UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

ELMER R. DYER, Appellant, v. OFFICE OF PERSONNEL MANAGEMENT, Agency. (CSA 2 782 556)	DOCKET NUMBER AT831E8810579 DATE: JUL 24 1989

Judson K. Vaughn, National Association of Letter Carriers, Atlanta, Georgia, for the appellant.

Pierre A. Pelmont, Washington, D.C., for the agency.

BEFORE

Daniel R. Levinson, Chairman
Maria L. Johnson, Vice Chairman
Samuel W. Bogley, Member

OPINION AND ORDER

The appellant has petitioned for review of the initial decision issued October 21, 1988, which sustained the Office of Personnel Management's (OPM) reconsideration decision which affirmed its earlier denial of his application for disability retirement. For the reasons discussed in this Opinion and Order, the petition is GRANTED. 5 U.S.C. § 7701(e)(1). The initial decision is REVERSED and OPM's reconsideration decision is NOT SUSTAINED.

BACKGROUND

On December 1, 1986, the appellant, a City Letter Carrier for the U.S. Postal Service, filed an application for disability retirement benefits which was denied by OPM.[1] *See* Initial Appeal File (IAF), Agency File, Tab 5, Sub-tab II(D). In his application, the appellant claimed that he has severe back pain which resulted from an automobile injury which occurred in May of 1962, and noted that he is a recovering alcoholic. *Id.*

By letter dated September 15, 1987, OPM denied the appellant's application. *Id.* at Sub-tab II(C). The appellant requested reconsideration of OPM's initial determination, and in its reconsideration decision,[2] OPM affirmed its earlier denial. *Id.* at Sub-tab II(A). OPM found that the appellant failed to provide sufficient objective evidence to establish that he has a back condition of disabling severity, and that it was therefore unable to determine if he is physically disabled for the duties of his position. *Id.*

The appellant filed a petition for appeal of OPM's reconsideration decision to the Board's Atlanta Regional

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[1] The appellant had previously filed an application for disability retirement on December 7, 1984, claiming hypertensive vascular disease which caused dizziness, blurred vision, a nervous condition and numbness in his hands and legs. *See* IAF, Tab 5, Sub-tab II(E). OPM denied that application, and sustained its denial in a reconsideration decision issued on January 27, 1986. *Id.*

[2] The date on OPM's reconsideration decision is illegible.

Office.[3] In the initial decision issued on October 21, 1988, the administrative judge sustained OPM's reconsideration decision, finding that the appellant failed to show that he has a disabling condition.

In his petition for review, the appellant argues that: (1) The administrative judge failed to mention or discuss a medical report submitted by Dr. Kelley at the hearing, wherein he explained what duties the appellant could not perform and why; and (2) the medical evidence of record supports his position that he is totally disabled. In addition, the appellant submits two new documents with his petition for the Board's consideration, i.e., Postmaster Joel D. Knight's September 2, 1988 response to the appellant's request for a permanent light-duty assignment, and a medical statement from Dr. Darrell G. Lowery dated November 9, 1988.

The agency filed a response to the appellant's petition, arguing that it does not meet the Board's regulatory criteria for granting review, and should be denied.

ANALYSIS

The appellant has failed to establish that the documents submitted with his petition for review are new and material evidence that, despite due diligence, was not available when the record was closed.

Under the Board's regulation, 5 C.F.R. § 1201.115(a), a petition for review may be granted based on new and material

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[3] The appellant requested, and was afforded, a hearing in connection with his appeal.

evidence. The Board has held that evidence is "new" when, despite due diligence, it was not available when the record closed below. *Avansino v. United States Postal Service*, 3 M.S.P.R. 211, 214 (1980) (the Board will not consider evidence submitted for the first time with the petition for review absent a showing that it was unavailable before the record was closed despite the party's due diligence). The Board has also held that new evidence is not "material" unless it is of sufficient weight to warrant an outcome different from that of the initial decision. *Russo v. Veterans Administration*, 3 M.S.P.R. 345, 349 (1980) (the Board will not grant a petition for review based on new evidence absent a showing that the new evidence is of sufficient weight to warrant an outcome different from that of the initial decision). Neither of the documents submitted with the appellant's petition here meets the Board's regulatory criteria for granting review based on new and material evidence.

The appellant has not even attempted to show that the report from Dr. Lowery was unavailable, despite due diligence, before the record closed. While the statement itself is dated November 9, 1988, approximately 19 days after the initial decision was issued, the appellant has failed to establish why he could not have been examined by Dr. Lowery and obtained any necessary medical reports before the record closed. *See Russo v. Veterans Administration*, 3 M.S.P.R. at 349.

Similarly, the appellant has failed to show that, with due diligence, he could not have obtained a statement from Postmaster Joel D. Knight, concerning his request for a permanent light-duty assignment,[4] prior to the close of the record. Moreover, we do not find that the statement is "material" to the outcome of this appeal. In his September 2, 1988 statement, Postmaster Knight denied the appellant's request for a permanent light-duty assignment, stating that the agency did not have the type of work available to accommodate the appellant's needs. *See* Appellant's Petition for Review. However, the record already contains a copy of the "Agency Certification of Reassignment and Accommodation Efforts," dated December 16, 1986, in which the agency certified that accommodation of the appellant's medical condition was not an option, and that reassignment was not possible because of the lack of vacant positions at the agency at the same grade or pay level for which the appellant met the minimum qualification standards. *See* IAF, Tab 5, Sub-tab II(D). Therefore, even if the Board were to consider Postmaster Knight's statement at this time, it provides no new information, and thus is not of sufficient weight to warrant an outcome different from that of the initial decision. *See Murphy v. Department of Health and Human Services*, 34 M.S.P.R. 534, 536 (1987).

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[4] Postmaster Knight's letter does not indicate when the appellant requested a permanent light-duty assignment.

The administrative judge's finding that the appellant failed to establish that he suffers from a disabling condition is not supported by the record evidence.

To establish entitlement to a disability retirement annuity, the employee must show, by a preponderance of the evidence, that he is unable because of disease or injury to render useful and efficient service in his position, that the condition will continue for at least 1 year, and that he is not qualified for reassignment to a vacant position in the employing agency at the same grade or level in which he would be able to render useful and efficient service. *See* 5 U.S.C. § 8337(a); 5 C.F.R. § 831.502(b). The final determination must be based on the probative value of all the evidence submitted, taking into account objective clinical findings, diagnoses and medical opinions, subjective evidence of pain and disability, and all evidence relating to the effect of the appellant's condition on his ability to perform in the position last occupied. *Chavez v. Office of Personnel Management*, 6 M.S.P.R. 404, 423 (1981).

The record in this appeal reveals that the appellant's condition was diagnosed as severe kyphosis and scoliosis. The record contains several statements from Dr. James M. Kelley concerning the appellant's medical condition, specifically, a July 1986 memorandum, *id.* at Sub-tab II(D), two subsequent notes typed on the same page as the July 1986 memorandum, *id.*, a letter dated November 2, 1987, *id.* at Sub-tab II(B), and what appears to be his most recent letter, which is undated, but which was stamped received by

the National Association of Letter Carriers Union on August 15, 1988, *id.* at Tab 11, Appellant's Ex. B.

In her discussion of the objective medical evidence of record, the administrative judge correctly noted that Dr. Kelley's submissions indicated that the appellant's x-rays revealed old compression fractures of T-7, 8, 9, and 10 which are now healed, and that the results of the straight leg raising test were within normal limits. However, the administrative judge failed to note other significant findings by Dr. Kelley in support of his conclusion that the appellant was disabled from his position.

Specifically, the administrative judge did not mention or discuss Dr. Kelley's statement that the appellant "has a forty percent limitation of forward bending in the lumbar region," that he "lacks a foot from being able to touch his toes which is associated with pain in the low back," and that his condition "has significantly worsened since he was employed under the civil service retirement system." IAF, Tab 5, Sub-tab II(B). In addition, the administrative judge failed to mention Dr. Kelley's most recent submission noting the specific requirements of the appellant's position that he cannot do, i.e., "carry a mail satchel (shoulder supported) up to thirty five pounds, and avoid heavy lifting over thirty pounds." This evidence is material because the record shows that the appellant's position requires him to be able to carry on his shoulder loads weighing up to

thirty-five pounds, and to load and unload sacks of mail up to seventy pounds from trucks. *See* IAF, Tab 11, Appellant's Exs. B and F. The Board has held that the persuasiveness of medical reports in disability retirement cases stems from their explanation of how certain aspects of a particular condition render an employee unable to perform specific work requirements. *Tanious v. Office of Personnel Management*, 34 M.S.P.R. 107, 111-14 (1987).

In fact, as the appellant correctly argues, the administrative judge made no mention of Dr. Kelley's most recent report which the appellant submitted at the hearing. We find that this omission was error under *Spithaler v. Office of Personnel Management*, 1 M.S.P.R. 587, 589 (1980) (an initial decision must identify all material issues of fact and law, summarize the evidence, resolve issues of credibility, and include the administrative judge's conclusions of law, legal reasoning and the authorities on which that reasoning rests).

The reasons which the administrative judge gave for assigning little probative value to Dr. Kelley's letters and memoranda were that his opinion that the appellant was disabled was not based on any clinical evidence, and that he failed to explain exactly what duties the appellant could not perform and why he could not perform them. *See* Initial Decision at 4. As discussed above, Dr. Kelley specifically stated which duties of the appellant's position he could not perform. In addition, it is apparent that he based his

medical findings on x-rays of the appellant's back, and his examination of the appellant. *See* IAF, Tab 5, Sub-tab II(B). In light of the nature of the appellant's condition, we find that this medical evidence was sufficient to establish disability.

Moreover, we note that, while the administrative judge found it to be detrimental to the appellant's case that Dr. Kelley did not prescribe any treatment plan or medication for the appellant's condition, we are not persuaded that either fact establishes that the appellant's back condition is not disabling. Dr. Kelley stated that he had no suggestions for treatment of the appellant's conditions other than the job limitations discussed, which indicates that he determined that the appellant's condition was untreatable. *See* IAF, Tab 11, Appellant's Ex. B.

Having fully considered all of the evidence presented, the Board finds that the appellant has sustained his burden of proving by the preponderance of the evidence that he is disabled for the performance of useful and efficient service as required for disability retirement under 5 U.S.C. § 8337(a). As the appellant demonstrates in his petition for review, the administrative judge appears to have misconstrued some evidence and overlooked other evidence. We believe that the above discussion of the circumstances in this case more accurately characterizes the evidence weighing in the appellant's favor. *See Weaver v. Department*

of the Navy, 2 M.S.P.R. 129, 133-34 (1980), *aff'd*, 669 F.2d 613 (9th Cir. 1982) (*per curiam*).

ORDER

The agency is ORDERED to award the appellant disability retirement benefits. This action must be accomplished within 20 days of the date of this decision.

The agency is ORDERED to inform the appellant of all actions being taken to comply with the Board's order and the date on which it believes it has fully complied. *See* 5 C.F.R. § 1201.181(b). The appellant is ORDERED to provide all necessary information requested by the agency in furtherance of compliance and should, if not notified, inquire as to the agency's progress from time to time. *See id.*

If, after being informed by the agency that it has complied with the Board's order, the appellant believes that there has not been full compliance, the appellant may file a petition for enforcement with the regional office within 30 days of the agency's notification of compliance. *See* 5 C.F.R. § 1201.182(a). The petition for enforcement shall contain specific reasons why the appellant believes there is noncompliance, and include the date and results of any communications with the agency with respect to compliance. *See id.*

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. *See* 5 U.S.C. § 7703(a)(1). 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 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.