UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 22

Docket No. DE-831E-07-0359-M-1

Sylvia M. Reilly,

Appellant,

v.

Office of Personnel Management,

Agency.

January 27, 2010

Brandie N. Weddle, Esquire, and Brian T. Edmunds, Esquire, Arnold & Porter, LLP, Washington, D.C., for the appellant.

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 This appeal is before the Board on remand from the U.S. Court of Appeals for the Federal Circuit. The Office of Personnel Management (OPM) has filed a motion to dismiss the appeal as moot. For the reasons discussed below, we DISMISS the appeal for lack of jurisdiction.

BACKGROUND

¶2 In *Reilly v. Office of Personnel Management*, 571 F.3d 1372 (Fed. Cir. 2009), the court vacated the Board's decision in *Reilly v. Office of Personnel*

Management, 108 M.S.P.R. 360 (2008), in which the Board had affirmed OPM's reconsideration decision denying the appellant's disability retirement application. The court remanded the case to the Board for further proceedings consistent with the court's opinion. *Reilly*, 571 F.3d at 1383.

¶3 On remand, OPM has moved to dismiss the appeal as moot. It states that, in accordance with the court's decision, it has reconsidered the post-separation evidence the appellant submitted to support her disability retirement application and finds that the appellant has offered sufficient evidence to establish that she is entitled to disability retirement benefits under the Civil Service Retirement System. It states that, therefore, it is rescinding its reconsideration decision and granting her disability retirement annuity. Remand File, Tab 12. The appellant agrees that the appeal should be dismissed as moot. *Id.*, Tab 13.

ANALYSIS

¶4 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). OPM asserts that it is rescinding its reconsideration decision and granting the appellant's disability retirement annuity retroactive to her last day in a pay status. Remand File, Tab 12. The appellant has not disputed OPM's assertions and agrees with OPM that the appeal should be dismissed. *Id.*, Tab 13. Thus, we conclude that OPM has completely rescinded its reconsideration decision and the appeal should be dismissed. *See, e.g.*, *Rorick*, 109 M.S.P.R. 597, ¶ 5.

¶5 Rescission of an OPM reconsideration decision can result in the issue on appeal being rendered moot. *Rorick*, 109 M.S.P.R. 597, ¶ 6. However, the Board has held that an appeal may not be dismissed as moot until the agency provides acceptable evidence showing that it has actually afforded the appellant all of the relief that she could have received if the matter had been adjudicated and she had

prevailed. *See, e.g.*, *Haskins v. Department of the Navy*, 106 M.S.P.R. 616, ¶ 22 (2007), *review dismissed*, 267 F. App'x 934 (Fed. Cir. 2008). Granted, this requirement appears to relate to a situation where, unlike here, the appellant did not consent to divesting the Board of jurisdiction. *Id.*, ¶ 15. Nonetheless, although OPM represents that it is rescinding its reconsideration decision and granting the appellant's disability retirement annuity, it also states that "[n]otwithstanding, upon receipt of the Board's Decision the appellant's case will be forwarded to our Adjudication Division for processing." Remand File, Tab 12. Further, OPM has not submitted evidence to support its representations. Thus, although we find that the appeal should be dismissed, we find that it would be inappropriate to dismiss it as moot.

¶6 If the appellant is dissatisfied with any subsequent OPM decision regarding her disability retirement benefits, she may ask OPM to reconsider the decision. If she is still dissatisfied, she may appeal OPM's final decision to the Board. *See, e.g.*, *Rorick*, 109 M.S.P.R. 597, ¶ 7; *Richardson v. Office of Personnel Management*, 101 M.S.P.R. 128, ¶¶ 3-4 (2006).

ORDER

¶7 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:

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