

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

100 M.S.P.R. 467

STEPHEN F. DELCEG,  
Appellant,

DOCKET NUMBER  
NY-844E-04-0324-I-1

v.

OFFICE OF PERSONNEL  
MANAGEMENT,  
Agency.

DATE: November 3, 2005

(CSA 8 223 234)

James D. Muirhead, Esquire, Hackensack, New Jersey, for the appellant.

Evelyn K. Payne, Washington, D.C., for the agency.

**BEFORE**

Neil A. G. McPhie, Chairman  
Barbara J. Sapin, Member

**OPINION AND ORDER**

¶1 The appellant has petitioned for review of an initial decision (ID), issued on February 18, 2005, that affirmed a reconsideration decision of the Office of Personnel Management (OPM) denying his application for disability retirement under the Federal Employees' Retirement System (FERS). For the reasons set forth below, we GRANT his petition, REVERSE the ID and OPM's reconsideration decision, and ORDER OPM to award disability retirement benefits to the appellant.

## BACKGROUND

¶2 In a reconsideration decision, OPM denied the appellant's application for disability retirement from the position of Letter Carrier based on bilateral knee injuries and surgeries. Initial Appeal File (IAF), Tab 3, Subtab IIA. OPM found that the appellant's employing agency, the U.S. Postal Service, removed him effective July 28, 2002, for misconduct unrelated to any disabling medical condition. *Id.* OPM found that the evidence before it did not demonstrate that the appellant was precluded from attending work because of his medical condition and did not show that his unsatisfactory conduct was caused by his medical condition. *Id.*

¶3 The appellant appealed OPM's decision. IAF, Tab 1. Based on the record developed by the parties, including the telephonic hearing held on January 10, 2005, the administrative judge affirmed the reconsideration decision. IAF, Tab 26 (ID). She found that the appellant was not entitled to a presumption under *Bruner v. Office of Personnel Management*, 996 F.2d 290, 294 (Fed. Cir. 1993), that an employee's removal for physical inability to perform the essential functions of his position constitutes prima facie evidence that he is entitled to disability retirement because the appellant had been removed for misconduct. ID at 10. She also found that the appellant did not file his application for disability retirement until after he had appealed his removal to the Board and an administrative judge had affirmed the employing agency's removal action. ID at 11. Ultimately, without specifically considering the effect of the appellant's medical condition on his ability to perform the duties of his position, the administrative judge found that the appellant failed to show that he could not perform the duties of his Letter Carrier position at the time of his removal for misconduct. ID at 10.

¶4 The appellant has petitioned for review. Petition for Review File (RF), Tab 1. OPM has responded in opposition to the petition. RF, Tab 3.

## ANALYSIS

¶5 In his petition, the appellant asserts that the administrative judge erred in finding that he was not entitled to a presumption of entitlement to disability retirement under *Bruner* because, before the Postal Service removed him, it had issued him discipline short of removal for attendance and performance problems that were related to his bilateral knee condition. Under *Bruner*, an employee's removal for physical inability to perform the essential functions of his position constitutes prima facie evidence that he is entitled to disability retirement. *Bruner*, 996 F.2d at 294. The burden of production then shifts to OPM to produce evidence sufficient to support a finding that the applicant is not entitled to disability retirement benefits and, if OPM produces such evidence, the applicant must then come forward with evidence to rebut OPM's showing that he is not entitled to benefits. *Id.* The record is clear that the appellant's removal was based on his misconduct, a verbal altercation with a Postal customer, and not on any alleged physical inability to perform his duties. Thus, the administrative judge did not err in finding that the appellant was not entitled to the *Bruner* presumption.

¶6 Removal for misconduct, however, does not preclude an appellant's receipt of disability retirement benefits if the appellant can show that he was disabled from performing useful and efficient service in his position prior to the effective date of his removal. See *Powitz v. Office of Personnel Management*, 82 M.S.P.R. 56, ¶¶ 4-9 (1999). Further, relying on an employee's removal for misconduct as a basis for finding him ineligible for disability retirement under FERS is error. *Burckley v. Office of Personnel Management*, 80 M.S.P.R. 617, ¶ 13 (1999), modified on other grounds by *Sangenito v. Office of Personnel Management*, 85 M.S.P.R. 211, ¶ 15 n\* (2000). Thus, the fact that the appellant was removed for misconduct and that he challenged his removal did not preclude him from seeking disability retirement.

¶7 An employee who appeals from OPM's decision on a voluntary disability retirement application bears the burden of persuasion by a preponderance of the evidence. *See* 5 C.F.R. § 1201.56(a)(2); *Chavez v. Office of Personnel Management*, 6 M.S.P.R. 404, 417 (1981). To qualify for disability retirement under FERS, an employee must establish that: (1) He has completed at least 18 months of civilian service that is creditable under FERS; (2) while employed in a position subject to FERS, he became disabled because of a medical condition, resulting in a service deficiency in performance, conduct, or attendance, or, if there is no such actual service deficiency, the disabling medical condition is incompatible with either useful and efficient service or retention in the position; (3) the disabling medical condition is expected to continue for at least one year from the date the disability retirement application is filed; (4) accommodation of the disabling medical condition in the position held must be unreasonable; and (5) he must not have declined a reasonable offer of reassignment to a vacant position. *See* 5 U.S.C. § 8451; 5 C.F.R. § 844.103(a); *Trevan v. Office of Personnel Management*, 69 F.3d 520, 522 (Fed. Cir. 1995).

¶8 It is undisputed that the first and third criteria are satisfied in this case. The appellant worked for the Postal Service from 1988 until 2002. IAF, Tab 3, Subtab IIE. Additionally, his treating physician Richard Boiardo, M.D., stated that the appellant's bilateral knee condition that formed the basis of his June 22, 2003 application for disability retirement,<sup>1</sup> IAF, Tab 3, Subtab IID, continued as of January 4, 2005, IAF, Tab 21 at 3-4, more than one year later. Further, there is

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<sup>1</sup> Although the altercation for which the Postal Service removed the appellant occurred on November 21, 2001, IAF, Tab 3, Subtab IIB at 11-31, the Postal Service did not effect his removal until July 28, 2002, *id.*, Subtab IIE. The appellant timely filed his application for disability retirement on June 22, 2003, within a year of the effective date of his removal *See* 5 U.S.C. § 8453; 5 C.F.R. § 844.201(a); *Ancheta v. Office of Personnel Management*, 92 M.S.P.R. 640, ¶ 5 (2002) (a claim for disability retirement under FERS may be allowed only if an application is filed with OPM before separation from the service or within one year thereafter, unless waiver of this time limit is warranted for mental incompetence).

no evidence in the record that the appellant declined a reasonable offer of reassignment to a vacant position and, therefore, we find that the fifth criterion is satisfied here. Thus, the appellant is entitled to disability retirement benefits if he satisfies the second and fourth criteria. As discussed below, we find that the appellant has done so.

¶9 A determination regarding whether an employee is disabled must consider the following evidence: (1) objective clinical findings; (2) diagnoses and medical opinions; (3) subjective evidence of pain and disability; (4) evidence relating to the effect of the applicant's condition on his ability to perform in the grade or class of position last occupied; and (5) evidence that the applicant was not qualified for reassignment to a vacant position at the same grade or level as the position he last occupied. *Dunn v. Office of Personnel Management*, 60 M.S.P.R. 426, 432 (1994), *dismissed*, 91 F.3d 169 (Fed. Cir. 1996) (Table).

¶10 In 1996, the appellant sustained an on-the-job injury to his right knee. The record indicates that Carl Mercurio, M.D., diagnosed the appellant as having an internal derangement of the right knee and performed surgery on September 10, 1996. IAF, Tab 3, Subtab IID at 17-18. After surgery on the appellant's right knee, Dr. Mercurio stated that the appellant had a tear of the posterior horn of the medial meniscus and a partial tear of the anterior cruciate ligament. *Id.* The Office of Workers' Compensation Programs (OWCP) determined that the appellant had a permanent 26% impairment of the right knee. IAF, Tab 13, Exhibits AA, BB.

¶11 In 1999, the appellant sustained an on-the-job injury to his left knee. Kenneth Jewel, M.D., a radiologist, stated that the appellant had a grade III tear of the posterior horn of the medial meniscus of the left knee. IAF, Tab 3, Subtab IID at 12-13. In January 2000, Dr. Boiardo performed surgery on the appellant's left knee and, after the surgery, Dr. Boiardo stated that he found a complex tear of the medial meniscus, a chondral fracture and abrasion of the medial femoral condyle, a tear of the lateral meniscus, and post-traumatic

inflammation of the synovial membrane. *Id.* at 9-11. The OWCP determined that the appellant had a permanent 27% impairment of the left knee. IAF, Tab 13, Exhibits EE, FF.

¶12 After the surgery on his left knee, the appellant returned to work with restrictions that included avoiding step climbing, no lifting of 35 pounds or more, and carrying mail for up to two hours each day. *Id.*, Exhibit T. There is some evidence that those restrictions were lifted at some point before the appellant's last day of work. The appellant filed an equal employment opportunity complaint seeking accommodation for his knee injuries. IAF, Tab 3, Subtab IIB at 3. The decision in that complaint indicates that a Postal Service physician referred the appellant for an orthopedic evaluation and, after receipt of the narrative report of that evaluation, released the appellant for duty with no restrictions. *Id.* at 7. The narrative report is not part of the record before the Board, however, and the decision on the appellant's complaint contains date discrepancies, indicating that the appellant's orthopedic referral occurred in January 2001 and he was released for duty in April 2000. *Id.* In any event, in September 2001, the restriction of carrying no more than two hours per day was reinstated by the appellant's treating physician. In an Attending Physician Report, an OWCP form, dated September 28, 2001, Dr. Boiardo stated that, although the appellant could return to work, he was limited to two hours walking per day.<sup>2</sup> IAF, Tab 13, Exhibit H.

¶13 The appellant testified that, after he returned to work from his left-knee surgery, he tried to carry his route and some days he completed it, but he was always in pain and it took him longer than the Postal Service's standard time to complete the route. Hearing Tape (HT) 1, Side A. He testified that he sometimes

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<sup>2</sup> The appellant testified that he did not work after November 21, 2001. On that day, which was the date of the occurrence of the altercation with a postal customer that resulted in his removal, the appellant testified that he was leaving work because of the pain he was experiencing in his knees when he encountered the customer in the parking lot. Hearing Tape 1, Side A.

could not even drive because of the pain in his knees. *Id.* Three of the appellant's coworkers corroborated the appellant's testimony. They testified that often the appellant was unable to complete his route or that it took him longer than the standard time to do so, that he walked with a limp, that they saw him in pain, and that often in 2000 and 2001, the Postal Service would not allow the appellant to work. HT, Tape 1, Side B.

¶14 The position description for the appellant's Letter Carrier position indicates that a Letter Carrier's duties include 1.5 to 3.5 hours of routing letters into a six-shelf letter case that requires continuous standing, twisting, turning, and reaching over the shoulder. IAF, Tab 13, Exhibit B. A Carrier also must lift, from the floor, trays of unsorted mail weighing between 17 to 29 pounds. *Id.* The job also involves one-half hour to two hours of routing flat-size mail and magazines into a four- or five-shelf flat case. *Id.* This function requires continuous reaching over the shoulder, bending, standing, stooping, twisting, and lifting packages weighing up to two pounds. *Id.* The mail is then taken from the letter and flat cases and bundled into separations for delivery. *Id.* The separations are placed into trays that, on average, weigh 50 pounds, and which the Carrier must lift into his vehicle for delivery. *Id.*

¶15 A Letter Carrier's duties also include delivering the mail. A route consists of parking and looping one or two blocks at a time by walking up one side of a block and returning down the other side to the parking point to pick up more mail or packages for delivery or moving to another parking point. *Id.* A delivery separation is put into a satchel, which is worn over a Letter Carrier's shoulder and weighs five pounds empty. *Id.* The mail separations in the satchel weigh approximately 15 pounds on average, but can weigh as much as 35 pounds on a heavy volume day. *Id.* Delivering mail consists of walking, climbing up and down stairs, walking on uneven terrain, twisting, turning, bending, reaching, reaching above the shoulders, and stooping. It is done for approximately five to seven hours per day in all types of weather. *Id.*

¶16 In this case, the position description indicates that, to perform the responsibilities of his position, the appellant must be physically capable of walking five to seven hours a day, standing two to three hours a day, and lifting up to 50 pounds. However, the medical evidence indicates that the appellant suffers a knee condition that prevents him from engaging in these activities for such extended periods of time. Thus, the objective clinical findings show permanent injury to the appellant's knees that is corroborated by the diagnoses and medical opinions of Drs. Mercurio, Jewel, and Boiardo and the OWCP awards to the appellant. *Suter v. Office of Personnel Management*, 88 M.S.P.R. 80, ¶ 12 (2001) (although an OWCP award is not dispositive of an employee's entitlement to disability retirement benefits, OPM and the Board must consider such an award in determining an employee's entitlement to disability retirement benefits). Additionally, the appellant's subjective expression of pain and disability is persuasive and corroborated by his coworkers. *See Cole v. Office of Personnel Management*, 88 M.S.P.R. 54, ¶¶ 8-9 (2001) (the appellant's own testimony of subjective pain and inability to work must be seriously considered, particularly where it is supported by competent medical evidence). Also, the limited time, two hours per day, that the appellant can walk given his permanent knee injuries shows that he cannot perform an essential duty of his position--that he walk for five to seven hours per day. Further, in April 2001 and July 2001, the Postal Service disciplined the appellant for reasons related to his knee injuries, namely his failure to timely request help to complete his mail route and his failure to complete his mail route in a timely manner. IAF, Tab 13, Exhibit U.

¶17 There is no direct evidence that the appellant was not qualified for reassignment to a vacant position at the same grade or level as the position he last occupied. Generally, this evidence comes from a Supervisor's Statement and an Agency Certification of Reassignment and Accommodation Efforts, two forms that are usually completed by the employing agency as part of OPM's disability retirement application file. *See Balmer v. Office of Personnel Management*,

99 M.S.P.R. 199, ¶ 16 (2005). OPM specifically requested that the Postal Service supply these forms. IAF, Tab 3, Subtab IIB at 32. The agency, however, supplied only a statement for the disability retirement record, noting that the appellant had been removed for a verbal altercation with a postal customer.<sup>3</sup> IAF, Tab 3, Subtab IIB at 2. The removal action did not relieve the Postal Service of its obligation as the employing agency to cooperate with the disability retirement application process and to submit to OPM a Supervisor's Statement and an Agency Certification of Reassignment and Accommodation Efforts.<sup>4</sup> In the absence of the Supervisor's Statement and Agency Certification, we have looked at other record evidence to determine whether the appellant was qualified for reassignment to a vacant position at the same grade or level as the Letter Carrier position. Considering the Postal Service's statement of April 6, 2000, that it could not find any "2 hour segments suitable to [the appellant's] restrictions," IAF, Tab 13, Exhibit T, and the testimony of the appellant's coworkers that, often, the Postal Service sent the appellant home when he reported for duty, HT 1, Side B, we find that the record shows that the appellant was not qualified for reassignment to a vacant position at the same grade or level as the position he last occupied.

¶18 Thus, we find that the appellant has shown that he is unable to render useful and efficient service in his position because of his bilateral knee injuries

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<sup>3</sup> The Postal Service also stated that the appellant did not apply for disability retirement prior to his removal. Contrary to the Postal Service's statement, however, the record shows that, prior to the incident that resulted in his removal, the appellant attempted to submit an application for disability retirement through his supervisor, who would not process the application. IAF, Tab 13, Exhibit A; HT, 1, Side A.

<sup>4</sup> As part of his effort to apply for disability retirement, the appellant completed an Agency Certification that appears in the record and is signed by him, not by a Postal Service official. IAF, Tab 3, Subtab IID at 23. The appellant's testimony that he completed the Agency Certification because his supervisor would not complete it is uncontroverted.

and that accommodation of his knee injuries in the Letter Carrier position is unreasonable. Accordingly, we find that the appellant has shown by preponderant evidence that he is entitled to a disability retirement annuity based on his bilateral knee conditions.<sup>5</sup>

### ORDER

¶19 We ORDER the Office of Personnel Management (OPM) to award the appellant disability retirement. OPM must complete this action no later than 20 days after the date of this decision.

¶20 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).

¶21 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).

¶22 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)).

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<sup>5</sup> Although the record contains some evidence relating to the appellant's depression, IAF, Tab 13, Exhibits V, W, X, the appellant did not apply for disability retirement on the basis of depression. We have not considered this evidence in finding that the appellant established that he is entitled to a disability retirement annuity.

**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 the United States Court of Appeals for the Federal Circuit to review this final decision. 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 your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. 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). You may read this law, as well as review the Board's regulations and other related material, at our website, <http://www.mspb.gov>. Additional information is available at the court's website, <http://fedcir.gov/contents.html>. 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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Bentley M. Roberts, Jr.  
Clerk of the Board

Washington, D.C.