has proven that, while employed in a position subject to FERS, she became disabled by a medical condition resulting in a performance deficiency.

¶8 The position description for a Rural Carrier states as follows in pertinent part with regard to the job requirements:

> Carriers are required to sort mail into delivery sequence, load mail into their vehicles, including parcels weighing up to 70 pounds, and deliver all mail and parcels to the designated addresses. . . . The duties of this position are arduous and require that the incumbent be in good physical condition. Placing letters and parcels in mail boxes

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[4] We note that the record shows that the appellant was granted disability benefits by the Social Security Administration (SSA) starting in September 2008. AF, Tab 10, Subtab II-F at 7. An SSA award and supporting medical evidence must be considered, although it is not dispositive, in a FERS disability retirement appeal. *Trevan v. Office of Personnel Management*, 69 F.3d 520, 526 (Fed. Cir. 1995). Where, as here, an AJ fails to inform the appellant that the medical records supporting SSA's award should be submitted, the Board has remanded FERS disability retirement appeals for the production of this evidence. *Brown v. Office of Personnel Management*, 106 M.S.P.R. 251, ¶ 6 (2007); *Lynum v. Office of Personnel Management*, 103 M.S.P.R. 426, ¶ 9 (2006); *Gardner v. Office of Personnel Management*, 91 M.S.P.R. 391, ¶ 8 (2002). We find, however, that because the record in this appeal is otherwise sufficient to find the appellant has proven her entitlement to a disability retirement annuity, a remand is unnecessary.

> requires careful handling of the vehicle, and frequent shifting from one side of the vehicle to the other.

AF, Tab 10, Subtab II-D at 12.

¶9 The appellant was diagnosed with degenerative osteoarthritis of the right knee and right ankle in June 2000. AF, Tab 10, Subtab II-F at 71, 76, 77. Osteoarthritis was also diagnosed in both knees and in her right hip in June 2005. *Id.* at 49-50. The appellant's condition deteriorated over time as she continued to work as a Rural Carrier. Hearing Compact Disc (testimony of the appellant); AF, Tab 9 (affidavit of the appellant). By November 2007, x-rays revealed "obvious end-stage DJD [degenerative joint disease] of both hips," necessitating bilateral hip replacement. AF, Tab 13 at 29; *see also* AF, Tab 10, Subtab II-F at 13.

¶10 In the appellant's March 3, 2007 Statement of Disability in her retirement application, she stated that she sat on a stool, rather than standing, to case (i.e., sort) mail and a "hank" to pick up mail from the floor when she dropped it. AF, Tab 10, Subtab II-D at 1. She said that she could not bend her knees or stoop down, could not lift mail tubs or trays, and her coworkers assisted her. *Id.* The appellant stated that her delivery route included more than 500 stops and that she had to lift her right leg with her hand to use the brake in her delivery truck. *Id.* She said she had difficulty getting in and out of the truck, could not walk without a cane or walk far, and could not carry all packages to customers' houses for delivery. *Id.*

¶11 The record also contains August and September 2007 statements from three coworkers of the appellant, stating that they had observed her working in significant pain and having difficulty in lifting, sorting mail, loading her delivery truck, and walking. AF, Tab 10, Subtab II-F at 35-37. They stated that others helped the appellant by bringing mail to her for sorting and by loading it into her vehicle. *Id.*

¶12 The Supervisor's Statement in the appellant's application for disability retirement, dated March 31, 2007, stated that she had a performance deficiency at

least since he arrived in July 2006. AF, Tab 10, Subtab II-D at 3. The supervisor stated that, because of the appellant's physical limitations, she had to sit on an adjustable platform stool rather than stand while casing. *Id.* at 4. He also stated that exiting her vehicle to deliver parcels or accountable mail "is with great effort and requires longer than allowed time[,]" as a result of which she did not meet the standard set for completing her route. *Id.* The appellant's supervisor stated that the impact of this performance deficiency on work operations was that it cost less to replace the appellant when she was not present than it did to pay her for the hours she worked. *Id.*

¶13 The appellant's physician, an arthritis specialist who had treated her since June 2005, opined several times (without explanation) that she was disabled by her combination of medical conditions. AF, Tab 10, Subtab II-F at 20, 32, 33 (letters of December 19, 2006, January 17, 2007, and April 10, 2007). On December 19, 2007, he stated in another letter that the knee pain the appellant was suffering from osteoarthritis made driving a motor vehicle difficult, that she was a danger to herself and others when driving, and that he had advised her not to drive. *Id.* at 13. On April 9, 2008, the Postal Service issued a letter to the appellant stating that it could not accommodate her driving restriction and that it was, therefore, placing her in an emergency off-duty status. *Id.* at 11. She was instructed to use sick and annual leave during the pendency of her disability retirement application and told that she would thereafter be on leave without pay until removed from the rolls. *Id.* The appellant exhausted her available leave in August 2008. AF, Tab 10, Subtab II-F at 6.

¶14 In March 2008, an orthopedic surgeon who evaluated the appellant for her ongoing hip pain observed on examination that she

> ambulates with an obvious antalgic gait pattern and is [sic] a waddling type gate [sic] even with her cane. She has limited range of motion of both hips with flexion comfortably to about 90° and when coupled with internal rotation it is only 0° with a lot of stiffness and groin pain and discomfort.

AF, Tab 13 at 29.[5] He noted that the appellant was taking Darvocet and had been "treated with multiple courses of medications and Corticosteroid injections in the past without any significant relief." *Id.* The surgeon concluded that the appellant had end-stage degenerative joint disease in her hips, and he recommended bilateral hip replacement and total knee replacement. *Id.* The bilateral hip replacement surgery was performed on April 21, 2008. AF, Tab 13 at 16. The procedure was successful, and by the end of August 2008, the appellant reported a reduction in hip pain and improvement in her ability to walk. *Id.* at 18. She continued, however, to take Vicodin for pain as needed. *Id.* The appellant also continued to have complaints regarding other joints, including both knees, and difficulty with lifting more than 10 pounds. AF, Tab 13 at 12, 15, 18, 23.

¶15 The general rule in disability retirement cases is that the medical evidence must show how the employee's condition affects her ability to perform specific job duties and requirements. *Musser v. Office of Personnel Management*, 102 M.S.P.R. 18, ¶ 8 (2006); *Tanious v. Office of Personnel Management*, 34 M.S.P.R. 107, 111 (1987). As noted above, the duties of the appellant's position as a Rural Carrier are arduous. The incumbent must have physical mobility sufficient to case mail and load it into a delivery vehicle, handle the vehicle safely at stops on the delivery route, and place letters and parcels in mailboxes, including shifting often from one side of the vehicle to the other. AF, Tab 10, Subtab II-D at 12. A Rural Carrier is also required to exit the vehicle and deliver parcels or certain items of mail directly to the customer. *Id.* at 1, 3. However, the appellant's longtime treating physician concluded that the knee pain from her osteoarthritis was such that she could not drive safely. AF, Tab 10, Subtab II-F

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[5] An antalgic gait is "a limp in which a phase of the gait is shortened on the injured side to alleviate the pain experienced when bearing weight on that side." http://medical-dictionary.thefreedictionary.com/antalgic+gait, citing the American Heritage Medical Dictionary (2007).

at 13. Her orthopedic surgeon's report attested that the appellant had limited mobility, i.e., that she waddled when she walked, even with the use of a cane, and also that she limped because of the pain of walking. *Id.*, Tab 13 at 29. The orthopedic surgeon also found that the appellant had a small range of motion in her hips, associated with stiffness and pain. *Id.* Because of the degree of her impairment, the orthopedic surgeon recommended total hip replacement and total knee replacement. *Id.* We find that the medical evidence from these two physicians sufficiently addresses the specific job duties and requirements of a Rural Carrier and shows how the condition of osteoarthritis negatively affected the appellant's ability to perform her job functions.

¶16 The medical evidence also validates the appellant's subjective description, in her disability retirement application, of her pain and great difficulty in performing her job functions, especially braking for the frequent stops on her delivery route and getting in and out of the vehicle for deliveries. AF, Tab 10, Subtab II-D at 1. The appellant's limitations were corroborated by coworkers who observed and attempted to assist her. *Id.*, Subtab II-F at 35-37. Moreover, her supervisor's statement shows that, even before being placed off duty because of her inability to drive safely, the appellant had a longstanding performance deficiency due to the limitations resulting from her osteoarthritis. *Id.*, Subtab II-D at 3-4. The ID did not address this performance deficiency and incorrectly held that the appellant's subjective evidence was not supported by competent medical evidence. ID at 8-9.

¶17 The ID also emphasized that the appellant had undergone successful hip replacement surgery. ID at 7. The record shows, however, that for one year after her disability retirement application in April 2007, the appellant's osteoarthritis prevented her from adequately performing the duties of her position. Further, there is no evidence that her hip replacement surgery restored the appellant's mobility to the point where she could work as a Rural Carrier. The record also does not show any improvement in her knee condition, which prevented her from

driving safely. There is no indication, for example, that she underwent the recommended knee replacement and that this restored the driving ability required of a Rural Carrier. In this regard, we note that the Board has not held that an appellant must undergo ameliorative surgery to qualify for disability retirement. *See Davis v. Office of Personnel Management*, 89 M.S.P.R. 690, ¶ 17 (2001); *Livengood v. Office of Personnel Management*, 41 M.S.P.R. 568, 574 (1989).

¶18 Considering all of the evidence, therefore, we conclude that the appellant has shown by preponderant evidence that, while employed in a position subject to FERS, she became disabled from useful and efficient service. Accordingly, she has established her entitlement to a disability retirement annuity.

ORDER

¶19 We ORDER the Office of Personnel Management (OPM) to award the appellant disability retirement. OPM must complete this action no later than 20 days after the date of this decision. OPM must complete this action no later than 20 days after the date of this decision.

¶20 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).

¶21 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).

¶22 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.