UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2013 MSPB 21

Docket No. AT-0839-11-0993-I-1

Clifford S. Nasdahl,

Appellant,

v.

Department of Veterans Affairs,

Agency.

March 15, 2013

Kathleen Pachomski, Memphis, Tennessee, for the appellant.

Lee Korzan, Nashville, Tennessee, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The agency has filed a petition for review of the December 12, 2011 initial decision that reversed its decision to correct the appellant's retirement coverage under the Federal Erroneous Retirement Coverage Corrections Act (FERCCA), 5 U.S.C. § 8331 note, and remanded the case to the agency for further processing. For the reasons set forth below, we GRANT the agency's petition and REVERSE the initial decision.[1] The agency's decision is SUSTAINED.

[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

BACKGROUND

¶2 In an August 15, 2011 letter, the agency notified the appellant that a review of his retirement records indicated that he was entitled to corrective action under FERCCA due to an error in his retirement plan coverage. Initial Appeal File (IAF), Tab 4 at 38-39. The agency explained that, when it first hired the appellant on October 1, 1981, for an excepted service appointment not to exceed September 30, 1982, it erroneously placed the appellant under the Civil Service Retirement System (CSRS) and that it instead should have placed the appellant under Social Security or Federal Insurance Contributions Act (FICA)[2]-only retirement coverage at that time because appointments limited to 1 year or less are excluded from CSRS coverage. *Id.* at 38; *see id.* at 24. The agency asserted that it made the same error three more times when it subsequently appointed the appellant to temporary positions that were each limited to 1 year or less on October 3, 1982, January 1, 1983, and April 1, 1983. *Id.* at 38; *see id.* at 18, 20, 22.[3] On July 8, 1984, the agency converted the appellant to a career-conditional appointment and placed him under CSRS, but it asserted in the August 15, 2011

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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.

[2] FICA, 26 U.S.C. §§ 3101-3128, comprises the tax provisions of the Social Security Act, as they appear in the Internal Revenue Code, *see, e.g.*, http://ssa-custhelp.ssa.gov/app/answers/detail/a_id/392/~/what-is-the-meaning-of-fica.

[3] The agency placed the appellant under FICA-only retirement coverage at the beginning of his October 3, 1982 appointment but subsequently issued a corrected SF-50 notification of proposed action placing him under CSRS. IAF, Tab 4 at 21-22. On July 5, 1983, the agency appointed the appellant to another temporary position, but this time it placed the appellant under FICA-only retirement coverage, continuing that coverage when it extended that appointment. *Id.* at 15-16. The agency did not cite the July 1983 placement as an error in its August 15, 2011 FERCCA letter to the appellant. *Id.* at 38-39.

FERCCA letter that it should have placed the appellant under CSRS Interim[4] retirement coverage because he was subject to mandatory Social Security withholding and this was his first retirement-covered appointment. *Id.* at 14, 38. The agency indicated that, because the appellant had at least 5 years of civilian service on December 31, 1986, it should have placed him under CSRS Offset retirement coverage on January 1, 1987, but that he was instead incorrectly placed in CSRS. *Id.* at 38. The agency informed the appellant that, due to the nature of the retirement coverage error, he did not have the option of remaining under CSRS. *Id.* at 39.

¶3 The appellant filed a timely appeal in which he asserted that the error in his retirement coverage had continued for nearly 30 years and stated that he would like to remain covered by CSRS. IAF, Tab 1. After holding a hearing, the administrative judge reversed the agency's determination in part, finding that the appellant's conversion to a career-conditional appointment in July 1984 transformed his prior temporary appointments into retirement-covered service and remanding the matter to the agency to allow it to determine the appellant's retirement options and to fulfill its other responsibilities in that regard. IAF, Tab 12, Initial Decision (ID) at 1, 5. The agency has filed a timely petition for review in which, among other things, it argues that the administrative judge misinterpreted 5 C.F.R. § 831.201(b)(2) when he found that the appellant's career-conditional appointment on July 8, 1994, transformed his prior non-CSRS covered service into covered service. Petition for Review (PFR) File, Tab 1 at 4, 10-13. The appellant has not responded to the petition for review.

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[4] Individuals like the appellant after his conversion to a career-conditional appointment, who were covered under both the CSRS and required to pay Old Age, Survivor, and Disability Insurance taxes (also known as FICA contributions) pursuant to the Social Security Act Amendments of 1983, Pub. L. No. 98-21 (Apr. 20, 1983), between January 1, 1984, and December 31, 1986, were CSRS Interim employees. *See, e.g.*, *Vecchio v. Office of Personnel Management*, 94 M.S.P.R. 464, ¶ 19 n.9 (2003).

ANALYSIS

¶4 An employee who has been placed under the wrong retirement system for a period of 3 or more years since December 31, 1986, is entitled to corrective action under FERCCA. *See* FERCCA, § 2003(b); *Stuart v. Department of the Air Force*, 104 M.S.P.R. 297, ¶ 13 (2006); 5 C.F.R. §§ 839.101(b), 839.201. The parties stipulated that the appellant was incorrectly placed under CSRS and that he should have been placed under CSRS Offset. IAF, Tab 9 at 1. As discussed below, Chapter 5 of FERCCA is applicable to situations like the instant matter in which an employee who should have been CSRS-Offset covered is or was, as a result of a retirement coverage error, CSRS covered instead. FERCCA, § 2141. In such a situation, correction of the retirement coverage error is mandatory. *Id.*, § 2142.

¶5 The administrative judge found that the agency had erroneously placed the appellant under FICA-only retirement coverage pursuant to his temporary appointments of less than 1 year between 1981 and 1984. ID at 3-4. However, the applicable regulation specifically provides that employees who are serving under appointments limited to 1 year or less, as the appellant was during that time period, are excluded from retirement coverage. 5 C.F.R. § 831.201(a)(1). Such appointments are excluded from retirement coverage even if they are subsequently extended past their 1-year limit. *See, e.g.*, *Odum v. Office of Personnel Management*, 73 M.S.P.R. 247, 249 (1997) (excluding from CSRS coverage continuous temporary service that in the aggregate exceeded 1 year where each of the pertinent appointments was limited to 1 year or less), *aff'd*, 152 F.3d 939 (Fed. Cir. 1998); *see also Portacio v. Office of Personnel Management*, 52 M.S.P.R. 396, 398-400 (1992) (same). Therefore, during the appellant's successive temporary appointments beginning on October 1, 1981, and continuing until the agency converted the appellant to a career-conditional appointment on July 8, 1984, the appellant was excluded from retirement coverage and subject only to FICA. *Cf. Hunter v. Office of Personnel Management*, 109 M.S.P.R. 514,

¶ 2 (2008) (the only retirement coverage for employees serving in temporary positions is under FICA), *aff'd*, No. 2008-3354, 2009 U.S. App. LEXIS 1406 (Fed. Cir. Jan. 27, 2009); *see* 5 C.F.R. § 831.201(a)(1).

¶6 The administrative judge found that, although the appellant's temporary appointments between 1981 and 1984 were initially excluded from retirement coverage, "the exclusion was rendered inoperative" by the appellant's conversion to a career-conditional appointment in July 1984. ID at 3-4. Thus, the administrative judge found that 5 C.F.R. § 831.201(b)(2) should be applied retroactively, such that "the appellant's temporary appointments were transformed into retirement-covered service when he received the career-conditional appointment." ID at 5. In its petition for review, the agency argues that "the clear intent of the regulation is to commence retirement coverage upon receipt of a career or career-conditional appointment, notwithstanding that the employee had been in a FICA-only position prior to the new appointment." PFR File, Tab 1 at 11. Thus, the agency asserts, "5 C.F.R. § 831.201(b)(2) does not affect prior service." *Id.* We agree. The Board has found that, when an employee serving in temporary appointments that are excluded from CSRS coverage by 5 C.F.R. § 831.201(a)(1) is converted to a career-conditional appointment, "retirement coverage does not attach retroactively" to those prior periods of service. *Hollowell v. Office of Personnel Management*, 30 M.S.P.R. 465, 469 (1986) (citing with approval the Office of Personnel Management's (OPM's) interpretation of 5 U.S.C. § 8333, a statute concerning eligibility for a CSRS annuity). Instead, retirement coverage attaches as of the date the employee acquires competitive status and is prospective only. *Id.* at 468.

¶7 The record reflects that the appellant's first appointment subject to retirement coverage occurred in July 1984. *See* IAF, Tab 4 at 14, 38. In Chapter 10 of the *CSRS and FERS Handbook for Personnel and Payroll Offices*

(Handbook)[5], which addresses coverage issues, OPM provides a Coverage Determination Table as an aid for agencies to make coverage decisions for employees who transfer or convert to new appointments, like the appellant in this matter.[6] Handbook, § 10A2.1-2(E). Using its Coverage Determination Table, OPM has also provided a series of examples, the second of which illustrates the proper retirement coverage determination for employees whose appointment changed from one that did not confer retirement coverage to one that does confer retirement coverage (specifically, temporary to career-conditional), like the appellant's July 1, 1984 conversion to a career-conditional appointment after more than 5 years of service as of December 31, 1986. *See* Handbook, § 10B2.1-1, Example 2. Under OPM's Coverage Determination Table, working through the individual steps in order, the answer to the question posed at Step 10 indicates that the appellant should be covered under CSRS Offset,[7] with the option to elect the Federal Employees Retirement System (FERS).[8] *See id.*

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[5] The Handbook is available at http://www.opm.gov/retire/pubs/handbook/hod.htm.

[6] The Handbook does not carry the force of law and is instead "entitled to deference in proportion to its 'power to persuade.'" *Warren v. Department of Transportation*, 116 M.S.P.R. 554, ¶ 7 n.2 (2011) (citing *Eldredge v. Department of the Interior*, 451 F.3d 1337, 1341-42 (Fed. Cir. 2006) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944))). We find that in this case the Handbook is persuasive.

[7] CSRS Offset is a continuation of CSRS Interim provisions for employees with CSRS Interim Coverage who, like the appellant, were not automatically covered by the Federal Employees Retirement System (FERS) because they had 5 years of creditable civilian service by the end of 1986. Handbook, § 10A1.2-1(F).

[8] We note that the agency was required to give the appellant the option to elect FERS coverage during the period from July 1 through December 31, 1987, pursuant to Section 301(a)(1) of the Federal Employees' Retirement System Act of 1986, Pub. L. No. 99-335, as amended by Pub. L. No. 99-556, or during the period of July 1 through December 31, 1998, pursuant to the Federal Employees' Retirement System Open Enrollment Act of 1997, Pub. L. No. 105-61, Title VI, § 642(a) to (c), 111 Stat. 1318, as amended by Pub. L. No. 105-66, Title III, § 348, 111 Stat. 1451. *See Stuart*, 104 M.S.P.R. 297, ¶ 14 & n.9. It appears that the appellant elected not to be covered under FERS in December 1987. *See* IAF, Tab 8, Exhibit 4.

¶8 Accordingly, we find that the agency correctly determined, as indicated in its August 15, 2011 FERCCA letter, that the appellant should have been covered under CSRS Interim, which later became CSRS Offset, upon his career-conditional appointment in July 1984. *See* IAF, Tab 4 at 38-39. As the agency also correctly determined, in the case of an employee who was erroneously placed under CSRS, but who should have been placed under CSRS Offset, the correction of such a retirement coverage error is mandatory. *See* FERCCA, § 2142; IAF, Tab 4 at 39. Therefore, the appellant's request that he be allowed to remain under CSRS cannot be granted.

ORDER

¶9 The agency's decision is SUSTAINED. This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

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 the date of this order. *See* 5 U.S.C. § 7703(b)(1)(A) (as rev. eff. Dec. 27, 2012). 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) (as rev. eff. Dec. 27, 2012). You may read this law as well as other sections of the United States Code, at our website, http://www.mspb.gov/appeals/uscode/htm. 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:

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