UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 171

Docket No. DC-0831-10-0408-I-1

Linton V. Powell,

Appellant,

v.

Office of Personnel Management,

Agency.

August 23, 2010

Linton V. Powell, Colon, Panama, pro se.

Kristine Prentice, 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 dismissed his appeal of the decision of the Office of Personnel Management (OPM) denying his application for a deferred annuity under the Civil Service Retirement System (CSRS). For the reasons set forth below, we DENY the petition for failure to meet the Board's review criteria under 5 C.F.R. § 1201.115(d), REOPEN the appeal on the Board's own motion under 5 C.F.R. § 1201.118, REVERSE the initial decision, and REMAND the appeal for further adjudication consistent with this Opinion and Order.

BACKGROUND

¶2 The appellant applied for a deferred annuity, and OPM issued a September 18, 2003 initial decision denying his request on the basis that he lacked the requisite creditable service. Initial Appeal File (IAF), Tab 1 at 1, Tab 4 at 4. The initial decision informed the appellant that he had 30 days to request reconsideration and advised him that he could seek a refund for his retirement deductions. IAF, Tab 4 at 4. The appellant apparently contacted OPM again, and the same official who issued the initial decision wrote the appellant a December 5, 2003 letter stating that if the appellant did not like the initial decision, he was required to request reconsideration within 30 days, and that she could not assist the appellant because she was the one who made the initial decision. IAF, Tab 1 at 7. The appellant apparently contacted OPM again, and OPM issued a December 17, 2007 letter that made no reference to OPM's prior correspondence with the appellant in 2003, but similarly stated that the appellant lacked the requisite 5 years of creditable service for an annuity. *Id*. at 8. The December 17, 2007 letter also stated that he was ineligible for any further benefits because he had received a refund for his retirement deductions in 2006. *Id*. The record does not contain the appellant's correspondence to OPM.

¶3 On or about March 20, 2010, the appellant filed a Board appeal, alleging that OPM improperly denied his request for a deferred annuity. *Id*. at 1-2. The appellant did not request a hearing. OPM moved to dismiss the appeal for lack of jurisdiction on the basis that it had not issued a final decision on the matter. IAF, Tab 4 at 2. The administrative judge issued a show cause order informing the appellant that the Board has jurisdiction to review an OPM determination regarding an individual's retirement rights or interests only after OPM has issued a final or reconsideration decision. IAF, Tab 5 at 1. He directed the appellant to file evidence and argument to prove that the appeal is within the Board's jurisdiction. *Id*. at 1-2. He also issued an order stating that the appeal appeared to be untimely, and directing the parties to file evidence and argument on the

issue. IAF, Tab 3 at 1-4. The appellant replied to the jurisdictional order, alleging that he "immediately responded" to OPM's initial decision, but that OPM denied his response as untimely. IAF, Tab 7. The parties did not respond to the administrative judge's order regarding the timeliness of the appeal.

¶4 The administrative judge issued an initial decision dismissing the appeal for lack of jurisdiction. IAF, Tab 8, Initial Decision (ID) at 1, 5. He found that the appellant failed to establish that OPM issued a final decision on his request for an annuity. ID at 4-5. Because he dismissed the appeal for lack of jurisdiction, the administrative judge did not reach the timeliness issue. ID at 5 n.*.

¶5 The appellant has filed a petition for review, claiming that he responded to OPM's initial decision outside the 30-day time period due to belated receipt of OPM's decision. Petition for Review File (PFR File), Tab 1 at 3. He seems to argue that OPM should have considered this response as a request for reconsideration. *Id*. The appellant also challenges the merits of OPM's decision. *Id*. at 4-6. OPM has filed a response, arguing that the petition for review should be denied for failure to meet the Board's review criteria. PFR File, Tab 4 at 4.

ANALYSIS

¶6 The Board generally has jurisdiction to adjudicate an individual's rights and interests under the CSRS only after OPM has rendered a reconsideration decision on the issue in question. *Luna v. Office of Personnel Management*, 89 M.S.P.R. 465, ¶ 8 (2001); *see* 5 C.F.R. §§ 831.109(c)-(f), .110. Nevertheless, the Board may take jurisdiction over a retirement appeal in the absence of an OPM reconsideration decision where the appellant has made repeated requests for such a decision and the evidence indicates that OPM does not intend to issue a reconsideration decision. *Luna*, 89 M.S.P.R. 465, ¶ 8. Because, as discussed below, OPM in effect has issued an appealable final decision concerning the appellant's request for a deferred annuity, we find that the administrative judge

erred in determining that the Board lacks jurisdiction over the instant appeal. ID at 4-5.

¶7 In this case, the record shows that the appellant filed an application for a deferred annuity with OPM, and that OPM issued a September 18, 2003 initial decision denying the application.[1] IAF, Tab 1 at 1, Tab 4 at 4. The record also shows that the appellant subsequently contacted OPM at least twice because OPM issued letters on December 5, 2003, and December 17, 2007, responding to his further inquiries. IAF, Tab 1 at 7-8. It is apparent from the letters themselves that the appellant was making further inquiry into his eligibility for a CSRS annuity. *Id*. Therefore, we disagree with OPM that "there is no evidence that [the appellant] requested reconsideration." IAF, Tab 4 at 2. However, the record does not show whether the appellant's inquiries met the criteria for a request for reconsideration. *See* 5 C.F.R. § 831.109(d) ("A request for reconsideration must be in writing, must include the individual's name, address, date of birth and claim number, if applicable, and must state the basis for the request.").

¶8 Nevertheless, regardless of whether the appellant properly requested reconsideration from OPM, we find that OPM's December 17, 2007 letter constitutes a final, appealable decision on the appellant's application for a deferred annuity. IAF, Tab 1 at 8. The letter, addressed to the appellant, states:

> You received a refund of your contributions on 12-22-2006. You are not eligible for any further benefits from the U.S[.] Civil Service Retirement System.
>
> The SF50 you submitted states that you did not pay into the retirement system during this period of service. This time could not be used towards your five years of service needed for a deferred annuity at age 62.

Id.

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[1] The record does not contain the appellant's application for an annuity.

¶9 The December 17, 2007 letter clearly constitutes a decision on the appellant's eligibility for benefits under the CSRS, but OPM did not label it as either an initial decision or a final decision. *Id*. The letter does not state that the appellant has any right to seek reconsideration from OPM, which is a requirement of an OPM initial decision. 5 C.F.R. § 831.109(c). Nor did it inform the appellant of his right to appeal to the Board under 5 C.F.R. § 831.110, which is a requirement of an OPM final decision. 5 C.F.R. § 831.109(f). Under the circumstances of this case, however, we find that the December 17, 2007 letter constitutes a final, appealable decision from OPM. Specifically, the letter did not mention reconsideration, and nothing in OPM's submissions to the Board indicates that it intends to take further action in this case. IAF, Tab 1 at 8, Tab 4 at 2; PFR File, Tab 4 at 4; *see Johnson v. Office of Personnel Management*, 113 M.S.P.R. 118, ¶ 12 (2010); *Luna*, 89 M.S.P.R. 465, ¶ 9; *Scallion v. Office of Personnel Management*, 72 M.S.P.R. 457, 461 (1996) (the absence of a reconsideration decision does not preclude Board review of a retirement decision when OPM fails to advise the appellant of his right to request a reconsideration decision and does not intend to issue any further decision on the appellant's application). Because OPM did not inform the appellant of his right to request reconsideration of its December 17, 2007 decision, we find it inappropriate to require a reconsideration decision as a prerequisite for Board review. *See Richards v. Office of Personnel Management*, 29 M.S.P.R. 310, 312 (1985). We therefore find that OPM's December 17, 2007 letter constitutes an appealable final decision affecting the appellant's rights and interests under the CSRS and that the Board has jurisdiction to consider the merits of the appellant's claim.[2] *See* IAF, Tab 1 at 8.

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[2] To the extent that OPM intended its December 5, 2003 letter to constitute an appealable final decision, IAF, Tab 1 at 7, that does not preclude the Board from taking jurisdiction over the appeal pursuant to the December 17, 2007 letter, *id*. at 8, *cf. Smith v. Office of Personnel Management*, 114 M.S.P.R. 395, ¶¶ 7-8 (2010) (where OPM

¶10 As noted above, the administrative judge ordered the parties to file evidence and argument regarding the timeliness of the appellant's Board appeal, but the record closed without either party responding to the order. *Supra*, ¶ 3; IAF, Tab 3 at 1-4. Nevertheless, for the following reasons, we find it inappropriate to rule on the timeliness issue based on the existing record.

¶11 When an agency is required to notify an individual of his Board appeal rights but fails to do so, the agency's failure may constitute good cause for a filing delay. *See Shiflett v. U.S. Postal Service*, 839 F.2d 669, 674 (Fed. Cir. 1988); *Mc Clendon v. Office of Personnel Management*, 92 M.S.P.R. 250, ¶¶ 10-13 (2002). In such cases, an appellant need not show that he acted diligently in discovering his Board appeal rights; he need only show that he acted diligently in pursuing his Board appeal rights once he discovered them. *Herring v. U.S. Postal Service*, 72 M.S.P.R. 438, 443 (1996). In this case, OPM's December 17, 2007 decision does not appear to include notice of Board appeal rights, and it is unclear whether or how long the appellant delayed in filing his Board appeal once he actually learned of his Board appeal rights. Because the timeliness issue will likely turn on these facts, and the parties were not previously ordered to address these specific issues, we find it appropriate to remand the appeal for further

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issued two decisions it had designated as "final" on the appellant's application for a survivor annuity, the Board had jurisdiction pursuant to the later decision). In addition, the instant appeal is distinguishable from *Muyco v. Office of Personnel Management*, 104 M.S.P.R. 557, ¶¶ 2-3, 11-12 (2007), where the Board found that OPM's letter informing the appellant that it was rejecting his new request for reconsideration, after the Board had already adjudicated his appeal concerning an earlier reconsideration request, was not an appealable final decision. The Board concluded that the letter in *Muyco* did not constitute a decision on the merits of the appellant's claim of entitlement to an annuity, but instead, it merely referred to OPM's previous final decision, which the appellant had already appealed to the Board. 104 M.S.P.R. 557, ¶¶ 2, 11. In this case, however, the December 17, 2007 letter addresses the merits of the appellant's claim without referring to any previous OPM decision. IAF, Tab 1 at 8.

development of the record. *See Bautista v. Office of Personnel Management*, 74 M.S.P.R. 47, 50 (1997).

ORDER

¶12 Accordingly, we remand this case to the Washington Regional Office for further adjudication consistent with this Opinion and Order. If the administrative judge finds that the appeal was timely filed, or that good cause existed for the delay, he shall adjudicate the merits of the appeal.

FOR THE BOARD:

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