UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 116

Docket No. PH-0831-10-0034-I-1

Freddie Hooten,

Appellant,

v.

Office of Personnel Management,

Agency.

June 22, 2010

Freddie Hooten, Wilmington, Delaware, 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 The appellant has filed a petition for review of the January 29, 2010 initial decision that affirmed the final decision of the Office of Personnel Management (OPM). For the reasons set forth below, we GRANT the appellant's petition for review, AFFIRM the initial decision insofar as the administrative judge correctly determined that OPM was required to recompute the appellant's retirement annuity, and REMAND the appeal to the regional office for further adjudication.

BACKGROUND

¶2 The appellant retired from his Housekeeping Aide position with the Department of Veterans Affairs on September 30, 2002. Initial Appeal File (IAF), Tab 7, Subtab 3 at 11. Prior to his federal civilian service, the appellant served in the U.S. Air Force from 1965 to 1969. *Id.*, Subtab 4 at 7, 15. The appellant did not make a deposit for his post-1956 military service before he retired. *Id.*, Subtab 3 at 13, Subtab 4 at 18. Because the appellant turned 62, had not made a deposit for his post-1956 military service prior to his retirement, and the Social Security Administration had certified that he was eligible for Social Security benefits, OPM recomputed the appellant's annuity. *Id.*, Subtab 2, Subtab 4 at 2. OPM issued a September 23, 2009 final decision to recompute his retirement annuity to exclude credit for his years of military service. *Id.*, Subtab 2. OPM stated in its final decision that its recomputation resulted in a decrease in the appellant's gross monthly annuity from $1,338.00 to $1,120.00. *Id.*, Subtab 2 at 2.

¶3 The appellant appealed OPM's final decision to recompute his annuity, asserting that the agency failed to inform him about the consequences of not paying the deposit. IAF, Tab 1 at 3. OPM responded that the appellant signed the 1990 version of Standard Form (SF) 2801, which provided him with specific notice that his annuity would be recomputed if he did not make a deposit for his post-1956 military service before he retired. IAF, Tab 7 at 1. The appellant subsequently asserted that he had not been given an opportunity to pay the deposit. IAF, Tab 9 at 2.

¶4 The appellant also produced evidence showing that OPM had reduced his gross monthly annuity to $912.00, not the $1,120.00 amount noted in its final decision. *Id.* at 3, Exhibits A-B. After holding a hearing, the administrative judge affirmed OPM's decision to recompute the appellant's retirement annuity. IAF, Tab 11, Initial Decision (ID). She did not, however, address the appellant's claim regarding the amount of the reduction.

¶5 In his petition for review (PFR), the appellant reasserts the claims he made below, including his contention that OPM reduced his gross monthly annuity more than the amount cited in its final decision. PFR File, Tab 1 at 3. He also notes that the agency neglected to list a contact person for information about making deposits for post-1956 military service in the space provided for that purpose on the OPM Form 1515 he executed at the time he retired. *Id.* at 4. OPM responds that the appellant's petition for review fails to meet the Board's criteria for review. PFR File, Tab 4 at 4.

ANALYSIS

OPM was required to recompute the appellant's annuity.

¶6 An annuitant who retires after September 7, 1982, is entitled to receive credit for active military service performed after 1956 under both the Civil Service Retirement System (CSRS) and the Social Security system if he deposits an amount equal to 7 percent of his total post-1956 military pay, plus interest, with the Civil Service Retirement and Disability Fund. *Lamb v. Office of Personnel Management*, 112 M.S.P.R. 335, ¶ 9 (2009); *see* 5 U.S.C. § 8334(j). If the annuitant fails to make such a deposit, OPM must recalculate the annuity payments when he first becomes eligible for Social Security benefits to exclude credit for the post-1956 service. 5 U.S.C. § 8332(j); *Lamb*, 112 M.S.P.R. 335, ¶ 9. Those who retire on or after October 1, 1983, must make such a deposit before their separation from service upon which entitlement to an annuity is based. 5 C.F.R. § 831.2104. The Board will order OPM to permit a post-separation deposit, however, if there was administrative error by the individual's employing agency or OPM and the failure to make the deposit prior to retirement was the product of that administrative error. *King v. Office of Personnel Management*, 97 M.S.P.R. 307, ¶¶ 4, 15 (2004), *aff'd sub nom. Grant v. Office of Personnel Management*, 126 F. App'x 945 (Fed. Cir. 2005); 5 C.F.R. § 831.2107(a)(1).

¶7 The Board has found that there is no administrative error when, as here, an employee is provided with and completes the 1990 version of SF 2801 electing not to make a deposit for his post-1956 military service. *King*, 97 M.S.P.R. 307, ¶¶ 16-17. Schedule A of the 1990 version of the SF 2801 contains the following question and explanation:

> If any of your military service occurred on or after January 1, 1957, have you paid a deposit to your agency for this service? (You must pay this deposit to your agency before separation. You cannot pay OPM after you retire.) See Section B of the instructions for the effect on your annuity if the deposit is not paid.

Id., ¶ 7; *see* IAF, Tab 7, Subtab 3 at 13. Section B of the instructions explains that if the employee does not pay the military service deposit while still employed, and the employee is eligible for Social Security benefits at age 62, OPM will recompute the employee's annuity at that time to eliminate credit for the post-1956 military service. *King*, 97 M.S.P.R. 307, ¶ 7; IAF, Tab 7, Subtab 3 at 3.

¶8 The record reflects that the agency provided the appellant with the 1990 version of the SF 2801 and that he completed it. IAF, Tab 7, Subtab 3. On Schedule A of his SF 2801, the appellant indicated that he served in the U.S. Air Force from June 21, 1965, to June 20, 1969, and that he had not paid a deposit to his agency for that service. *Id.* at 13. The agency also provided the appellant with OPM Form 1515 "Service Credit Payments for Post-1956 Military Service."[*] *Id.*, Subtab 4 at 18-20. Form 1515 informs the employee that the

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[*] In his petition for review, the appellant notes for the first time that the agency failed to list an agency contact person for information about making a deposit in the space allocated for that purpose on page 3 of OPM Form 1515. PFR File, Tab 1 at 4, 8. The Board will not consider an argument raised for the first time in a petition for review absent a showing that it is based on new and material evidence not previously available despite the party's due diligence. *Banks v. Department of the Air Force*, 4 M.S.P.R. 268, 271 (1980). Because this form was included in the record below, it is not new. *Meier v. Department of the Interior*, 3 M.S.P.R. 247, 256 (1980); IAF, Tab 7, Subtab 4 at 20. Moreover, because an agency's omission of OPM Form 1515 in its entirety may not amount to administrative error if the employee is provided with the 1990 version of

agency's "records indicate that you had military service after 1956" and that "you must either make a deposit for the military service or have your annuity benefits reduced at age 62." *Id.* at 18. The appellant placed an "X" in the box indicating "I do not want to make (or complete) this deposit" and signed the form. *Id.* Thus, the appellant was advised of his right to make a deposit for his post-1956 military service and of the consequences if he did not do so. Accordingly, we agree with the administrative judge that the appellant was not prevented by administrative error from making a timely and complete deposit and AFFIRM the initial decision insofar as the administrative judge correctly determined that OPM was required to recompute the appellant's retirement annuity.

The administrative judge failed to address a discrepancy in the evidence.

¶9 However, as noted above, the appellant filed evidence below that OPM reduced his gross monthly annuity further than the $1,120.00 amount cited in its final decision. *See* IAF, Tab 9 at 1, 3, Exhibits A-B. Exhibit A is OPM's final decision to recompute the appellant's annuity. That decision provides that, beginning with his November 1, 2009 payment, the appellant's gross monthly annuity would be $1,120.00. *Id.*, Exhibit A. Exhibit B is an undated letter from OPM to the appellant informing him that, effective with his November 2, 2009 payment, his gross monthly annuity would be $912.00. *Id.*, Exhibit B. The administrative judge did not address this evidence in her initial decision and the record does not reflect why OPM lowered the appellant's gross monthly annuity from $1,120.00 to $912.00. In his petition for review, the appellant reiterates this claim. PFR File, Tab 1 at 3.

¶10 The record is insufficient to determine why OPM further reduced the appellant's gross monthly annuity from the amount given in its final decision on the matter. Thus, we must remand the appeal for further development of the

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the SF 2801, the lesser omission at issue here would not amount to administrative error either. *See King*, 97 M.S.P.R. 307, ¶ 17.

record in order to address the discrepancy between OPM's September 23, 2009 final decision and its undated letter to the appellant regarding the amount of his recomputed gross monthly annuity.

ORDER

¶11 Accordingly, we REMAND the appeal to the regional office for further adjudication on this matter.

FOR THE BOARD:

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