UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2012 MSPB 52

Docket No. DC-0845-11-0740-I-1

Daniel-Lynn Whittacre,

Appellant,

v.

Office of Personnel Management,

Agency.

April 13, 2012

Daniel-Lynn Whittacre, Henderson, North Carolina, pro se.

Kristine Prentice, Washington, D.C., for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant has filed a petition for review of the initial decision that affirmed the reconsideration decision of the Office of Personnel Management (OPM) finding that the appellant had received an overpayment of Federal Employees' Retirement System (FERS) interim disability retirement annuity payments. For the reasons set forth below, we REVERSE OPM's reconsideration decision, and REMAND this appeal to OPM to make a new determination of the amount of the FERS disability retirement annuity to which the appellant is entitled and to issue a new reconsideration decision as set forth in this Opinion and Order.

BACKGROUND

¶2 The appellant began his federal civilian service as a Criminal Investigator with the Department of Health and Human Services (HHS) effective January 9, 2005. Initial Appeal File (IAF), Tab 3, Subtab 2d at 1, 15-16, 22-23. During his civilian service, the appellant was recalled to active military duty, and HHS placed him in a leave without pay (LWOP) status for the period of June 12, 2007, through January 5, 2008. *Id.* at 22. The appellant returned to his civilian position on January 6, 2008. *Id.* The appellant was thereafter recalled to active military duty and HHS again placed him in a LWOP status effective February 3, 2008. *Id.* While on this second period of military LWOP, the appellant submitted an application for a FERS disability retirement. *Id.* at 18-21. OPM determined that the appellant was eligible for a disability retirement,[1] and HHS separated him from service based on disability retirement effective August 30, 2008, with his last day in a pay status being February 2, 2008. *Id.* at 1, 22, 28.[2] OPM commenced the appellant's FERS interim disability retirement annuity payments effective February 2, 2008. *Id.*, Subtab 2c.

¶3 After making its final determination of the amount of the annuity to which the appellant is entitled, OPM informed him that he had received an overpayment of $7,690.23 in interim annuity payments for the period of February 2, 2008, through May 30, 2009, and that it intended to offset his future annuity payments

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[1] The record does not clearly reflect the date OPM approved the appellant's application for a disability retirement.

[2] The record alternatively reflects the appellant's last day in a pay status as February 1, 2008, and February 2, 2008. IAF, Tab 3, Subtab 2d at 22, 28. We take official notice of the fact that Friday, February 1, 2008, and Saturday, February 2, 2008, were the last two days in pay period 2 of 2008. *See Wofford v. Department of Justice*, 115 M.S.P.R. 468, ¶ 5 n.4 (2010) (the Board may take official notice of matters that can be verified); 5 C.F.R. § 1201.64. No claim of error was presented below or on review regarding OPM's use of Friday, February 1, 2008, as the appellant's last day in a pay status and, thus, we make no finding as to which day the appellant's pay ceased.

by $213.61 for a period of 36 months in order to recoup the overpayment. IAF, Tab 3, Subtab 2c. The appellant sought reconsideration, and OPM issued a reconsideration decision affirming its finding of the overpayment. *Id.*, Subtabs 2a, 2b. The appellant filed a timely appeal in which he asserted, inter alia, that OPM's calculation of the amount of the annuity to which he was entitled was erroneous because OPM failed to include his periods of LWOP while serving active military duty in determining his "average pay." *Id.*, Tab 7 at 1. Thus, he argued that he had not received an overpayment of interim annuity payments. The appellant did not request a hearing. IAF, Tab 1 at 3-7.

¶4 In the initial decision, the administrative judge concluded that OPM's determination that the appellant's "last day of service" with HHS was February 1, 2008, and that OPM had lawfully commenced the appellant's interim FERS disability retirement annuity payments on February 2, 2008. IAF, Tab 8, Initial Decision (ID) at 4. She also found that OPM had properly calculated the appellant's "high-3" average salary in determining his annuity and that OPM had presented preponderant evidence supporting its determination that the appellant had received an overpayment in interim annuity payments for the period of February 2, 2008, to May 30, 2009, in the amount of $7,690.23. ID at 5-7. Accordingly, the administrative judge affirmed OPM's reconsideration decision. ID at 1, 7.

¶5 The appellant has filed a petition for review in which he asserts that the administrative judge erred in finding that OPM proved that he had received an interim annuity overpayment. Petition for Review (PFR) File, Tab 1 at 4-5. OPM has filed a response. *Id.*, Tab 4.

ANALYSIS

¶6 OPM bears the burden of proving by preponderant evidence the existence and amount of an annuity overpayment. *Vojas v. Office of Personnel Management*, 115 M.S.P.R. 502, ¶ 10 (2011); 5 C.F.R. § 845.307(a). Under

5 U.S.C. § 8452, the amount of a FERS disability retirement annuity in the first year of receipt is 60% of the annuitant's average pay. 5 U.S.C. § 8452(a)(1)(A)(i); *Cebzanov v. Office of Personnel Management*, 96 M.S.P.R. 562, ¶ 5 (2004). At the end of that year, the FERS benefit is reduced to 40% of the annuitant's average pay. 5 U.S.C. § 8452(a)(1)(A)(ii); *Cebzanov*, 96 M.S.P.R. 562, ¶ 5. With an exception not relevant here, "average pay" means the largest annual rate resulting from averaging an employee's pay in effect over any 3 consecutive years of service. 5 U.S.C. § 8401(3).

¶7 In calculating the appellant's average pay, OPM excluded any imputed pay and pay increases that the appellant would have received during his period of military LWOP from June 12, 2007, through January 5, 2008, on the grounds that he had not made a deposit to obtain military service credit for that time.[3] PFR File, Tab 1 at 4-5; IAF, Tab 3, Subtabs 2a, 2d at 34. We find that OPM's position in this case is contrary to law and OPM's own regulations.

¶8 OPM relied upon 5 U.S.C. § 8411(c)(1)(B) to conclude that the appellant was required to make a deposit for his military service while on LWOP in order to receive credit for his service between June 12, 2007, and January 5, 2008. IAF, Tab 3, Subtab 2a. However, section 8411(d) specifically provides that creditable service "shall be allowed for leaves of absence without pay granted an employee while performing military service." 5 U.S.C. § 8411(d). This provision does not require payment of a deposit to obtain service credit. Similarly, OPM's regulations make no mention of a deposit requirement to obtain

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[3] The appellant has not reiterated on review his alternative argument below that OPM should have included the pay that he would have received between February 3, 2008, and August 31, 2008, in calculating his average pay. Instead, he requested that a "review of the information on file be conducted to determine if OPM included 13 June 2007 – 5 January 2008 in their calculation of High Three Salary." PFR File, Tab 1 at 5. We also find no error in the administrative judge's determination below that, consistent with 5 U.S.C. § 8464, OPM properly used the appellant's last day in pay status on February 1, 2008, as the endpoint in the calculation of his average pay. ID at 4.

service credit for periods of civilian service while in a military LWOP status. Furthermore, while the regulations generally limit service credit for leaves of absence in excess of 6 months, they specifically provide that the 6-month limit does not apply while an individual is performing military service. 5 C.F.R. § 842.304(a)(4). Thus, a federal civilian employee absent on leave without pay because of military service is entitled to service credit under FERS for the period of the absence, regardless of its duration, without making a deposit.[4]

¶9 In sum, we find that OPM and the administrative judge erred in finding that the appellant was not entitled to service credit for his June 12, 2007 through January 5, 2008 period of LWOP because he had not made a military service credit deposit for that service. As a result, we find that OPM erroneously calculated the amount of the appellant's "average pay" by not including his imputed salary during this period in its calculations, and therefore, failed to prove the existence and amount of the asserted annuity overpayment for the period of February 2, 2008 through May 30, 2009.

¶10 Based upon the current record, we are unable to determine whether the appellant actually received an overpayment and, if so, the amount of that overpayment. We therefore reverse OPM's reconsideration decision and remand this appeal to OPM to issue a new reconsideration decision regarding the existence and amount of any overpayment consistent with this Opinion and Order. *See Nichol v. Office of Personnel Management*, 105 M.S.P.R. 201, ¶ 20 (2007); *De Laet v. Office of Personnel Management*, 70 M.S.P.R. 390, 395 (1996).

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[4] This conclusion is consistent with part 353 of OPM's regulations regarding Restoration to Duty from Uniformed Service or Compensable Injury, which provides that "agencies have an obligation to consider employees absent on military duty for any incident or advantage of employment that they may have been entitled to had they not been absent." 5 C.F.R. § 353.106(c).

ORDER

¶11 Accordingly, we remand this appeal to OPM to issue a new reconsideration decision consistent with this Opinion and Order within 90 days of the date of this Order. OPM's new reconsideration decision shall advise the appellant of his right to file an appeal with the Board's Washington Regional Office if he disagrees with that new decision. *See Boyd v. Office of Personnel Management*, 98 M.S.P.R. 685, ¶ 14 (2005).

FOR THE BOARD:

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