UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2013 MSPB 59

Docket No. AT-0839-12-0717-I-1

Katharine Jane Archer,

Appellant,

v.

Office of Personnel Management,

Agency.

July 31, 2013

Katharine Jane Archer, Piedmont, South Carolina, pro se.

James Williams, 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 petitions for review of an initial decision that affirmed the reconsideration decision of the Office of Personnel Management (OPM) denying her request for corrective action under the Federal Erroneous Retirement Coverage Corrections Act (FERCCA). For the following reasons, we GRANT the appellant's petition for review, REVERSE the initial decision, and ORDER OPM to afford the appellant the opportunity to elect Federal Employees' Retirement System (FERS) or Civil Service Retirement System (CSRS) Offset coverage

retroactive to the date on which the Department of Veterans Affairs (DVA) erroneously determined that the appellant was covered under FERS.[*]

BACKGROUND

¶2 The appellant was a federal employee covered under the CSRS from 1974 through 1980. Hearing Tape (HT) (testimony of the appellant). She returned to Federal service from June 1987 through June 1988, and then again for a few months in 1993. *See id.* Upon her appointment as a Physician in 2003, DVA placed her in FERS, effective September 7, 2003. Initial Appeal File (IAF), Tab 6 at 3-4 (Standard Form 50-B indicating that her retirement plan was "FERS & FICA," her previous retirement coverage was "Never Covered," and she "is automatically covered under FERS"). There is no dispute that DVA should have placed her in the CSRS Offset plan, with the option of electing FERS, because she had at least 5 years of service under CSRS. *See Warren v. Department of Transportation*, 116 M.S.P.R. 554, ¶ 7 (2011), *aff'd*, 493 F. App'x 105 (Fed. Cir. 2013); IAF, Tab 3 at 6 (OPM's reconsideration letter stating that the appellant was erroneously placed in FERS). On September 29-30, 2003, despite already having been placed in FERS, the appellant signed an "Election of Coverage" form electing FERS coverage, and initialed the box indicating that she understood that her election was irrevocable. IAF, Tab 3 at 10. The appellant presented unrebutted testimony at the hearing that DVA told her to sign the FERS election form in order to get started contributing to the Thrift Savings Plan, told her that she did not have enough time in the civil service "for it to make a difference," and did not tell her anything about the CSRS Offset plan. HT; IAF, Tab 6 at 2.

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[*] 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.

¶3 In December 2011, the appellant learned that she should have been given the option of electing CSRS Offset when she was rehired in 2003. HT. In May 2012, DVA denied the appellant's request for corrective action under FERCCA. IAF, Tab 3 at 6. OPM denied the appellant's request for reconsideration of DVA's decision, finding that although DVA erroneously placed the appellant in FERS upon her rehire, the appellant signed a FERS election form indicating that the election was irrevocable; OPM held that this was not, therefore, a FERCAA case, but instead dealt with whether the appellant could revoke her FERS election. *Id*. OPM held that the election could not be revoked absent documentation confirming that proper counseling or additional information was not provided to assist her with her decision. *Id*.

¶4 After a hearing on appeal, the administrative judge affirmed OPM's determination, finding that the action the appellant was attempting to overturn was not a determination or placement by the agency in the wrong retirement system; rather, she was seeking to overturn her own election of retirement coverage under FERS. IAF, Tab 9, Initial Decision (ID) at 4. The administrative judge found that an individual's own election of a retirement system is not included in the definition of a retirement coverage error under FERCCA for which there is a remedy. ID at 4-5. Relying on *Springer v. Office of Personnel Management*, 911 F.2d 675 (Fed. Cir. 1990), and *Nielsen v. Department of the Interior*, 198 F. App'x 953, 955 (Fed. Cir. 2006), the administrative judge held that a FERS election is irrevocable, and that no relief is warranted under FERCCA when an employee claims that, on her return to federal employment, she was incorrectly told that her only choice was to convert to FERS coverage. ID at 3, 5. The administrative judge cited *Office of Personnel Management v. Richmond*, 496 U.S. 414, 416 (1990), for the principle that erroneous advice or information provided by an agency does not entitle an employee to benefits that are not available as a matter of law. ID at 5. Finally, the administrative judge held that, although relief may be accorded in egregious cases of mismanagement

or incompetence, the appellant's assertion that the agency did not fully advise her about her election was not such an egregious case warranting relief under FERCCA. *Id.*

¶5 The appellant has filed a petition for review again asserting that she is entitled to corrective action under FERCCA. Petition for Review File, Tab 1.

ANALYSIS

¶6 FERCCA addresses the problems created when employees are in the wrong retirement plan for an extended period. *Poole v. Department of the Army*, 117 M.S.P.R. 516, ¶ 13 (2012); 5 C.F.R. § 839.101(a). An employee may seek relief under FERCCA if the employee experienced a qualifying retirement coverage error. *Poole*, 117 M.S.P.R. 516, ¶ 13. A "qualifying retirement coverage error" is "an erroneous decision by an employee or agent of the Government as to whether Government service is CSRS covered, CSRS Offset covered, FERS covered, or Social Security-Only covered that remained in effect for at least 3 years of service after December 31, 1986." 5 C.F.R. § 839.102. An employee who has been the subject of a qualifying retirement coverage error under FERCCA may be entitled to various forms of relief, including a choice of retirement plans. *Poole*, 117 M.S.P.R. 516, ¶ 13.

¶7 Under section 301(a)(2)(A) of the Federal Employee Retirement System Act of 1986 (FERSA), 5 U.S.C. § 8331 note, "[a]ny individual who, after June 30, 1987, becomes reemployed by the Federal Government, and *who is then subject to subchapter III of chapter 83 of title 5, United Stated Code*, may elect to become subject to chapter 84 of such title." 5 U.S.C. § 8331 note (emphasis added). Section 301(c) of FERSA provides that "[a]n election made *under this section* . . . shall be irrevocable." *Id.* (emphasis added). Here, as far as DVA was concerned, the appellant was not "then subject to subchapter III of chapter 83 of title 5" when she made the election in 2003, because DVA had determined that the appellant was subject to FERS at that time and had no previous retirement

coverage. Therefore, there was no legal authority for DVA to have offered the appellant the opportunity to make the election in question given DVA's determination that she was already covered under FERS and had no prior retirement coverage. *See Sutter v. Office of Personnel Management*, 78 M.S.P.R. 73, 78 (1998) (because of DVA's error in placing the appellant under FERS, she could not elect FERS coverage during that time because she was already under FERS). The government cannot have it both ways: It cannot erroneously inform the appellant that she is covered by FERS and encourage her to sign a FERS election form in order to start a Thrift Saving Plan account, but then rely on appeal, for purposes of deeming the FERS election irrevocable, that under section 301 of FERSA she was really "subject to" CSRS after all. *Cf. Shiflett v. U.S. Postal Service*, 839 F.2d 669, 673 (Fed. Cir. 1988) (refusing to apply the Board's regulations in a "one-sided" manner by requiring the appellant to strictly comply with the regulations on time limits, while the agency violates the regulations with impunity); *Stephen v. Department of the Air Force*, 47 M.S.P.R. 672, 684 (1991) (when an agency has no legal authority for taking an action, that action is not in accordance with law and must be reversed).

¶8 Under these circumstances, we find that the appellant's election was invalid under the statute, that DVA's erroneous placement of her in FERS therefore continued for more than 3 years, and that she is entitled, under section 2132 of FERRCA, as a "FERS-eligible employee who should have been CSRS covered, CSRS-Offset Covered, or Social Security-Only Covered, but who was erroneously FERS covered instead without an election," to correction of that error. *See* 5 C.F.R. § 839.411 (if an individual was placed in FERS due to a qualifying retirement coverage error and should have been in CSRS Offset, the individual may elect FERS or CSRS Offset); *cf. Gershfeld v. Office of Personnel Management*, 179 F. App'x 3 (Fed. Cir. 2006) (OPM invalidated the appellant's election of coverage under FERS and retroactively placed him under CSRS).

¶9 There is an alternative ground upon which we find that the appellant's September 29-30, 2003 election was invalid. Under 5 C.F.R. § 846.204(b)(2)(i), for an employee whose employing agency erroneously determined that the individual was covered by FERS when the individual was eligible to elect FERS, and the employing agency should have placed the individual in, for example, CSRS Offset under conditions that would have included an opportunity to elect FERS coverage, and the employee remained in FERS for less than 3 years of service, the employee is deemed to have elected FERS and the individual will remain covered by FERS unless the individual declines to be covered by FERS. The employing agency must provide written notice to each individual who is deemed to have elected FERS that the individual may, within 60 days after receiving the notice, decline to be deemed to have transferred to FERS. 5 C.F.R. § 846.204(b)(2)(ii)(A). Here, even assuming that the retirement coverage error initially lasted only from September 7, 2003, until September 29-30, 2003, when the appellant made her election, DVA was required to have deemed her to have elected FERS under section 846.204(b)(2)(i) and provided her with written notice that she may decline to be deemed to have transferred to FERS, rather than providing her with a FERS election form. The agency's failure to provide such notice similarly renders her election invalid. *See Brush v. Office of Personnel Management*, 982 F.2d 1554, 1564 (Fed. Cir. 1992) ("There is no indication that the holding in *Richmond* was meant to apply when an agency fails to carry out a statutory duty at a detriment to the other party and a benefit to itself."); *cf. Shiflett v. U.S. Postal Service*, 839 F.2d 669, 673 (Fed. Cir. 1988) (the critical and controlling fact in determining whether there is good cause for a filing delay is the flagrant violation of the regulations by the agency in failing to give notice of appeal rights in the form and manner prescribed by the regulations).

¶10 This case is distinguishable from *Springer*, 911 F.2d at 676-77, which held that an assertion of equitable estoppel must be rejected as a matter of law because the applicable statute specifically precludes revocation of a FERS election and

cannot be ignored based on the facts of individual cases. There was no indication in *Springer* that Mr. Springer had been improperly placed by his employing agency in FERS before he made his FERS election, thereby invalidating the election. Nor is there any indication in *Springer* that the agency failed to follow OPM's regulations that require an individual to be deemed to have elected FERS with an option to decline such coverage. Moreover, we find that *Richmond* does not apply because this case does not involve a claim for payment of money from the U.S. Treasury, the narrow ground upon which the Supreme Court based its holding. *See Blaha v. Office of Personnel Management*, 106 M.S.P.R. 265, ¶¶ 8-9 (2007) (in a case involving a failure to make an election of an annuity that included an insurable interest, *Richmond* did not apply because there was no claim for payment of money from the U.S. Treasury in contravention of law); *Snow v. Office of Personnel Management*, 57 M.S.P.R. 364, 368 (1993). Rather, it involves the right to make an informed election of FERS or CSRS Offset. Finally, *Nielsen* is a nonprecedential decision that the Board is not obligated to follow, *see Mills v. U.S. Postal Service*, 119 M.S.P.R. 482, ¶ 8 (2013), and relies primarily upon *Richmond*, which we have found is not controlling in this case.

ORDER

¶11 Accordingly, we ORDER OPM to afford the appellant an opportunity under FERCCA and OPM's regulations to correct the erroneous retirement coverage error in this case. OPM must notify the appellant of the qualifying retirement coverage error and afford her a 6-month period following her receipt of such notification to make an election between FERS and CSRS Offset in accordance with OPM's regulations set forth at 5 C.F.R. Part 839. *See Stuart v. Department of the Air Force*, 104 M.S.P.R. 297, ¶ 16 (2006); *Wallace v. Office of Personnel Management*, 88 M.S.P.R. 375, ¶¶ 10-11 (2001); 5 C.F.R. § 839.611(a). OPM must complete this action no later than 20 days after the date of this decision.

¶12 We also ORDER OPM to tell the appellant promptly in writing when it believes it has fully carried out the Board's Order and to describe the actions it took to carry out the Board's Order. We ORDER the appellant to provide all necessary information OPM requests to help it carry out the Board's Order. The appellant, if not notified, should ask OPM about its progress. *See* 5 C.F.R. § 1201.181(b).

¶13 No later than 30 days after OPM tells the appellant it has fully carried out the Board's Order, the appellant may file a petition for enforcement with the office that issued the initial decision on this appeal if the appellant believes that OPM did not fully carry out the Board's Order. The petition should contain specific reasons why the appellant believes OPM has not fully carried out the Board's Order, and should include the dates and results of any communications with OPM. *See* 5 C.F.R. § 1201.182(a).

¶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 RIGHT TO REQUEST
ATTORNEY FEES AND COSTS

You may be entitled to be paid by the agency for your reasonable attorney fees and costs. To be paid, you must meet the requirements set out at Title 5 of the United States Code (5 U.S.C.), sections 7701(g), 1221(g), or 1214(g). The regulations may be found at 5 C.F.R. § § 1201.201, 1201.202 and 1201.203. If you believe you meet these criteria, you must file a motion for attorney fees WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION. You must file your attorney fees motion with the office that issued the initial decision on your appeal.

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. 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.