UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2013 MSPB 51

Docket No. DC-844E-12-0571-I-1

Christine E. Bruce,

Appellant,

v.

Office of Personnel Management,

Agency.

July 8, 2013

Edward H. Passman, Esquire, Washington, D.C., for the appellant.

Thomas L. Styer, 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 in which the administrative judge affirmed the Office of Personnel Management's (OPM) final decision dismissing as untimely her application for disability retirement. For the reasons set forth below, we GRANT the petition for review, REVERSE

the initial decision, and REMAND the case to OPM for further proceedings consistent with this Opinion and Order.[1]

BACKGROUND

¶2 The appellant, a GS-5 Library Technician with the Library of Congress, stopped coming to work in 1997 after suffering an incident of sexual harassment at work. Initial Appeal File (IAF), Tab 4 at 18, 33-34. The Library carried her on leave without pay until July 19, 2004, when it removed her. IAF, Tab 4 at 80. On August 4, 2010, the appellant's brother completed and subsequently filed on her behalf an application for disability retirement under the Federal Employees' Retirement System (FERS). *Id*. at 86-92. The appellant's brother had been named as the appellant's legal guardian on July 19, 2010, by the Circuit Court for Montgomery County, Maryland, based upon its determination that she lacked sufficient understanding or capacity to make or communicate responsible decisions concerning her person and lacked such capacity because of a mental disability. IAF, Tab 1 at 5-6. Before OPM, the appellant's guardian asserted that the appellant became mentally incompetent by July 19, 2004, because of severe symptoms of Major Depressive Disorder that rendered her unable to complete the application for disability retirement in a timely manner. IAF, Tab 4 at 55-61.

¶3 OPM dismissed the appellant's application as untimely filed. IAF, Tab 4 at 23-25. The appellant's guardian requested reconsideration and submitted additional documentation to support the claim that the appellant's mental incompetence justified a waiver of the filing time limit. *Id*. at 11-19. On reconsideration, OPM sustained its initial dismissal of the appellant's application

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[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.

as untimely filed, finding that the evidence submitted did not show that she was mentally incompetent during the filing time limit. *Id*. at 6-9.

¶4 On appeal to the Board, the appellant's guardian argued through counsel that, during the period in question, she had so neglected her personal affairs because of severe psychiatric symptoms that she lost her home, was living in a homeless shelter, was facing law suits, multiple financial judgments and bankruptcy, and was not responding to subpoenas. IAF, Tab 1 at 3. He asserted that he had filed the application for disability retirement within 1 year of the effective date of the guardianship. He also noted that the appellant has been receiving Social Security benefits and has continued to be mentally incompetent "until present." *Id*.

¶5 Following a telephonic hearing, at which the appellant's guardian and mother testified, along with Board-certified psychiatrist Dr. Stephen J. Rojcewicz, the administrative judge issued an initial decision affirming OPM's decision. IAF, Tab 16, Initial Decision (ID) at 2, 11. She found that it was not shown that the appellant was incompetent before July 19, 2005, and remained incompetent until July 19, 2010, when her brother was appointed her legal guardian. ID at 9-10.

¶6 On petition for review, the appellant's guardian argues that she did carry her burden to show that she was mentally incompetent from July 19, 2004, to July 19, 2005. Petition for Review File, Tab 1. OPM has responded in opposition to the petition submitted on behalf of the appellant. *Id*., Tab 5.

ANALYSIS

¶7 Pursuant to 5 U.S.C. § 8453, an application for disability retirement under FERS must be filed with an employee's employing agency before the employee separates from service or with the former employing agency or OPM within 1 year after the employee's separation. The 1-year time limit may be waived if the employee is mentally incompetent at the date of separation or within 1 year

thereafter and if the application is filed with OPM within 1 year from the date the employee is restored to competency or is appointed a fiduciary, whichever is earlier. The issue in this case is whether the appellant showed by preponderant evidence that she was mentally incompetent during the period from July 19, 2004, to July 19, 2005. In determining whether an applicant was mentally incompetent for purposes of the time limit, the Board requires medical evidence supporting subjective opinions of mental incompetence. *Arizpe v. Office of Personnel Management*, 88 M.S.P.R. 463, ¶ 9 (2001). The definition of mental incompetence "may be satisfied by one having some minimal capacity to manage his own affairs, and not needing to be committed"; the applicant need not show that he was a "raving lunatic continuously." *French v. Office of Personnel Management*, 810 F.2d 1118, 1120 (Fed. Cir. 1987).

¶8 The appellant's guardian argues that the administrative judge failed to accord appropriate weight to the medical evidence, and failed to apply Board precedent to the facts of this case. The administrative judge specifically considered two reports from Dr. Rojcewicz, one from January 5, 2010, and one from May 21, 2011. ID at 4-7; IAF, Tab 4 at 63-70, Tab 14 at 5-8. Both were based on current examinations of the appellant and in both reports, after reviewing the appellant's personal medical history, Dr. Rojcewicz opined that she was unable to manage her affairs and therefore was mentally incompetent during the 1-year period in question because of severe symptoms of Major Depressive Disorder. *Id.*; see also Hearing Transcript (HT) at 12-14. The administrative judge discounted Dr. Rojcewicz's reports, and his testimony which was in accord, finding it "inherently suspect" because he did not examine the appellant during the 1-year period in question and because, in the administrative judge's view, he based his opinion of the appellant's incompetency solely on his interview of her and her family in 2010 and 2011. ID at 9.

¶9 While it is true that Dr. Rojcewicz did not examine the appellant in 2004 and 2005, the administrative judge acknowledged, but failed to consider, that he

did see her on six occasions in 2003. ID at 4. Dr. Rojcewicz testified as to those sessions, HT at 7-9, and they are supported in the record by his medical notes, IAF, Tab 11 at 12-14. Based on his July 1, 2003 psychiatric evaluation, Dr. Rojcewicz diagnosed the appellant as suffering from Major Depressive Disorder, stating that she was "positive" for all nine items under Criterion A, as set forth under the Diagnostic and Statistical Manual of Mental Disorders (DSM), Fourth Edition. These include depressed mood most of the day, nearly every day, markedly diminished interest in almost all activities, fatigue and loss of energy, and diminished ability to think and concentrate nearly every day. Dr. Rojcewicz saw the appellant five more times in July and August 2003 for individual psychotherapy with evaluation and management, changed her antidepressant medication and then increased the dosage. He noted that she did not keep her September 2, 2003 appointment. *Id*. Dr. Rojcewicz testified that the appellant did not contact him after that time and did not respond to his phone calls, and that she later told him that she had not taken the prescribed medication, and had also not done so in the past. HT at 9.

¶10 The record further reflects that, as of sometime earlier in 2003, the appellant's family did not know her whereabouts, and that their attempts to locate her were, for a period of time, unsuccessful. Eventually they learned that she was living in Luray, Virginia, having lost her home. HT at 34-35. In March 2003, her brother obtained a Power of Attorney in order to intervene and attempt to resolve matters that she had neglected, including foreclosure of her home, bankruptcy, and various lawsuits. *Id*. at 36. He prevailed upon her to come to Washington to see Dr. Rojcewicz, which she did, but she did not follow through with treatment, as noted above, and she ultimately returned to Luray. In 2004, her family learned that she was living in a women's shelter. According to her brother, she was "incoherent" and "inconsistent" when he visited her and was reluctant to seek treatment, either medical or psychological. *Id*. at 38, 46. Over the next years, her

condition did not improve, prompting her brother to successfully seek and procure Social Security benefits for her. *Id*. at 40.

¶11 In 2010, the appellant's brother persuaded her to return to Dr. Rojcewicz. He again diagnosed her as suffering from 296.23 Major Depressive Disorder, Single Episode, Severe, without Psychotic Features, with symptoms more severe and chronic than before, as well as numerous medical conditions. *Id*. at 10-11; IAF, Tab 4 at 63-69. Dr. Rojcewicz also saw the appellant on May 21, 2011, and found her psychiatric condition much the same. HT at 11; IAF, Tab 14. Dr. Rojcewicz testified that, based on the eight or nine times he had seen the appellant, the lack of improvement in her condition over the years, and the history provided by her family that she did not receive any treatment, he believed to a reasonable degree of medical certainty that she was incompetent for at least the 1-year period from 2004 to 2005, and that she remained so for years thereafter. HT at 12, 17.

¶12 Contrary to the administrative judge's statement, a finding of mental incompetence need not always be based on medical evidence reflecting the results of an examination conducted of the appellant during the 1-year filing period. *See, e.g.*, *Creasy v. Office of Personnel Management*, 107 M.S.P.R. 44, ¶¶ 7-8 (2007) (a psychiatrist's testimony, based on his examination of the appellant in 2004, that, "with probably a fairly good degree of medical certainty," his psychiatric symptoms had been present for 5-7 years, was sufficient to establish that the appellant was mentally incompetent during the filing period from January 3, 2002, to January 3, 2003); *Hass v. Office of Personnel Management*, 84 M.S.P.R. 110, ¶¶ 7-11 (1999) (a psychiatrist's 1996 report diagnosing the appellant as suffering from Schizophrenia, Paranoid Type, was probative in finding her mentally incompetent during the filing period from January 16, 1987, to January 16, 1988); *cf. McLaughlin v. Office of Personnel Management*, 353 F.3d 1363, 1368-69 (Fed. Cir. 2004) (the mere fact that psychiatrist's assessment was

committed to paper outside the filing period is not probative of whether the applicant was mentally incompetent during the filing period).

¶13 The other cases cited by the administrative judge are distinguishable and do not preclude a finding that Dr. Rojcewicz's medical opinion may be relied upon to support a finding that the appellant was mentally incompetent during the 1-year period in question. In *Pilcher v. Office of Personnel Management*, 96 M.S.P.R. 317 (2004), the record included a statement prepared 5 years after the end of the filing period by the appellant's family physician in support of her late application for benefits. Although the statement indicated that the appellant was unable to handle her own affairs, the Board found it was entitled to little or no weight because it provided no support for its conclusion and was not accompanied by any supporting documentation. *Id.*, ¶ 24. The Board also considered a statement from a psychiatrist who assessed that the appellant was in no "psychic distress" and that she could manage any benefits in her own interest. *Id.*, ¶ 25. Considering testimony from the appellant's supervisor to the effect that, during the period in question, her ability to make decisions was compromised by her alcoholism, testimony from her aunt that she was "doing fine," and a one-sentence statement from a friend that the appellant was mentally incompetent, the Board, after reviewing all the evidence, upheld OPM's decision to disallow the appellant's application for disability retirement as untimely filed. *Id.*, ¶ 26.

¶14 In the instant case, however, Dr. Rojcewicz is a Board-certified psychiatrist, his well-explained findings are based on the criteria set forth in the DSM, and he has provided support for his conclusion that the appellant was mentally incompetent during the period in question. IAF, Tab 4 at 63-69; Tab 11 at 12-14; Tab 14. Moreover, there is no contrary medical evidence. And, there is significant detailed nonmedical evidence from the appellant's mother, IAF, Tab 4 at 17; HT at 21-33, and brother, IAF, Tab 4 at 18-19; HT at 33-52, during the time period in question that supports Dr. Rojcewicz's expert opinion regarding the appellant's incompetence. *Id.*

¶15 In *Thieken v. Office of Personnel Management*, 56 M.S.P.R. 192, 194-95, *aff'd*, 11 F.3d 1074 (Fed. Cir. 1993) (Table), the Board found that, notwithstanding the testimonies and statements of the appellant, her family, friends, and former co-workers that she had limited capacity to handle her affairs, the appellant had not substantiated her claim of mental incompetence so as to excuse her late-filed application for disability retirement. The Board found that none of the evidence she submitted to either OPM or the Board substantiated a mental problem and that instead, the evidence only chronicled her substantial medical problems. *Id*. at 195. Here, however, Dr. Rojcewicz submitted considerable medical evidence as to the appellant's psychiatric condition and her mental incompetence.

¶16 In *Crane v. Office of Personnel Management*, 55 M.S.P.R. 16, 18 (1992), *aff'd*, 996 F.2d 1235 (Fed. Cir. 1993) (Table), the Board found that the administrative judge's reliance on the appellant's and her husband's testimony to find mental incompetence was insufficient without a medical report finding mental incapacity, either during the alleged period of incapacity or after the diagnosis through a report finding mental incapacity over the prior 4 to 7 years, or at least a medical probability that the appellant was mentally incompetent during the relevant period. The Board further found that, in determining that the appellant was mentally incompetent, the administrative judge did not address the fact that, during the same period of time, the appellant was able to file employment applications and to be successfully employed in a variety of positions with skills and accomplishments that the Board deemed "at odds" with a determination of mental incapacity. *Id*. at 19.

¶17 Here, however, the record includes medical reports of the type the Board referenced in *Crane* supporting a finding of mental incapacity. IAF, Tab 4 at 63-67, Tab 14 at 2-5. And, there is evidence that, during the period in question and thereafter, the appellant had given a Power of Attorney to her brother allowing him to manage her affairs. HT at 36; IAF, Tab 4 at 17-19. Further,

there is evidence that she has not been employed after leaving her job with the Library of Congress in 2004. HT at 28, 40.

¶18 In view of the above, we conclude, based on all the evidence presented, that the appellant has shown that she was mentally incompetent during the period from July 19, 2004, to July 19, 2005, and that her application was filed within 1 year from the date her brother was appointed as her guardian, and that therefore the statutory 1-year time limit for filing her application for disability retirement must be waived. 5 U.S.C. § 8453.

ORDER

¶19 For the reasons discussed above, we REMAND this case to OPM. OPM shall waive the statutory time limit for filing the application for disability retirement and shall determine the merits of the application in a new decision.

FOR THE BOARD:

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