FRANCISCO E. CHAVEZ
v.
OFFICE OF PERSONNEL MANAGEMENT

Docket No.
DA831L09003

OPINION AND ORDER

We here review an initial decision sustaining the denial by the Office of Personnel Management (OPM) of an employee's application for civil service disability retirement benefits. The case presents issues concerning the scope of our review, the burden and standard of proof, and the probative value of "objective" and other medical evidence in such appeals. We remand for readjudication by the presiding official under the standards set out herein.

I. BACKGROUND

Appellant Chavez applied to OPM in 1979 for disability retirement from his position as Forestry Technician, Department of Agriculture. He explained that starting three years earlier, he "began an intolerance to dust, smoke and changes in weather which has caused severe blockage of the nasal passage and nasal drainage, running eyes which interferes with my vision, headaches and dizziness." Appellant further stated that on some days he could not get out of bed due to his illness, that attacks were frequent and sudden, and that treatment and medication afforded no relief.

Accompanying his application was a report from C. Curtis Robinson, M.D., who had been treating appellant since June 1977. Doctor Robinson described appellant's symptoms as follows:

> Intolerance to dust and smoke causing severe blockage of the nose, running of the eyes to the point of not being able to see, headaches, post nasal drainage, and generalized discomfort. When these symptoms first started they were responsive to medication, however, in the last 1 1/2 years, the patient has become less and less responsive to a variety of medications, and he is finally to a point where very little helps.

The doctor's findings revealed a positive allergic workup for housedust, and his diagnosis was "Chronic vasomotor rhinitis, severe."[1] Doctor Robinson concluded that appellant was disabled for his position, and that the disability was expected to last for the rest of appellant's life.

[1] "Vasomotor rhinitis" is defined as "a form of nonallergic rhinitis [inflammation of the mucous membrane of the nose] in which transient changes in vascular tone and permeability with the same symptoms as in allergic rhinitis, are brought on by such stimuli as mild chilling, fatigue, anger, and anxiety." *Dorland's Illustrated Medical Dictionary* 1356 (25th ed. 1974).

In addition to that report, appellant submitted a February 1979 letter from Doctor Robinson which stated that appellant had become unresponsive to medications to the point that "very little helps him," and that an allergy specialist after examining appellant had ruled out allergy as to the cause of illness in July 1978, so that "nasal symptoms are secondary to physical factors in the environment such as dust, temperature changes, dryness, smoke, etc."

Also submitted with the application was a statement from appellant's supervisor, the agency's District Forest Ranger, which described appellant's duties as including the supervision of fire crews "engaged in various types of fire project work and fire suppression" and the conduct of "fuel inventories for timber sales and preattack plans" for fire suppression. Only a "small portion" of appellant's work was stated to involve office compilation of field data. The supervisor stated further that appellant had performed 16-1/2 years of civilian service, and that he was unable to perform any of his duties when an attack occurred.

OPM disallowed appellant's claim on the ground that all evidence submitted failed to establish that he had a disability severe enough to "prevent useful, efficient, and safe performance of the essential duties of the position from which" he was seeking retirement.

Appellant requested OPM to reconsider its determination, submitting a further letter from his supervisor supporting the request. The supervisor therein stated that in the agency's "considered administrative opinion" appellant was unable to "continue in any work assignment due to his physical condition," because all of the agency's field work subjected appellant to "smoke, dust, and pollens which cause or contribute to his extreme discomfort and inability to perform as required." Appellant's reactions to field work conditions were described as "watering of eyes, blockage of nasal passages, severe headaches, facial swelling, eyes almost completely swollen shut, some difficulty in breathing with an obvious shortness of breath, and groggy responsiveness."

Upon reconsideration, OPM adhered to its decision disallowing appellant's claim for disability retirement. Stating that a finding of disability "must be based on objective medical evidence of a disabling condition," OPM concluded that upon review of the available medical information, the statements of appellant's supervisor, and the requirements of appellant's position, OPM lacked "objective medical findings to support a sustained condition of total disablement for . . . [the] position held."

Appellant thereupon appealed to this Board's Dallas Field Office, pursuant to 5 U.S.C. 8347(d) and 5 C.F.R. 1201.3(a)(6). In support of his appeal he submitted a letter dated September 15, 1978, from Bruce H. Feldman, M.D., an allergy specialist who had previously examined and treated his condition. In that letter, which had not previously been submitted to OPM, the allergist reported to appellant's then supervisor

that appellant's nasal symptoms at that time were responding to medication and that appellant seemed to be motivated to continue working.

At appellant's request, the Board's presiding official conducted a hearing on the appeal. Appellant appeared, presented witnesses, and was represented by counsel. OPM chose not to appear or to be represented at the proceeding, relying upon its documentary administrative record. Appellant testified about his disability, described the responsibilities of his position, and recounted the symptoms of his condition as affected by his job. His supervisor corroborated appellant's description of his symptoms and further testified that appellant's condition affected his ability to perform the duties of his position, stating that while appellant may be able to perform his duties on "a hit or miss basis" he could not perform his prime function as a fire fighter. The supervisor also testified that there were no other positions available in which appellant could serve. Finally, the agency's employee relations specialist testified that appellant's condition rendered him unqualified to carry out his primary fire-fighter duties and that there were no other positions available for which appellant qualified. Since OPM had elected not to be represented at the hearing, none of appellant's witnesses were cross-examined and no rebuttal evidence was offered by OPM.

The presiding official found in an initial decision that the objective medical evidence did not demonstrate that appellant's condition was totally disabling, but that appellant's condition "essentially arises from the dust and/or smoke the appellant sporadically encounters in the performance of his duties." Therefore, the presiding official concluded, appellant was not totally disabled for useful and efficient service in his position and OPM's reconsideration decision was sustained.

The Board then reopened the appeal pursuant to 5 U.S.C. 7701(e)(1)(B), to address the issues of who must bear the burden of proof in a voluntary disability retirement appeal under 5 U.S.C. 8347(d), the standard of proof in such appeals, and the application of such standard to the evidence in this case. Both parties have submitted briefs, in which OPM also raises once again issues concerning the Board's scope of review which were previously considered in *Hein v. OPM*, 1 MSPB 396 (1980).

II. SCOPE OF REVIEW

OPM contends that the "finality clause" of 5 U.S.C. 8347(c) limits the Board's scope of review to that employed by the appellate courts, and precludes the Board from considering evidence which had not previously been presented to OPM. While both of those contentions have already been essentially resolved adversely to OPM's position, *see Hein, supra*, and *Toppi v. OPM*, 2 MSPB 360 (1980), we will address them in an effort to clarify the applicable legal principles once and for all.

Subchapter III of chapter 83, title 5, U.S. Code, relates to civil service retirement. Prior to enactment of the Civil Service Reform Act of 1978

(the Reform Act),[2] the administrative determination of retirement benefit claims by federal employees, including disability retirement, was vested exclusively in the Civil Service Commission. *See* 5 U.S.C. 8347 (1976). Since the Commission performed both administrative and appellate adjudicatory functions with respect to federal personnel matters, the statute referred to the Commission's role in both respects. Subsections (c) and (d) of Section 8347 thus provided:

> (c) The Commission shall determine questions of disability and dependency arising under this subchapter. The decisions of the Commission concerning these matters are final and conclusive and are not subject to review. The Commission may direct at any time such medical or other examinations as it considers necessary to determine the facts concerning disability or dependency of an individual receiving or applying for annuity under this subchapter. The Commission may suspend or deny annuity for failure to submit to examination.
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> (d) An administrative action or order affecting the rights or interests of an individual or of the United States under this subchapter may be appealed to the Commission under procedures prescribed by the Commission.

Under the Commission's regulations, the administrative determinations called for by subsection 8347 (c) were made by the Commission's Bureau of Retirement, Insurance, and Occupational Health (BRIOH). 5 C.F.R. 831.1204 (1978). However, if BRIOH disallowed an application, the affected applicant had a right of administrative appeal as provided by subsection 8347(d). The appellate adjudicatory functions called for by subsection 8347 (d) were performed by the Commission's Federal Employee Appeals Authority (FEAA), subject to reopening by the Commission's Appeals Review Board (ARB). 5 C.F.R. 831.1205 (1978) and 5 C.F.R. Part 772 (1978). The decisions of FEAA appeals officers, or of the ARB in reopened cases, including decisions reversing BRIOH determinations, were final and there was no further right of appeal. 5 C.F.R. 772.309, 772.310(g) (1978). Since both BRIOH and the appellate bodies FEAA and ARB were constituent units of the Commission, no question arose of any inconsistency between the "finality clause" of subsection 8347(c) and the appellate adjudicatory functions performed by the FEAA and ARB under subsection 8347(d).

The Commission's procedures provided for *de novo* review by the FEAA of BRIOH determinations. Appellants before the FEAA had a right to a hearing, to designate a representative, to produce and cross-examine witnesses, to introduce documentary and other evidence, to request that the hearing be open to the public, and to obtain a transcript of the hearing. 5 C.F.R. 772.307 (1978). Such FEAA review, including

[2]Pub. L. No. 95-454, 92 Stat. 1111 (1978).

specifically the right to a hearing, was expressly provided for appeals from BRIOH determinations in disability retirement cases. 5 C.F.R. 831.1205 (1978). Nothing in the Commission's regulations, or in the FEAA's normal practice, limited appellants before the FEAA to the documentary record considered by BRIOH. Indeed, since there was no provision for BRIOH to hear witnesses or to consider any evidence beyond the written reports and other documentary information appearing in the employee's file, *see* 5 C.F.R. 831.1204 (1978), the provision for a hearing with witnesses before the FEAA necessarily entitled the appellant to present for the FEAA's consideration evidence which had not been presented to BRIOH.

Thus, in the Commission's consistent administrative practice, the "finality clause" of subsection 8347(c) was construed solely as a limitation upon *judicial* review of Commission disability retirement determinations. It was not construed as limiting an appellant's right of *de novo* review upon appeal of BRIOH decisions to the FEAA. Consistently with that construction, the courts interpreted subsection 8347(c) to limit judicial review of Commission disability retirement determinations to whether there had been a substantial departure from important procedural rights, a misconstruction of governing legislation, or some like error going to the heart of the administrative determination.[3] Despite their aversion to reviewing the Commission's determinations, the courts did review the records of the administrative proceedings to ascertain the existence of some evidence to support the Commission's disability determinations. The courts equated any harmful misjudgment by the Commission in evaluating the evidence to "an error going to the heart of the administrative determination."[4] The courts made it plain, however, that they could not weigh the evidence or even apply the conventional "substantial evidence" standard for review of the Commission's disability determinations.[5]

The only change made by the Reform Act in subsections 8347(c) and (d) was to substitute OPM for the Commission in subsection (c) and this

[3]*See Fitzgerald v. United States*, No. 26–79 at 5 (Ct. Cl. May 28, 1980); *Polos v. United States*, 621 F.2d 385, 391 n. 9 (Ct. Cl.1980); *Fancher v. United States*, 588 F.2d 803, 806 (Ct. Cl. 1978); *McFarland v. United States*, 517 F.2d 938, 942–43 (Ct. Cl. 1975), *cert. denied*, 423 U.S. 1049 (1976); *Lech v. United States*, 409 F.2d 252, 255 (Ct. Cl. 1969); *McGlasson v. United States*, 397 F.2d 303, 307 (Ct. Cl. 1968); *Scroggins v. United States*, 397 F.2d 295, 297 (Ct. Cl.), *cert. denied*, 393 U.S. 952 (1968); *Gaines v. United States*, 158 Ct. Cl. 497, 502, *cert. denied*, 371 U.S. 936 (1962); *Smith v. Dulles*, 236 F.2d 739, 742 (D.C. Cir.), *cert. denied*, 352 U.S. 955 (1956); *Matricciana v. Hampton*, 416 F. Supp. 288, 289 (D. Md. 1976); *Cantrell v. United States*, 240 F. Supp. 851, 853 (W.D.S.C. 1965), *aff'd*, 356 F.2d 915 (4th Cir. 1966).

[4]*See Fancher v. United States*, 588 F.2d 803, 807 (Ct. Cl. 1978); *McGlasson v. United States*, 397 F.2d 303, 309 (Ct. Cl. 1968); *Scroggins v. United States*, 397 F.2d 295, 299–300 (Ct. Cl.), *cert. denied*, 393 U.S. 952 (1968).

[5]*See, e.g., Scroggins, v. United States*, 397 F.2d 295, 298 (Ct. Cl.), *cert. denied*, 393 U.S. 952 (1968).

Board for the Commission in subsection (d).[6] Both of those changes were described by the Congress as mere technical amendments to conform those subsections with the substantive provisions of the Reform Act, which bifurcated the administrative and appellate functions of the former Commission and devolved them upon OPM and this Board respectively.[7] Neither the Reform Act nor its legislative history supports the proposition that the substitution of this Board as the administrative appellate authority which adjudicates retirement-related appeals under subsection 8347(d) was designed to restrict the administrative appeal rights theretofore accorded the parties in retirement-related claims. A congressional intent to limit the Board's administrative appellate review of OPM's determinations of retirement-related claims may not be gleaned from these technical amendments.

On the contrary, a clearly opposite congressional intent is manifested by the broad grant of *de novo* review authority to the Board provided by 5 U.S.C. 7701, as amended by the Reform Act, which applies expressly and unequivocally to all matters which are appealable to the Board "under any law, rule, or regulation."[8] Since subsection 8347(d) clearly is a "law" under which applicants in disability retirement cases may submit an appeal to the Board, such appeals are necessarily governed by Section 7701. We so held in *Hein, supra,* and we now reaffirm that decision. The Reform Act contains no provision for Board consideration of "appeals," whether authorized under that act or under some

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[6]Sec. 906(a)(3), (9) of the Reform Act, Pub. L. No. 95-454, 92 Stat. 1224-25.

[7]*See H.R. Rep. No. 95-1717, 95th Cong., 2d Sess. 122-23 (1978); S. Rep. No. 95-969, 95th Cong., 2d Sess. 116 (1978); H.R. Rep. No. 95-1403, 95th Cong., 2d Sess. 88 (1978).*

[8]5 U.S.C. 7701(a) and (b) provide:

> (a) An employee, or applicant for employment may submit an appeal to the Merit Systems Protection Board under any law, rule or regulation. An appellant shall have the right—
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> (1) to a hearing for which a transcript will be kept; and
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> (2) to represented by an attorney orother representative.
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> Appeals shall be processed in accordance with regulations prescribed by the Board.
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> (b) The Board may hear any case appealed to it or may refer the case to an administrative law judge appointed under section 3105 of this title or other employee of the Board designated by the Board to hear such cases, except that in any case involving a removal from the service, the case shall be heard by the Board, an employee experienced in hearing appeals, or an administrative law judge. The Board, administrative law judge, or other employee (as the case may be) shall make a decision after receipt of the written representations of the parties to the appeal and after opportunity for a hearing under subsection (a)(1) of this section. A copy of the decision shall be furnished to each party to the appeal and to the Office of Personnel Management.

See also 5 U.S.C. 1205(a)(1), which states:

> (a) The Merit Systems Protection Board shall (1) hear, adjudicate, or provide for the hearing or adjudication, of all matters within the jurisdiction of the Board under this title, section 2023 of title 38, or any other law, rule, regulation, and, subject to otherwise applicable provisions of law, take final action on any such matter. . . .

other statutory or regulatory authority, which are not to be governed by Section 7701.[9]

OPM asserts that in this case the Board's presiding official erred in considering the medical report by Dr. Feldman, the allergy specialist, because that report had not been submitted to OPM when appellant applied for disability retirement. Under its theory that *de novo* review by the Board is inconsistent with the finality clause of Section 8347(c), OPM urges the Board to "direct its Field Offices in future disability retirement appeals to refuse to admit any *de novo* evidence—particulary medical evidence—which had not been submitted to OPM with the application." However, the Board has consistently rejected the theory that its scope of review is limited to that of the appellate courts or to consideration of the administrative record established before the agency,[10] and we reject it here. The limitation for which OPM contends would render nugatory the right of appellants to a hearing pursuant to 5 U.S.C. 7701(a) and 1205(a)(1), and our implementing regulations at 5 C.F.R. 1201.24(c). It would also be inconsistent with 5 U.S.C. 8347(c) and (d) as consistently construed by the former Civil Service Commission,[11] and as re-enacted without substantive change by the Reform Act.[12]

We conclude for these reasons that in adjudicating an appeal to the Board under 5 U.S.C. 8347(d) from an OPM disability retirement determination, the Board is not limited to a review of the record before OPM. We are mandated by 5 U.S.C. 7701(a) and (b) to conduct a hearing if requested by the appellant, and to consider *de novo* all the relevant evidence presented by both parties, whether offered at a hearing or

[9]In a recent amendment to 5 U.S.C. 8347(d), Pub. L. No. 96-500 (Dec. 5, 1980), Congress eliminated the judicial review limitation of section 8347(c) in those cases where OPM approves an *agency-initiated* application based on an employee's alleged mental condition. *See* S. Rep. No. 96-1004, 96th Cong., 2d Sess. 1 (1980). Of course, the subject of this amendment is inapposite to the circumstances of the instant case in which the employee is himself seeking disability retirement benefits. The effect of this amendment is not inconsistent with our determination that the rights of appellants before this Board under 5 U.S.C. 7701 extend to *all* disability retirement appeals. While 5 U.S.C. 7703 generally authorizes judicial review of our final decisions, Congress sought by this amendment to eliminate, for agency-initiated psychiatric disability retirement applications, what it envisioned as a specific statutory bar to judicial review which otherwise existed for retirement appeals under the finality clause of 5 U.S.C. 8347(c). Congress feared the improper use by agencies of fitness-for-duty examinations leading to the forced imposition upon employees of disability retirement based upon suspected or alleged mental disorders. *See* S. Rep. No. 96-1004, *supra*, at 2; H. Rep. No. 96-1080, 96th Cong., 2d Sess. 2–5 (1980); H. Rep. No. 95-20, 95th Cong., 2d Sess. (1978). We have expressed our concern in this area as well. *See Brink v. Veterans Administration*, 4 MSPB 419, 421 (1980). However, nothing that we have decided in *Hein* or in this case purports to construe the applicability of 5 U.S.C. 7703.

[10]*See Douglas v. Veterans Administration*, 5 MSPB 313, 315-318 (1981); *Parker v. Defense Logistics Agency*, 1 MSPB 489, 497–99 (1980); *Toppi v. OPM*, *supra*.

[11]*See* discussion *ante*, 317-318.

[12]*See* 2A Sands, Sutherland Statutory Construction § 49.09 (4th ed. 1973).

transmitted as part of the administrative record. Nothing in the law or in our regulations restricts OPM to reliance upon its documentary administrative record, or withholds from OPM a full and fair opportunity to cross-examine or otherwise rebut appellant's evidence presented at the Board's hearing.[13] We therefore find no merit to OPM's contention that the presiding official erred in admitting and considering additional medical evidence during the adjudication of the appeal below.[14]

III. BURDEN AND STANDARD OF PROOF

Our conclusion that Section 7701 applies to disability retirement appeals does not, however, necessarily resolve the issue of how burdens of proof should be allocated in such appeals. While 7701(c) specifies standards of proof, it does not expressly mention burdens of proof.[15] Moreover, even when a statute expressly specifies who bears "the burden of proof," the burden of coming forward with evidence may differ from the burden of ultimate persuasion. *Environmental Defense Fund, Inc. v. EPA*, 548 F. 2d 998, 1004–05, 1012–13 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 925 (1977). We therefore look first to the legislative history of 7701(c) for further guidance.

The legislative history discloses plainly that in enacting 7701(c), Congress addressed burdens and standards of proof only in the context of agency-initiated actions *against* employees (or applicants), as in mis-

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[13]Nor does anything in the law or in our regulations prevent OPM from reconsidering its disallowance of an appellant's application, and possibly settling the case, in light of the evidence presented to the Board. *See Toppi v. OPM, supra.* While OPM has apparently restricted itself from doing so by its own self-imposed limitation, *see* 5 C.F.R. 831.110(c), that limitation can be removed at OPM's discretion. *See* 5 U.S.C. 8347(a).

[14]The additional evidence in this case related to the same medical condition on which appellant had based his application to OPM. By contrast, since we have jurisdiction under 5 U.S.C. 8347(d) only to consider matters "appealed" to us, we do not consider in such cases evidence relating to a totally different or additional medical condition which was never the subject of an appellant's application to OPM. *See Scovens v. OPM*, 5 MSPB 333 (1981); *Hudson v. OPM*, 1 MSPB 1 (1980).

[15]Section 7701(c) provides:

> (c)(1) Subject to paragraph (2) of this subsection, the decision of an agency shall be sustained under subsection (b) only if the agency's decision—
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> (A) in the case of an action based on unacceptable performance described in section 4303 of this title, is supported by substantial evidence, or
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> (B) in any other case, is supported by a preponderance of the evidence.
>
> (2) Notwithstanding paragraph (1), the agency's decision may not be sustained under subsection (b) of this section if the employee or applicant for employment—
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> (A) shows harmful error in the application of the agency's procedures in arriving at such decision;
>
> (B) shows that the decision was based on any prohibited personnel practice described in arriving at such decision; or
>
> (C) shows that the decision was not in accordance with law.

conduct or performance-related cases.[16] As we pointed out in *Parker v. Defense Logistics Agency, supra,* 1 MSPB at 503:

> The attention of the legislators throughout their consideration of the standards governing appeals to the Board was focused overwhelmingly on removal actions, whether based on performance or other reasons, with scant attention to the myriad other personnel actions appealable to the Board.

The legislative history contains no suggestion whatsoever that Congress intended to allocate the burden of persuasion to OPM in cases where the employee voluntarily initiates the action because he or she is seeking to establish entitlement to a benefit, as in employee applications for disability retirement.

The absence of any indicia of such a legislative intention is all the more telling in light of the clear and long-established practice of the Civil Service Commission to place the burden of persuasion upon the applicant in such appeals. Both the FEAA and the ARB consistently placed the burden on the appellant to prove by a preponderance of the evidence his or her entitlement to disability retirement.[17] A typical application of that burden and standard is illustrated by the ARB's decision in No. RB831L50132 (April 22, 1975), which stated:

> Upon review of the medical evidence summarized above, the Board notes that none of the reports unqualifiedly found you totally disabled to perform the duties of your position. (Dr. Willer's statement was not a formal report of examination and diagnosis.) The findings in those reports indicated either that you were partially disabled or that you were temporarily disabled, pending rehabilitative therapy. Neither of those conditions constitutes total disability to continue performing the functions of your position. With due weight accorded to Dr. Willer's opinion, it is not sufficient to counterbalance the medical evidence which does not find you totally disabled. *Therefore, the Board concurs in the opinion of the Field Office that the preponderance of the evidence does not indicate that you are totally disabled for useful and efficient service in your position.* (Emphasis supplied.)

Allocation of the burden of persuasion to OPM would thus involve a complete reversal of the burden as consistently assigned under the former Commission's well-established practice, which was presumably known to Congress. It would also conflict with the generally accepted rule of

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[16] *See* H.R. Conf. Rep. No. 95-1717, 95th Cong., 2d Sess. 138–39 (1978); S. Rep. No. 95-969, 95th Cong., 2d Sess. 10, 51, 53–55 (1978); H.R. Rep. No. 95-1403, 95th Cong., 2d Sess. 7, 22 (1978).

[17] *See, e.g.*, No. RB831L60033 (ARB Nov. 17, 1975); No. RB831L50145 (ARB June 3, 1975); No. RB831L50144 (ARB June 2, 1975); No. RB831L50141 (ARB May 27, 1975); No. RB831L50133 (ARB May 1,1975); No. AT831L50058 (FEAA Nov. 13, 1974); No. BN831L50023 (FEAA Aug. 27, 1974).

law that the proponent of an action bears the burden of persuasion.[18]It is well established that one who asserts entitlement to a statutory benefit bears the burden of demonstrating that he or she meets the statutory criteria for such entitlement.[19]Here, such a burden appropriately reflects the fact that the proponent of a voluntary disability retirement application normally possesses or has readier access to the evidence relating to his or her own medical condition,[20]and further that it is usually impractical for an opposing party to prove a negative—in this instance, for OPM to prove that an applicant is not disabled.

If Congress had intended such a significant transformation as a shift in the ultimate burdens of the parties in appeals before the Board of employee-initiated applications for voluntary disability retirement, surely there would be some indication of this intent in the legislative history of the Reform Act. In the absence of any such indication, however, and in view of the clear Congressional intent to effect only technical and conforming changes in Section 8347 under which the burden of persuasion had long been allocated to voluntary retirement applicants in accordance with generally accepted principles of law, we conclude that Section 7701(c) does not alter the assignment to applicants of the ultimate burden of persuasion in such cases.[21]This conclusion is also consistent with the manifest intention of Congress in enacting Section 7701(c) to place the burden of proof on the party initiating the action, as in actions against employees based on misconduct or performance.

Since it is OPM's decision that we review in such cases, OPM of course remains obliged to come forward with evidence and an explanation demonstrating the basis on which it reached its determination.[22]Indeed, as to some material issues OPM or the employing agency may be in a better position than the applicant to adduce at least some of the relevant evidence, *e.g.*, total creditable service or availability of other positions of the same grade or class in which the applicant might perform useful and

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[18]*See, e.g., In re Frazier*, 1 MSPB 159, 177–78 (1979); McCormick, *Evidence* 355 (2d ed. 1972); 4 Mezines, Stein, Gruff, *Administrative Law*, § 24.03 (1979); Administrative Procedure Act, 5 U.S.C. 556(d); 3 Davis, *Administrative Law Treatise* 256–62 (2d ed. 1980).

[19]*E.g., Alton Railroad Co. v. United States*, 315 U.S. 15, 25 (1942); *NLRB v. Mastro Plastics Corp.*, 354 F.2d 170, 176 (2d Cir. 1965), *cert. denied*, 384 U.S. 972 (1966); *Litwaitis v. Mathews*, 427 F. Supp. 458, 460 (W.D. Pa. 1976); *Ryan v. Fleming*, 187 F. Supp. 655, 656 (D. Mont. 1960); *Normet v. Hobby*, 124 F. Supp. 389 (N.D. Ala. 1953).

[20]*Cf. Losure v. ICC*, 2 MSPB 361, 366 n. 6 (1980).

[21]*Cf. Douglas v. Veterans Administration*, 5 MSPB 313, 326 (1981).

[22]*See* 5 C.F.R. 1201.25, 1201.63. *See also Kerner v. Flemming*, 283 F.2d 916, 921–22 (2d Cir. 1960)("[A]n applicant [for Social Security disability benefits] has the ultimate burden of persuasion . . . However, it does not follow that the court is bound to sustain a denial of disability benefits where the applicant has raised a serious question and the evidence affords no sufficient basis for the Secretary's negative answer").

efficient service.[23]We hold only that the ultimate burden of persuasion is on the applicant "in the sense of answering the question of who wins if all the evidence is inadequate or unconvincing."[24]

The standard of proof in such cases, under 7701(c) as under the former Civil Service Commission's consistent practice, is the preponderance of the evidence. This is also the standard most commonly applied in agency proceedings and generally best suited to the type of cases adjudicated by the Board.[25]Accordingly, we conclude that it is the employee who bears the burden of persuasion by a preponderance of the evidence in an appeal before the Board from an OPM decision on a voluntarily-initiated employee application for disability retirement.

IV. PROBATIVE VALUE OF "OBJECTIVE" AND OTHER EVIDENCE OF DISABILITY

OPM and our presiding official found that appellant's application could not be allowed because the "objective" medical evidence presented by appellant did not support a finding of disability.[26]Congress has specified, in 5 U.S.C. 8331(6), that for purposes of such determinations the following definition of "disabled" is to be utilized:

> (6) "disabled" and "disability" means totally disabled or total disability, respectively, for useful and efficient service in the grade or class of position last occupied by the employee or member because of disease or injury not due to vicious habits, intemperance, or willful misconduct on his part within 5 years before becoming so disabled.[27]

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[23]*See Meneses v. Secretary of HEW*, 442 F.2d 803, 806–08 (D.C. Cir. 1971) (when claimant shows disability for former position, burden shifts to Government to come forward with evidence of alternative employment opportunities).

[24]Davis, 3 *Administrative Law Treatise* § 16.9 at 258 (2d ed. 1980).

[25] *See e.g., Polcover v. Secretary of the Treasury*, 477 F.2d 1223 (D.C. Cir. 1973), *cert, denied*, 414 U.S. 1001 (1973); *In re Frazier*, 1 MSPB 159, 178 (1979).

[26]"Objective" medical facts have been defined as "the clinical findings of treating or examining physicians divorced from their expert judgments or opinion as to the significance of those clinical findings." *Underwood v. Ribicoff*, 298 F.2d 850, 851 (4th Cir. 1962). *See also* S. Horovitz, *Injury and Death under Workmen's Compensation Laws* (1944), which sets forth the following definitions of objective and subjective medical evidence:

> Pathology that can be seen or felt, or proved to exist through scientific deduction, may be termed an objective finding. For example, the clinical signs of a fractured leg would be quite obvious and fully demonstrable, while pain in the muscle of the cervical spine, supported by the patient pointing to the areas of tenderness, would be strictly subjective.

[27]OPM has repeated the statutory language in setting forth, at FPM Supp. 831-1, subch. S10-a (May 15, 1978), the following criteria which an applicant for disability retirement benefits must establish on administrative determination before OPM:

> a. Requirements. An employee under the retirement system must meet all of the following conditions to be eligible for an immediate annuity because of disability retirement:
>
> (1) He or she must have completed at least five years of civilian service.

Given the limitation upon judicial review contained in the "finality clause" of Section 8347(c), the courts have not had occasion to determine what types of evidence have substantial probative value in support of such administrative determinations.[28] But some indication of legislative intent appears from the fact that Congress has provided since 1920 for determinations of such disability to be substantiated by "medical" examination,[29] a requirement which as subsequently amended is currently embodied in Section 8347(c) authorizing OPM to "direct at any time such medical or other examinations as it considers necessary to determine the facts concerning disability." However, the congressional intent that a claim for disability retirement be supported by medical examination does not lead logically to a conclusion that a determination of disability must always be established by "objective" medical evidence. Indeed, OPM has recognized that an employee may be totally disabled within the meaning of Section 8331(6) when the employee's illness is exclusively "mental or emotional,"[30] a condition not usually ascertainable by "objective" clinical evidence divorced from expert judgment or opinion. Nor did the former ARB construe 8331(6) as imposing any such requirement.[31]

The purpose of a medical examination is to reach an accurate and comprehensive diagnosis. The medical history and the physical examination are needed together to arrive at that diagnosis:

> Ordinarily, the steps involved in arriving at a definitive diagnosis include an evaluation of facts derived from the history or an an-

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(2) He or she must, while employed subject to the retirement system, have become totally disabled for useful and efficient service in his or her position or any other position of the same grade or class.

(3) The disease or injury which caused the disability must not be the result of vicious habits, intemperance, or willful misconduct on his or her part within the 5-year period immediately prior to becoming disabled.

[28] *See* text at notes 3–5, *supra*.

[29] Pub. L. No. 215, 41 Stat. 614 (1920), Sec. 5, provided that "no employee shall be retired under the provisions of this section until examined by a medical officer of the United States or a duly qualified physician or surgeon or board of physicians or surgeons designated by the Commissioner of Pensions for that purpose and found to be disabled in the degree and in the manner specified herein." *See* S. Rep. No. 99, 66th Cong., 1st Sess. 5 (1919); H.R. Rep. No. 120, 66th Cong., 1st Sess. 3 (1919).

[30] 5 C.F.R. 831.1203.

[31] While the ARB sometimes sustained the disallowance of disability benefits because of the absence of "objective" medical evidence, in other cases the ARB did not require such evidence. Frequently the ARB declared that it "considers [all] the medical evidence of record" or that a disability determination must be based "at least in part" on objective medical evidence. *E.g.*, No. RB831L60052 (ARB March 26, 1976); No. RB831L50124 (ARB April 11, 1975). In practice the ARB often gave probative weight to medical opinions not based on "objective" clinical findings and to evidence of an appellant's symptoms presented by fellow employees or supervisors. *E.g.*, No. RB831L60055 (ARB April 22, 1976); No. RB831L60016 (ARB Aug. 14, 1975). The ARB decisions as a whole, to the extent of any consistency, reflect only that disability determinations must be substantiated by medical evidence, a conclusion which we agree is dictated by Section 8347(c).

amnesis *and* the physical and laboratory examinations of the patient.[32]

The first step to diagnosis usually consists of the physician questioning the patient about his subjective symptoms via the medical history and the second step to diagnosis usually consists of the physician's clinical or objective finding arrived at via the physical examination:

> Subjective symptoms are a valuable part of a patient's medical history, because they assist the physican in making his diagnosis. In making his diagnosis, the physician also relies on the clinical findings of a physical examination and on laboratory tests. In performing a physical examination, the physician looks for signs that provide objective evidence of disease, such as elevated blood pressure or low blood pressure.[33]

Hence, a medical examination includes both a medical history which consists of testimony of subjective symptoms and a physical examination which consists of a report of objective findings by way of observation and clinical and laboratory tests. We do not therefore believe that anything in Sections 8331(6), 8347, or 7701 requires us to conclude that a disability retirement claim on appeal before us must be established solely by objective medical evidence.[34]

We find strong support for our conclusion in the court's interpretation of the even more stringent disability insurance benefits provisions of the Social Security Act, 42 U.S.C. 423(d), which provides in pertinent part:

> (1) The term "disability" means: (A) inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months. . . .
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> * * * *
>
> (2) For purposes of paragraph (1)-(A) an individual . . . shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age,

[32]Mettler, *The Medical Sourcebook: A Reference Book for Legal, Legislative and Administrative Personnel* (1st ed. 1959) (emphasis supplied).

[33]Moss & Wagman, *The Complete Illustrated Book of Better Health* (1973). *See also* MacBryde, *Signs and Symptoms, Applied Pathologic, Physiology and Clinical Interpretation* (5th ed. 1970) ("The physician who fails to utilize opportunities to consider and evaluate subjective aspects of the illness and confines his efforts unduly to objective data is not studying the patient as a whole and may be misled into inaccurate or incomplete conclusions and solutions").

[34]OPM is authorized by Section 8347(a) to prescribe "such regulations as are necessary and proper" to implement subchapter III of Chapter 83, title 5, but no such regulation prescribes that disability determinations must always be established by "objective" medical evidence. *Cf.* 5 U.S.C. 1103(b) and 1105, as amended by the Reform Act.

education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work.

* * * *

(3) For purposes of this subsection, a "physical or mental impairment" is an impairment that results from anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques.

* * * *

(5) An individual shall not be considered to be under a disability unless he furnishes such medical and other evidence of the existence thereof as the Secretary [of Health and Human Services] may require.

Under these Social Security Act "disability" provisions, a finding of "disability" under Section 423(d)(1)(A) requires that a claimant be incapable of engaging in any substantial gainful employment whatsoever, whereas Section 8331(6) only requires that an applicant for civil service disability retirement benefits be "disabled" for useful and efficient service in the grade or class of position last occupied. *Cerrano v. Fleishman*, 339 F.2d 929, 931 (2d Cir. 1964), *cert. denied*, 382 U.S. 855 (1965). While both Section 423 (d)(5) and Section 8347(c) direct the claimant for disability benefits to present medical evidence or submit to medical examination in support of the claim, Section 423(d)(3) requires further that the claimant's "physical or mental impairment" result from "anatomical, physiological, or psychological abnormalities which are *demonstrable by medically acceptable clinical and laboratory diagnostic techniques*" (emphasis supplied).

Nevertheless, the federal courts have held that Section 423(d) does not always require objective medical evidence in proof of disability.[35] A recent case reflecting this interpretation is *Marcus v. Califano*, 615 F. 2d 23, 27–28 (2d Cir. 1979):

> It has been established, both in this Circuit and elsewhere, that subjective pain may serve as the basis for establishing disability, *even if* such pain is unaccompanied by positive clinical findings or other "objective medical evidence." (Emphasis supplied).

The Court then quoted with approval the statement of the Fifth Circuit in *Page v. Celebrezze*, 311 F.2d 757, 762-63 (1963):

[35]*See, e.g. Ragsdale v. Secretary, Department of Health, Education & Welfare*, 623 F.2d 528, 530 (8th Cir. 1980); *Rossi v. Califano*, 602 F.2d 55, 58 (3d Cir. 1979); *Day v. Weinberger*, 522 F.2d 1154, 1156 (9th Cir. 1975); *Gualtney v. Weinberger*, 505 F.2d 943 (5th Cir. 1974); *Stark v. Weinberger*, 497 F.2d 1092, 1097 (7th Cir. 1974); *Moore v. Finch*, 418 F.2d 1224, 1226 (4th Cir. 1969); *Prewitt v. Gardner*, 389 F.2d 993, 994 (5th Cir. 1968); *Branham v. Gardner*, 383 F.2d 614, 627 (6th Cir. 1967).

> If pain is real to the patient and as such results in that person being physically unable to engage in any gainful occupation suited to his training and experience, and this results from "any medically determinable physical or mental impairment," the disability entitles the person to the statutory benefit even though the cause of such pain cannot be demonstrated by "objective clinical and laboratory findings."

The courts have identified the elements of proof to be considered, together and in combination with each other, in assessing a claim for social security disability benefits. These include (1) the objective medical facts or clinical evidence of the treating or examining physicians, (2) the diagnoses and medical opinions of the treating and examining physicians based on such objective findings, and (3) the subjective evidence of pain and disability testified to by the claimant, co-workers, relatives, neighbors and others who have observed him or her.[36] Although objective medical evidence establishing disability is not always necessary, the courts agree that medical opinion evidence of impairment must support the claim for benefits.[37] This is not to say, however, that the courts consider the absence of objective medical evidence in a claim for social security benefits as insignificant, especially where the alleged impairment or disease is readily susceptible of medical verification.[38]

The interrelationship of the elements of proof, and the difference between subsidiary issues of medical fact and the ultimate issue of qualification for disability benefits, have been well described by the Fourth Circuit in *Underwood v. Ribicoff*, 298 F.2d 850, 851–52 (1962). Observing that "a recitation of objective, clinical findings will seldom show, without more, the over-all effect of [any clinically determinable] impairments on a particular individual," the court pointed out that the "expert medical opinion of treating or examining physicians on these subsidiary questions of fact will in most cases be essential in determining with respect to a particular individual the severity of an objectively determinable physical impairment." Cautioning, however, that the ultimate fact in issue is not to be resolved solely on the basis of medical opinion evidence, the Court emphasized that such expert diagnostic opinion and evidence alone "may not enable a fact finder properly to determine whether or not such limitation of capacity amounts to disability within the terms of the Act."

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[36] *See, e.g. Singletary v. Secretary of Health, Education & Welfare*, No. 970 at 2 (2d Cir. May 13, 1980); *Strickland v. Harris*, 615 F.2d 1103, 1106 (5th Cir. 1980); *Johnson v. Weinberger*, 525 F.2d 403, 407 (7th Cir. 1975); *Dillon v. Celebreeze*, 345 F.2d 753 (4th Cir. 1975). A fourth factor relates to possible alternative employment opportunities, for which the standards of section 8331(6) and the Social Security Act differ.

[37] *See Rossi v. Califano*, 602 F.2d 55, 58 (3d Cir. 1979); *Northcutt v. Califano*, 581 F.2d 164, 166 (8th Cir. 1978); *Stark v. Weinberger*, 497 F.2d 1092, 1097 (7th Cir. 1974); *Stille v. Weinberger*, 499 F.2d 244, 247 (6th Cir. 1974).

[38] *Valentino v. Richardson* 468 F.2d 588 (10th Cir. 1972); *Johnson v. Finch*, 310 F. Sup. 1235 (D. Kan. 1970), *aff'd*, 437 F.2d 1321 (10th Cir. 1971).

It then "becomes necessary to consider subjective testimony to determine accurately the effect of these impairments upon the Claimant." Such subjective evidence

> may be entitled to great weight on the matter of disability, especially where such evidence is uncontradicted in the record. Even where medical opinion is very strong in favor of disability, this subjective evidence will always be a significant source of corroboration.

Objective medical evidence, then, is but one of the elements of proof to be considered, along with expert opinion evidence and subjective evidence of pain and inability to work, in determining the ultimate fact of disability *vel non*. Testimony by the applicant of subjective pain and inability to work, particularly where it is supported by competent medical evidence, must be considered seriously.[39] When objective medical evidence and expert diagnostic opinion are not adequate to determine whether the applicant's impairment has a disabling effect, such subjective evidence may be entitled to great weight if uncontradicted in the record and consistent with the objective clinical findings. *Underwood v. Ribicoff, supra.*

The probative value of such evidence will of course depend in part upon the credibility attached to it by the fact finder, just as the probative value of medical opinions may depend in part upon such factors as whether the opinion was based on a medical examination, whether the opinion provides a reasoned explanation for its findings as distinct from mere conclusory assertions, the qualifications of the expert rendering the opinion, and the extent and duration of the expert's familiarity with or treatment of the applicant's condition.[40] The ultimate determination must be based upon the probative value of all the evidence taking into account each of the elements of proof—objective clinical findings, diagnoses and expert medical opinions, and subjective evidence of pain and disability, together with all evidence relating to the effect of the applicant's con-

[39]*See Dobrowolsky v. Califano*, 606 F.2d 403, 409 (3d Cir. 1979); *Thorne v. Weinberger*, 530 F.2d 580, 583 (4th Cir. 1976); *Baerga v. Richardson*, 500 F.2d 309, 312 (3d Cir. 1974), *cert. denied*, 420 U.S. 931 (1975). Where the claimant has a continuous and lengthy work record with the same employer, the claimant's testimony as to his or her capabilities is entitled to substantial weight. *See Dobrowolsky v. Califano, supra.*

[40]*See, e.g. Hephner v. Mathews*, 574 F.2d 359, 362 (6th Cir. 1978); *Martin v. Secretary of HEW*, 492 F.2d 905, 907–08 (4th Cir. 1974); *Landers v. Weinberger*, 490 F.2d 1187 (8th Cir. 1974); *Brown v. Richardson*, 468 F.2d 1003 (1st Cir. 1972); *Vaughn v. Finch*, 431 F.2d 997, 998 (6th Cir. 1970). Since it is the province of the fact finder to choose which expert to believe when there is a conflict in the opinions of experts, *Swearingen v. Sears, Roebuck & Co.*, 376 F.2d 637, 640 (10th Cir. 1969), such factors assume all the greater significance in weighing the probative value of expert opinions which are presented in the form of hearsay reports without opportunity for cross-examination. We have reviewed generally the factors to be considered in assessing the probative value of hearsay evidence, particularly documentary evidence such as an administrative record, in *Borninkhof v. Department of Justice*, 5 MSPB 150 (1981).

dition upon his or her ability to perform in the grade or class of position last occupied. Section 8331(6) imposes no requirement that a disability determination must be based on any single one of these elements of proof.[41] Therefore, our presiding official erred in assuming that appellant's claim for disability retirement benefits could not be granted if it was not proven by objective medical evidence.

IV. CONCLUSION

Appellant's treating physician of several years made findings on the basis of objective medical evidence and submitted his expert opinion of the causes and effects of appellant's condition. These findings were entitled to greater weight than the presiding official appears to have given them.[42] Similarly, the testimony of appellant and his supervisor as to the effects of appellant's condition was entitled to more serious consideration than it appears to have received.[43]

OPM's reconsideration decision did not articulate any reason or basis for denying appellant's disability retirement claim, other than the alleged lack of objective medical evidence establishing disability. The reconsideration decision did not find whether or not appellant was suffering from a "disease or injury" within the meaning of section 8331(6). Nor did OPM evaluate on record its findings as to appellant's medical condition in comparison with the official description of appellant's position to determine whether he was capable of useful and efficient service as a Forestry Technician. *Cf. Kerner v. Flemming*, quoted at note 22, *supra*.

These factors, together with our conclusion that it was error to consider only the so-called "objective" medical evidence, militate in favor of appellant's claim. On the other hand, the burden of persuasion which we have held must be borne by appellant may make his position more difficult on this record. Since we cannot tell what result the presiding official would have reached if the standards enunciated herein had been applied, particularly in view of the importance of the presiding official's assessment of witness credibility relating to appellant's subjective symptoms, *cf. Weaver v. Department of the Navy*, 2 MSPB 297, 298–99 (1980), a remand is necessary.

Upon remand, the presiding official should allow the parties a reasonable opportunity to supplement the existing record, including holding a new hearing if he finds it appropriate, before making a new adjudication on the merits.

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[41]Even under the limited scope of judicial review accorded civil service disability retirement decisions, we believe that OPM's requirement that disability be established by objective medical evidence constitutes "a misconstruction of governing legislation" or "some error going to the heart of the administrative determination." *See* text and cases cited at note 3, *supra*.

[42]*See* text and authorities cited at note 40, *supra*.

[43]*See* text and authorities cited at note 39, *supra*.

Accordingly, the initial decision is hereby REVERSED and the case is REMANDED to the presiding official for readjudication consistent with this opinion.

For the Board:

RONALD P. WERTHEIM.

May 28, 1981