UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 14

Docket No. DA-0841-09-0711-I-1

Brendan A. Daniel,

Appellant,

v.

Office of Personnel Management,

Agency.

January 13, 2010

Brendan A. Daniel, Abita Springs, Louisiana, pro se.

Karla W. Yeakle, 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 petitioned for review of the initial decision that dismissed his appeal for lack of jurisdiction. For the reasons discussed below, we find that the petition does not meet the criteria for review set forth at 5 C.F.R. § 1201.115(d), and we therefore DENY it. We REOPEN the case on our own motion under 5 C.F.R. § 1201.118, however, VACATE the initial decision, and REMAND the appeal for further adjudication.

BACKGROUND

¶2 The appellant filed an appeal regarding the amount of his disability retirement annuity on September 18, 2009. Appeal File (AF), Tab 1. The Office of Personnel Management (OPM or the agency) moved to dismiss the appeal on the grounds that it had not issued a final or reconsideration decision in the case. *Id.*, Tab 5. The administrative judge (AJ) issued an Order informing the appellant that the Board has jurisdiction only where OPM has issued a final or reconsideration decision and directing him to show cause why his appeal should not be dismissed for lack of jurisdiction. *Id.*, Tab 6. The appellant did not respond to the agency's motion or the AJ's Order. On October 22, 2009, the AJ therefore issued an initial decision (ID) dismissing the appeal. *Id.*, Tab 7.

¶3 The appellant has filed a petition for review (PFR) in which he asserts that OPM issued a final decision in his case on November 3, 2009. Petition for Review File (RF), Tab 1. The agency has filed a response in which it confirms that it has issued a final decision with appeal rights to the Board and moves for the PFR to be dismissed. *Id.*, Tab 4. The appellant filed a further pleading after the close of record with which he includes a copy of the OPM final decision and other documents. *Id.*, Tab 5.[*]

ANALYSIS

¶4 The Board generally lacks jurisdiction over a retirement appeal when OPM has not issued a reconsideration decision on the matter. *Moorer v. Office of Personnel Management*, 104 M.S.P.R. 609, ¶ 10 (2007); *McLaughlin v. Office of Personnel Management*, 62 M.S.P.R. 536, 546 (1994), *aff'd*, 47 F.3d 1181 (Fed. Cir. 1995) (Table). On appeal below, the record supported the conclusion that OPM had not issued a reconsideration decision on the appellant's claim that the

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[*] We have considered the appellant's untimely pleading which does not change the result in adjudicating this case. *See Social Security Administration v. Steverson*, 111 M.S.P.R. 649, ¶ 4 (2009).

amount of his disability retirement annuity was incorrect. AF, Tab 5. The appellant has not shown that the AJ made an error of law or regulation, and his petition is therefore DENIED.

¶5 Since the ID was issued, however, OPM has issued a reconsideration decision. RF, Tabs 1, 4, 5. That is, there is new and material evidence that was not available before the record closed below, showing that the Board now has jurisdiction to consider the appeal. *See Garnace v. Office of Personnel Management*, 51 M.S.P.R. 375, 377 (1991). Therefore, the proper action is to reopen the appeal and remand it to the regional office for adjudication. *Id.; cf. Moorer*, 104 M.S.P.R. 609, ¶ 10. On remand, the AJ shall provide the parties with an opportunity to submit argument and evidence, and issue an initial decision on the merits of the appeal.

ORDER

¶6 Accordingly, we REMAND this appeal to the Dallas Regional Office for further adjudication consistent with this Opinion and Order.

FOR THE BOARD:

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