

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

DORIS I. HOOVER,
Appellant,

v.

OFFICE OF PERSONNEL MANAGEMENT,
Agency.
(CSA 2 895 539)

DOCKET NUMBER
DA08318910145

DATE: MAR 20 1991

George A. Parker, Fort Worth, Texas, for the appellant.

Bruce Hughes, Washington, D.C., for the agency.

BEFORE

Daniel R. Levinson, Chairman
Antonio C. Amador, Vice Chairman
Jessica L. Parks, Member

OPINION AND ORDER

The appellant petitions for review of the initial decision issued on March 31, 1989, that affirmed the Office of Personnel Management's (OPM) reconsideration decision denying her request to retroactively convert her disability retirement status to that of optional retirement. The Board DENIES the appellant's petition for failure to meet the criteria for review. 5 C.F.R. § 1201.115. The Board REOPENS the case on its own motion, however, and AFFIRMS the initial decision as MODIFIED by this Opinion and Order, still sustaining OPM's reconsideration decision.

BACKGROUND

On May 5, 1986,¹ the appellant submitted an application for disability retirement from her position of Clerk Typist at the General Services Administration (GSA), Fort Worth, Texas. Because of her medical condition, the appellant had been in an almost continuous leave status from 1985 until her retirement. OPM approved her application for disability retirement in July of 1986 and the appellant began receiving a disability annuity.

On October 2, 1987, the appellant requested OPM to change her retirement from disability retirement to optional retirement. OPM denied this request, informing the appellant that she must show either that she is medically recovered or that her earning capacity has been restored in order to end her disability annuity and then, if she was eligible, she could obtain optional retirement benefits.

The appellant requested reconsideration of OPM's denial, contending that she was not advised by GSA or OPM of her retirement rights, specifically that she was eligible for optional retirement. She also contended that, had she known of the new alternative form of annuity (lump sum payment) that became law in 1986, she would have elected optional retirement rather than disability retirement. OPM's reconsideration

¹The record is unclear as to the date that OPM received the application from the agency. Although portions of the appellant's application were executed on April 23 and 24, the appellant signed section H of the application and it was received at her agency's personnel office on May 5, 1986. Appeal File, Tab 4(6).

decision denied the appellant's request. OPM informed the appellant that her request to change her disability retirement to optional retirement was not timely, since the request to withdraw the disability application must be received before the disability retirement claim is approved or before the applicant is separated from Federal service.

In an initial decision dated March 31, 1989, the administrative judge sustained OPM's reconsideration decision, finding that the appellant has not shown that she was improperly placed on disability retirement, or that she is otherwise eligible for optional retirement.

In her timely petition for review, the appellant reasserts her claim that neither GSA nor OPM counseled or explained the retirement options available to her at the time of her disability application, during the processing of the forms, or when her retirement became effective, and that when she retired, she believed that disability retirement was her only annuity option. She contends that the law offering alternative annuities went into effect prior to the effective date of her retirement, and that, had she been properly counseled, she would have had the opportunity to elect optional retirement with a lump sum payment rather than disability retirement.

ANALYSIS

By Pub. L. No. 99-335, Title II, § 204(a) (June 6, 1986), Congress authorized OPM to prescribe regulations allowing Civil Service Retirement System (CSRS) retirees to

elect one of several alternative forms of annuities, including a lump sum payment with a reduced annuity. 5 U.S.C. § 8343a. The law states, however, that disability retirees are excluded from this provision.

Under 5 U.S.C. § 8337, a disability retirement annuitant can only be terminated by recovery from the disability or restoration of the annuitant's earning capacity.² The appellant does not contend that she meets either of these conditions. Rather, she seeks to be placed on optional retirement only for the purpose of becoming eligible to elect an alternative form of annuity. See Appeal File, Tab 1.

The appellant's request to retroactively convert her status is, in effect, a request to estop OPM from honoring the effective date of her disability retirement as governed by 5 U.S.C. § 8337 and to order OPM to grant optional retirement and remit a lump sum payment and optional annuity payments, despite the fact that she does not meet the statutory requirements. Grant of the appellant's request, regardless of the equity of her argument, would be contrary to the Supreme Court's holding in *Richmond v. Office of Personnel Management*, 110 S. Ct. 2465 (1990). The Court held in *Richmond* that "payments of money from the Federal Treasury are limited to

²The appellant could have avoided becoming a disability annuitant by withdrawing her application before the effective date of her retirement in June or July of 1986. Initial Decision at 2, n.1. The appellant, however, did not make a withdrawal request before the effective date. Instead, in October 1987, she filed a request to change her retirement. Appeal File, Tab 4(5).

those authorized by statute." An appellant who does not meet statutory requirements cannot receive monetary payments even where there has been reliance on oral and/or written misinformation. See *Richmond* at 2471. Under the rationale of the *Richmond* holding, a lack of required information, as asserted here,³ does not provide a basis for the expenditure of public funds where there is a failure to meet statutory requirements.⁴

Thus, we find that OPM correctly denied the appellant's request. Since she does not meet the statutory requirements for optional retirement, the appellant can only obtain relief at the instance of Congress.

ORDER

This is the final order of the Merit Systems Protection Board in this appeal. See 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

³Because of the *Richmond* holding, we need not decide whether the agency or OPM failed to provide required information to the appellant.

⁴The appellant cites *Biliter v. Office of Personnel Management*, 23 M.S.P.R. 143 (1984), for the proposition that the Board will require OPM to take remedial action where it did not provide full information regarding retirement options, even where all statutory requirements are not met. We find that our decision in *Biliter* is inconsistent with the Court's holding in *Richmond* and we therefore overrule it. The appellant also relies on *Brantner v. Office of Personnel Management*, 30 M.S.P.R. 417 (1986). *Brantner*, however, is distinguishable because the requirement that the appellant failed to meet was a Federal Personnel Manual requirement rather than a statutory one.

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.