UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

TEREA ANN MCCOY, Appellant, v. OFFICE OF PERSONNEL MANAGEMENT, Agency.	DOCKET NUMBER PH-844E-11-0528-I-1 DATE: October 4, 2012

THIS ORDER IS NONPRECEDENTIAL*

Taron V. Brown, New Castle, Delaware, for the appellant.

Evelyn K. Payne, Washington, D.C., for the agency.

BEFORE

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

REMAND ORDER

The appellant has filed a petition for review in this case asking us to reconsider the initial decision issued by the administrative judge. We grant petitions such as this one only when significant new evidence is presented to us

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* A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions.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).

that was not available for consideration earlier or when the administrative judge made an error interpreting a law or regulation. The regulation that establishes this standard of review is found in Title 5 of the Code of Federal Regulations, section 1201.115 (5 C.F.R. § 1201.115). For the reasons discussed below, we GRANT the appellant's petition for review and REMAND the case to the regional office for further adjudication in accordance with this Order.

BACKGROUND

The appellant applied for disability retirement under the Federal Employees' Retirement System (FERS) based on migraine headaches, loss of use of her arms and hands, and poor vision. Initial Appeal File (IAF), Tab 4, Subtab d. She stated that she could not walk up and down stairs and could not walk a long way. *Id*. In a reconsideration decision, the Office of Personnel Management (OPM) denied the appellant's application, stating only that it considered her application on the basis of migraine headaches and vision problems. IAF, Tab 4, Subtab a. OPM found that the appellant failed to submit detailed evidence to show that the condition diagnosed was severe enough to preclude performing the duties of her position. *Id*.

The appellant appealed the reconsideration decision. IAF, Tab 1. Based on the written record, the administrative judge affirmed the reconsideration decision. IAF, Tab 11. She noted that the appellant received Office of Workers' Compensation Programs (OWCP) payments based on the injury when a bar fell on her head and that the physician completing the OWCP claim form recommended that the appellant receive disability retirement. *Id*. at 4. The administrative judge found that the appellant's medical evidence failed to explain why she cannot perform the duties of her position. *Id*. at 6. The administrative judge did not cite any evidence disputing the employing agency's statements that the appellant's condition could not be accommodated and did not refuse reassignment. *Id*. at 7-8.

The appellant has petitioned for review. Petition for Review (PFR) File, Tab 1. OPM has responded in opposition to the petition. PFR File, Tab 3.

ANALYSIS

In an appeal from an OPM decision denying a voluntary disability retirement application, the appellant bears the burden of proof by preponderant evidence. 5 C.F.R. § 1201.56(a)(2); *see Chavez v. Office of Personnel Management*, 6 M.S.P.R. 404, 417 (1981). To be eligible for a disability retirement annuity under FERS, an employee must show that: (1) She completed at least 18 months of creditable civilian service; (2) while employed in a position subject to FERS, she became disabled because of a medical condition, resulting in a deficiency in performance, conduct or attendance, or, if there is no such deficiency, the disabling medical condition is incompatible with either useful and efficient service or retention in the position; (3) the disabling medical condition is expected to continue for at least 1 year from the date that the application for disability retirement benefits was filed; (4) accommodation of the disabling medical condition in the position held must be unreasonable; and (5) she did not decline a reasonable offer of reassignment to a vacant position. 5 U.S.C. § 8451(a); *Yoshimoto v. Office of Personnel Management*, 109 M.S.P.R. 86, ¶ 8 (2008); *Thorne v. Office of Personnel Management*, 105 M.S.P.R. 171, ¶ 5 (2007); 5 C.F.R. § 844.103(a).

Here, there is no dispute that the appellant had completed 18 months of creditable civilian service, that the disabling condition would continue for at least 1 year, that the agency could not accommodate the appellant's medical condition, and that the appellant did not decline an offer of reassignment to a vacant position. At issue is whether, while employed in a position subject to FERS, she became disabled because of a medical condition, resulting in a deficiency in performance, conduct or attendance, or, if there is no such deficiency, the

disabling medical condition is incompatible with either useful and efficient service or retention in the position.

As noted, in affirming OPM's reconsideration decision, the administrative judge found that the appellant failed to submit persuasive medical evidence explaining how her medical conditions preclude her from performing her specific job duties. IAF, Tab 11. However, the Board has 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.

In *Henderson*, the Board noted that, under FERS, there are 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": (a) by showing that the medical condition caused a deficiency in performance, attendance, or conduct; or (b) 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)). Under the first method, an appellant can establish entitlement by showing that her medical condition affects her ability to perform specific work requirements, prevents her from being regular in attendance, or causes her 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 concluded that the ultimate question, based on all the relevant evidence, is

whether the appellant's medical impairments preclude her from rendering useful and efficient service in her 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. In the *Henderson* decision, the Board overruled cases that have relied on the Board's decision in *Mullins–Howard v. Office of Personnel Management*, 71 M.S.P.R. 619 (1996), as relegating method (b) above to 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 her position. *Henderson*, 117 M.S.P.R. 313, ¶¶ 14, 18.

Here, the administrative judge did not have the benefit of *Henderson* because it was issued after the initial decision in this case and she only considered whether the medical evidence satisfied the first method under *Henderson*. Therefore, we find it is necessary to remand this appeal in order to determine whether the appellant has met her burden of establishing entitlement to disability retirement benefits under either of the alternative ways to do so specified by statute and the framework under which to analyze a claim for disability retirement provided in *Henderson*. *See Rucker v. Office of Personnel Management*, 117 M.S.P.R. 669, ¶¶ 10-11 (2012).

ORDER

For the reasons discussed above, we REMAND this case to the regional office for further adjudication in accordance with this Remand Order. On remand, the administrative judge shall provide the parties with the standard for establishing a claim of disability retirement under *Henderson* and an opportunity to submit evidence and argument in response to the administrative judge's order.

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

FOR THE BOARD:

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William D. Spencer
Clerk of the Board

Washington, D.C.