UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2013 MSPB 13

Docket No. SF-0845-12-0170-I-1

Harolean Norris Martin,

Appellant,

v.

Office of Personnel Management,

Agency.

February 8, 2013

Zedie E. Ramage, Jr., Fresno, California, for the appellant.

Roxann Johnson, Washington, D.C., for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant has filed a petition for review of the initial decision that dismissed her appeal for lack of jurisdiction. For the reasons set forth below, we GRANT the appellant's petition and REMAND the case for further adjudication.[1]

[1] Except as otherwise noted in this decision, we have applied the Board's regulations that became effective November 13, 2012. We note, however, that the petition for review in this case was filed before that date. Even if we considered the petition under the previous version of the Board's regulations, the outcome would be the same.

BACKGROUND

¶2 In an initial decision dated November 5, 2004, the Office of Personnel Management (OPM) notified the appellant of its determination that she had been overpaid $18,692.64 as a result of her concurrent receipt of civil service annuity benefits and Office of Workers' Compensation Programs (OWCP) benefits during the period from February 8, 2002, through September 30, 2003. Initial Appeal File (IAF), Tab 3, Ex. K.[2] OPM informed her that if she did not respond within 30 days, the overpayment would be withheld from her recurring OWCP benefit in 36 installments of $519.24. *Id*. In her request for reconsideration, dated December 3, 2004, the appellant denied the existence of the overpayment and asserted that it would be a hardship to have her income reduced by $519.24 per month. *Id*., Ex. J.

¶3 In a reconsideration decision dated February 16, 2006, OPM stated that it was affirming the initial decision, but that the amount of the overpayment had been changed to $13,143.77. IAF, Tab 6. OPM further explained that the appellant was not entitled to a waiver of collection of the overpayment. *Id*. The decision included notice of Board appeal rights, and also included a statement that if the appellant did not file a Board appeal within 30 days, OPM would ask OWCP to immediately offset her monthly benefit by $250.00 until the overpayment was paid in full. *Id*. The appellant asserts that neither she nor her representative received a copy of the February 16, 2006 reconsideration letter. Petition for Review (PFR) File, Tab 1 at 1-2.

¶4 On April 21, 2006, OPM issued the appellant another letter, in which it indicated that the appellant had received an overpayment of $18,692.64, and that if she did not respond within 30 days, the overpayment would be withheld in 63 installments of $300.00 and 1 installment of $92.64. IAF, Tab 3, Subtab G.

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[2] The record contains conflicting information as to whether the appellant retired under the Civil Service Retirement System (CSRS) or the Federal Employees' Retirement System (FERS). *Compare id*., Ex. G, K, *with* IAF, Tab 6.

The letter made no reference to the February 16, 2006 reconsideration decision, and did not include notice of Board appeal rights. *Id*. The appellant responded by letter dated May 17, 2006, requesting that OPM review her December 3, 2004 letter and supporting documents. *Id*., Ex. F. OPM did not reply to the May 17, 2006 letter. *Id*. at 3, Ex. D.

¶5 In a letter to OWCP, dated May 23, 2006, OPM stated that due process had been provided to the appellant, and requested that OWCP begin the deductions. *Id*., Ex. E. The appellant received a copy of the May 23, 2006 letter, but again was provided no notice of Board appeal rights. *See id*. In a June 7, 2006 telephone conversation with an OPM official, the appellant and her representative inquired about the status of the May 17, 2006 letter, and the OPM official indicated that she not seen the letter, that it was probably in the mail room, and that she would get back to her. *Id*., Ex. D. In July 2006, OWCP began deducting $300.00 per month from the appellant's OWCP benefits, consistent with the repayment schedule described in the April 21, 2006 letter.[3] *See id*., at 2, Ex. C. The appellant sent additional letters, dated March 6, 2008, May 5, 2011, and July 23, 2011, asking OPM to respond to her previous correspondence. *Id*., Ex. A, B, D. Again, OPM did not respond to the appellant's letters. *Id*. at 2.

¶6 The appellant filed an appeal with the Board on December 16, 2011. IAF, Tab 1. In the acknowledgment order, the administrative judge notified the appellant that the Board might not have jurisdiction over her appeal, and directed her to submit evidence and argument on the issue. IAF, Tab 2. The acknowledgment order did not address the timeliness of the appeal. *See id*. In a submission dated January 19, 2012, OPM stated that it had decided to rescind its February 16, 2006 reconsideration decision, due to an error in its calculation of the overpayment, and moved that the appeal be dismissed for lack of jurisdiction.

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[3] The April 21, 2006 letter indicated that the overpayment installments would be withheld from the appellant's OPM annuity, *see id*., but this was evidently a drafting error, as the appellant was at that time receiving benefits from OWCP, not OPM.

IAF, Tab 5. OPM indicated that, once the appeal was dismissed, it would recompute the amount of the overpayment and, "if warranted," issue a new final decision, which the appellant would have the right to appeal to the Board. *Id*. OPM subsequently provided a copy of the February 16, 2006 reconsideration decision, which had not previously been entered into the record. IAF, Tab 6. OPM did not allege or provide evidence that it had returned the money that had already been deducted from the appellant's OWCP benefits. *Id*. On February 1, 2012, the administrative judge issued an initial decision dismissing the appeal for lack of jurisdiction, without deciding the issue of timeliness. IAF, Tab 7.

¶7 On petition for review, the appellant contends that the administrative judge dismissed the appeal prematurely without waiting for her response to OPM's motion to dismiss. PFR File, Tab 1. She asserts that neither she nor her representative received the February 16, 2006 reconsideration decision, and that if she had received it, she would have exercised her Board appeal rights at that time. *Id*. The appellant further argues that OPM did not fully rescind its decision because it did not return all of the money it had already collected and OPM's statement that it would issue a new final decision "if warranted" is merely speculative. *Id*. OPM has filed a response, asserting in general terms that the appellant's petition does not meet the criteria for review. PFR File, Tab 4.

ANALYSIS

¶8 The Board has held that, if OPM completely rescinds a reconsideration decision, the rescission divests the Board of jurisdiction over the appeal in which the reconsideration decision is at issue, and the appeal must be dismissed. *Frank v. Office of Personnel Management*, 113 M.S.P.R. 164, ¶ 8 (2010). However, an agency's unilateral modification of its action after an appeal has been filed cannot divest the Board of jurisdiction unless the appellant consents to such divestiture or unless the agency completely rescinds the action being appealed. *Butler v.*

Office of Personnel Management, 46 M.S.P.R. 288, 291 (1981). We agree with the appellant that OPM has not rescinded the final decision on appeal.

¶9 As an initial matter, we find that the February 16, 2006 reconsideration decision, which the appellant never mentioned below, is not the subject of this appeal. The decision the appellant seeks to appeal is rather OPM's letter of April 21, 2006, which superseded the February 16, 2006 decision with respect to the amount of the alleged overpayment and the repayment schedule.[4] Although the April 21, 2006 letter was not labeled as a final decision, the Board may take jurisdiction over a retirement appeal if the appellant has made "repeated requests" for such a decision and the evidence indicates that OPM does not intend to issue a final decision. *Fletcher v. Office of Personnel Management*, 118 M.S.P.R. 632, ¶ 5 (2012). Here, the appellant made repeated inquiries to OPM, requesting review of the April 21, 2006 decision, but to no avail. Moreover, in its May 23, 2006 letter to OWCP, OPM stated that "due process rights were given" to the appellant, from which it may be inferred that OPM had no intention of issuing another final decision. While OPM has since indicated that it may issue a new final decision, it had not given any such indication at the time the appellant filed her appeal. *See Butler*, 46 M.S.P.R. at 291 (jurisdiction is determined by the nature of an agency's action at the time the appeal is filed). We therefore conclude that the April 21, 2006 letter is tantamount to a final decision within the Board's jurisdiction.

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[4] We note that OPM's imposition of a repayment schedule, with deductions to be taken from the appellant's OWCP benefits, is a matter affecting the appellant's rights and interests under CSRS or FERS, as the case may be, and therefore lies within the Board's review authority. *See* 5 U.S.C. §§ 8347(d)(1), 8461(e)(1); *Alexander v. Office of Personnel Management*, 114 M.S.P.R. 122, ¶¶ 11-12 (2010) (where appellant was receiving OWCP benefits from which his overpayment could be administratively offset, OPM's decision to set a repayment schedule was a matter affecting the appellant's rights or interests under CSRS).

¶10 OPM's attempt to unilaterally divest the Board of jurisdiction by "rescinding" the already-superseded February 16, 2006 decision is unavailing. First, OPM does not claim to have rescinded its April 21, 2006 decision, which is the subject of this appeal. Moreover, even if OPM did claim to have rescinded its April 21, 2006 decision, the appellant asserts, and OPM does not dispute, that she has not received repayment of the funds that have already been withheld from her OWCP benefits. PFR File, Tab 1. Because the appellant has not been restored to the status quo ante, we find that OPM has not rescinded its final decision, and that the appeal remains within the Board's jurisdiction. *See Butler*, 46 M.S.P.R. at 292.

¶11 With regard to the timeliness of her appeal, the appellant asserts that neither she nor her representative received the February 16, 2006 reconsideration decision, which was the only correspondence from OPM to include notice of Board appeal rights. When an agency is required to notify an individual of her Board appeal rights but fails to do so, the agency's failure may constitute good cause for a filing delay. *Powell v. Office of Personnel Management*, 114 M.S.P.R. 580, ¶ 11 (2010). In such cases, an appellant need not show that she acted diligently in pursuing her Board appeal rights; she need only show that she acted diligently in pursuing her Board appeal rights once she discovered them. *Id*. In this case, it appears the appellant may not have received notice of her right to appeal to the Board, and it is unclear whether or how long the appellant may have delayed in filing her appeal once she learned of her appeal rights. Because the timeliness issue will likely turn on these facts, and the parties were not previously ordered to address these specific issues, we find it appropriate to remand the appeal for further development of the record on timeliness and, if appropriate, adjudication on the merits. *See id*.

ORDER

¶12 We REMAND the appeal to the Western Regional Office for further adjudication consistent with this Opinion and Order.

FOR THE BOARD:

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