UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2012 MSPB 49

Docket No. AT-844E-11-0552-I-1

Wardell Jackson,

Appellant,

v.

Office of Personnel Management,

Agency.

April 6, 2012

Stanley L. Taylor, Esquire, Natchez, Mississippi, for the appellant.

Matthew D. MacIsaac, Washington, D.C., for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman

OPINION AND ORDER

¶1 This case is before the Board on the appellant's petition for review of the initial decision that affirmed the Office of Personnel Management's (OPM's) reconsideration decision denying his application for disability retirement. For the reasons set forth below, we GRANT the appellant's petition, VACATE the initial decision, and REMAND the case to the regional office for further adjudication consistent with this Opinion and Order.

BACKGROUND

¶2 On June 19, 2010, the appellant, a Level 6 Mail Processing Clerk, completed his application for disability retirement under the Federal Employees'

Retirement System (FERS) citing uncontrollable hypertension and glaucoma. Initial Appeal File (IAF), Tab 4, Subtab IID at 1-3, Subtab IIE at 1. OPM denied his application, initially and on reconsideration, on the basis that he had failed to provide sufficient diagnostic and treatment evidence pertaining to his claimed conditions and did not establish that he was disabled for useful and efficient service or that his continued absence from the workplace was medically warranted.[1] *Id.*, Subtab IIA at 1-2, Subtab IIC at 1-4.

¶3 The appellant timely appealed OPM's reconsideration decision, claiming that he was disabled by hypertension, glaucoma, gout, and depression.[2] IAF, Tab 1 at 4. He requested a hearing. *Id.* at 2.

¶4 Thereafter, the administrative judge issued an initial decision affirming OPM's reconsideration decision. *Id.*, Tab 13, Initial Decision (ID) at 1, 10. After reviewing the medical evidence, ID at 3-6, the administrative judge stated that the "general" rule in disability retirement cases is that the medical evidence must show how the employee's conditions affect his ability to perform specific job duties and requirements. *Id.* at 5; *see Musser v. Office of Personnel Management*, 102 M.S.P.R. 18, ¶ 8 (2006). The administrative judge then found that, with one exception, none of the appellant's treatment providers explained how his conditions affected his specific work requirements.[3] *Id.* at 5-7. Citing the Board's decision in *Mullins-Howard v. Office of Personnel Management*,

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[1] The appellant testified that he stopped going to work in early 2010. Hearing Compact Disc.

[2] The administrative judge correctly advised the appellant that the Board could only consider those conditions that were referenced in his disability retirement application. *Id.*, Tab 9; *see Jones v. Office of Personnel Management*, 89 M.S.P.R. 474, ¶ 5 (2001).

[3] That exception was Dr. Moses Young's Residual Functional Capacity Assessment in which he described certain work-related activities that were affected by the appellant's impairments. IAF, Tab 12, Appellant's Exhibit 1 at 20-21; *see* ID at 4-5. The administrative judge found Dr. Young's assessment unpersuasive. ID at 7.

71 M.S.P.R. 619, 627 (1996), the administrative judge further found that the medical evidence did not unambiguously and without contradiction indicate that the appellant could not perform the particular duties of his Level 6 Processing Clerk position based on the conditions he listed in his disability retirement application. ID at 8. The administrative judge considered the appellant's testimony that he was removed from his position effective May 20, 2011, based on excessive absence without medical documentation, but found that, even if he was entitled to the so-called *Bruner* presumption[4], a lack of objective medical evidence in the record providing a reasoned explanation of how his conditions rendered him unable to perform specific work requirements would rebut the presumption. *Id.* at 8.

¶5 In his petition for review, the appellant alleges that the Postal Service has agreed to change the basis for his removal to inability to perform his job duties, therefore entitling him to a presumption of disability consistent with *Bruner*. Petition for Review File, Tab 1 at 2; *Bruner v. Office of Personnel Management*, 996 F.2d 290, 294 (Fed. Cir. 1993).

ANALYSIS

Because the administrative judge did not have the benefit of the Board's recent decision in *Henderson v. Office of Personnel Management* restating the criteria for awarding disability retirement benefits, this matter must be remanded to the administrative judge for further adjudication.

¶6 As noted, in affirming OPM's reconsideration decision, the administrative judge applied the "general" rule to find that the appellant failed to submit persuasive medical evidence explaining how his medical conditions preclude him from performing his specific job duties. ID at 5, 9. However, the Board has

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[4] Under *Bruner v. Office of Personnel Management*, 996 F.2d 290, 294 (Fed. Cir. 1993), an appellant's removal for inability to perform his duties establishes a prima facie case of entitlement to disability retirement benefits, and the burden then shifts to OPM to provide evidence sufficient to support a finding that the appellant is not disabled.

recently overruled a line of cases that indicated that there is a "general" rule that such evidence is required to prove entitlement to disability retirement benefits. *Henderson v. Office of Personnel Management*, 117 M.S.P.R. 313, ¶¶ 12-19 (2012). The Board in *Henderson* provided a framework under which to analyze a claim for disability retirement.

¶7 In *Henderson*, the Board noted that, under the Civil Service Retirement System, OPM's implementing regulation describes two ways to meet the statutory requirement that the employee "be unable, because of disease or injury, to render useful and efficient service in the employee's position": (1) by showing that the medical condition caused a deficiency in performance, attendance, or conduct; or (2) by showing that the medical condition is incompatible with either useful and efficient service or retention in the position. *Henderson*, 117 M.S.P.R. 313, ¶ 16 (citing *Gometz v. Office of Personnel Management*, 69 M.S.P.R. 115, 121 (1995)). The applicable FERS statute and implementing regulation contain the same relevant language, 5 U.S.C. § 8451(a)(1)(B); 5 C.F.R. § 844.103(a)(2), and we discern no basis not to apply the holding in *Henderson* to disability retirement cases under FERS.

¶8 Under the first method discussed above, an appellant can establish entitlement by showing that his medical condition affects his ability to perform specific work requirements, prevents him from being regular in attendance, or causes him to act inappropriately. *Henderson*, 117 M.S.P.R. 313, ¶ 16. Under the second method, an appellant can show that the medical condition is inconsistent with working in general, working in a particular line of work, or working in a particular type of setting. *Id.* Regardless of the particular method of establishing an inability to render useful and efficient service, the burden of proof in every case is by a preponderance of the evidence, i.e., more likely true than not. *Id.*, 5 C.F.R. § 1201.56(a), (c)(2). The Board specifically found that to require medical evidence that is unambiguous and without contradiction is to

impose a higher burden of proof, one that is not authorized by law or regulation.[5] *Henderson*, 117 M.S.P.R. 313, ¶ 16. The Board concluded that the ultimate question, based on all the relevant evidence, is whether the appellant's medical impairments preclude him from rendering useful and efficient service in his position, and that the question must be answered in the affirmative if the totality of the evidence makes that conclusion more likely to be true than not true. *Henderson*, 117 M.S.P.R. 313, ¶ 20.

¶9 Here, the administrative judge did not have the benefit of *Henderson* because it was issued after the initial decision in this case. Therefore, we find it is necessary to remand this appeal in order to determine whether the appellant has met his burden of establishing his entitlement to disability retirement benefits under *Henderson*.

ORDER

¶10 We REMAND the appeal to the Atlanta Regional Office for further adjudication of the appellant's disability retirement claim. On remand, the administrative judge shall provide the parties with the standard for establishing a claim for disability retirement under *Henderson*, and an opportunity to submit evidence and argument in response to the administrative judge's order.[6] The

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[5] In the *Henderson* decision the Board overruled cases that have relied on the Board's decision in *Mullins-Howard*, referenced by the administrative judge in the instant case, ID at 8, as providing an "exception" to the "general" rule, allowing the Board to link the medical evidence to the job duties where such evidence unambiguously and without contradiction indicates that the appellant cannot perform the duties or meet the requirements of his position. *Henderson*, 117 M.S.P.R. 313, ¶¶ 14, 18.

[6] The appellant shall also be afforded an opportunity to submit evidence to support the claim he raised in his petition for review that the Postal Service has changed the basis for his removal to inability to perform. If the appellant submits such evidence, the administrative judge shall address it in his remand initial decision.

administrative judge shall then determine whether the totality of the evidence supports an entitlement to disability retirement benefits.

FOR THE BOARD:

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