

UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD

BETTIE L. GIVENS )

v. )

OFFICE OF PERSONNEL MANAGEMENT )

DOCKET NUMBER  
SF831L8310071

OPINION AND ORDER

Appellant's application for disability retirement was disallowed by reconsideration decision of the Office of Personnel Management (OPM) and she appealed the action to the Board's San Francisco Regional Office. In the initial decision, the presiding official found that the preponderance of the evidence supported OPM's decision and, accordingly, affirmed the denial.<sup>1/</sup>

In her petition for review, appellant contends that the presiding official erred by basing his determination solely on the lack of objective evidence of a disorder. Appellant asserts that the presiding official should have also considered appellant's separation from her position

---

<sup>1/</sup> Since appellant's application was filed prior to the effective date of legislation repealing prior 5 U.S.C. § 8331(d), the presiding official correctly applied the earlier statutory definition. Initial Decision at 2 n.1.

due to disability,<sup>2/</sup> appellant's statements that she is unable to perform her position, the medical opinions of appellant's physicians, the familiarity of appellant's physician with her condition, appellant's job description, and the Department of Labor's determination that appellant is entitled to workers' compensation.

In Chavez v. Office of Personnel Management, 6 MSPB 343, 358-59 (1981), the Board stated that the ultimate determination of whether appellant is disabled must be based upon 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 appellant's condition upon his or her ability to perform in the grade or class of position last occupied. The Board also specifically stated that objective medical evidence is but one of the elements of proof. Id. at 358. Further, proper application of this test requires that it focus attention on the effect of the condition on the employee's ability to perform useful and efficient service in the grade or class last occupied, rather than on the employee's ability to establish by objective evidence a specific cause for the condition. See Turner v. Office

---

<sup>2/</sup> Appellant also contends that the Department of the Navy's notice of proposed separation and notice of separation constitute new and material evidence which was not available when the record was closed. The notice of proposed separation was dated October 7, 1983, but the record was not closed until October 11. Official File Tab 4. Appellant has not explained why this document was not submitted below and has, therefore, failed to satisfy the Board's criteria with respect to this letter. See 5 C.F.R. § 1201.115(a). Although the notice of separation was issued after the record closed, appellant has failed to establish the letter's materiality since removal for disability does not establish that the criteria for disability retirement have been met. See Page v. Office of Personnel Management, 4 MSPB 436 (1980).

of Personnel Management, MSPB Docket No. AT831L8110243 at 2-3 (August 19, 1983).

Appellant's petition for review fails to establish that the presiding official relied solely on the absence of objective evidence in reaching his conclusion. In the initial decision, the presiding official discussed appellant's subjective evidence of disability, as stated in her disability application. Initial Decision at 2. The presiding official also discussed the medical opinions of appellant's physicians as well as the Navy medical officer's opinion. Id. at 3. The presiding official, however, afforded appellant's physicians' opinions less weight because those opinions were not supported by objective evidence. Id. at 3-4.

Further, consideration of the additional factors submitted by appellant would not affect the outcome of this case. As the presiding official found, the medical reports relied upon by appellant emphasize that appellant's problems resulted from exposure to toxic chemicals. Initial Decision at 4; Agency File Tab B. Appellant's position, however, was changed in 1976 to her current position of aircraft electrician helper, as a result of a fitness for duty examination, in order to restrict exposure to such chemicals. At her current position, appellant assists in electrical work and normally works indoors under good ventilation conditions. The position description does not indicate that appellant works with toxic chemicals in performing her duties. Agency File Tab B. Additionally, appellant's medical reports, including the psychiatric report which found that appellant was depressed with paranoid features related to exposure to toxic chemicals, do not explain how her condition renders her unable to perform the specific requirements of her current position. See Wagoner v.

Office of Personnel Management, 7 MSPB 174, 175 (1981);  
French v. Office of Personnel Management, 7 MSPB 152,  
153 (1981).

Finally, consideration of appellant's separation from her position and the Department of Labor's (DOL) determination that appellant is entitled to workers' compensation does not affect the result reached in this case. The Board has held that an agency may find an employee too disabled to continue working while OPM may determine that the employee does not qualify for disability retirement. See Page, supra. Further, appellant has merely asserted that she is receiving workers' compensation (Official File Tab 1) without submitting any documentation of DOL's findings on this issue. Thus, on the basis of this record, we are unable to determine whether DOL's determination is entitled to enough evidentiary weight to warrant a different result in this case.

Accordingly, appellant's petition for review is hereby DENIED.

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five (5) days from the date of this order. 5 C.F.R. § 1201.113(b).

The U.S. Court of Appeals for the Federal Circuit has held that the Board's final decision in an appeal from a denial of an employee-initiated application for disability retirement benefits is not subject to judicial review under 5 U.S.C. § 7703. Lindahl v. Office of Personnel Management, 718 F.2d 391 (Fed. Cir. 1983).

FOR THE BOARD:

JUL 6 1984

\_\_\_\_\_  
(Date)

Washington, D.C.

*Michael H. Hapner*  
\_\_\_\_\_  
for PAULA A. LATSHAW  
ACTING SECRETARY