UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2013 MSPB 89

Docket No. AT-0831-12-0821-I-1

Kenneth Randy Resnick,

Appellant,

v.

Office of Personnel Management,

Agency.

November 4, 2013

Kimberly H. Berry, Reston, Virginia, for the appellant.

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 affirmed the reconsideration decision of the Office of Personnel Management (OPM), which denied the appellant's application for a Civil Service Retirement System (CSRS) annuity as a former air traffic controller upon becoming 50 years of age. For the reasons set forth below, we DENY the petition for review and AFFIRM the initial decision.

BACKGROUND

¶2 The appellant resigned from his position as an Air Traffic Control Specialist effective April 22, 2007, when he was 45 years old. Initial Appeal File (IAF), Tab 4, Subtab 2b at 6. At the time, the appellant had 23 years, 2 months, and 9 days of creditable service as an air traffic controller. IAF, Tab 4, Subtabs 2a at 1, 2b at 1. Shortly before his 50th birthday, the appellant submitted an application for an immediate retirement under CSRS to OPM. IAF, Tab 4, Subtab 2d. OPM denied the appellant's application in an initial decision, finding that he was ineligible. IAF, Tab 4, Subtab 2c. The appellant requested reconsideration of the initial decision, IAF, Tab 4, Subtab 2b, and OPM issued a reconsideration decision explaining that the appellant was not entitled to an immediate annuity under the statute governing immediate retirements for air traffic controllers because he was less than 50 years of age when he separated from service, IAF, Tab 4, Subtab 2a (citing 5 U.S.C. § 8336(e)).

¶3 The appellant filed a Board appeal challenging OPM's reconsideration decision. IAF, Tab 1. He argued that he became entitled to an immediate annuity under 5 U.S.C. § 8336(e) upon turning 50 years of age, even though he had already separated from service, because he had over 20 years of service as an air traffic controller at the time he resigned. *Id.* at 5. OPM argued in response that the appellant was not eligible for an immediate annuity under 5 U.S.C. § 8336(e) because he failed to meet both the age and the service requirements at the time of his separation. IAF, Tab 4 at 1. After holding the requested hearing, IAF, Tab 1 at 2, the administrative judge issued an initial decision affirming OPM's reconsideration decision, IAF, Tab 9, Initial Decision. The administrative judge found that, because the appellant had not reached 50 years of age prior to his resignation, he was not eligible for an immediate retirement under 5 U.S.C. § 8336(e) once he turned 50 years old. *Id.* at 4-6. Also, in response to the appellant's claim during his hearing testimony that he relied on his facility manager's assurance that he would qualify for an annuity once he turned 50 years

old even if he resigned prior to that time, the administrative judge found that the appellant's reliance on such erroneous advice from a government official could not be the basis for an award of a retirement benefit to which the appellant was not otherwise entitled. *Id.* at 3-4, 6 (citing *Office of Personnel Management v. Richmond*, 496 U.S. 414, 416, 434 (1990)).

¶4 The appellant has filed a petition for review. Petition for Review (PFR) File, Tab 2. The appellant, who was pro se below, has obtained representation and asks the Board to consider new argument and evidence pertaining to his alleged entitlement to an annuity under 5 U.S.C. § 8336(e). *Id.* The agency has filed a response acknowledging receipt of the appellant's petition for review and his representative's appearance. PFR File, Tab 5.

ANALYSIS

¶5 An appellant bears the burden of proving his entitlement to a civil service retirement annuity by preponderant evidence. *See Sanderson v. Office of Personnel Management*, 72 M.S.P.R. 311, 317 (1996), *aff'd*, 129 F.3d 134 (Fed. Cir. 1997) (Table); 5 C.F.R. § 1201.56(a). The statute that grants an immediate CSRS retirement under the special provisions applicable to air traffic controllers provides as follows:

> An employee who is voluntarily or involuntarily separated from the service, except by removal for cause on charges of misconduct or delinquency, after completing 25 years of service as an air traffic controller or after becoming 50 years of age and completing 20 years of service as an air traffic controller, is entitled to an annuity.

5 U.S.C. § 8336(e).

¶6 The administrative judge found that this case presented an issue of first impression before the Board, the issue being whether an individual who has more than 20 years of service as an air traffic controller and who resigns before reaching the age of 50 is entitled to an annuity under 5 U.S.C. § 8336(e) upon becoming 50 years of age. Initial Decision at 4 n.3. For the following reasons,

we agree with OPM and the administrative judge that the individual is not entitled to an annuity under those conditions.

¶7 In the initial decision, the administrative judge accurately set forth the general rules of statutory construction. Initial Decision at 4-5. Significantly, it is axiomatic that the interpretation of a statute begins with the language of the statute itself. *Van Wersch v. Department of Health & Human Services*, 197 F.3d 1144, 1148 (Fed. Cir. 1999). If the language provides a clear answer, the inquiry ends, and the plain meaning of the statute will be regarded as conclusive. *Id.* Here, the administrative judge found, and we agree, that 5 U.S.C. § 8336(e) is clear on its face in that it awards an annuity only to employees who were separated, in relevant part, after becoming 50 years of age and completing 20 years of service as an air traffic controller. Initial Decision at 5. The only way to interpret the statute to reach the conclusion advocated by the appellant would be to completely read the words "who is voluntarily or involuntarily separated from the service, except by removal for cause on charges of misconduct or delinquency" out of the statute. Such a reading, however, would be contrary to the basic rule of statutory construction that "[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Corley v. United States*, 556 U.S. 303, 314 (2009) (internal quotations omitted). Furthermore, 5 U.S.C. § 8336(e) appears in the section of the CSRS retirement statutes that provides for an "immediate annuity," i.e., an annuity payable to a former employee immediately upon his separation from the federal service. Therefore, to interpret the statute in the manner proposed by the appellant, i.e., in a manner that would allow a former air traffic controller to receive an "immediate" annuity several years after his separation from the federal service, would be inconsistent with the "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *National*

Association of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 666 (2007) (internal quotations omitted).

¶8 The appellant argues on review that "a plain reading of the statute does nothing to contradict the notion that an employee who has already completed 20 years of employment could access retirement annuities after reaching age 50, even if he was not 50 at the time of his separation from the agency." PFR File, Tab 2 at 13 of 28. We disagree. The plain language of 5 U.S.C. § 8336(e) requires that an employee reach 50 years of age and complete 20 years of service as an air traffic controller before separating from service in order to qualify for an immediate retirement, and there is simply nothing within the grammatical structure of the statute to support the appellant's assertion. To conclude otherwise would require reading several words out of the statute, which, as described above, is at odds with one of the basic rules of statutory construction. *See Corley*, 556 U.S. at 314. Therefore, we find the appellant's argument unpersuasive.

¶9 The appellant also argues on review that, even if the statute reads as OPM contends, OPM's interpretation of the statute is entitled to less deference because it is unreasonable. PFR File, Tab 2 at 13 of 28 (citing *Hollander v. Office of Personnel Management*, 39 M.S.P.R. 195, 198-99 (1988), *aff'd sub nom. Horner v. Hollander*, 895 F.2d 759, 761 (1990)). In *Hollander*, the Board found that an OPM regulation interpreting a statute unreasonably and erroneously interpreted the statutory phrase "eligible to retire" because it covered only those federal employees who qualified for age and service retirement and excluded those eligible to retire solely on the basis of disability. *Hollander*, 39 M.S.P.R. at 199-201. The Board found that OPM's interpretation of the statute was contrary to the statute's plain meaning and, therefore, could not stand. *Id.* Unlike in *Hollander*, however, we find here that OPM's interpretation of the statute is consistent with the statute's plain meaning and, therefore, is neither unreasonable

nor erroneous. Accordingly, the appellant has set forth no reason to disturb the initial decision based upon the Board's decision in *Hollander*.

¶10 The appellant additionally challenges the administrative judge's reliance on *Richmond*, 496 U.S. 414, in finding that the appellant's alleged reliance on his facility manager's erroneous advice could not form the basis for an award of a retirement benefit to which he was not otherwise entitled. PFR File, Tab 2 at 10-11 of 28. Specifically, the appellant argues that the Court in *Richmond* left open the possibility that a claim of equitable estoppel could succeed against the government under certain circumstances, and he contends that the Board has "continued to confirm that affirmative misconduct by a government official would justify the application of equitable estoppels." *Id.* (citing *McDonald v. Office of Personnel Management*, 115 M.S.P.R. 236 (2010)). The appellant alleges that, because the Board recognizes that equitable estoppel may be applied in situations where the government official displayed affirmative misconduct, the administrative judge erred in failing to advise him of his burden of proof to establish his equitable estoppel claim. PFR File, Tab 2 at 11-12 of 28. Accordingly, the appellant submits new argument and evidence in an attempt to establish affirmative misconduct by the facility manager, who he claims knowingly and maliciously provided him false information about his retirement eligibility. *Id.* at 7-12, 16-27 of 28.

¶11 Equitable estoppel, however, is not available to the appellant under the circumstances. Contrary to the appellant's assertions, even though the Court in *Richmond* did leave open the possibility that equitable estoppel may be applied against the federal government in cases involving affirmative misconduct, it specifically excluded cases, like the appellant's, in which the relief sought would result in the expenditure of public funds from the United States Treasury not appropriated by an act of Congress. *Richmond*, 496 U.S. at 434. Indeed, in the case relied upon by the appellant to support his contentions, *McDonald*, 115 M.S.P.R. 236, ¶ 11, the Board explained that equitable estoppel was available to

the appellant in her particular situation because she did not seek to draw additional funds from the United States Treasury but rather requested that her husband's annuity be reduced to provide her with a survivor annuity.[1] Here, the administrative judge properly concluded that equitable estoppel is not available to the appellant under *Richmond* because an award of an immediate retirement to the appellant would result in the expenditure of appropriated funds in contravention of 5 U.S.C. § 8336(e).[2] Initial Decision at 6. Accordingly, the appellant's new argument and evidence with respect to his equitable estoppel claim are not material to the outcome of his appeal. *See Russo v. Veterans Administration*, 3 M.S.P.R. 345, 349 (1980); 5 C.F.R. § 1201.115(a)(1), (d).

¶12 Finally, for the first time on review, the appellant appears to assert that the agency misled him into signing a settlement agreement in which the agency agreed to remove a proposed suspension it had initiated from the appellant's employment records in exchange for the appellant's immediate retirement in 2007. PFR File, Tab 2 at 9 of 28. To the extent the appellant is challenging the validity of the settlement agreement, the Board lacks jurisdiction over that claim because the settlement agreement was not reached during the course of an appeal to the Board and therefore was not made part of a Board record. *See, e.g.*, *Wobschall v. Department of the Air Force*, 43 M.S.P.R. 521, 523, *aff'd*, 918 F.2d 187 (Fed. Cir. 1990) (Table).

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[1] The appellant also cites *Ramirez-Carlo v. United States*, 496 F.3d 41, 49 (1st Cir. 2007), to support his contention that equitable estoppel is available to him because of the affirmative misconduct of his facility manager. PFR File, Tab 2 at 11 of 28. That case, however, involves a claim against the Department of Veterans Affairs for monetary damages under the Federal Tort Claims Act and is not analogous to the present appeal.

[2] Although the appellant is not entitled to an immediate retirement, the administrative judge properly noted that the appellant's reliance on misinformation may serve as the basis for an involuntary resignation appeal against his former employing agency should the appellant wish to pursue reinstatement. Initial Decision at 6 n.4.

ORDER

¶13 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. 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:

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