UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 46

Docket No. SF-0752-09-0278-I-1

Dennis J. Pariseau,

Appellant,

v.

Department of the Air Force,

Agency.

March 4, 2010

Dennis J. Pariseau, Yukon, Oklahoma, pro se.

Major Mary Spangler, Arlington, Virginia, for the agency.

Megan E. Middleton, Esquire, Arlington, Virginia, 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 for lack of jurisdiction his appeal of an alleged involuntary disability retirement. For the reasons set forth below, we GRANT the appellant's petition, VACATE the initial decision, and REMAND the case for further proceedings.

BACKGROUND

¶2 The appellant formerly occupied the position of Machinist, WG-3414-11, at Edwards Air Force Base. In August 2007, the appellant completed an application

for disability retirement under the Civil Service Retirement System (CSRS). Initial Appeal File (IAF), Tab 11, Subtab M. In his application, he indicated that he suffered from plantar fasciitis and plantar calcaneal spur in his left foot, as well as deep vein thrombosis (DVT). He explained that one has to stand in order to operate the machines, and that he could not stand long without severe pain in his leg. *Id*. at 3. On November 8, 2007, the Office of Personnel Management approved the appellant's application for disability retirement, finding that he was disabled from his Machinist position due to the claimed conditions. IAF, Tab 11, Subtab N. The appellant retired on disability effective December 7, 2007. IAF, Tab 11, Subtab O.

¶3 The appellant filed a formal complaint of discrimination, in which he alleged, among other things, that the agency discriminated against him on the basis of age (over 40) and disability (acute plantar fasciitis and DVT) by forcing him to take disability retirement. IAF, Tab 1. On January 8, 2009, the agency issued a Final Agency Decision finding no discrimination. Among other things, the agency found that the appellant was disabled under 29 C.F.R. § 1630.2(g), that he requested accommodation for his medical limitations, and that no accommodation was available. *Id*.

¶4 On February 6, 2009, the appellant filed a timely appeal with the Board, again alleging that his disability retirement was involuntary and the result of age and disability discrimination. *Id*. He requested a hearing. *Id*. In the acknowledgment order, dated February 10, 2009, the administrative judge advised the appellant that the Board may not have jurisdiction over his appeal, and ordered him to submit evidence and argument on the issue. IAF, Tab 2. In his response, dated February 24, 2009, the appellant alleged that the agency wished to replace him with a younger machinist and engaged in various acts of coercion, misrepresentation, threats, intimidation, and discrimination to that end. He did not at that time allege that he had requested accommodation or that the agency

had failed to provide an available accommodation that would have allowed him to continue working. IAF, Tab 5.

¶5 On February 25, 2009, the appellant filed an additional submission, which stated in relevant part: "I would like to request that my hearing be canceled, and have you decided [sic] my case as an Administrative Judge. My mother has less than two weeks to live and my mother and family come first before any case." IAF, Tab 6. The appellant attached a letter from his mother's oncologist, dated the previous day, confirming that she had been diagnosed with advanced lung cancer and that the cancer was progressing rapidly. *Id*.

¶6 On March 2, 2009, the administrative judge issued a second jurisdictional order. IAF, Tab 7. He indicated that the appellant had withdrawn his request for a hearing, and that the appeal would therefore be adjudicated on the written record. *Id*. The appellant filed a timely response, in which he claimed that he was forced to retire because the agency had failed to provide the accommodation he requested. IAF, Tab 10. He did not dispute that he was unable to perform the duties of the Machinist position, but he alleged that there was an open Tool and Parts Attendant job to which he could have been reassigned, and that there may have been other open jobs as well. In support of that contention, he provided an e-mail, dated October 31, 2007, which he received from another agency employee by the name of Frank Susca. In that message, Mr. Susca provided a link to a vacancy announcement, presumably for the Tool and Parts Attendant position, and stated, "Here is a good job for you." *Id*., Subtab 55A. It is unclear from the record what position Mr. Susca held with the agency.

¶7 The agency then moved to dismiss the appeal for lack of jurisdiction. IAF, Tab 11. On June 3, 2009, the administrative judge issued an initial decision dismissing the appeal based on the written record. IAF, Tab 12. He found that, while the appellant was disabled within the meaning of 29 C.F.R. § 1630.2(g), there was no available accommodation for the appellant's medical condition. In reaching this conclusion, the administrative judge relied on the agency's

documentary evidence, including declarations by agency officials who stated that there was no vacant funded position on the base, including the Tool and Parts Attendant position, that was within the appellant's medical restrictions and for which he was qualified. *Id*. at 8-11. The administrative judge concluded that, because the appellant had not shown by a preponderance of the evidence that accommodation was possible, he failed to show that his disability retirement was a constructive removal within the Board's jurisdiction. *Id*. at 11.

¶8 On petition for review, the appellant states that he "would have liked" to have a hearing and call witnesses, and that he withdrew his request only because his mother was dying. He contends that, had there been a hearing, the matter "could have been settled at the lowest level." Petition for Review File (PFR) File, Tab 1. The agency has filed a response. PFR File, Tab 3.

ANALYSIS

The appellant did not make an informed decision to withdraw his request for a hearing.

¶9 An appellant before the Board has the right to withdraw his request for a hearing. *Graves v. U.S. Postal Service*, 106 M.S.P.R. 224, ¶ 4 (2007); *Conant v. Office of Personnel Management*, 79 M.S.P.R. 148, 150 (1998). However, there is a strong policy in favor of granting an appellant a hearing on the merits of his case,[*] and therefore withdrawal of a hearing request must come by way of clear, unequivocal, or decisive action. *Id*. Further, the decision to withdraw a hearing request must be informed, i.e., the appellant must be fully apprised of the relevant adjudicatory requirements and options, including the right to request a postponement or continuance of the hearing, or dismissal of the appeal without prejudice to its timely refiling. *Id*.

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[*] In an involuntary retirement appeal, the issue of the Board's jurisdiction and the merits of the action are inextricably intertwined. *Aldridge v. Department of Agriculture*, 111 M.S.P.R. 670, ¶ 7 (2009).

¶10 Here, the appellant's decision was clear and unequivocal. IAF, Tab 6. However, the record does not show that his decision was informed, as there is no indication that the administrative judge apprised him of the alternatives to withdrawing his hearing request. Therefore, given the strong policy in favor of granting an appellant a hearing on the merits of his appeal, the appellant may be entitled to the hearing he initially requested and which he evidently still desires. *See Graves*, 106 M.S.P.R. 224, ¶ 6; *Conant*, 79 M.S.P.R. at 151-52.

The appellant made a non-frivolous allegation that his disability retirement was involuntary, and is therefore entitled to a hearing on the issue of jurisdiction.

¶11 A retirement is presumed to be voluntary and therefore outside the Board's jurisdiction. *See Vitale v. Department of Veterans Affairs*, 107 M.S.P.R. 501, ¶ 17 (2007). An involuntary retirement, however, is equivalent to a forced removal within the Board's jurisdiction under chapter 75. *Garcia v. Department of Homeland Security*, 437 F.3d 1322, 1328 (Fed. Cir. 2006) (en banc). Generally, an appellant who claims that a retirement was involuntary may rebut the presumption of voluntariness in a variety of ways, for example, by showing that the retirement was the result of misinformation or deception by the agency, intolerable working conditions, or the unjustified threat of an adverse action. *Id*. at 1328-29.

¶12 However, the Board has recognized that involuntary disability retirement cases are somewhat different from ordinary involuntary retirement cases. In an appeal of an alleged involuntary disability retirement, the appellant must show, inter alia, that there was an accommodation available that would have allowed him to continue his employment, and that the agency improperly failed to provide that accommodation. *Nordhoff v. Department of the Navy*, 78 M.S.P.R. 88, 91 (1998), *aff'd*, 185 F.3d 886 (Fed. Cir. 1999) (Table). If accommodation was impossible, then the appellant's disability retirement was not a constructive removal. Other theories of involuntariness, e.g., intolerable working conditions, cannot lead to a different conclusion because the essence of all claims of

involuntary retirement is that the employee had a choice between retiring or continuing to work, but was forced to choose retirement by improper acts of the agency. *Okleson v. U.S. Postal Service*, 90 M.S.P.R. 415, ¶ 7 (2001). An employee who is unable to work because of a medical condition that cannot be accommodated has no such choice in the first instance. *Id*.

¶13 If, on the other hand, an appellant's condition could have been accommodated so that he could have continued working, then it is possible that his retirement was involuntary. *Id*. In such a case, the appellant must also show that he informed the agency of his need and desire for an accommodation. *Id*., ¶ 8. The time period relevant for determining whether an appellant could have been accommodated begins on the date he requested accommodation and extends to the date of his separation. *Rule v. Department of Veterans Affairs*, 85 M.S.P.R. 388, ¶ 14 (2000). In sum, an appellant who alleges that his disability retirement was involuntary must show the following:

> (1) that he indicated to the agency that he wished to continue working, but that his medical limitations required a modification of his work conditions or duties, i.e., accommodation;
>
> (2) there was a reasonable accommodation available during the period between the date on which he indicated to the agency that he had medical limitations but desired to continue working and the date that he was separated, that would have allowed the appellant to continue working; and
>
> (3) the agency unjustifiably failed to offer that accommodation.

Okleson, 90 M.S.P.R. 415, ¶ 8.

¶14 If an appellant makes a non-frivolous allegation casting doubt on the presumption of voluntariness, he is entitled to a hearing at which he must prove jurisdiction by a preponderance of the evidence. *Garcia*, 437 F.3d at 1344. To meet the non-frivolous standard, an appellant need only plead allegations of fact that, if proven, could show jurisdiction. *Goodwin v. Department of Transportation*, 106 M.S.P.R. 520, ¶ 12 (2007). Mere pro forma allegations are insufficient to meet the standard, however. *Id*. In determining whether the

appellant has made such a non-frivolous allegation, the administrative judge may consider the agency's documentary submissions. However, to the extent that the agency's evidence constitutes mere factual contradiction of the appellant's otherwise adequate prima facie showing of jurisdiction, the administrative judge may not, as he did below, weigh evidence and resolve conflicting assertions of the parties, and the agency's evidence may not be dispositive. *Ferdon v. U.S. Postal Service*, 60 M.S.P.R. 325, 329 (1994).

¶15 Although this is a close case, we find that the appellant has made allegations that, if proven, could establish that his disability retirement was an involuntary action within the Board's jurisdiction. Consequently, he is entitled to a jurisdictional hearing. *Garcia*, 437 F.3d at 1344.

ORDER

¶16 We vacate the initial decision and remand the case to the regional office for further adjudication consistent with this Opinion and Order, including a hearing at which the appellant may attempt to prove by preponderant evidence that his disability retirement was involuntary and thus tantamount to a removal action within the Board's jurisdiction.

FOR THE BOARD:

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