UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2013 MSPB 58

Docket No. AT-844E-12-0025-I-1

Carol A. Christopherson,

Appellant,

v.

Office of Personnel Management,

Agency.

July 29, 2013

Carol A. Christopherson, Jacksonville, Florida, 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

OPINION AND ORDER

¶1 The Office of Personnel Management (OPM) has petitioned for review of the initial decision that reversed OPM's reconsideration decision denying the appellant's application for disability retirement benefits. For the reasons set forth below, we REVERSE the initial decision and affirm OPM's reconsideration decision.[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 The appellant filed an appeal challenging OPM's reconsideration decision, which denied her application for disability retirement benefits under the Federal Employees' Retirement System (FERS). Initial Appeal File (IAF), Tab 1. The record reflects that the appellant, who is completely deaf, was hired by the U.S. Postal Service three times and terminated twice during her probationary period. IAF, Tab 5, Subtab II (E) at 3-5. After being hired for the third time in 1993 for the position of city carrier, the appellant completed the probationary period. *Id*. at 3. However, in 1996, she suffered a compensable injury for which she continues to receive compensation from the Office of Workers' Compensation Programs (OWCP). IAF, Tab 5, Subtab II (B) at 871-74.

¶3 In 2000, the appellant sought treatment for depression that she maintains resulted from abusive treatment (including both taunting and neglect) by agency supervisors and co-workers while working for the Postal Service. Hearing CD (HCD). The appellant contends that, based on her doctors' advice, she stopped reporting for work on or about September 13, 2000, and that she did not return. HCD. In June 2002, the Social Security Administration (SSA) awarded the appellant disability retirement benefits retroactive to 2001, determining that she became disabled on September 13, 2000. IAF, Tab 5, Subtab II (B) at 883. In 2009, the agency removed the appellant for medical inability to perform, IAF, Tab 14 at 2, and the appellant did not challenge her removal. The appellant continues to receive SSA disability retirement benefits as a result of her mental conditions, which allegedly arose in 2000. HCD.

¶4 In August 2010, the appellant applied to OPM for disability retirement benefits based on bilateral deafness, a left or right (unspecified) wrist and shoulder injury, major depression with agoraphobia, a sleep disorder, and post-traumatic stress disorder (PTSD). IAF, Tab 5, Subtab II (D). In both its initial and reconsideration decisions, OPM denied the appellant's application. IAF, Tab 5, Subtabs II (A) and II (C). OPM found in its reconsideration decision

that the appellant's application package was incomplete, as it did not include the supervisor's statement form or a physician's statement form. IAF, Tab 5, Subtab II (A) at 1. OPM also found that the appellant failed to provide any current diagnostic or treatment evidence from the year 2009 through the present date. *Id*. at 2. OPM noted that, although the appellant submitted a letter dated June 17, 2011, from Dr. Henry Lepely, opining that she remained permanently disabled with a diagnosis of Major Depression Recurrent without Psychosis and PTSD, there was insufficient medical evidence to establish the diagnosis and current severity of the appellant's mental health condition. *Id*. OPM also noted that Dr. Lepely's letter stated that, although she remained a patient, the appellant had not been compliant with follow-up treatment for a least a year. *Id*. Thus, OPM denied the appellant's application, finding that she failed to provide sufficient medical evidence to prove that she was disabled by major depression, PTSD, wrist and shoulder injuries, or total bilateral deafness. *Id*.

¶5 On appeal, the administrative judge found that, under *Bruner v. Office of Personnel Management*, 996 F.2d 290, 294 (Fed. Cir. 1993), the appellant was presumed to be entitled to disability retirement benefits and that OPM did not meet its burden in rebutting this presumption. IAF, Tab 15, Initial Decision (ID) at 5-8. The administrative judge found that Dr. Lepely's June 2011 letter provided persuasive evidence that the appellant became mentally disabled while working for the Postal Service, that her condition would continue indefinitely, and that it would be unreasonable for the Postal Service to accommodate her as a city carrier or in any other position. *Id*. at 6-7. The administrative judge found further that both OWCP and SSA had approved the appellant for disability benefits based on the same conditions which caused the agency to remove the appellant for inability to perform. *Id*. at 6. Thus, the administrative judge found that the appellant had shown that she is entitled to a FERS disability retirement annuity. *Id*. at 8.

ANALYSIS

¶6 In an appeal from an OPM decision on a voluntary disability retirement application, the appellant bears the burden of proof by preponderant evidence. *Thorne v. Office of Personnel Management*, 105 M.S.P.R. 171, ¶ 5 (2007); 5 C.F.R. § 1201.56(a)(2). To be eligible for a disability retirement annuity under FERS, an employee must show the following: (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 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. *Thorne*, 105 M.S.P.R. 171, ¶ 5; *see* 5 U.S.C. § 8451(a); 5 C.F.R. § 844.103(a). An appellant may meet the statutory requirement that she "be unable, because of disease or injury, to render useful and efficient service in the employee's position" by: (1) showing that the medical condition caused a deficiency in performance, attendance, or conduct, as evidenced by the effect of her medical condition on her ability to perform specific work requirements, or her medical condition prevented her from being regular in attendance, or caused her to act inappropriately; or (2) showing that the medical condition is incompatible with useful and efficient service or retention in the position by demonstrating that her medical condition is inconsistent with working in general, in a particular line of work, or in a particular type of work setting. *Rucker v. Office of Personnel Management*, 117 M.S.P.R. 669, ¶ 10 (2012).

¶7 An appellant's removal for physical inability to perform the essential functions of her position constitutes prima facie evidence that she is entitled to

disability retirement benefits. *Bruner*, 996 F.2d at 294; *Rucker*, 117 M.S.P.R. 669, ¶ 5. The burden of production then shifts to OPM to produce evidence sufficient to support a finding that the appellant is not entitled to disability retirement benefits. *Rucker*, 117 M.S.P.R. 669, ¶ 5. If OPM produces such evidence, the appellant must then come forward with evidence to rebut OPM's assertion that she is not entitled to benefits. *Id*. The Board then considers the totality of the evidence in deciding the disability issue, including objective clinical findings, diagnoses and medical opinions, subjective evidence of pain and disability, evidence relating to the effect of the appellant's condition on her ability to perform in the grade or class of position she last occupied, and evidence that the appellant was not qualified for reassignment to a vacant position at the same grade or level as the position she last occupied. *Id*.; *Hunt v. Office of Personnel Management*, 105 M.S.P.R. 264, ¶ 5 (2007).

¶8 Here, the administrative judge properly found that the appellant is entitled to the *Bruner* presumption of disability because she was removed based on her physical inability to perform her job duties. ID at 5; IAF, Tab 14 at 2. On review, OPM contends that it rebutted the *Brune*r presumption by showing a lack of medical evidence to establish the diagnosis and current severity of the appellant's mental health conditions and cites to *Trevan v. Office of Personnel Management*, 69 F.3d 520, 526 (Fed. Cir. 1995). Petition for Review (PFR) File, Tab 1 at 5. OPM argues further that the administrative judge erred by finding that the appellant is entitled to a disability retirement annuity after weighing the totality of the evidence pursuant to *Bruner* and *Trevan*. *Id*. at 9-11. For the following reasons, we agree with OPM's arguments.

¶9 In *Trevan*, our reviewing court agreed with the Board that OPM can meet its burden of production "by demonstrating a lack of objective medical evidence 'provid[ing] a reasoned explanation of how certain aspects of a particular condition render the employee unable to perform specific work requirements.'" *Trevan*, 69 F.3d at 526 (quoting *Thomas v. Office of Personnel Management*, 54

M.S.P.R. 686, 689-90 (1992)). Relying on *Trevan*, the Board has held that the lack of any indication in the reports by the appellant's treating physicians as to how or why her medical condition affected her ability to perform her specific job duties satisfies OPM's burden of production to rebut the *Bruner* presumption. *Rucker*, 117 M.S.P.R. 669, ¶ 7.

¶10 Here, although the OWCP and SSA documents include numerous references to medical reports concerning the appellant's mental health conditions, there are no such medical reports in the record. We find that OPM rebutted the *Bruner* presumption of disability by showing a lack of medical evidence explaining how the appellant was unable to perform her specific work requirements, prevented her from being regular in attendance, or caused her to act inappropriately, or in the alternative, that her medical conditions are inconsistent with work in general, in a particular line of work, or in a particular type of work setting. *Rucker*, 117 M.S.P.R. 669, ¶ 10; *see Henderson v. Office of Personnel Management*, 117 M.S.P.R. 313, ¶¶ 16, 19 (2012). Accordingly, we must review the record evidence to determine whether, considering the totality of the evidence, the appellant has met her burden of establishing an entitlement to a disability retirement annuity under FERS.

¶11 On review, OPM argues, inter alia, that the appellant failed to produce any adequate medical documentation to support her claimed medical conditions related to PTSD and depression. PFR File, Tab 1 at 9-11. We agree. In *Vanieken-Ryals v. Office of Personnel Management*, 508 F.3d 1034, 1041 (Fed. Cir. 2007), the court stated that "OPM's regulations define the type of 'medical documentation' required to establish disability. Such evidence must come from 'a licensed physician or other appropriate practitioner,' it must be 'justified according to established diagnostic criteria,' and it must 'not be inconsistent with generally accepted professional standards.'"

¶12 In this case, the only medical document in the record relevant to the appellant's diagnosed mental health conditions, the basis for the OWCP and SSA

awards of benefits, *see* IAF, Tab 5, Subtab II (B) at 881-82, is Dr. Lepely's June 2011 letter, in which he states that the appellant remains permanently disabled and unable to be gainfully employed. IAF, Tab 14 at 17. In the June 2011 letter, Dr. Lepely refers to a 2007 medical report in which he diagnosed the appellant with "Major Depression Recurrent without Psychosis, and Prolong[ed] Post Traumatic Stress Disorder." IAF, Tab 14 at 17. However, Dr. Lepely did not include his 2007 report with the June 2011 letter, and the report is not otherwise in the record. The administrative judge issued a notice that explicitly advised the appellant that a copy of Dr. Lepely's 2007 assessment of her medical condition would assist him in adjudicating the appeal. IAF, Tab 12 at 4. Nevertheless, the appellant did not submit Dr. Lepely's 2007 assessment. Nor did the appellant submit any of the other medical reports or assessments relevant to her mental health conditions that both OWCP and SSA apparently considered when determining her eligibility for benefits. *See* IAF, Tab 14; Tab 5, Subtab II (B) at 881-82.

¶13 The administrative judge correctly found that, in a disability retirement application under FERS, OPM and the Board must consider an award of either OWCP or Social Security disability benefits. ID at 6; *see Trevan*, 69 F.3d at 526; *Suter v. Office of Personnel Management*, 88 M.S.P.R. 80, ¶ 12 (2001). However, as is the case here, OPM and the Board may find that such evidence is outweighed by inconsistent and inadequate medical evidence. *Trevan*, 69 F.3d at 526; *Suter*, 88 M.S.P.R. 80, ¶ 12. Further, even though the administrative judge relied upon the appellant's testimony concerning her medical conditions, the Board has held that an employee's subjective evidence of disability is entitled to consideration and weight in a disability retirement case when it is supported by competent medical evidence. *Newkirk v. Office of Personnel Management*, 101 M.S.P.R. 667, ¶ 16 (2006). In this case, there is no competent medical evidence to support the appellant's testimony with regard to her mental health conditions of depression and PTSD. Accordingly, because there is no competent medical

evidence in the record to support the appellant's claim of debilitating depression and PTSD, the appellant has failed to establish entitlement to a disability retirement under FERS. Therefore, we reverse the initial decision and affirm OPM's reconsideration decision.[2]

ORDER

¶14 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 review of this final decision by the United States Court of Appeals for the Federal Circuit. 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.

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[2] Based on our finding that the appellant has failed to provide adequate medical documentation to support her medical conditions of depression and PTSD, we find no need to address OPM's remaining arguments on review.

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:

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