

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

2013 MSPB 87

Docket No. CH-0839-13-0267-I-1

Joseph Wible, Jr.,

Appellant,

v.

Department of the Army,

Agency.

November 1, 2013

Joseph Wible, Jr., Westlake, Ohio, pro se.

Samantha Black, 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 for lack of jurisdiction under either the Veterans Employment Opportunities Act of 1998 (VEOA) or the Federal Erroneous Retirement Coverage Corrections Act (FERCCA). For the reasons set forth below, we GRANT the appellant's petition for review, VACATE the initial decision, and REMAND the appeal to the regional office for further adjudication in accordance with this order.

BACKGROUND

¶2 The appellant, a preference-eligible veteran, works for the Defense Contract Management Agency. Initial Appeal File (IAF), Tab 5 at 20. In 2012, the appellant requested a retirement estimate from the agency, which the Army Benefits Center-Civilian (ABC-C) calculates under an agreement with the agency. *Id.* at 9. On January 8, 2013, the appellant received a letter from ABC-C that informed him of an error in his retirement plan coverage for the period of May 3 through September 24, 1993. *Id.* at 21. Specifically, ABC-C indicated that the appellant had been placed in the Civil Service Retirement System (CSRS) during that period, when he should have been placed in CSRS Offset. *Id.* ABC-C also informed the appellant that corrections would be made to his retirement deductions and Social Security. *Id.* Finally, ABC-C informed the appellant of his right to file a Board appeal if he disagreed with its decision. *Id.*

¶3 The appellant filed a Board appeal and alleged that changing him from CSRS to CSRS Offset constituted a violation of his veterans' preference rights under the Veterans Employment Opportunities Act of 1998 (VEOA) and harmful error. IAF, Tab 1 at 3-4, 12. The administrative judge issued a jurisdiction order directing the appellant to submit a statement addressing the jurisdictional requirements for a VEOA appeal. IAF, Tab 3 at 6-7. The appellant never responded to the order. The agency moved to dismiss the VEOA claim for lack of jurisdiction. IAF, Tab 5 at 13-15. The agency argued that, under FERCCA, the Board had jurisdiction over the appeal, but only with respect to its determination that the appellant's retirement coverage error was not a qualifying error under FERCCA because it lasted less than 3 years. *Id.* at 12-13.

¶4 The administrative judge scheduled a prehearing conference, but the appellant was unavailable for the conference. IAF, Tab 8 at 1. Without holding the appellant's requested hearing, the administrative judge issued an initial decision that dismissed the appeal for lack of jurisdiction. IAF, Tab 9, Initial Decision (ID) at 1. The administrative judge found the appellant failed to exhaust

his remedies with the Department of Labor (DOL) on his VEOA claim. ID at 2. The administrative judge also found that FERCCA did not apply to the appeal because the period of erroneous coverage was less than 3 years. *Id.* He further found that the agency erred in providing notice of Board appeal rights to the appellant but that the agency's error did not confer a right of appeal. *Id.*

¶5 The appellant has filed a timely petition for review. Petition for Review (PFR) File, Tab 1. The appellant argues that the Board should be able to hear the appeal because he is being harmed by the conversion from CSRS to CSRS Offset. *Id.* at 4-6. The agency has submitted a response opposing the petition for review. PFR File, Tab 3.

ANALYSIS

The Board has jurisdiction over a determination that a retirement coverage error is not covered under FERCCA.

¶6 Congress enacted the CSRS in 1920, and federal employees hired after its effective date and before December 31, 1983, were eligible for this retirement plan. *See* Office of Personnel Management (OPM), *CSRS and FERS Handbook for Personnel and Payroll Offices (Handbook)*, § 10A1.1-2. Individuals hired after December 31, 1983, became eligible for a new retirement plan, the Federal Employees' Retirement System (FERS). *Id.* Individuals hired after December 31, 1983, were also required to begin making Old Age, Survivor, and Disability Insurance payments into the Social Security system. *Id.* If an individual, who was covered under the CSRS plan with at least 5 years of federal service at the end of 1986, had a break in service of greater than 1 year, then that individual would be placed in a separate plan known as CSRS Offset. *Handbook*, § 10A1.2-1. Rules covering individuals in CSRS Offset are found in 5 C.F.R. Part 831, Subpart J. Individuals in CSRS Offset are covered by both CSRS and Social Security. Office of Personnel Management, *Retirement FAQs-What is CSRS Offset?*, <http://www.opm.gov/faq/retire/What-is-CSRS-Offset.ashx> (last

visited Oct. 31, 2013). An individual in CSRS Offset earns credits in both CSRS and Social Security. *Id.* An employee in CSRS Offset pays the same amount into the retirement plan as a CSRS employee does; however, 6.2 percent of such an employee's salary is paid into Social Security and the balance of the retirement contribution is paid into CSRS Offset. *Id.* When an employee in CSRS Offset retires, OPM calculates the retirement annuity using the same method as a CSRS employee, but, when the individual becomes eligible to draw Social Security, the CSRS retirement payment is reduced by the amount of Social Security benefit attributed to the covered government service. *Id.*

¶7 The administrative judge found that the Board lacked jurisdiction over the appeal under FERCCA. ID at 2. FERCCA was enacted to address problems created when employees are placed in the wrong retirement plan for an extended period. *Poole v. Department of the Army*, [117 M.S.P.R. 516](#), ¶ 13 (2012). Generally, an employee must be in the wrong retirement plan for at least 3 years to be eligible for relief under the statute. *Id.*; [5 C.F.R. § 839.101](#)(b). If the agency determines that the error is not subject to FERCCA, it must provide the individual with a written notice that the error is not covered under FERCCA and that decision may be appealed to the Board. [5 C.F.R. §§ 839.1301-1302](#). Although ABC-C's letter does not explicitly state that it is a FERCCA notice, *see* IAF, Tab 5 at 21, we deem the letter to be ABC-C's notice under [5 C.F.R. § 839.1301](#)(a) that the appellant's retirement coverage error was not covered under FERCCA because the error lasted less than 3 years.¹ IAF, Tab 5 at 21. We find that the Board has jurisdiction to review that determination. [5 C.F.R. § 839.1302](#)(a)(1).

¹ The appellant states in his petition for review that he never paid into the Social Security system. PFR File, Tab 1 at 5. The appellant's statement is inconsistent with the information provided by ABC-C that shows all of his service since October 16, 1995, has been CSRS Offset. IAF, Tab 5 at 22. Those periods of service are not at issue in the present appeal, however.

¶8 It appears undisputed that the retirement coverage error at issue in this appeal lasted less than the 3 years required to be covered under FERCCA. Although there do not appear to be any disputed material facts and the outcome of the FERCCA appeal appears to be a matter of law, we are unable to resolve the appeal at this time because the appellant requested a hearing. See *Muyco v. Office of Personnel Management*, [114 M.S.P.R. 694](#), ¶ 14 (2010); see also [5 U.S.C. § 7701\(a\)\(1\)](#) (an appellant before the Board has the right to a hearing for which a transcript will be kept). However, both the Board and its reviewing court have held that, in an appeal such as this one, where the appellant bears the burden of proving entitlement to retirement benefits, the Board has the discretion to decide the case without a full evidentiary hearing. *Jezouit v. Office of Personnel Management*, [97 M.S.P.R. 48](#), ¶ 13 (2004) (citing *Crispin v. Department of Commerce*, [732 F.2d 919](#), 922 (Fed. Cir. 1984)), *aff'd*, 121 F. App'x 865 (Fed. Cir. 2005) (Table). Where there is no dispute of material fact and the outcome of the appeal is a matter of law, the hearing required under [5 U.S.C. § 7701\(a\)\(1\)](#) may be limited to an opportunity to present oral argument on the dispositive legal issue. *Muyco*, [114 M.S.P.R. 694](#), ¶ 14. Unless the appellant identifies a genuine dispute of material fact, the hearing in this matter may be limited to oral argument over the issue of whether the appellant's coverage error is covered under FERCCA.

¶9 ABC-C also argued in its response to the initial appeal that the Board lacks jurisdiction over the substantive determination of the appellant's appropriate retirement coverage for the period at issue. IAF, Tab 5 at 12-13. ABC-C is correct, provided that the retirement coverage error is too brief to be covered under FERCCA. However, the Board would have jurisdiction over the substantive determination if the administrative judge determines on remand that

the error was covered under FERCCA.² See [5 C.F.R. § 839.1302](#)(a) (a decision which affects an employee's rights and interests under FERCCA, other than a discretionary action by OPM, can be appealed to the Board).

The administrative judge properly found that the Board lacks jurisdiction over the appellant's VEOA claim.

¶10 The appellant alleged in his appeal that the agency's action was in violation of his veterans' preference. IAF, Tab 1 at 12. To establish Board jurisdiction over an appeal brought under VEOA, an appellant must, among other things, show that he exhausted his administrative remedy with DOL. *Graves v. Department of Veterans Affairs*, [117 M.S.P.R. 491](#), ¶ 8 (2012). The first step of the exhaustion process is for the appellant to file a complaint with DOL containing a summary of the allegations that form the basis of the complaint. *Id.* The administrative judge directed the appellant to provide information regarding his DOL complaint and any response received. IAF, Tab 3. The appellant did not provide any evidence that he had filed a DOL complaint. Evidence of exhaustion with DOL is mandatory under the statute. *Graves*, [117 M.S.P.R. 491](#), ¶ 11. The Board, therefore, lacks jurisdiction over the appellant's VEOA claim. In his remand initial decision, the administrative judge may incorporate his prior jurisdictional finding that the appellant failed to exhaust his administrative remedy with respect to his VEOA claim.

The appellant may have a claim regarding his reemployment rights following a period of military service.

¶11 In its response to the appeal, ABC-C provided a detailed explanation regarding the retirement coverage error and why the appellant should have been

² Even if his retirement coverage claim is not subject to FERCCA, the appellant could request a decision regarding his coverage from the Office of Personnel Management, and that decision could be appealed to the Board. See *Wallace v. Office of Personnel Management*, [88 M.S.P.R. 375](#), ¶ 6 (2001).

in CSRS Offset and not CSRS during the relevant period of service. IAF, Tab 5 at 15-19. The appellant left his position with the Defense Logistics Agency to go on active military duty on April 21, 1992. *Id.* at 22. The appellant returned to his civilian job from military service on May 3, 1993. *Id.* at 16-17. ABC-C stated that the reason for the change in retirement plans involved the appellant's reemployment rights to his civilian position from active duty status. *Id.* at 17. If the appellant had exercised his reemployment rights within 90 days of separating from military service, the appellant's military service absence would have been considered a furlough. *Id.* at 16-17. A furlough is not characterized as a break in service; therefore, the appellant would have retained eligibility in the CSRS. *Id.* ABC-C stated that the appellant did not qualify for furlough because he did not exercise his reemployment rights. *Id.* at 17. Instead of exercising his right to be reemployed in his former GS-11 position in the Defense Logistics Agency, the appellant obtained an appointment to a GS-12 position in the Department of the Air Force. *Id.* ABC-C claimed that this was not an exercise of reemployment rights and that as a result the appellant incurred a break in service instead of a military furlough. *Id.* Because the supposed break in service was more than 365 days, according to ABC-C the appellant was required to be placed in CSRS Offset. *Id.*

¶12 Reemployment after military service is covered under the Uniformed Services Employment and Reemployment Rights Act of 1994 (codified at [38 U.S.C. §§ 4301-4333](#)) (USERRA) and its predecessor statutes. A federal employee who believes his employer has violated USERRA may seek corrective action by filing a complaint with the Secretary of Labor through the Veterans' Employment and Training Services (VETS), or by filing an appeal directly with the Board. *See* [38 U.S.C. § 4324](#)(a)-(b). Under the 1998 amendments to USERRA, the Board has the authority to decide a claim for a violation of USERRA's predecessor statute, the Vietnam Era Veterans' Readjustment Assistance Act, based on events that pre-dated USERRA's enactment, including

reemployment claims. *Stuart v. Department of the Air Force*, [104 M.S.P.R. 297](#), ¶¶ 8-9 (2006). Because the appellant has not indicated that he wishes to file a USERRA appeal, we do not forward this matter to the regional office for docketing as a separate appeal. However, if the appellant believes his reemployment rights have been violated, he may file a USERRA complaint with VETS or a separate USERRA appeal with the Board.

ORDER

¶13 We remand this case to the Central Regional Office for further adjudication. Consistent with this Opinion and Order, the administrative judge shall issue a remand initial decision as to the FERCCA appeal and may incorporate his prior jurisdictional finding with respect to the appellant's VEOA claim.

FOR THE BOARD:

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