UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2011 MSPB 42

Docket No. AT-831M-10-0554-I-1

Lora Anne Harper,

Appellant,

v.

Office of Personnel Management,

Agency.

March 22, 2011

Lora Anne Harper, Charleston, South Carolina, pro se.

Roxann Johnson, Washington, D.C., for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The appellant petitions for review of the initial decision that reversed the Office of Personnel Management's (OPM's) reconsideration decision finding that the appellant has received an overpayment of $28,596.67. For the reasons set forth below, we GRANT the petition and AFFIRM the initial decision AS MODIFIED.

BACKGROUND

¶2 The appellant has approximately 22 years of federal service, with a number of breaks in service. Initial Appeal File (IAF), Tab 8, Subtab 2d. At several of

her breaks in service, she took a refund of her retirement contributions. *Id*. The appellant filed an application for disability retirement that OPM granted. *Id*. At the time that the appellant retired, she had only about 2 years and 10 months of funded service. *Id*. In order for all of her service to be funded and to be used as such in calculating her disability retirement annuity, she would have had to redeposit $83,778 into the retirement fund. *Id*. The appellant never made this redeposit. IAF, Tab 8, Subtab 2d. However, when OPM first computed the appellant's disability retirement annuity, it erroneously believed that the appellant had made the redeposit for her unfunded approximately 17 years of service and computed the annuity at the higher rate as if the appellant had made a redeposit. *Id*., Subtab 1. Subsequently, OPM realized its error and recomputed the appellant's annuity downward. IAF, Tab 8, Subtab 2d. The appellant's receipt of an annuity computed as though she had made a redeposit of her refunded retirement contributions resulted in an overpayment. IAF, Tab 8, Subtab 2a.

¶3 OPM issued a reconsideration decision finding that the appellant, a Civil Service Retirement System (CSRS) Offset employee, had been overpaid $28,596.67 in civil service annuity benefits. *Id*. The appellant appealed OPM's decision. IAF, Tab 1. In her appeal, the appellant sought waiver of both the $83,778 redeposit and the $28,596.67 overpayment. IAF, Tab 1. During proceedings before the administrative judge, the appellant alleged that OPM's reconsideration decision constituted discrimination on the basis of her race (white). IAF, Tabs 16, 17. Based on the record developed by the parties, without a hearing because the appellant did not request one, the administrative judge reversed the reconsideration decision. IAF, Tab 23 (Initial Decision (ID)). The administrative judge found that the appellant was without fault in the overpayment and that her expenses exceeded her income. ID at 2-4. The administrative judge also found that the appellant failed to prove that OPM discriminated against her on the basis of her race. ID at 4-6.

¶4 The appellant petitions for review. Petition for Review File (PFR File), Tab 1. OPM did not respond on the merits of the appellant's petition, PFR File, Tab 4.

ANALYSIS

¶5 In her petition, the appellant states that OPM has not yet complied with the administrative judge's order. The Board's regulations provide that the initial decision will not become final if any party files a timely petition for review. 5 C.F.R. § 1201.113(a). Thus, the appellant's petition for review prevents the order in the initial decision from becoming the final order of the Board. OPM cannot comply with any order to waive the appellant's entire overpayment until the order becomes final. *See Days v. Office of Personnel Management*, 113 M.S.P.R. 698, ¶ 5 (2010) (the agency must comply with a final Board Order).

¶6 The appellant contends that the disputed amount is $83,778, not $28,596.67. She reiterates that she seeks waiver of the redeposit amount. The administrative judge did not address the appellant's request for waiver of the redeposit amount. However, in the summary of the prehearing conference, the administrative judge limited the issues in the appeal to "[w]hether the recovery of the overpayment should be waived." IAF, Tab 15. The administrative judge informed the parties that they must state exceptions to the summary by June 11, 2010. *Id*. Although the appellant made a number of submissions after the administrative judge issued the summary, she did not object to the issues identified in it. Thus, because the redeposit amount is not an overpayment, the appellant arguably failed to preserve any issue regarding the redeposit amount for review by objecting to the administrative judge's summary when given the opportunity to do so. *See Nichols v. U.S. Postal Service*, 80 M.S.P.R. 229, ¶ 7 (1998); *Germino v. Department of Defense*, 61 M.S.P.R. 683, 690 (1994), *aff'd*, 52 F.3d 345 (Fed. Cir. 1995) (Table); *Crowe v. Small Business Administration*, 53 M.S.P.R. 631, 635 (1992) (an issue is not properly before the Board where it is

not included in the administrative judge's memorandum summarizing the prehearing conference that states that no other issues will be considered unless either party objects to the exclusion of that issue in the summary).

¶7 Even if the appellant did preserve this issue, her assertions regarding the redeposit amount are without merit. It is well settled that an employee who received a refund pursuant to 5 U.S.C. § 8342 may be allowed credit for prior service under 5 U.S.C. § 8334(d) only if "[w]hile subsequently reemployed in a covered position" he redeposits the amount received, with interest. *Sanchez v. Office of Personnel Management*, 47 M.S.P.R. 343, 346-47 (1991). There is no statutory or regulatory provision for waiver of the redeposit amount. The government cannot be estopped from denying monetary benefits, including those that would result from using unfunded service in its calculation of an annuity, not otherwise permitted by law. *See Office of Personnel Management v. Richmond*, 496 U.S. 414, 425-34 (1990). The appellant thus has failed to make a nonfrivolous allegation that she may be granted waiver of the redeposit amount and the administrative judge's failure to address the issue, if error, did not harm the appellant's substantive rights. *Panter v. Department of the Air Force*, 22 M.S.P.R. 281, 282 (1984) (an adjudicatory error that is not prejudicial to a party's substantive rights provides no basis for reversal of an initial decision).

¶8 The appellant contends that she did not raise the issue of race discrimination. The appellant's submissions after the administrative judge issued her summary of perhearing conference and order regarding the discrimination claim, however, create at least an inference that she raised such an allegation. In her submission of June 22, 2010, the appellant states that on June 4, 2010, she alleged "discriminatory treatment of myself, a disabled white woman, by members of a protected group." IAF, Tab 19. Further, the appellant stated that the administrative judge "put me (not OPM) on notice of what I need to establish for a discrimination claim." *Id*. Additionally, the appellant stated that she "can only hope that [she has] established a prima facie case despite its apparent

protection for only minority appellants," an apparent assertion that ethnic minority employees of OPM treated her disparately as compared to their treatment of minority applicants. *Id*. The appellant's submissions create the inference that she is alleging discrimination on the basis of race. The administrative judge, therefore, did not err in finding that the appellant alleged race discrimination, in addressing this allegation, and in finding that the appellant failed to prove her claim. *See Wrighten v. Office of Personnel Management*, 89 M.S.P.R. 163, 167 (2001). The Board, however, finds that on petition for review the appellant's statement that she did not intend to file a race discrimination complaint constitutes a clarification of any inference that she filed such a complaint. Petition for Review at 3. Thus we do not afford the appellant the benefit of mixed-case appeal rights.

¶9 Finally, the appellant asserted below that counselors at her former employing agency, the Department of the Navy, did not inform her that she would have to repay anything for her disability retirement. IAF, Tab 1. In this regard, we note the appellant is proceeding with her appeal pro se. Pro se filings are to be construed liberally. *Farooq v. Corporation for National & Community Service*, 109 M.S.P.R. 73, ¶ 11 (2008). The appellant's assertion regarding the advice she states she received from counselors at the Department of the Navy could be construed as an allegation that the counselors misled her to retire on disability and thus that her retirement was involuntary.

¶10 The Board has found that, to establish a claim of involuntary disability retirement, an appellant must prove that: (1) After the onset of her disability and prior to her separation, she requested altered duties or working conditions, or indicated to the agency that she wished to continue working with a modification of her working conditions or duties; (2) there was a reasonable accommodation available prior to the date of her separation, either at or below her grade level, that would have allowed her to continue her employment; and (3) the agency did

not provide her that accommodation.* *See Okleson v. U.S. Postal Service*, 90 M.S.P.R. 415, ¶ 8 (2001). The Board explained in *Okleson* that, if an accommodation is not possible for an appellant, then other theories for finding a constructive removal cannot lead to another conclusion because the appellant does not have a choice between retiring and continuing to work. *Id.*, ¶ 7. If the appellant wishes to pursue a claim that her disability retirement was involuntary, she should file a new Board appeal at the Atlanta Regional Office against her former employing agency.

ORDER

¶11 We ORDER the Office of Personnel Management (OPM) to grant the appellant waiver of the entire overpayment in the amount of $28,596.67. OPM must complete this action no later than 20 days after the date of this decision.

¶12 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).

¶13 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

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* This standard is correct to determine the Board's jurisdiction in most involuntary disability retirement appeals. However, in unusual circumstances, we have also applied the principles for determining jurisdiction in regular involuntary retirement appeals. *See Hosford v. Office of Personnel Management*, 107 M.S.P.R. 418, ¶¶ 8-9 (2007) (finding the appellant's disability retirement was involuntary on the basis of misinformation).

Board's Order, and should include the dates and results of any communications with OPM. *See* 5 C.F.R. § 1201.182(a).

¶14 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT
REGARDING YOUR 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, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

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