UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

NAOMI PECUKONIS, Appellant, v. OFFICE OF PERSONNEL MANAGEMENT, Agency. (CSA 2 836 965)	DOCKET NUMBER PH831L8710057 DATE: AUG 05 1987

David R. Lipka, Esquire, Plymouth, Pennsylvania, for the appellant.

William C. Jackson, Washington, D.C., for the agency.

BEFORE

Daniel R. Levinson, Chairman
Maria L. Johnson, Vice Chairman
Dennis M. Devaney, Member

OPINION AND ORDER

This case is before the Board on the appellant's petition for review of the administrative judge's initial decision affirming the Office of Personnel Management's (OPM) reconsideration decision denying the appellant's application for a disability retirement annuity. For the reasons stated below, we GRANT the appellant's petition for review, and AFFIRM the initial decision as MODIFIED by this Opinion and Order.

BACKGROUND

The appellant was employed with the Department of Health and Human Services as a Data Transcriber from January 28, 1980, until the date of her resignation on August 30, 1985. She filed an application for disability retirement on August 26, 1985, four days prior to her resignation, claiming that she was unable to make her job quotas because of pain in her hands and legs. *See* Agency File, Tabs D and E. In a note from her attending physician, Dr. Michael J. Kotch, dated November 4, 1985, Dr. Kotch stated that the appellant was under his care for "Severe Peripheral Neuritis with chief complaint of hands and feet being painful, numb sensation and burning." Agency File, Tab D. He also stated that the appellant had been evaluated by a neurologist, Dr. Yu Song Kao, and was advised to "use a cane . . . ." *Id.* He concluded that "although there is slight improvement in the past year she is still under my care."

Since Dr. Kotch did not provide a copy of the neurologist's report or describe any objective clinical findings or mode of treatment pursued with regard to the appellant's condition, OPM requested that the appellant have her physician forward such information in order that it

may complete the processing of her application for disability retirement.[1]

Dr. Kotch responded to OPM's request in a letter dated April 10, 1986. Although he did report a few objective physical findings and opined that the appellant was "disabled as far as gainful employment is concerned," he, again, failed to describe treatment, to submit the neurologist's report, and to relate the appellant's condition to her inability to perform specific job tasks. Based on the documentation which the appellant and her physician had submitted, OPM issued a decision denying the appellant's application for a disability retirement annuity because the medical documentation failed to establish a disabling medical condition of such severity as to render her incapable of performing useful and efficient service in her position, or in any other position for which she qualified. The appellant requested that OPM reconsider its decision, and stated that she would be submitting additional evidence for its reconsideration.

In its reconsideration decision, OPM stated that the report from the appellant's physician failed to provide a discussion of treatment (although given a second opportunity to do so) to show that the appellant's symptoms were

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[1] In its March 10, 1986 letter to appellant, OPM specifically requested from the appellant "an assessment of the present status of your peripheral Neuritis from your attending Physician, including response to treatment, more precise Diagnosis, and Prognosis, also need a copy of Neurological evaluation." Agency File, Tab c.

uncontrollable, resistant to treatment, or incompatible with her position. OPM further stated that, although the appellant's counsel indicated that additional evidence would be submitted for its consideration, it had not received any evidence, nor had it received the neurologist's report. OPM again concluded, based upon the evidence submitted, that the appellant's application for a disability retirement annuity was insufficient to establish an entitlement to a disability annuity. OPM, therefore, sustained its decision to deny the appellant's application for a disability retirement annuity.

The appellant filed a petition for appeal with the Board's Philadelphia Regional Office and later submitted copies of her hospital records as new evidence.[2] A review of those medical records (from Nanticoke State General Hospital) discloses that the appellant's principal diagnosis at discharge was severe cirrhosis of the liver (alcoholic)

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[2] The appellant's counsel stated that, because the appellant was confined in the Nanticoke State General Hospital from October 19, 1986, to November 24, 1986, she was not previously able to obtain or submit the hospital records as new evidence. The administrative judge found that the appellant showed good cause why she could not submit these medical records in a more timely fashion; reopened the record to allow for the submission of the additional medical evidence; and afforded OPM an opportunity to review and/or comment on the new evidence.

with numerous other diagnoses.[3] Dr. Thomas Miller, the appellant's attending physician at the hospital, stated that the appellant would need home health services indefinitely in light of her extensive liver disease. In response to the appellant's submission, OPM pointed out that the appellant based her claim for disability on peripheral neuropathy, not liver disease. OPM also noted that, among the diagnoses listed by the medical staff at Nanticoke State Hospital, the medical condition upon which the appellant based her claim for a disability retirement annuity--peripheral neuropathy--is not even listed. OPM argued, therefore, that the Board may not consider medical conditions that were not first presented to OPM in support of an application for disability retirement, and may only grant the appellant a disability annuity if she has successfully shown, by a preponderance of the evidence, that "peripheral neuropathy" has rendered her unfit for federal service.

The administrative judge found that the Board has consistently held that it will not award a disability annuity to an appellant who introduces evidence of a disabling condition for the first time before the Board, and

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[3] In addition to the appellant's alcoholic condition, Dr. Thomas Miller of Nanticoke State General Hospital diagnosed the appellant's condition as: (1) Pernicious anemia; (2) alcohol abuse; (3) adjustment disorder; (4) depression; (5) massive ascities; (6) acute gastritis; (7) portal hypertension; (8) hepatic encephalopathy; (9) malnutrition; (10) hypo-albuminemia; and (11) urinary tract infection.

not to OPM, inasmuch as OPM would not have had the opportunity to make a final decision on such new conditions.[4] She also found that: (1) Although the appellant claimed that she became disabled in December of 1984 due to peripheral neuropathy, no clinical studies confirming this diagnosis were ever submitted to OPM or to the Board; (2) the appellant failed to show that she does, in fact, suffer from the disease of peripheral neuropathy upon which she based her claim for a disability annuity; and (3) the appellant failed to meet her burden of proving, by a preponderance of the evidence, her entitlement to a disability annuity. The administrative judge therefore sustained OPM's reconsideration decision disapproving the appellant's application for a disability retirement annuity.

In her petition for review, the appellant's counsel alleges that: (1) The administrative judge erred in not granting her the hearing she requested; (2) although he attempted to obtain objective medical evidence from the appellant's doctors, they did not provide the requested

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[4] Information concerning new or different medical conditions may, however, form the basis for an appellant's filing of a new application for disability retirement if the application is filed within one year of his or her separation from the service. *See Hudson v. Office of Personnel Management*, 3 M.S.P.R. 476, 477 (1980). Further, this time limit may be waived under circumstances where an employee demonstrates that he or she was mentally incompetent at the date of separation from the service or within one year thereafter, as long as the application is filed with OPM within one year from the date the employee is restored to competency or the appointment of a fiduciary, whichever comes first. 5 U.S.C. § 8337(b).

evidence; and (3) the Board should consider new evidentiary submissions. The agency responded in opposition to the petition for review, contending that the petition fails to meet the criteria for review.[5]

ISSUES

1. Did the administrative judge err in deciding the appellant's appeal on the record?

2. Do the appellant's additional submissions filed with the Board on March 27, 1987, meet the new and material evidence criteria?

ANALYSIS

1. The administrative judge did not err in deciding the appellant's appeal on the record.

Although the Board has consistently held that an employee who meets the jurisdictional prerequisites for an appeal has a statutory right to a hearing, it has also unequivocally stated that the right to a hearing may be waived, among other ways, by failing to request a hearing on the appeal form. *See Howell v. Veterans Administration*, 30 M.S.P.R. 321, 322 (1986).

A review of the record in the instant case reveals that the appellant did not request a hearing. *See* Appeal File, Tab 1. That review also reveals that the administrative

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[5] The appellant filed a reply to the agency's response to the appellant's petition for review. The Board regulations, however, do not provide for submissions beyond the petition for review and responses thereto. *See* 5 C.F.R. part 1201, subpart C.

judge appropriately notified the appellant's counsel--who subsequently entered an appearance in representation of the appellant--that the appellant had not requested a hearing, and that he should contact the administrative judge if he had any questions regarding the processing of the appellant's appeal. At no time did the appellant or her counsel request a hearing, except in her petition for review. See Appeal File, Tab 5. Thus, the appellant's contention that the administrative judge improperly denied her a hearing and decided her appeal on the written record must be rejected.

2. The appellant's evidentiary submission of March 27, 1987, is not new evidence.

Subsequent to the filing of her petition for review, the appellant submitted purportedly new evidence. It consists of a medical report dated December 24, 1984, with updates dated April 3, 1986, and July 31, 1986, from the appellant's neurologist. Since this report pre-dates the closing of the record on January 9, 1987, it cannot be considered as "new" evidence, and will not be so considered by the Board, since the appellant has failed to show why it was, with due diligence, unavailable prior to the close of the record.

Although it is unfortunate that the appellant's counsel was unable to obtain from her treating physician the medical documentation necessary to support the appellant's claim, the fact remains that it is the appellant's burden to

establish entitlement to a disability retirement annuity. *See Chavez v. Office of Personnel Management*, 6 M.S.P.R. 404, 417 (1981). The failure or refusal of her treating physicians to provide such information does not provide a basis for finding the information now presented to have been previously unavailable with due diligence under the circumstances of this case.[6] *See Avansino v. United States Postal Service*, 3 M.S.P.R. 211 (1980).

This is the Board's final order in this appeal. 5 C.F.R. § 1201.113(c).

NOTICE TO APPELLANT

You may petition the United States Court of Appeals for the Federal Circuit to review the Board's decision in your appeal if the court has jurisdiction. 5 U.S.C. § 7703. The address of the court is 717 Madison Place, N.W., Washington, D.C. 20439. The court must receive the petition no later

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[6] The appellant's counsel asserts in the petition for review that he tried several times to obtain more detailed information concerning the appellant's physical condition from her two examining physicians, and submits copies of his letters to the physicians along with the petition. We note that the letters submitted impart no sense of urgency in obtaining the requested medical reports, except for one letter to each physician asking for additional information "as soon as possible," without explaining why an immediate response was necessary. Later letters said nothing about a speedy response. We note, further, that the record contains no evidence demonstrating other reasonable efforts, such as telephone conversations or office visits, made by the appellant or his counsel to obtain the medicial information -- which they both knew to be essential for a successful disability retirement application -- in a timely manner.

than thirty days after you or your representative receives this order.

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.