

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

EMMETT W. MCNEEL,
Appellant,

DOCKET NUMBER
DE-0831-09-0175-X-1

v.

OFFICE OF PERSONNEL
MANAGEMENT,
Agency.

DATE: September 4, 2012

THIS FINAL ORDER IS NONPRECEDENTIAL¹

Emmett W. McNeel, Prescott, Arizona, pro se.

Thomas L. Styer, Washington, D.C., for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

FINAL ORDER

This matter is before the Board based on the administrative judge's October 13, 2011 Recommendation that the Office of Personnel Management (OPM or agency) be found in noncompliance with the Board's order for a retroactive adjustment to the appellant's disability retirement benefits. *McNeel v.*

¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions. In contrast, a precedential decision issued as an Opinion and Order has been identified by the Board as significantly contributing to the Board's case law. See [5 C.F.R. § 1201.117\(c\)](#).

Office of Personnel Management, DE-0831-09-0175-X-1, Compliance Referral File (CRF), Tab 1 at 1 (Recommendation). For the reasons set forth below, we find OPM is now in compliance with the Board's order.

BACKGROUND

The appellant began receiving disability annuity benefits from OPM in 1994. *McNeel v. Office of Personnel Management*, [113 M.S.P.R. 356](#), ¶ 2 (2010). Those benefits were discontinued effective March 1, 1997, based on information from Dr. Lillian Muzyka, M.D., that the appellant was physically and mentally able to return to work in the same capacity that he had prior to being approved for disability retirement. *Id.*² The appellant requested reinstatement of his disability annuity on July 9, 1999; on September 2, 1999, OPM denied that request. DE-0831-09-0175-B-2, Remand File (RF), Tab 7 at 2.

In a November 19, 1999 letter, Dr. Muzyka stated that the appellant's medical condition "is chronic and it will persist no matter what we do." *Id.* at 3. The appellant requested reconsideration of OPM's September 2, 1999 denial on or about November 30, 1999, and attached Dr. Muzyka's November 19, 1999 letter. *Id.* at 2-3. OPM issued a reconsideration decision denying the appellant's request on January 21, 2000. *Id.* at 3.

On June 9, 2003, the appellant obtained a hand-written note from Dr. Muzyka that described his medical problems and noted that they were "ongoing." *Id.* The appellant submitted this note to OPM on or about June 11, 2003, again

² This matter has a long and complex history that involves several other docketed appeals, which include the following: (1) OPM's discontinuation of the appellant's benefits, *McNeel v. Office of Personnel Management*, DE-831E-97-0746-I-1 (*McNeel I*); (2) OPM's decision not to apply cost of living allowances to his annuity, DE-831E-07-0341-I-1 (*McNeel II*); (3) OPM's reconsideration decision denying his request for cost of living allowances, DE-831E-08-0137-I-1 (*McNeel III*); and (4) OPM's decision denying his request for retroactive restoration of his disability annuity benefits, DE-831E-08-0376-I-1 (*McNeel IV*). [113 M.S.P.R. 356](#), ¶¶ 2, 4, 7. The appellant filed the instant appeal, DE-0831-09-0175-I-1, on February 2, 2009. *Id.*, ¶ 8.

requesting reinstatement of his annuity. *Id.* OPM informed him in a November 25, 2003 decision that his annuity would be reinstated effective the date of Dr. Muzyka's June 9, 2003 note. *Id.*

On May 5, 2011, an administrative judge reversed OPM's determination, finding that appellant's annuity should have been reinstated on November 19, 1999. *Id.* at 7-9. The administrative judge reasoned that the appellant sought reinstatement of his annuity in 1999, and that the November 19, 1999 letter he submitted in support of that request was at least as substantive as the June 9, 2003 note that OPM found warranted the reinstatement of his annuity effective June 9, 2003, "if not more so." *Id.* at 9. The administrative judge therefore ordered OPM to retroactively reinstate the appellant's disability annuity "effective November 19, 1999." *Id.* at 9. Implicitly, the administrative judge found no dispute that OPM had already retroactively reinstated the appellant's annuity as far back as June 9, 2003, as OPM stated it would; therefore, the period for which retroactive reinstatement was needed was November 19, 1999, through June 8, 2003. Nonetheless, the administrative judge also ordered OPM to "calculate and pay to the appellant all appropriate adjustments to his annuity payments which result from the retroactive reinstatement." *Id.* The administrative judge's decision became the final decision of the Board on June 9, 2011, when neither party filed a petition for review. *Id.* at 10.

On October 13, 2011, the administrative judge issued a compliance initial decision recommending that OPM be found in noncompliance with the May 5, 2011 Board order. Recommendation at 1. In response to the administrative judge's Recommendation, OPM submitted a November 10, 2011 statement that the appellant "*is to receive* a retroactive net payment of \$96,608.45 covering the

period of November 19, 1999, to October 31, 2011.” CRF, Tab 4 at 2 (emphasis added).³

Further information from OPM was required because OPM’s statement did not indicate that it had actually made the \$96,608.45 payment and did not explain its calculation of that amount. Also absent was any indication of what deficiency existed for the period of June 9, 2003, through October 31, 2011, a period for which the appellant had presumably already received annuity payments. The Clerk of the Board therefore ordered OPM to provide additional evidence and explanation of its compliance. CRF, Tab 5 at 4. OPM has responded to the Clerk’s Order. CRF, Tab 6.

ANALYSIS

An agency bears the burden of proving its compliance with a final Board order, and compliance must be supported by relevant, material, and credible evidence in the form of documentation or affidavits. *Heath v. Department of Agriculture*, [111 M.S.P.R. 434](#), ¶ 5 (2009). The appellant may rebut that evidence by making specific, nonconclusory, and supported allegations to the contrary. *Id.*

OPM’s obligation to pay disability annuity benefits can be broken into two relevant periods: (1) November 19, 1999, through June 8, 2003, a period for which the Board found that OPM improperly denied benefits despite the doctor’s November 19, 1999 letter; and (2) June 9, 2003, through October 31, 2011, a period for which OPM provided benefits to the appellant, but at an incorrectly low rate. OPM lumped these periods together – or rather, called the Board’s attention to a potential deficiency for the second period – in its statement that it

³ OPM faxed this submission to the Board on November 10, 2011. CRF, Tab 4 at 1. The agency representative referenced “[t]he Board’s October 13, 2011 Recommendation” but dated his signature to “10/10/2011.” *Id.* at 2. Seemingly, the representative intended to date his signature to 11/10/2011.

“underpaid the appellant in the gross amount of \$129,279.67 for the period of 11/19/99 to 10/31/11,” for a net amount due of \$96,608.45. CRF, Tab 6 at 6. OPM’s evidence indicates that it initially gave the appellant *no* annuities for the period of November 19, 1999, through June 8, 2003, and gave the appellant annuities for the period of June 9, 2003, through October 31, 2011, albeit at incorrectly low rates. *Id.* at 27.

For the first period, November 19, 1999, through June 8, 2003, OPM initially gave zero disability annuity benefits to the appellant. CRF, Tab 6 at 27 (spreadsheet). OPM’s spreadsheet identifies the gross annuities due for this period, the rates that correspond to those annuities, and the fact that \$0.00 was initially paid to the appellant for this period. *Id.*⁴

For the second period, June 9, 2003, through October 31, 2011, OPM paid annuity benefits to the appellant, but based its payments on incorrectly low gross annuity rates. *Id.* OPM’s brief acknowledges that its spreadsheet reflects an “underpayment comparing the gross annuity paid and gross annuity due.” *Id.* at 6. OPM’s spreadsheet specifies the gross annuities due for this period, the proper rates that correspond to those annuities, and the actual, deficient rates applied to the appellant’s annuities. *Id.* at 27.⁵

OPM’s spreadsheet identifies the total gross amount underpaid for the period of November 19, 1999, through October 31, 2011, as \$129,279.67. *Id.* at 27. OPM also reports that it deducted from that federal taxes in the amount of \$25,855.93, and life insurance premiums in the amount of \$6,814.29. *Id.* at 21,

⁴ The spreadsheet identifies the following total gross annuities *due* from November 19, 1999, through June 8, 2003: \$906.40, \$27,864.00, \$28,836.00, \$29,580.00, and \$15,660.40. CRF, Tab 6 at 27. These gross amounts total \$98,826.40. The spreadsheet indicates that the gross annuity initially paid for this period was \$0.00. *Id.*

⁵ For the first month, June 2003, the appellant was due a gross amount of \$2,499.00, but received a deficient payment of \$2,266.00. For the last month, October 2011, the appellant was due a gross amount of \$3,045.00, but received a deficient payment of \$2,762.00.

31-32. After these deductions, the amount due to the appellant was \$96,609.45. CRF, Tab 6 at 32, Tab 7 at 2.

The appellant acknowledges that \$96,608.45 was deposited in his bank. CRF, Tab 7 at 1. Although that amount was deficient by \$1.00, the agency acknowledged that deficiency and paid it to the appellant in his December 1, 2011 check. *Id.* at 2; CRF, Tab 6 at 6, 42. However, the appellant states that he does not “really know how they came up with that figure” of \$96,608.45. CRF, Tab 7 at 1. Normal office records, compiled in the ordinary course of business, are entitled to substantial weight. *Rint v. Office of Personnel Management*, [48 M.S.P.R. 69](#), 71-72, *aff’d*, 950 F.2d 731 (Fed. Cir. 1991) (Table). We find that the agency has supported its calculations with relevant, material, and credible evidence, and that the appellant has not rebutted that evidence with specific, nonconclusory, and supported allegations to the contrary. We therefore find that the agency has properly reinstated the appellant’s disability retirement annuity.

The appellant’s reply also questioned whether he has “any recourse for the [loss] of my home, my outstanding credit, vehicles and personal items not to mention my marriage.” *Id.* The Board is without authority to award damages for a deficient payment of disability retirement benefits. *Giove v. Office of Personnel Management*, [106 M.S.P.R. 53](#), ¶ 9 (2007).

CONCLUSION

For the aforesaid reasons, we find the agency has brought itself into COMPLIANCE with the Board’s final order and dismiss this matter as MOOT.

NOTICE TO THE APPELLANT REGARDING YOUR RIGHT TO REQUEST ATTORNEY FEES AND COSTS

You may be entitled to be paid by the agency for your reasonable attorney fees and costs. To be paid, you must meet the requirements set out at Title 5 of the United States Code (5 U.S.C.), sections 7701(g), 1221(g), or 1214(g). The regulations may be found at [5 C.F.R. §§ 1201.201](#), 1201.202, and 1201.203. If

you believe you meet these requirements, you must file a motion for attorney fees WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION. You must file your attorney fees motion with the office that issued the initial decision on your appeal.

**NOTICE TO THE APPELLANT REGARDING
YOUR FURTHER REVIEW RIGHTS**

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, [931 F.2d 1544](#) (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 ([5 U.S.C. § 7703](#)). You may read this law, as well as review the Board's regulations and other related material, at our website, <http://www.mspb.gov>. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's

"Guide for Pro Se Petitioners and Appellants," which is contained within the court's [Rules of Practice](#), and [Forms](#) 5, 6, and 11.

FOR THE BOARD:

William D. Spencer
Clerk of the Board

Washington, D.C.