UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2013 MSPB 67

Docket No. AT-0831-13-0010-I-1

Charles Winfield Reid,

Appellant,

v.

Office of Personnel Management,

Agency.

September 5, 2013

Charles Winfield Reid, Bonaire, Georgia, pro se.

Christopher H. Ziebarth, 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 his appeal of an Office of Personnel Management (OPM) decision regarding his Civil Service Retirement System (CSRS) annuity for lack of jurisdiction. For the reasons set forth below, we GRANT the appellant's petition for review, REVERSE the initial decision, and REMAND the case for further adjudication consistent with this Opinion and Order.

BACKGROUND

¶2 On August 1, 2008, OPM informed the appellant that it had awarded his former spouse 35% of his gross CSRS annuity benefits pursuant to a court order. Initial Appeal File (IAF), Tab 5 at 16. The appellant subsequently "request[ed] OPM reconsideration" of the award by letter dated July 28, 2010, *id.* at 12-14, and, in a letter dated March 28, 2011, OPM informed the appellant that it had not yet issued an initial decision in the matter and that, as a result, his case file had been forwarded for review and issuance of an initial decision, *id.* at 15. On May 17, 2012, OPM issued its initial decision, which affirmed the award of former spousal annuity benefits. IAF, Tab 1 at 6. On August 15, 2012, OPM issued an additional letter to the appellant in which it further explained its reasoning for the award of former spousal annuity benefits. *Id.* at 7.

¶3 The appellant filed an appeal of OPM's August 15, 2012 letter on September 24, 2012. IAF, Tab 1. In his appeal, the appellant challenged the validity of the court order upon which OPM had based the award. *Id.* at 4. Thereafter, the administrative judge issued a jurisdictional order advising the appellant of his burden of proof and ordering the appellant to submit evidence or argument that OPM had either issued a final decision or that OPM had failed to render a final decision in the matter. IAF, Tab 3. In response, the appellant detailed his efforts to receive a final decision in the matter since 2010, which he claimed included numerous telephone calls to OPM Customer Service and e-mail messages to caseworkers. IAF, Tab 5 at 3. The appellant also claimed that, although OPM's May 17, 2012 initial decision indicated that it had enclosed instructions regarding how to request reconsideration of the decision, OPM had not done so. *Id.* As a result, the appellant claimed that he made additional telephone calls to OPM concerning the missing enclosure and that, on May 30, 2012, he spoke to the OPM Paralegal Specialist who wrote the May 17, 2012 initial decision. *Id.* The appellant claimed that the OPM Paralegal Specialist agreed that the appellant had requested reconsideration of OPM's original

decision in light of his July 28, 2010 letter, and that he needed 13 days to make a decision on the request for reconsideration. *Id.* The appellant claimed that, after several more telephone calls regarding the status of his case, he received the August 15, 2012 decision, in which OPM did not indicate that it was a final decision in the matter and did not provide the appellant with notice of appeal rights to the Board. *Id.* The appellant, therefore, asserted that OPM did not intend to issue a final decision in the matter and that the Board should assume jurisdiction. *Id.* at 4.

¶4 OPM subsequently filed a response to the appeal in which it claimed that it had extended reconsideration rights to the appellant in its May 17, 2012 letter, but that it had no record of a request for reconsideration from the appellant. IAF, Tab 7 at 4. Therefore, OPM argued that the Board lacks jurisdiction over the appellant's appeal. *Id.* OPM did not address the appellant's factual allegations in its response. Based on the written record, the administrative judge issued an initial decision dismissing the appeal for lack of jurisdiction. IAF, Tab 8. The administrative judge found that the appellant did not present evidence or even claim that OPM had issued a final decision in the matter in response to the jurisdictional order and that, in the absence of such decision, the Board lacks jurisdiction. *Id.* at 2.

¶5 The appellant has filed a petition for review. Petition for Review (PFR) File, Tab 1. On review, the appellant asserts that OPM does not intend to issue a final decision in the matter, and he also argues the merits of the appeal. *Id.* at 2-4. OPM has filed a response to the appellant's petition for review arguing that it fails to meet the review criteria. PFR File, Tab 4 at 3.

ANALYSIS

¶6 The Board's jurisdiction is not plenary; it is limited to those matters over which it has been given jurisdiction by law, rule, or regulation. *Maddox v. Merit Systems Protection Board*, 759 F.2d 9, 10 (Fed. Cir. 1985). The appellant bears

the burden of establishing by preponderant evidence that the Board has jurisdiction over his appeal. 5 C.F.R. § 1201.56(a)(2). In general, the Board has jurisdiction over OPM determinations affecting an appellant's rights or interests under CSRS only after OPM has issued a final decision in the matter. *See McNeese v. Office of Personnel Management*, 61 M.S.P.R. 70, 73-74, *aff'd*, 40 F.3d 1250 (Fed. Cir. 1994) (Table). The absence of such a decision does not preclude Board review of a retirement decision when OPM fails to advise the appellant of his right to request reconsideration and OPM does not intend to issue any further decision to the appellant. *Youngblood v. Office of Personnel Management*, 108 M.S.P.R. 278, ¶ 10 (2008).

¶7 Here, the appellant claimed, and OPM did not dispute, that OPM failed to enclose the attachment to its May 17, 2012 letter to the appellant that provided instructions regarding how to request reconsideration of its initial decision. IAF, Tab 5 at 3. The appellant additionally claimed that he followed up with OPM regarding the missing enclosure, *id.*, and the record supports his claim that he at least contacted OPM after receipt of the initial decision because of OPM's subsequent letter, dated August 15, 2012, in which it explained in more detail than the initial decision the reasons for its award of a portion of his annuity benefits to his former spouse, IAF, Tab 1 at 6, 7. Moreover, although in its August 15, 2012 letter OPM did not indicate that its decision was final, it did inform the appellant that, in order for him to change or terminate his former spouse's portion of his retirement annuity, OPM needed him to send it an amended court order with those instructions from the court. *Id.* at 7. Further, in its responses to the appellant's appeal and petition for review, OPM did not indicate that it had any intention of issuing the appellant a final decision in the matter. IAF, Tab 7 at 4; PFR File, Tab 4 at 3. Therefore, based on OPM's actions in this appeal, it appears that it does not have any intention of issuing the appellant a further decision absent receipt of an amended court order.

¶8 Based on the foregoing, we find that OPM's August 15, 2012 letter is tantamount to an appealable final decision concerning the appellant's challenge to the award of a portion of his annuity benefits to his former spouse.* *See Scallion v. Office of Personnel Management*, 72 M.S.P.R. 457, 461 (1996). The Board therefore has jurisdiction to adjudicate the merits of the appellant's appeal. *See id.*

ORDER

¶9 Accordingly, we remand this case to the Atlanta 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.

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* The appellant claimed that he received OPM's August 15, 2012 decision on August 25, 2012, and he attached a copy of the postmarked envelope from OPM that allegedly contained the decision. IAF, Tab 1 at 4, 8. The postmark is not legible, *id.* at 8, but OPM has not contested the appellant's assertion regarding the date of receipt or otherwise argued that the appeal was untimely. Thus, we find that the appellant timely filed his appeal on September 24, 2012, thirty days after he received OPM's decision on August 25, 2012. *See* 5 C.F.R. § 1201.22(b).