UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 164

Docket No. DA-844E-09-0152-X-1

Gwendolyn G. Lewis,

Appellant,

v.

Office of Personnel Management,

Agency.

August 17, 2010

Gwendolyn G. Lewis, Gretna, Louisiana, pro se.

Camela Green-Brown, 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 case is before the Board based on a Recommendation granting the appellant's petition for enforcement of a final Board decision. *Lewis v. Office of Personnel Management*, MSPB Docket No. DA-844E-09-0152-C-1 (Jan. 22, 2010). Compliance File ("CF"), Tab 14. For the reasons set forth below, we find the agency in compliance and DISMISS the appellant's petition for enforcement.

BACKGROUND

¶2 The Board's decision on the merits of this appeal ordered the Office of Personnel Management ("OPM") to grant the appellant's application for disability

retirement no later than 20 calendar days after the initial decision became final, May 13, 2009. *Lewis v. Office of Personnel Management*, MSPB Docket No. DA-844E-09-0152-I-1 (Initial Decision, April 8, 2009). Initial Appeal File ("IAF"), Tab 14. The decision ordered OPM to inform the appellant in writing of all actions taken to comply with the Board's Order and the date on which it believed full compliance was achieved. IAF, Tab 14 at 17.

¶3 On October 27, 2009, the appellant filed a petition for enforcement, contending that OPM had failed to contact her in writing regarding payment of her disability retirement. CF, Tab 1. The administrative judge, in three separate orders, directed the agency to provide information demonstrating compliance. CF, Tabs 2, 6, and 10. In a Recommendation dated January 22, 2010, the administrative judge found that OPM was not in compliance because: (1) it failed to demonstrate that it had provided the written notification required by the Board's final decision; (2) it failed to explain why the appellant's retirement is still in the "developmental stage" more than eight months after the Board's final decision; and (3) it failed to show that it is making regular annuity payments. CF, Tab 14 at 4. The administrative judge ordered OPM to: (1) inform the appellant in writing of all actions it has taken to comply with the Board's Order; (2) show that it has completed final adjudication of the appellant's disability retirement or explain why it has not done so, and detail the steps it is taking to complete the final adjudication; and (3) provide documentation showing the dates and amounts of the annuity payments that it claims have been made to the appellant since the effective date of the appellant's disability retirement. *Id*. at 5.

ANALYSIS

¶4 It is the agency's burden to establish compliance with a final Board Order. *Vargo v. U.S. Postal Service*, 78 M.S.P.R. 66, 73 (1998). It must produce relevant, material, and credible evidence of compliance in the form of documentation or affidavit. *Spates v. U.S. Postal Service*, 70 M.S.P.R. 438, 443

(1996). Where the agency produces such evidence, an appellant must offer documentation or affidavits to rebut the agency's claim of compliance. *Id*.

¶5 Following issuance of the Recommendation, the appellant filed submissions with the Board expressing confusion about the computation of her disability benefits and asserting that her service computation date was incorrect.[1] Compliance Referral File ("CRF"), Tabs 3, 4, 6, and 7. She also submitted a certificate of appreciation for 15 years of government service in support of her claim that she was given insufficient credit for her service. CRF, Tab 7

¶6 In response to the administrative judge's Recommendation and the appellant's queries, the agency provided submissions dated February 4, 2010, and March 16, 2010. CRF, Tabs 8 and 9. While the submissions purported to establish compliance, they failed to explain sufficiently the agency's actions. CRF, Tab 9.

¶7 By Order dated April 1, 2010, the Board directed the agency to provide more information regarding its compliance efforts. CRF, Tab 10. In particular, the agency was ordered to: 1) provide an explanation of the codes used on the agency's disability benefit statement; 2) provide a line by line explanation of how the amounts in the statement were determined, the date payments were made and how they were made; 3) address the appellant's claim that she had more than the 9 years and 5 months of government service credited to her by the agency; and (4) explain whether the computation included the appellant's intermittent service with the Department of the Army from May 10, 1987, through October 19, 1992. *Id*.

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[1] The appellant indicates that she has an unresolved claim for workers' compensation benefits. CRF, Tab 3 and 5. To the extent the appellant is raising lack of receipt of such benefits as an issue, the Board lacks authority to resolve this issue. *See* 5 U.S.C. § 8128(b) (the action of the Secretary of Labor allowing or denying workers' compensation benefits is conclusive); *see also Clavin v. U.S. Postal Service*, 99 M.S.P.R. 619, ¶ 4 (2005) (Board lacks jurisdiction to review a denial of workers' compensation benefits).

¶8 The agency responded in submissions dated April 30, 2010, and June 17, 2010. CRF, Tabs 14 and 15. The agency provided the codes used in its benefits statement and provided a chart showing the calculation of the appellant's disability benefits, noting the offset required by 5 U.S.C. § 8452(a)(2) of the Federal Employees' Retirement System (FERS), for an individual receiving Social Security Disability benefits. CRF, Tab 14, Exhibits 1 and 2. The evidence shows that the appellant received a total of $2,692.00 by electronic transfer, which includes interim payments totaling $1,176.00. *Id*. and CRF, Tab 15, Exhibit 10. The agency also explained that the appellant received a refund of her retirement contributions to the FERS fund for the period March 22, 1989, through August 19, 1995, and therefore service for that period was not credited for retirement purposes. CRF, Tab 14, Exhibit 3. The agency also explained that the appellant did not make any contributions to the FERS fund for her service with the Department of the Army for the period May 10, 1987, through March 16, 1989, and therefore that service was not included in the computation of her annuity. CRF, Tab 14. The agency's statement is supported by the record. *See Lewis v. Office of Personnel Management*, MSPB Docket No. DA-844E-09-0152-I-1, IAF, Tab 4, Subtab E.

¶9 As of July 12, 2010, the appellant has not disputed or specifically responded to the agency's evidence of compliance, despite being notified of an opportunity to do so.[2] *See* CRF, Tabs 2 and 10. Accordingly, we find the agency in compliance and DISMISS the appellant's petition for enforcement.

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[2] The appellant asserted, in a submission filed before the agency's April 30, 2010 explanation of its compliance efforts, that her monthly annuity was insufficient to cover family health insurance and that she wished to change her coverage to "self only." CRF, Tab 11. The appellant should address this request to the Office of Personnel Management.

ORDER

¶10 This is the final decision of the Merit Systems Protection Board in this compliance proceeding. Title 5 of the Code of Federal Regulations, section 1201.183(b) (5 C.F.R. § 1201.183(b)).

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:

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