UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 12

Docket No. SF-0831-09-0677-I-1

George Johnson,

Appellant,

v.

Office of Personnel Management,

Agency.

OPM Claim No. CSA 414 0 593

January 13, 2010

George Johnson, Tracy, California, pro se.

Roxann Johnson, Washington, D.C., for the agency.

BEFORE

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

OPINION AND ORDER

¶1 This case is before the Board upon the appellant's timely filed petition for review of the initial decision that dismissed for lack of jurisdiction his appeal of the decision of the Office of Personnel (OPM), terminating his disability annuity under the Civil Service Retirement System (CSRS). For the reasons set forth below, we GRANT the petition for review, REVERSE the initial decision IN PART, AFFIRM it IN PART, and REMAND the appeal to the regional office for further proceedings consistent with this Opinion and Order.

BACKGROUND

¶2 On February 7, 2003, the appellant separated from his position as Clerk with the U.S. Postal Service and thereafter began receiving a disability annuity under the Civil Service Retirement System (CSRS). *See* Initial Appeal File (IAF), Tab 1 at 18-20, 23. By letter dated March 13, 2009, OPM informed the appellant that a computer match had revealed a discrepancy between the earned income he reported to OPM for calendar year 2007 and the income figure reported by the Social Security Administration (SSA). IAF, Tab 1 at 2. In particular, OPM found that the appellant's earned income for 2007, as reported by the SSA, exceeded the earnings limitation for his continued entitlement to disability retirement benefits, i.e., 80 percent of the current rate of pay for the position he occupied immediately before his retirement.[*] *Id*. The letter informed the appellant that if the amount reported by SSA was accurate, he would be ineligible to receive those benefits after June 30, 2008, and that any benefits paid after that date would constitute an overpayment. *Id.* at 3. OPM invited the appellant to dispute the SSA figure by submitting documentation of his 2007 earnings and any other documentation he deemed relevant. *Id*. at 1-2.

¶3 On April 8, 2009, the appellant submitted a response in which he disputed OPM's determination, claiming that he was not notified of the 80 percent earnings limitation and that OPM improperly excluded a locality pay increase from its calculation of his rate of pay immediately before retirement. *Id.* at 11-12. The appellant also requested that OPM waive any overpayment resulting from its determination that he had exceeded his earnings limitation, and that OPM

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[*] OPM is required to terminate the annuity of a CSRS disability retirement annuitant who is restored to earning capacity before reaching 60 years of age; earning capacity is deemed to be restored "if in any calendar year the income of the annuitant from wages or self-employment or both equals at least 80 percent of the current rate of pay of the position occupied immediately before retirement." 5 U.S.C. § 8337(d).

change his "disability retirement . . . to a regular discontinued service retirement . . . ." IAF, Tab 1 at 13-16.

¶4 By letter dated April 24, 2009, OPM informed the appellant that, after reviewing the information in his submission, it had determined that he had been restored to earning capacity. IAF, Tab 1 at 77. It also notified him that his disability benefits would be terminated effective June 30, 2008. *Id.*

¶5 By letter to OPM dated May 6, 2009, the appellant requested "information regarding [his] appeal rights," stating that OPM's April 24 letter failed to provide him with such information and that it also "did not address [his] request for waiver of any overpayment or [his] request to transfer to a regular retirement." IAF, Tab 1 at 80. The record below contains no response from OPM to the appellant's May 6 letter.

¶6 The appellant filed the instant appeal on June 6, 2009. IAF, Tab 1 at 1, 81. In it, he stated that he was "appealing OPM's determination that [he] was overpaid and the denial of a waiver of the overpayment," he claimed that OPM had failed to respond to his request for a waiver or advise him of his appeal rights, and he requested as relief that the Board grant him "a waiver of any overpayment and that [he] be changed to regular retirement." *Id.* at 1.

¶7 The administrative judge issued an acknowledgment order advising the appellant that the Board might not have jurisdiction over his appeal because he had not submitted any evidence that OPM had issued a final decision on the termination of his disability annuity, and ordering him to submit evidence and argument proving that the matter he appealed was within the Board's jurisdiction. IAF, Tab 2 at 2. The appellant stated in his response that because he had "responded to OPM's claim of overpayment including the issue of waiver of the overpayment," and OPM had not "responded to [his] waiver request," the Board should assert jurisdiction over his appeal. IAF, Tab 3 at 1-3. OPM thereafter moved that the appeal be dismissed for lack of Board jurisdiction, stating:

> There is no evidence to show that OPM has issued a final decision, or an initial decision, to the applicant regarding the issue raised in his appeal to the MSPB nor has the appellant provided any evidence of one. . . . OPM did make a determination on March 13, 2009, finding that [the appellant's] earnings for 2007 exceeded the 80% limitation. The March 13, 2009, determination informed [the appellant] on how to dispute that finding.

IAF, Tab 4 at 2. Thereafter, the administrative judge again ordered the appellant to show why his appeal should not be dismissed for lack of jurisdiction, and the appellant filed a response arguing that Board jurisdiction attached because OPM's failure to issue a determination on his waiver request amounted to a refusal to do so. IAF, Tab 6; *id.*, Tab 7 at 1-3.

¶8 Based on the parties' written submissions, the administrative judge dismissed the appeal for lack of jurisdiction. IAF, Tab 8, Initial Decision (ID) at 4. He found that OPM's March 13 letter was an initial determination that the appellant had exceeded his earnings limitation for 2007 and was no longer eligible for disability retirement benefits. ID at 3. Without referring to OPM's April 24 letter, however, the administrative judge further found that

> [t]here is no evidence in the record that OPM has issued a final decision on the question of the appellant's eligibility for benefits after June 30, 2008, nor is there any evidence that OPM has made a final decision on any overpayment that would result if he was found ineligible for benefits after that date.

ID at 3. The administrative judge further found that

> the failure of OPM to issue a reconsideration decision less than four months after the appellant's response to the original OPM letter did not constitute a constructive refusal to issue a reconsideration decision, particularly where, as here, OPM has stated it intends to issue a reconsideration decision after the appellant's response to the letter.

ID at 3.

¶9 The appellant has timely filed a petition for review, Petition for Review File, Tab 1, to which OPM has timely responded in opposition, *id.*, Tab 4.

ANALYSIS

¶10 The Board has jurisdiction to adjudicate an individual's rights and interests under the Civil Service Retirement System only after OPM has rendered a reconsideration decision on the issue in question. *Luna v. Office of Personnel Management*, 89 M.S.P.R. 465, ¶ 8 (2001). Nevertheless, the Board may take jurisdiction over a retirement appeal in the absence of an OPM reconsideration decision where the appellant has made repeated requests for such a decision and the evidence indicates that OPM does not intend to issue a reconsideration decision. *Id.* Because, as discussed below, OPM in effect has issued an appealable final decision concerning the termination of the appellant's retirement annuity and his request to convert that annuity to a discontinued service annuity, we find that the administrative judge erred in determining that the Board lacks jurisdiction over the instant appeal as it relates to that issue. *See* ID at 3.

¶11 In its April 24 letter, OPM informed the appellant, as we have noted above, of its decision to terminate the appellant's disability retirement annuity retroactively. It also enclosed a form that provided information about the circumstances under which a disability retirement annuity could be reinstated, and that included detailed instructions for applying for reinstatement. IAF, Tab 1 at 77-79. Those instructions included a statement that the applicant was required to "wait until after January 1st of the year following the year in which [his] earnings fall below the 80 percent limitation." *Id.* at 78. Nothing in the April 24 letter or the enclosed form includes any information about procedures for requesting review of the decision to terminate the appellant's annuity retroactively. OPM did not address or even mention the appellant's claims that it had improperly calculated the current rate of pay for the position from which he retired, and that it had otherwise improperly terminated his disability benefits. Further, it did not address or mention the appellant's argument that, if his disability benefits could not be continued, his annuity should be continued under provisions authorizing discontinued service annuities.

¶12 In addition, we find no support for the administrative judge's finding, ID at 3, that OPM had stated that it "intends to issue a reconsideration decision" at some future time, and no other indication in the record that OPM intends to issue any further decision on the appellant's entitlement to an annuity continuing after June 30, 2008. The letter of April 24 gave no indication that any further action would be taken unless and until the appellant requested reinstatement of his annuity based on circumstances arising after the termination of that annuity, and it gave no indication that it had considered or would consider the appellant's argument that his annuity should be continued under provisions other than those authorizing disability annuities. OPM also has not responded, as we have previously indicated, to the appellant's correspondence following its April 24 letter. Moreover, in its only substantive submission below, it denied having issued either an initial decision or a final decision. OPM stated that its letter preceding the April 24 letter, i.e., its letter of March 13, "informed [the appellant] on how to dispute [its] finding that his earnings exceeded the 80% limit, and it made no mention of the subsequent letter of April 24, terminating the appellant's annuity. IAF, Tab 4 at 1. Finally, OPM's response to the appellant's petition for review includes no reference to any intention to take further action in this case. *See* Petition for Review File, Tab 4.

¶13 Under similar circumstances, the Board has held that an OPM letter notifying an annuitant that his annuity payments were being suspended was tantamount to an appealable reconsideration decision. *See Luna*, 89 M.S.P.R. 465, ¶¶ 9-10; *cf. Scallion v. Office of Personnel Management*, 72 M.S.P.R. 457, 461 (1996) (where a letter from OPM informed the retiree that he was entitled to no further refund of his annuity-related deposit, but the letter did not advise him of his right to request reconsideration, and where there was no indication that OPM intended to issue any further decision, OPM's letter was tantamount to an appealable reconsideration decision); *Dopadre v. Office of Personnel Management*, 69 M.S.P.R. 346, 351 (1996) (letter in which OPM found that an

appellant was not entitled to a survivor annuity under her divorce decree constituted OPM's final decision, since OPM apparently did not intend to issue a reconsideration decision). Accordingly, we find that the April 24 letter is tantamount to an appealable reconsideration decision that affects the appellant's rights or interests under the CSRS, and that the Board therefore has jurisdiction to adjudicate his appeal of OPM's decision to terminate his annuity.

¶14 With respect to any alleged overpayment related to OPM's determination that he was no longer eligible for disability retirement benefits, however, the administrative judge correctly determined that OPM had yet to make any finding that the appellant had received an overpayment. Further, OPM did not address the appellant's request for a waiver of recovery of this overpayment. ID at 3. "A corollary to [the] rule [that a reconsideration decision is a jurisdictional prerequisite to a Board appeal involving federal retirement benefits] is that the scope of an appeal involving federal retirement benefits is limited to those matters addressed in OPM's reconsideration decision." *Dragonette v. Office of Personnel Management*, 71 M.S.P.R. 384, 386 (1996). Because OPM has yet to issue an appealable reconsideration decision addressing these questions, the Board is without jurisdiction to adjudicate the appellant's claims concerning them. If OPM issues a decision determining that the appellant has received an overpayment, the appellant will have an opportunity to request reconsideration and, if necessary, file a Board appeal.

ORDER

¶15 Accordingly, we AFFIRM the administrative judge's finding that the Board lacks jurisdiction over the appellant's claim of entitlement to waiver of recovery of any annuity overpayment, we REVERSE his finding that it lacks jurisdiction over OPM's decision to terminate the appellant's retirement annuity, and we REMAND this case to the Western Regional Office for adjudication of the latter issue.

FOR THE BOARD:

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