UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 130

Docket No. PH-0845-09-0446-I-1

Robert S. Zucker,

Appellant,

v.

Office of Personnel Management,

Agency.

July 8, 2010

Janet M. Zucker, Charles Town, West Virginia, for the appellant.

Christopher H. Ziebarth, Washington, D.C., for the agency.

BEFORE

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

Member Rose issues a dissenting opinion.

OPINION AND ORDER

¶1 The appellant petitions for review of the initial decision, issued September 1, 2009, that affirmed the Office of Personnel Management's (OPM) determinations that the appellant received an annuity and that he was not entitled to waiver of that overpayment. For the reasons set forth below, the Board GRANTS the appellant's petition, VACATES the initial decision, and REMANDS the appeal for further adjudication.

BACKGROUND

¶2 The appellant, a former Department of Veterans Affairs physician, filed a disability retirement application based upon conditions causing cognitive impairments. Initial Appeal File (IAF), Tab 1; Tab 5, Subtab 5 at 13, 19; Tab 7 at C2-1. On June 19, 2007, OPM informed the appellant that it was approving his Federal Employees' Retirement System (FERS) disability retirement application, and that he was required to both apply for Social Security Administration (SSA) disability benefits and to immediately inform OPM of any SSA disability award. IAF, Tab 5, Subtab 5 at 23.

¶3 SSA subsequently informed OPM that it had awarded the appellant a disability benefit, and OPM informed the appellant that it was required to reduce his FERS annuity because he was also receiving the SSA benefit. *Id*. at 20; IAF, Tab 5, Subtab 4. OPM also informed the appellant that his receipt of SSA benefits had caused a FERS annuity overpayment of $36,450.00, and that it intended to collect that overpayment from him through 72 monthly installments of $500.00, and one final payment of $450.00. IAF, Tab 5, Subtab 4.

¶4 The appellant requested waiver of repayment, asserting that repayment would cause him financial hardship and that he was without fault with respect to the overpayment because he did not understand that his FERS annuity would be adjusted upon receiving the SSA benefits. IAF, Tab 5, Subtab 3. OPM then issued a reconsideration decision that denied the appellant's request for a waiver, explaining that it had informed him of the effect that receiving SSA benefits would have on his FERS annuity, and instructed him to set aside any retroactive payment received from SSA to cover the amount he needed to repay OPM. IAF, Tab 5, Subtab 2. OPM further found that the appellant established that the scheduled collection rate would cause him financial hardship and adjusted the collection schedule to 138 monthly installments of $263.71 and one final installment of $58.24. *Id*.

¶5 Following a hearing, the administrative judge affirmed OPM's reconsideration decision, but adjusted the repayment schedule, finding as follows: (1) OPM proved both the existence and the amount of the overpayment; (2) even if the appellant was without fault in creating the overpayment, he was not entitled to a waiver of the overpayment because he was required to have set aside the amount of the overpayment; (3) the appellant's alleged financial hardship and medical conditions, that included dementia, did not constitute exceptional circumstances that would bar OPM from recovering the overpayment; and (4) the appellant's financial circumstances warranted adjusting the repayment schedule to $100.00 per month. IAF, Tab 9.

¶6 In his petition for review, the appellant asserts, among other things, that the set-aside rule should not apply to bar waiver of the overpayment because he did not realize that he was receiving an overpayment. Petition for Review File, Tabs 1, 3.

ANALYSIS

¶7 A waiver of an annuity overpayment may be granted when the annuitant is without fault and recovery would be against equity and good conscience. *Knox v. Office of Personnel Management*, 107 M.S.P.R. 353, ¶ 5 (2007). Generally, recovery is against equity and good conscience when it would cause financial hardship, the annuitant can show that, because of the overpayment, he relinquished a valuable right or changed positions for the worse, or recovery could be unconscionable under the circumstances. *Id.*, ¶ 8. OPM's Policy Guidelines on the Disposition of Overpayments further provides, however, that individuals who know or suspect that they are receiving overpayments are expected to set aside the amount overpaid pending recoupment, that absent exceptional circumstances, recovery in these cases is not against equity and good conscience, and that exceptional circumstances do not include financial hardship. *Id.*; IAF, Tab 5, Subtab 6 at 8.

¶8 Here, the administrative judge found that set-aside rule applied to preclude waiver because the appellant indicated that he "probably" received OPM's letters discussing both the effect of an SSA disability benefits award on his FERS disability retirement benefits and the set-aside requirement, and that the appellant was, therefore, aware of the set-aside requirement and should have anticipated that he was receiving an overpayment that he would need to repay. IAF, Tab 9 at 5-6. The appellant, however, claimed that the timing of his SSA award and FERS annuity, coupled with his deteriorating mental conditions, led him to reasonably believe that he was not receiving an overpayment. IAF, Tab 1, Appeal Supplement at 1-2. Because the set-aside rule applies only to individuals who know or suspect that they are receiving an overpayment, the appellant's claim raises a question regarding whether the rule should apply here to bar the appellant's request for waiver. IAF Tab 5, Subtab 6 at 8; *see Knox*, 107 M.S.P.R. 353, ¶ 8.

¶9 Because resolving the factual question of whether the appellant knew or suspected that he was receiving an overpayment may require credibility determinations that are best made first by the administrative judge, we remand the appeal for further adjudication regarding this issue. *See Garrison v. Department of the Navy*, 88 M.S.P.R. 389, ¶ 10 (2001). On remand, the administrative judge should also afford the appellant the opportunity to submit an updated Financial Resource Questionnaire for consideration of the appellant's financial hardship claim, if the set-aside rule does not preclude waiver, or for readjusting the repayment schedule, in the event the administrative judge again finds that the set-aside rule bars waiver.

ORDER

¶10 Accordingly, we REMAND this appeal 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.

DISSENTING OPINION OF MARY M. ROSE

in

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¶1 My colleagues have concluded that this case must be remanded to the administrative judge in order to determine whether the set-aside aside rule should be applied here to bar the appellant's request for a waiver of his overpayment. I have reviewed the record below and conclude that the appellant, despite his deteriorating mental condition, was aware that he was receiving an overpayment when he received both Social Security Administration benefits and a Federal Employees' Retirement System disability retirement annuity. While I am sympathetic to his mental condition, I do not find that the record warrants waiving the overpayment he has received and his obligation to repay that overpayment, even if he were without fault. *See, e.g., James v. Office of Personnel Management*, 72 M.S.P.R. 211, 217 (1996). I have concluded that the administrative judge carefully analyzed and correctly explained that the appellant's situation does not meet the exceptional circumstances standard necessary to waive this overpayment.

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Mary M. Rose
Member