

**UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD**

**2010 MSPB 199**

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Docket No. SF-0831-09-0885-I-1

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**Gaudencio L. Muyco,  
Appellant,**

**v.**

**Office of Personnel Management,  
Agency.**

September 30, 2010

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Rufus F. Nobles, I, Zambales, Philippines, 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 petitioned for review of an initial decision that dismissed his appeal under the doctrine of res judicata. 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 In 2001, OPM denied the appellant's application for a Civil Service Retirement System (CSRS) retirement annuity. The appellant filed a request for reconsideration of that decision, which OPM denied as untimely filed. The

appellant filed a Board appeal challenging OPM's denial of his request for reconsideration, but the Board affirmed OPM's decisions in initial and final decisions issued in 2003. *See Muyco v. Office of Personnel Management*, [104 M.S.P.R. 557](#), ¶ 2 (2007).

¶3 In a February 2006 letter in response to correspondence from the appellant, OPM indicated that it had already issued a final decision on his application for CSRS retirement benefits and that the Board had affirmed its decision. *Id.*, ¶ 3. The appellant filed a Board appeal seeking review of OPM's letter, which he characterized as a new final decision addressing his entitlement to CSRS retirement benefits. *Id.* The administrative judge dismissed the appellant's second appeal as barred by res judicata. *Id.*, ¶ 5. On petition for review, the Board reopened the appeal on its own motion and dismissed the appeal for lack of jurisdiction, finding that OPM's February 2006 letter did not constitute a decision on the merits of his entitlement to CSRS retirement benefits. *Id.*, ¶¶ 9-11.

¶4 By letter dated July 7, 2009, OPM responded to the appellant's request for reconsideration of an initial decision finding that he was not entitled to pay a deposit to obtain credit under CSRS for his civilian service with the Department of the Navy between 1966 and 1991. Initial Appeal File (IAF), Tab 1 at 51. OPM informed the appellant that he was not eligible to make a deposit for his service because he was not currently employed in a federal position subject to federal retirement deductions. *Id.* at 52. OPM notified the appellant of his right to appeal its decision to the Board. *Id.*

¶5 The appellant filed a Board appeal on August 6, 2009. IAF, Tab 1 (postmarked envelope). He requested a hearing. *Id.* at 2. He characterized OPM's decision as having denied both his claim for retirement benefits as well as his request to make a deposit. *Id.* at 6.

¶6 In an order issued on September 11, 2009, the administrative judge ordered the appellant to show cause why his appeal should not be dismissed on the basis

of res judicata or, in the alternative, collateral estoppel. IAF, Tab 3 at 2-3. In response to the show cause order, the appellant argued in part that his entitlement to make a deposit had never been the subject of an initial or reconsideration decision from OPM, and that the issue of a deposit is separate from his entitlement to a CSRS retirement annuity. IAF, Tab 5 at 1. The agency argued that the appeal should be dismissed on the basis of res judicata, and that the appellant could not raise a new theory of the case or a new argument in support of his claim. IAF, Tab 7 at 2.

¶7 The administrative judge scheduled two telephonic status conferences, but the appellant and his representative failed to appear for either conference. IAF, Tabs 6, 8. On December 10, 2009, the administrative judge issued an initial decision dismissing the appeal without holding the appellant's requested hearing. IAF, Tab 9. He found that the matters raised in the present appeal could have been raised in his first Board appeal, and that the present appeal was therefore barred under the doctrine of res judicata. *Id.* at 3-5.

¶8 The appellant has filed a timely petition for review of the initial decision. Petition for Review (PFR) File, Tab 1. On petition for review, he again argues that his right to make a deposit is separate from his right to an annuity. *Id.* at 11. He also argues that OPM discriminated against him. *Id.* The agency has responded in opposition to the petition for review. PFR File, Tab 4. After the close of the record on review, PFR File, Tab 2, the appellant filed additional argument in support of his petition for review,<sup>1</sup> PFR File, Tab 5.

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<sup>1</sup> The Board's regulations do not provide a party filing a petition for review with the right to file a reply, and the appellant has not shown that his additional argument is based on evidence that was not readily available before the record closed; therefore we have not considered the appellant's most recent submission in reaching our decision. See *Cebzanov v. Office of Personnel Management*, [100 M.S.P.R. 170](#), ¶ 4 (2005); [5 C.F.R. § 1201.114\(i\)](#).

## ANALYSIS

The present appeal is not barred by res judicata.

¶9 Under the doctrine of res judicata, a valid, final judgment on the merits of an action bars a second action involving the same parties or their privies based on the same cause of action. *Peartree v. U.S. Postal Service*, [66 M.S.P.R. 332](#), 337 (1995). Res judicata precludes parties from relitigating issues that were, or could have been, raised in the prior action, and is applicable if: (1) the prior judgment was rendered by a forum with competent jurisdiction; (2) the prior judgment was a final judgment on the merits; and (3) the same cause of action and the same parties or their privies were involved in both cases. *Id.*

¶10 The prior decision to which the administrative judge gave preclusive effect in this case was the Board's 2003 decision affirming OPM's dismissal of the appellant's request for reconsideration as untimely. IAF, Tab 9 at 4. However, we find that a decision concerning the timeliness of a request for reconsideration before OPM is not a decision on the merits. *See Vargo v. U.S. Postal Service*, [62 M.S.P.R. 156](#), 159 (1994) (generally, when the merits of an agency action are not examined, res judicata is inapplicable). We therefore find that the present appeal is not barred by res judicata.

The appellant is entitled to a hearing, but not necessarily an evidentiary hearing.

¶11 In appeals from OPM reconsideration decisions involving Civil Service Retirement Act (CSRA) retirement benefits, the appellant has the burden of proving entitlement to benefits by preponderant evidence. [5 C.F.R. § 1201.56\(a\)\(2\)](#). Two types of federal service are pertinent to a determination of whether an individual is eligible for a retirement annuity under the CSRA, "creditable service" and "covered service." *Noveloso v. Office of Personnel Management*, [45 M.S.P.R. 321](#), 323 (1990), *aff'd*, 925 F.2d 1478 (Fed. Cir. 1991) (Table). While almost all federal service is creditable service, covered service is more limited in scope, referring to employees who are subject to the CSRA, i.e.,

employees who must deposit part of their basic pay into the Civil Service Retirement and Disability Fund. *Id.* Further, to be eligible for a civil service annuity, an applicant must demonstrate that he has completed at least 5 years of creditable civilian service, and that he has served at least 1 of his last 2 years of federal service in a position covered under the CSRA. [5 U.S.C. § 8333](#)(a), (b); *Quiocson v. Office of Personnel Management*, [490 F.3d 1358](#), 1360 (Fed. Cir. 2007).

¶12 Under [5 U.S.C. § 8334](#)(c), an individual generally may make a deposit into the Fund if he is currently an “employee.” See [5 U.S.C. § 8334](#)(c); *Floresca v. Office of Personnel Management*, [69 M.S.P.R. 93](#), 98 (1995). The term “employee,” as it is used for the purposes of the statutory chapter governing CSRS, is defined at [5 U.S.C. § 8331](#)(1), and it refers to individuals who are serving in positions covered by CSRS. See *Vanaman v. Office of Personnel Management*, [59 M.S.P.R. 598](#), 601 (1993) (covered service refers only to those federal employees who are subject to the CSRA and must deposit a portion of their pay into the Fund); see also [5 U.S.C. § 8334](#)(a)(1) (requiring the employing agency to deduct retirement contributions from the pay of an “employee”). Here, there is no indication that the appellant was ever employed in any capacity that would cause him to be an “employee.” See IAF, Tab 1 at 23 (Standard Form 50 indicating that the appellant’s retirement plan was “Other”). Instead, the record shows that the appellant performed service that was excluded from coverage under the CSRA. See [5 C.F.R. § 831.201](#)(b)(1)(i) (excluding from coverage alien workers at duty stations in a foreign country under circumstances where U.S. citizens may be covered).

¶13 In [5 C.F.R. § 831.112](#)(a)(2), OPM has interpreted [5 U.S.C. § 8334](#)(c) to permit an individual who is no longer employed by the federal government to make a deposit if he “retains civil service retirement annuity rights based on a separation from a position in which retirement deductions were properly withheld . . . in the Civil Service Retirement and Disability Fund,” and if his “annuity has

not been finally adjudicated.” In other words, an individual who has been separated from a CSRS-covered position (i.e., one in which he was subject to CSRS retirement contributions), who is eligible for a CSRS annuity, and whose annuity has not been “finally adjudicated” may make a deposit. However, the U.S. Court of Appeals for the Federal Circuit specifically has found that an individual may not make a deposit under section 8334 if he was not separated from a CSRS-covered position and a retroactive deposit does not convert a non-covered position to a covered position. *Quiocson*, 490 F.3d at 1360. Here, the appellant does not allege that he was in a position in which he was subject to CSRS retirement contributions. It therefore appears, based on the undisputed facts, that the appellant is not entitled to make a deposit under 5 C.F.R. § 831.112(a)(2).

¶14 Although there do not appear to be any disputed material facts and the outcome of the appeal appears to be a matter of law, we are unable to resolve the appeal at this time because the appellant requested a hearing.<sup>2</sup> See [5 U.S.C. § 7701\(a\)\(1\)](#) (an appellant before the Board has the right “to a hearing for which a transcript will be kept”); IAF, Tab 1 at 2 (the appellant’s hearing request). However, both the Board and our reviewing court have held that an appellant in a case like this one is not entitled to a full evidentiary hearing. Where there is no dispute of material fact and the outcome of the appeal is a matter of law, the hearing required under [5 U.S.C. § 7701\(a\)\(1\)](#) may be limited to an opportunity to present oral argument on the dispositive legal issue. See *Carew v. Office of*

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<sup>2</sup> We note that the administrative judge’s show cause order set forth the burden of proof and law applicable to the merits of the appeal, and required the parties to submit all evidence and argument on all matters, including the merits of the appeal, by November 4, 2009. IAF, Tab 3 at 3-5. The appellant subsequently submitted additional written submissions on the merits, IAF, Tabs 4, 5, including what he described as “my final arguments and evidences [sic] in my case,” IAF, Tab 4 at 1. However, he also requested that a representative of his former employing agency participate in the hearing. IAF, Tab 5 at 1. We therefore find that the appellant did not express a desire to withdraw his hearing request.

*Personnel Management*, [878 F.2d 366](#), 367-68 (Fed. Cir. 1989) (approving the Board's resolution of an appeal without an evidentiary hearing where a statutory provision precluded the appellant's claim for law enforcement officer retirement credit); *see also Jezouit v. Office of Personnel Management*, [97 M.S.P.R. 48](#), ¶¶ 10-13 (2004) (resolving an appeal without an evidentiary hearing where the dispositive issue was whether OPM's method of calculating the appellant's service credit and average pay were legally correct), *aff'd*, 121 F. App'x 865 (Fed. Cir. 2005). Therefore, unless the appellant identifies a genuine dispute of material fact, the hearing in this matter may be limited to oral argument.

¶15 We note the appellant's allegation that OPM discriminated against him. PFR File, Tab 1 at 11. However, because the appellant's entitlement to make a deposit is a matter of law that does not permit OPM to exercise any discretion, there can be no discriminatory act by OPM. *See Jordan v. Office of Personnel Management*, [108 M.S.P.R. 119](#), ¶¶ 9-14 (2008). Therefore, the administrative judge need not address the discrimination claim on remand.

#### ORDER

¶16 Accordingly, we remand the appeal to the Western Regional Office 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.