UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 9

Docket No. SF-0831-07-0721-B-1

Steven L. Frank,
Appellant,
v.
Office of Personnel Management,
Agency.

January 12, 2010

Steven L. Frank, Hollywood, California, pro se.

Peggy G. Smith, Washington, D.C., for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The appellant has filed a petition for review of the initial decision that dismissed this appeal as moot. For the reasons set forth below, we DENY the petition, REOPEN the appeal on our own motion under 5 C.F.R. § 1201.118, VACATE the initial decision, and DISMISS the appeal for lack of jurisdiction.

BACKGROUND

¶2 The undisputed facts underlying this appeal, which are summarized below, are fully set forth in the Board's Opinion and Order in *Frank v. Office of Personnel Management*, 111 M.S.P.R. 206 (2009).

¶3 The appellant requested a survivor annuity benefit under 5 U.S.C. § 8341 as an unmarried dependent child of a deceased federal employee who is incapable of self-support because of a mental or physical disability incurred before the age of 18. 111 M.S.P.R. 206, ¶¶ 3, 8. The Office of Personnel Management (OPM) denied the appellant's request, and it thereafter issued a final decision upholding its denial on the grounds that he failed to submit medical documentation showing that he was incapable of self-support. *Id.* On appeal to the Board, the administrative judge affirmed OPM's reconsideration decision, finding that the appellant had failed to carry his burden of proving that he was incapable of self-support because of a mental or physical disability incurred before age 18. *Id.* ¶ 6. On review, the Board vacated the initial decision and remanded the appeal for further proceedings to determine if application of the procedures set forth by our reviewing court in *French v. Office of Personnel Management*, 810 F.2d 1118 (Fed. Cir. 1987), was appropriate.* 111 M.S.P.R. 206, ¶¶ 10, 13.

¶4 On remand, OPM filed a motion to dismiss the appeal in which it stated that, upon review of additional medical evidence, it was "rescinding its final decision and granting the disability benefit to [the appellant]." Remand Appeal File (RAF), Tab 5 at 2. OPM further stated that "[u]pon receipt of the Initial Decision [dismissing the appeal], the appellant's case file will be forwarded to the appropriate Adjudication Division to determine the benefit payable." *Id.*

¶5 The AJ thereafter ordered the appellant to show why the appeal should not be dismissed "for lack of jurisdiction and/or mootness . . . ." RAF, Tab 7 at 1. After the appellant responded that he was entitled to a Board decision based on the merits of his appeal, RAF, Tab 8, the administrative judge granted OPM's motion, determining that "[w]here OPM has completely rescinded or reversed its

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* In the *French* case, the court instructed the Board to establish procedures for obtaining representation for appellants in some cases involving entitlement to disability retirement benefits. 810 F.2d at 1120.

final decision, and indicated it will grant the appellant the relief requested on appeal, the appeal is rendered moot and must be dismissed." RAF, Tab 10, Initial Decision (ID) at 2-3.

¶6 The appellant, proceeding pro se, has submitted a timely petition for review of the initial decision. Petition for Review File, Tab 1.

ANALYSIS

¶7 If OPM completely rescinds a reconsideration decision, its rescission divests the Board of jurisdiction over the appeal in which that reconsideration decision is at issue, and the appeal must be dismissed. *Rorick v. Office of Personnel Management*, 109 M.S.P.R. 597, ¶ 5 (2008); *Glasgow v. Office of Personnel Management*, 103 M.S.P.R. 531, ¶ 5 (2006). OPM asserted below that it was "rescinding its reconsideration decision and granting the disability benefit to [the appellant], as a dependent child incapable of self support prior to age 18." RAF, Tab 5 at 2. Although the appellant objects to the dismissal of his appeal, he has not challenged the accuracy of OPM's statement or identified any other basis on which to find that the Board retains jurisdiction over this appeal despite that rescission. We therefore DENY the appellant's petition for review. *See* 5 C.F.R. § 1201.115(d). We REOPEN this appeal on our own motion, however, as explained below. *See* 5 C.F.R. § 1201.118.

¶8 As stated above, although the AJ dismissed the instant appeal, he did so on the grounds that OPM's representations in its motion to dismiss rendered the appeal moot. *See* ID at 2-3. This was error. Although rescission of an OPM reconsideration decision can cause an appeal from that decision to become moot, *see Rorick*, 109 M.S.P.R. 597, ¶ 6, for an appeal to be deemed moot, the appellant must have received all of the relief that he could have received "if the matter had been adjudicated and he had prevailed," *see Harris v. Department of Transportation*, 96 M.S.P.R. 487, ¶ 8 (2004). In *Haskins v. Department of the Navy*, 106 M.S.P.R. 616, ¶¶ 19-22 (2007), *review dismissed*, 267 F. App'x 934

(Fed. Cir. 2008), the Board clarified its mootness case law to hold that an appeal may not be dismissed as moot until the agency has submitted acceptable evidence that it has actually afforded the appellant all relief to which he would be entitled if the appeal had been adjudicated and he had prevailed. OPM's assertion that "[u]pon receipt of the Initial Decision, the appellant's case file will be forwarded to the appropriate Adjudication Division to determine the benefit payable," RAF, Tab 5 at 2, does not show that it *has afforded* the appellant all relief to which he would be entitled if he were to prevail in his appeal. Thus, although OPM's rescission of its reconsideration decision divested the Board of jurisdiction over this appeal, it did not render the appeal moot.

¶9 Accordingly, we dismiss this appeal for lack of jurisdiction. If the appellant is dissatisfied with any subsequent OPM decision regarding his survivor annuity benefits, he may request that OPM reconsider the decision and, if he is still dissatisfied, may appeal OPM's final decision to the Board. *See* 5 ;U.S.C. § 8347(d)(1); 5 C.F.R. § 831.110. Any future appeal must be filed within the time limits set forth in the Board's regulations. *See* 5 C.F.R. § 1201.22.

ORDER

¶10 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.