UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 147

Docket No. PH-831E-09-0554-I-1

Debra G. Langton,

Appellant,

v.

Office of Personnel Management,

Agency.

July 16, 2010

Richard E. Molan, Esquire, Concord, New Hampshire, for the appellant.

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 initial decision that sustained the Office of Personnel Management's (OPM) final decision discontinuing her Civil Service Retirement System (CSRS) disability retirement annuity. For the reasons set forth below, we GRANT the petition for review, VACATE the initial decision, and REMAND the appeal for further adjudication consistent with this Opinion and Order.

BACKGROUND

¶2 On January 27, 1993, the appellant entered into CSRS disability retirement from her EAS-16, step 05 Training and Development Specialist position with the U.S. Postal Service. Initial Appeal File (IAF), Tab 7 at 13. On April 7, 2007, OPM issued an initial decision, stating that the appellant had been restored to earning capacity as of December 31, 2006, because her income from wages in 2006 was at least 80% of the current rate of basic pay for the position she occupied immediately before retirement, and that it would therefore discontinue her disability retirement annuity. IAF, Tab 4, Subtab 2c at 1. The appellant requested reconsideration, arguing that the decision was in error because OPM miscomputed the current rate of basic pay for calendar year 2006 for the position she occupied immediately before retirement. *Id*., Subtab 2b at 1-4. OPM issued a final decision, affirming its initial decision as amended. *Id*., Subtab 2a at 1-2. OPM agreed that, in reaching its initial decision, it had miscomputed the applicable current rate of basic pay. *Id*. Nevertheless, OPM found that the appellant was restored to earning capacity even under the correct computation, and that its initial decision to discontinue her disability retirement annuity was ultimately correct. *Id*.

¶3 The appellant filed a Board appeal and requested a hearing. IAF, Tab 1 at 3. She argued that OPM's computation of the applicable current rate of basic pay remained incorrect, and that she was not restored to earning capacity under a properly computed rate of basic pay. IAF, Tab 1 at 5, Tab 7 at 6-8. OPM argued that it properly computed the applicable current rate of basic pay in reaching its final decision. IAF, Tab 4 at 1, Subtab 2a at 1-2.

¶4 After a hearing, the administrative judge issued an initial decision affirming OPM's final decision. IAF, Tab 12, Initial Decision (ID) at 1, 7. She found that OPM correctly computed the applicable rate of basic pay for 2006 in reaching its final decision, and that the appellant had been restored to earning

capacity under the applicable statute and regulation because her income from wages in 2006 exceeded 80% of that figure. ID at 7.

¶5 The appellant has filed a petition for review, arguing that (1) OPM applied its regulations incorrectly in computing the applicable current rate of basic pay for 2006, Petition for Review File (PFR File), Tab 1 at 7-9, (2) the administrative judge erred in sustaining OPM's final decision without resolving conflicting evidence regarding the appellant's rate of basic pay at retirement, *id*. at 9-10, and (3) the administrative judge disregarded OPM's admitted confusion in computing the applicable current rate of basic pay, *id*. at 10-11. OPM has filed a response, admitting that the computation of the current rate of basic pay underlying its final decision was incorrect. PFR File, Tab 4 at 5-6. However, OPM argues that the computation underlying its initial decision was correct, and that its ultimate decision to discontinue the appellant's disability retirement annuity was correct based on that computation. *Id*. at 5-6 & n.2. OPM addresses the appellant's arguments on review and argues that the petition for review should be denied for failure to meet the Board's review criteria. *Id*. at 4-7.

ANALYSIS

¶6 Under 5 U.S.C. § 8337(d), the annuity of a CSRS disability annuitant who is restored to earning capacity before becoming 60 years of age terminates upon reemployment by the Federal government or 180 days after the end of the calendar year in which earning capacity is restored, whichever is earlier. *See also* 5 C.F.R. § 831.1209(a). Earning capacity is deemed restored if in any calendar year the income of the annuitant from wages and/or self-employment equals at least 80% of the current rate of basic pay of the position occupied immediately before retirement. 5 U.S.C. § 8337(d); *Wulff v. Office of Personnel Management*, 133 F.3d 880, 882 (Fed. Cir. 1998); *Hudson v. Office of Personnel Management*, 87 M.S.P.R. 385, ¶ 5 (2000); 5 C.F.R. § 831.1209(a). An appellant bears the burden of proving her entitlement to a disability retirement annuity. *Hudson*, 87

M.S.P.R. 385, ¶ 5; 5 C.F.R. § 1201.56(a)(2). OPM, however, is obliged to come forward with evidence and an explanation demonstrating the basis on which it reached its determination. *Hollifield v. Office of Personnel Management*, 83 M.S.P.R. 563, ¶ 15 (1999).

¶7 The issue in this appeal is whether OPM correctly computed the 2006 rate of basic pay for the EAS-16, step 05 Training and Development Specialist position from which the appellant retired. OPM has issued regulations for computing the current rate of basic pay for a given position in a given calendar year. 5 C.F.R. § 831.1209(b). This is normally determined based on the current annual rate of basic pay for the grade and step of the position from which the disability annuitant retired. 5 C.F.R. § 831.1209(b)(1); *see Barbarino v. Office of Personnel Management*, 33 M.S.P.R. 441, 444-45 (1987). In this case, however, the normal method of computation is inapplicable because the Postal Service changed the pay system for EAS employees after the appellant retired. Specifically, the Postal Service eliminated the "step" system, under which EAS employees would receive pay increases based on their length of service in a particular grade, and implemented a "Pay-for-Performance Program," under which EAS employees' pay increases are based on their performance evaluations within minimum and maximum limits for the various grades.[1] IAF, Tab 7 at 15-16, 22-23. Therefore, in 2006, there was no "EAS 16, step 5" position within the meaning of 5 C.F.R. § 831.1209(b)(1) from which to determine the appellant's rate of basic pay for that year.

¶8 In the case of annuitants whose rate of basic pay at retirement does not match a specific grade and step in a pay schedule for the calendar year at issue, OPM has established alternative methods for determining the rate of basic pay.

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[1] It appears that the Postal Service eliminated the step system in 1994, implementing two versions of a Merit Pay Program prior to implementing the Pay-for-Performance Program in 2004. IAF, Tab 4, Subtab 2d at 8, 10, Tab 7 at 21-22. Only the Pay-for-Performance Program was in effect on dates relevant to this appeal.

5 C.F.R. § 831.1209(b)(2)(i)-(v). In reaching its final decision, OPM appears to have computed the appellant's 2006 rate of basic pay pursuant to 5 C.F.R. § 831.1209(b)(2)(v). Specifically, OPM used a method proposed by the Postal Service that was inconsistent with any of the methods set forth under subsections (i)-(iv). IAF, Tab 4, Subtab 2a at 1-2, Subtab 2d at 1; Hearing Compact Disc (HCD) (testimony of Legal Administrative Specialist Wilbert Tillery).

¶9 However, OPM may use the subsection (v) method only for employees "whose pay is not set under a formal system, [and] where none of the . . . guidelines [in subsections (i)-(iv)] will yield a current rate of pay." 5 C.F.R. § 831.1209(b)(2)(v). We find that OPM erred in computing the appellant's rate of basic pay under subsection (v) because, according to its own submissions, the appellant's basic pay is set under a formal system. IAF, Tab 4, Subtab 2d at 10. It was also improper for OPM to apply the guidelines in subsection (v) because, as explained below, the guidelines in subsection (iv) are applicable and will yield a current rate of pay. Because OPM's final decision is not in accordance with the law, the administrative judge erred in sustaining it. *See* ID at 7.

¶10 The appellant argues that OPM should have computed her rate of basic pay pursuant to 5 C.F.R. § 831.1209(b)(2)(iii), which provides:

> When the pay system under which an annuitant retired has been either modified or eliminated since the individual retired, the individual will be treated as if he or she had been employed at their retirement grade and step at the time of the system change, and will be deemed to have been placed under the new system using whatever rules would have been applicable at that time.

IAF, Tab 7 at 7; HCD (testimony of the appellant, closing argument of the appellant's representative); PFR File, Tab 1 at 7-9. The appellant argues that, under subsection (iii), she should be deemed to have been placed under the new Pay-for-Performance system in the "top quartile" of EAS-16 pay. IAF, Tab 7 at 5; PFR File, Tab 1 at 6. Specifically, the appellant argues that OPM should have computed her 2006 rate of basic pay by factoring in performance-based pay

increases that she would have received between 1994 and 2006 had she still been employed by the Postal Service and received performance ratings for those years consistent with the performance ratings that she received in the years immediately preceding her retirement. IAF, Tab 4, Subtab 2b at 8-13, Tab 7 at 15-16, 20-23, 25; HCD (testimony of the appellant); PFR File, Tab 1 at 6.

¶11 We agree with the administrative judge that the appellant's proffered method of computing her 2006 rate of basic pay is impermissible because it factors in performance-based pay increases that the appellant might have received if she had remained employed with the Postal Service up to 2006. ID at 6-7. The relevant position for computing the rate of basic pay is the one "occupied at the time of retirement" – not one that might have been occupied at some point in the future. 5 U.S.C. § 8337(d). The statute does not permit the Board to speculate as to an increased salary that a retiree might have received for performance-related reasons had she not retired. *See Smith v. Office of Personnel Management*, 760 F.2d 244, 246 (Fed. Cir. 1985) (the Board is not permitted to speculate as to a "current rate of pay" based on promotions or salary increases that an annuitant may have received had she not retired); *Barbarino*, 33 M.S.P.R. at 445-46 (the Board would not presume that, had the appellant not retired, he would have continued to work and receive satisfactory or better performance ratings until his former position was re-classified to a higher grade level); *Foley v. Office of Personnel Management*, 28 M.S.P.R. 291, 295 (1985) (the Board could not consider that, had the appellant not retired but continued to work with performance ratings of satisfactory or better, he may have received promotions or within-grade increases by operation of statute).

¶12 Furthermore, we find that there are additional reasons why 5 C.F.R. § 831.1209(b)(2)(iii) is inapplicable to the appellant's situation. Under subsection (iii), an annuitant "will be treated as if he or she had been employed at their retirement grade and step at the time of the system change." However, the appellant could not have been employed at her "retirement grade and step" when

the Postal Service implemented its Pay-for-Performance Program in 2004 because the Postal Service had already abolished steps when it implemented its Merit Pay Program in 1994. IAF, Tab 7 at 26-28. The absence of steps in the Pay-for-Performance Program makes it impossible to extrapolate under this method to reach the appellant's rate of basic pay for 2006.

¶13 We further find that the guidelines at 5 C.F.R. § 831.1209(b)(2)(i) and (ii) are inapplicable because the appellant did not retire from a "merit pay position," a position for which a special pay rate was authorized or in effect, or any other position in which the rate of basic pay is not equal to a grade and step in a pay schedule, and she did not retire with a "retained rate of basic pay." IAF, Tab 7 at 13, 21, 28.

¶14 We find that OPM should have computed the appellant's 2006 rate of basic pay pursuant to 5 C.F.R. § 831.1209(b)(2)(iv), which provides:

> If using the [guidelines in subsections (i)-(iii)] it is not possible to set a grade and step for computing the current rate of pay, then if possible the current rate of pay will be set using the relative position in the range of pay applicable to the position from which the individual retired. For example, if at the time of retirement the rate of pay was $75,000 in a range from $70,000 to $90,000, for all future determinations, the current rate of pay would be 25% up the new pay range from the bottom. If the new range was $96,000 to $120,000, then the new current rate of pay would be $102,000 ($96,000 plus 0.25 times $24,000 ($120,000 minus $96,000)).

As explained above, it is not possible to set a grade and step under subparts (i)-(iii) for computing the appellant's 2006 rate of basic pay. It is, however, possible to compute the appellant's 2006 rate of basic pay under subsection (iv) because both the Pay-for-Performance Program in effect for that year and the step system under which the appellant retired were formal systems with minimum and maximum salaries for EAS-16 positions. IAF, Tab 7 at 23.

¶15 In order to compute the appellant's 2006 rate of basic pay under subsection (iv), the Board would need the following information: (1) the appellant's rate of basic pay at retirement; (2) the range of basic pay for EAS-16 positions when the

appellant retired; and (3) the range of basic pay for EAS-16 positions as of December 31, 2006. For the following reasons, we find that the record is not sufficiently developed for the Board to ascertain these elements at this stage of the appeal.

¶16 The appellant argues on review that it is unclear what her rate of basic pay was at retirement, and that OPM should have investigated the matter before deciding to terminate her annuity. PFR File, Tab 1 at 9-10. Specifically, OPM found that the appellant's rate of basic pay at retirement was $37,191, alleging that it obtained this amount from a form SF-2806 supplied by the Postal Service. IAF, Tab 4, Subtab 2d at 1; HCD (testimony of Legal Administrative Specialist Katherine Sampson). The appellant, however, submitted a form PS-50, indicating that her salary at retirement was $40,686. IAF, Tab 7 at 13. The administrative judge credited OPM's explanation that the SF-2806, rather than the PS-50, was the proper document to use for these purposes. ID at 5; HCD (testimony of Ms. Sampson); *see* 5 C.F.R. § 831.103(a) (SF-2806 is the basic record for action on all claims for annuity).

¶17 OPM has explained the apparent discrepancy between the PS-50 and the SF-2806 for the first time on review. PFR File, Tab 4 at 7 & n.3. Specifically, OPM states that the "Salary" line in the PS-50 includes $3,495 in cost-of-living allowances (COLA) reflected on the "COLA" line of the PS-50, but that the rate of basic pay for Postal Service annuitants excludes COLAs that are not subject to civil service retirement deductions. *Id.*; IAF, Tab 7 at 13; *see* 5 C.F.R. §§ 831.1202 ("*Basic pay* means the pay an employee receives that is subject to civil service retirement deductions."); 831.1209(b)(3) ("For annuitants retiring from the United States Postal Service, only cost-of-living allowances subject to civil service retirement deductions are included in determining the current rate of basic pay of the position held at retirement."). OPM's explanation withstands scrutiny to the extent that the PS-50 does not indicate that the appellant elected to roll the COLAs into her basic pay for retirement deduction purposes, and the

difference between the $40,686 reflected on the PS-50 and the $37,191 allegedly reflected on the SF-2806 is equal to the $3,495 reflected on "COLA" line of the PS-50. IAF, Tab 7 at 13. However, the appellant has not had the opportunity to address OPM's argument in this regard, and in light of OPM's failure to provide a copy of the alleged SF-2806 for the record, we find that it has failed to satisfy its obligation to come forward with evidence and an explanation demonstrating the basis on which it reached its determination. *See Hollifield*, 83 M.S.P.R. 563, ¶ 15; *see also Lewis v. Department of Veterans Affairs*, 111 M.S.P.R. 388, ¶ 8 (2009) (the statements of an agency's representative in its response to the petition for review do not constitute evidence). Accordingly, if the appellant disagrees with OPM's late-raised explanation of the figure that it used as her rate of basic pay at retirement, she will have the opportunity to address the issue on remand.

¶18 The remaining two elements of the 5 C.F.R. § 831.1209(b)(2)(iv) computation are the EAS-16 basic pay ranges effective on the date of the appellant's retirement and on December 31, 2006, respectively. Although the record contains documents reflecting the EAS-16 salary ranges in effect at the relevant times, the documents appear to factor COLAs into the salary range in effect at the appellant's retirement.[2] IAF, Tab 7 at 23, 32. To the extent that OPM properly excluded COLAs from the appellant's rate of basic pay at retirement, any computation of the appellant's relative position in the salary range on that date must use a salary range that also excludes COLAs.[3] Because it does not appear that the record contains an EAS-16 salary range in effect on the

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[2] It appears that there was a general COLA "roll-in" in 1995 and that COLAs for EAS-16 positions ceased after that date. IAF, Tab 7 at 23. It is unclear what effect the 1995 COLA roll-in might have on the validity of the 2006 salary range reflected in the record for purposes of the required computation.

[3] Although it does not appear to be the case in the instant appeal, computing the relative position of a pay rate that excludes COLAs within a salary range that includes COLAs could yield an anomalous result, i.e., the pay rate could fall below the salary range.

date of the appellant's retirement that is valid for purposes of computing the appellant's relative position in that salary range under 5 C.F.R. § 831.1209(b)(2)(iv), the parties shall have an opportunity to develop the record on this issue on remand.

¶19 The appellant argues on review that the administrative judge disregarded OPM's admitted confusion in reaching its decision to discontinue her disability retirement annuity. PFR File, Tab 1 at 10-11. We disagree with the appellant that the administrative judge disregarded OPM's confusion because she acknowledged it in her initial decision. ID at 7. However, as explained above, OPM's well-documented confusion resulted in an erroneous computation of the appellant's December 31, 2006 rate of basic pay, and the Board is unable to correct OPM's computation without further development of the record.

ORDER

¶20 We REMAND this appeal to the Northeastern Regional Office for further adjudication consistent with this Opinion and Order. On remand, the administrative judge shall issue a new initial decision after affording the parties an opportunity to submit evidence and argument regarding (1) the appellant's rate of basic pay at retirement, (2) the range of basic pay for EAS-16 positions when the appellant retired, (3) the range of basic pay for EAS-16 positions as of

December 31, 2006, and (4) the computation of the appellant's December 31, 2006 rate of basic pay under 5 C.F.R. § 831.1209(b)(2)(iv).

FOR THE BOARD:

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