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

**2010 MSPB 218**

Docket No. AT-0841-10-0385-I-1

**Arthur R. Niederhofer,**

**Appellant,**

**v.**

**Office of Personnel Management,**

**Agency.**

November 9, 2010

Arthur R. Niederhofer, Saint Augustine, Florida, 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 petitioned for review of an initial decision that dismissed for lack of jurisdiction his appeal of an Office of Personnel Management (OPM) reconsideration decision that denied his request to change the classification of his retirement under the Federal Employees' Retirement System (FERS). For the reasons stated below, we GRANT the appellant's petition, VACATE the initial decision, and REMAND the appeal for adjudication. We also FORWARD the appellant's involuntary retirement claim to the regional office for separate docketing and adjudication.

## BACKGROUND

¶2 On June 3, 1996, the appellant resigned[1] from his position as an Equipment Specialist, GS-1670-13, with the Department of Agriculture's National Information Technology Center in Kansas City, Missouri. At the time, the appellant had 14 years and 6 months of service and he was 47 years old. Initial Appeal File (IAF), Tab 1 at 1, 9; Tab 4, subtab 2e at 11, 18. Because the appellant was not eligible to retire at that time, the appellant completed an Application for Deferred or Postponed Retirement and he elected for his retirement to commence on February 1, 2004.[2] IAF, Tab 4, subtab 2e at 14-17.

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[1] We note that, although it is not relevant to this appeal, the record is unclear whether the appellant left federal service under his agency's Voluntary Early Retirement program. IAF, Tab 1; Tab 4, subtabs 2b, 2e.

[2] There are two categories of FERS retirement benefits relevant to this appeal, immediate retirement under 5 U.S.C. § 8412, and deferred retirement under 5 U.S.C. § 8413. Eligibility for these benefits is determined by age and the number of years of creditable service the employee has at the time of the retirement. There are two instances in which minimum retirement age (MRA) with 10 years of service comes in to play in determining the employee's retirement eligibility. First, under what OPM labels as "MRA + 10 Retirement," an individual can apply for a reduced optional immediate retirement at the MRA with 10 to 29 years of service. An eligible employee can receive an immediate annuity as early as age 55 with as few as 10 years of service. OPM's CSRS and FERS Handbook, Section 42A1.1-1 (http://www.opm.gov/retire/pubs/handbook/C042.pdf); *see* 5 U.S.C. § 8412(g)-(h). Further, "[a]n employee or Member entitled to an annuity under this subsection may defer the commencement of such annuity by written election." 5 U.S.C. § 8412(g)(2). Thus, an individual who is eligible for retirement under an immediate MRA + 10 can "postpone" his annuity if he chooses. *See* IAF, Tab 4, subtab 2e at 17.

The second instance where the MRA with 10 years of service comes into play is for a deferred retirement annuity under 5 U.S.C. § 8413, which provides as follows:

> (a) An employee or Member who is separated from the service . . . after completing 5 years of service is entitled to an annuity beginning at the age of 62 years.
>
> (b)(1) An employee or Member who is separated from the service . . . after completing 10 years of service but before attaining the applicable [MRA] under section 8412 (h) is entitled to an annuity beginning on the date designated by the employee or Member in a written election under this

On June 20, 2004, the appellant applied for retirement benefits, which were granted effective February 1, 2004, the date he had elected to receive his deferred retirement annuity.[3] *Id.* at 10, 14-17. The appellant also requested to enroll in the Federal Employee Health Benefits (FEHB) program as a retiree, *id.* at 17, and was informed by OPM that, as a deferred retiree, he was not eligible to continue or re-enroll in the FEHB program and OPM denied his request, *id.* at 9. The appellant sought reconsideration, asserting that his retirement classification was incorrect. *Id.*, subtab 2b. OPM subsequently issued a reconsideration decision finding that the appellant is not eligible to change the classification of his retirement under FERS. IAF, Tab 4, subtab 2a. OPM stated that it did not have the authority to waive the requirements that deferred retirees are not allowed to continue or re-enroll for health benefits coverage in their own right. *Id.*

¶3 The appellant appealed OPM's reconsideration decision and requested Board review of OPM's denial of his request to change the classification of his FERS retirement from a deferred retirement under 5 U.S.C. § 8413(b) to a postponed immediate retirement under 5 U.S.C. § 8412(g). IAF, Tabs 1, 6. The appellant asserted that, at the time he left federal service, OPM advised him that

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> subsection. The date designated under this subsection may not precede the date on which the employee or Member attains such [MRA] and must precede the date on which the employee or Member becomes 62 years of age.

FERS thus provides separate and distinct eligibility requirements and annuity provisions for immediate (or postponed) retirement under MRA + 10, deferred retirement after 5 years of service at age 62, and deferred retirement with at least 10 years of service. *See* 5 U.S.C. §§ 8412(g)-(h), 8413.

[3] In this case, the appellant, who was 47 with 14+ years of service when he separated from federal service, completed an application for a "deferred or postponed" retirement. IAF, Tab 4, subtab 2e at 17. Although the appellant completed the section of the form for "Applicants with Immediate MRA + 10 Eligibility," *see id.*, because he had over 10 years of service when he retired in 1996, but he had not reached his MRA (55 years and 2 months), OPM provided the appellant with a deferred retirement effective February 1, 2004. IAF, Tab 4, subtab 2e at 9

as long as he maintained FEHB coverage until his annuity went into effect, he could reinstate his self-only FEHB benefits when his retirement became effective. *Id.*, Tab 6. The appellant asserted that he would not have left federal employment when he did if he had known that his retirement classification would preclude him from reinstating his self-only FEHB benefits. *Id.* Without holding the requested hearing, the administrative judge dismissed the appeal for lack of jurisdiction, citing *Kearby v. Office of Personnel Management*, 47 M.S.P.R. 34 (1991), for the proposition that OPM determinations concerning health plan enrollment are final and not reviewable by the Board, and *Wonsock v. Office of Personnel Management*, 108 M.S.P.R. 154, ¶ 12 (2008), *aff'd*, 296 F. App'x 48 (Fed. Cir. 2008), for the proposition that OPM has sole discretion to grant a waiver under 5 U.S.C. § 8905(b) and that such a determination is not reviewable by the Board. Initial Decision (ID) at 3. In addition, the administrative judge noted that, if the appellant wishes to adjudicate a claim that his resignation/retirement was involuntary, "he should file an appeal with the Board against the Department of Agriculture." ID at 3 n.4.

¶4 In his petition for review, the appellant continues to contend that OPM erred in refusing to correct his retirement classification, and argues that the Board has jurisdiction to adjudicate this claim under 5 U.S.C. § 8347(d), which provides that the rights or interests of an individual under that subchapter may be appealed to the Board. Petition for Review (PFR) File, Tab 1 at 1-2. The appellant asserts further that he relied on misinformation from OPM in deciding to resign/retire and that he would not have left federal service if he knew that he could not reinstate self-only FEHB benefits when his deferred retirement became effective. *Id.* at 1. The appellant requests that his former employing agency, the Department of Agriculture, be included in this appeal. *Id.*

## ANALYSIS

¶5 The administrative judge correctly found that claims concerning federal employee life insurance and federal employee health insurance programs are beyond the Board's jurisdiction. *See Chamblin v. Office of Personnel Management*, 112 M.S.P.R. 266, ¶ 7 (2009). Nevertheless, the Board's jurisdiction over final decisions of OPM in administering FERS derives from 5 U.S.C. § 8461(e)(1), which provides that "an administrative action or order affecting the rights or interests of an individual . . . under this chapter administered by [OPM] may be appealed to the Merit Systems Protection Board . . . ."[4]

¶6 Here, the administrative judge dismissed the appeal for lack of jurisdiction finding that OPM determinations concerning health plan enrollment are final and not reviewable by the Board. However, the appellant is not challenging OPM's determination that he is not eligible to continue or reenroll in the FEHB program. Rather, he is questioning OPM's determination that he is not eligible to change the classification of his retirement under FERS. IAF, Tabs 1, 6. Even though the appellant's ultimate goal was to secure enrollment in a federal health insurance program, his specific request to OPM was to change his retirement classification. The fact that the appellant's ultimate purpose relates to health insurance coverage does not preclude Board jurisdiction over his appeal concerning the proper classification of his retirement under FERS. *Cf. Lua v. Office of Personnel Management*, 102 M.S.P.R. 108, ¶ 8 (2006) (although the Board does not have jurisdiction over FEGLI (life insurance elections), the appellant is not challenging her FEGLI election, she is questioning whether OPM's computation of her annuity correctly encompassed OPM's retroactive deductions of certain FEGLI premiums). Thus, because this is an appeal of a final decision from OPM that

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[4] The appellant, who retired under FERS, cited the comparable provision of law under the Civil Service Retirement System, 5 U.S.C. § 8347(d).

affected the appellant's rights or interests with regard to his retirement, the Board has jurisdiction over issues relating to his request to change the classification of his deferred FERS retirement under 5 U.S.C. § 8413(b) to a postponed immediate retirement under 5 U.S.C. § 8412(g).

¶7 Even though there do not appear to be any issues of material fact as to the correct classification of the appellant's retirement, he is entitled to the hearing he requested. *See Gowan-Clark v. Office of Personnel Management*, 84 M.S.P.R. 116, ¶ 5 (1999). Accordingly, the appeal must be remanded to the Atlanta Regional Office for hearing and adjudication on the merits.[5]

¶8 In addition, the appellant argued below and on petition for review that he relied on misrepresentations from OPM and would not have left federal service if he knew that he could not reinstate self-only FEHB benefits when his deferred retirement became effective. Such an assertion is, in essence, an involuntary retirement claim even though it was raised in the context of an appeal of OPM's denial of his request to change his retirement classification. Therefore, we FORWARD the appellant's involuntary retirement claim to the regional office for docketing against the Department of Agriculture.

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[5] Both the Board and our reviewing court have held that an appellant in a case like this one may not be 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 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 credit); *see also Jezouit v. Office of Personnel Management*, 97 M.S.P.R. 48, ¶¶ 10-13 (2004) (resolving whether 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 issue of material fact, the hearing in this matter may be limited to oral argument. *See Muyco v. Office of Personnel Management*, 114 M.S.P.R. 694, ¶ 14 (2010).

## ORDER

¶9 For the reasons stated above, we find that the Board has jurisdiction to review the appellant's claim concerning the proper classification of his retirement under FERS. Accordingly, we VACATE the initial decision and REMAND the appeal for adjudication of that matter. We also FORWARD the appellant's involuntary retirement claim for separate docketing and adjudication.

FOR THE BOARD:

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