

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

SONYA SATTERFIELD,
Appellant,

v.

OFFICE OF PERSONNEL MANAGEMENT,
Agency.

CSA 3 592 270

DOCKET NUMBER
PH-0831-98-0106-I-1

DATE: MAR 1 1999

Sonya Satterfield, Lawnside, New Jersey, pro se.

Michael N. Velemirovich, Washington, D.C., for the agency.

BEFORE

Ben L. Erdreich, Chairman
Beth S. Slavet, Vice Chair
Susanne T. Marshall, Member

Vice Chair Slavet issues a dissenting opinion.

ORDER

After full consideration, we DENY the appellant's petition for review of the initial decision issued on April 10, 1998, because it does not meet the criteria for review set forth at 5 C.F.R. § 1201.115. This is the Board's final order in this appeal. The initial decision in this appeal is now final. 5 C.F.R. § 1201.113(b).

NOTICE TO THE APPELLANT REGARDING
FURTHER REVIEW RIGHTS

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 60 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.

DISSENTING OPINION OF VICE CHAIR BETH S. SLAVET

in

Sonya Satterfield v. Office of Personnel Management,
MSPB Docket No. PH-0831-98-0106-I-1

I disagree with the majority's disposition of this appeal. I would reopen this case under 5 C.F.R. § 1201.118 and reverse both the initial decision and the reconsideration decision of the Office of Personnel Management denying the appellant's application for disability retirement. As explained below, I would find that the appellant established her entitlement to a disability retirement annuity.

Background

The appellant, a Distribution Clerk for the Postal Service, ceased working on October 31, 1992 due to a work-related injury, an allergic reaction to workplace allergens, and has been receiving benefits from the Office of Workers' Compensation Programs (OWCP). Initial Appeal File (IAF), Tab 4, Subtab B. In February 1994, she filed an application for disability retirement with the Office of Personnel Management (OPM), alleging that she was unable to perform her duties because she suffers from a multiple chemical sensitivity condition. *Id.* She alleged that, after being exposed to various allergens in the workplace including paints, cleaning solvents, floor strippers, inks, copier machines, pesticides, scented personal products, cigarette smoke, and many other substances, she experienced symptoms including severe headaches, conjunctivitis, respiratory problems, allergic rhinitis, sinusitis and other symptoms that affected the performance of her duties. IAF, Tab 4, Subtab A. She claimed that her medical condition warrants her continued absence from the workplace. *Id.*

OPM denied her application, finding that the medical evidence submitted failed to substantiate that she had a disabling medical condition of such severity to prevent her from performing the essential duties of her position. *Id.* In its reconsideration decision, OPM affirmed its initial decision, finding that the evidence submitted failed to show that the appellant has a disabling medical condition that medically warranted restrictions from performing the critical or essential duties of her position or that required continued absence from the workplace. IAF, Tab 4, Subtab A.

The appellant filed a timely appeal to the Board and appointed her doctor, Grace Ziem, as her representative. IAF, Tabs 1 and 7. After conducting a telephone hearing, the administrative judge issued an initial decision, finding that the evidence supported OPM's determination. Initial Decision (ID) at 10. On petition for review, the appellant claims that the administrative judge failed to give proper weight to the evidence. Petition for Review File (PFRF), Tab 1.

Analysis

In an appeal from OPM's denial of a voluntary disability retirement application, the employee bears the burden of persuasion by a preponderance of the evidence. *See* 5 C.F.R. § 1201.56(a)(2); *Chavez v. Office of Personnel Management*, 6 M.S.P.R. 404, 417 (1981). To be eligible for a disability retirement annuity under the Civil Service Retirement System (CSRS), an employee must have completed five years of civilian service, must be unable, because of disease or injury, to render useful and efficient service in his or her position, and must not be qualified for reassignment to a vacant position in the agency at the same grade or level in which he or she could render useful and efficient service. 5 U.S.C. § 8337(a); *see also* 5 C.F.R. § 831.1203(a). OPM's implementing regulations further require that the disabling medical condition be expected to continue for at least one year from the date the application is filed and that the employing agency be unable to accommodate it in the appellant's former position or in an existing vacant position. 5 C.F.R. § 831.1203(a). Here, there is no dispute that the appellant had at least five years of service in a position covered by CSRS.

The question is whether the appellant has shown that her allergic reactions to workplace allergens disabled her to the point that she was unable to perform useful and efficient service in her position. For the reasons discussed below, I believe that the appellant has presented unrebutted evidence that she was unable to work in a useful and efficient manner.

A determination of disability must be based on the probative value of all of the evidence, 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 employee's condition on her ability to perform in the position she last occupied. *See Carter v. Office of Personnel Management*, 64 M.S.P.R. 619, 625 (1994). Useful and efficient service is defined as "acceptable performance of the critical or essential elements of the position and satisfactory conduct and attendance." *See* 5 C.F.R. § 831.1201.

Medical documentation submitted by the appellant shows that she has moderate to severe symptoms from brief exposure (*i.e.*, 20 minutes) to a wide variety of petrochemicals and combustion products, including solvents used to clean the postal machines. IAF, Tab 4, Subtab A. Dr. Ziem's report indicates that the appellant's symptoms, which developed from exposure to those solvents, include severe headaches, dizziness, sinus and face pain, acute ear pain, irritated, burning and itchy eyes and throat, breathing difficulty, chest pain, loss of sense of smell, numbness of arms, hands, legs and feet, chronic fatigue, skin rashes, hoarseness, nausea, reduced memory, coughing, difficulty with coordination, joint and muscle aching, palpitations, intestinal symptoms, and sleep disturbances. *Id.* She stated that these symptoms continued even when the appellant was moved to a different building. *Id.*

In another report, Dr. Ziem noted that the appellant is "very ill" and that she does "not anticipate her being able to return to work in the next few years." IAF, Tab 4,

Subtab A. The appellant stated in her disability application that "[a]t work I was regularly and continuously exposed to all types of chemical and toxic substances [which caused me to become] ill to the point of not being able to perform my duties." IAF, Tab 4, Subtab C. In addition to Dr. Ziem's evidence and the appellant's statements on her disability application, the record reflects that, when Dr. Nahum Malcolm Balotin referred the appellant to the West Jersey Occupational Safety & Health Administration, he noted that she "has allergic reaction[s] to environmental exposure" and that she "is unable to work until [her] condition is further evaluated and disposition is made." IAF, Tab 4, Subtab C.

At the agency's request, the appellant's medical records were sent to Julia E. Klees, M.D., M.P.H., for her review and opinion on the appellant's condition. IAF, Tab 4, Subtab C. Dr. Klees opined that Dr. Ziem's diagnosis of multiple chemical sensitivity is not an accepted medical definition or medical diagnosis. *Id.* She further stated that the chemicals to which the appellant was allegedly exposed were nonspecific respiratory irritants and that there was a lack of objective documentation of potential respiratory hypersensitivity to the nonspecific irritants. *Id.* In its reconsideration decision, OPM relied extensively on Dr. Klees' report. IAF, Tab 4, Subtab A.

However, Dr. Klees never examined the appellant and based her findings only on a review of the record presented to her. In contrast, the record reflects that Dr. Ziem examined and treated the appellant's symptoms on a regular basis over a number of years. At the hearing, Dr. Ziem adamantly asserted that the appellant is "totally disabled" and unable to perform useful and efficient service in her position because of her severe symptoms. Hearing Tape 1A and 1B. *See Mullin-Howard v. Office of Personnel Management*, 71 M.S.P.R. 619, 627 (1996) (finding that it was unnecessary for the doctors to have a detailed understanding of the appellant's specific duties in order to opine that her medical condition rendered her unable to perform successfully in her position where the nature of the condition caused a general disqualification for employment).

Because Dr. Klees' report was not based on any examination of the appellant, as an opinion, it does not rebut the appellant's showing that she is unable to work in a useful and efficient manner. In addition, there is no indication in the record that OPM exercised its option under 5 C.F.R. § 831.1206(c) to require the appellant to submit to a medical examination. Furthermore, notwithstanding Dr. Klees' opinion that the appellant does not have a work-related allergic reaction, OWCP granted the appellant benefits based on her claim of "allergic reaction to workplace allergens." IAF, Tab 4, Subtab A. *Cf. New v. Department of Veterans Affairs*, 142 F.3d 1259, 1264 (Fed. Cir. 1998) (OWCP is expert in its field and its decisions do not bind the Board only when the Board or the agency acts within its own statutory sphere of authority).

In the statement filed with the appellant's disability application (Supervisor's Statement), the appellant's supervisor, Ida Waters, indicated that the appellant's attendance had stopped for medical reasons, that she had used 880 hours of leave without

pay, and that her attendance was unacceptable for continuing in her current position. IAF, Tab 4, Subtab C. While absences from work do not conclusively establish that an employee is incapable of rendering useful and efficient service, they are nonetheless a factor worthy of consideration in judging disability. *See Hupp v. Office of Personnel Management*, 64 M.S.P.R. 273, 277 (1994). Here, the appellant's absences were continuous because she is allergic to various allergens in the workplace, especially the solvents used to clean the mail machines. Moreover, according to the Supervisor's Statement, her absence imposed a burden (*i.e.*, understaffing) on the employing agency because her position is a bid assignment and cannot be filled until resolution of this case. IAF, Tab 4, Subtab C.

The Board has long held that the failure to establish the precise name of a medical condition does not necessarily render a disability claim less credible. *Meighen v. Office of Personnel Management*, 7 M.S.P.R. 164 (1981); *Bridges v. Office of Personnel Management*, 21 M.S.P.R. 716, 719, (1984); *Pugh v. Office of Personnel Management*, 38 M.S.P.R. 184 (1988). *See also Parten v. Office of Personnel Management*, 59 M.S.P.R. 119, 123 (1993). The foremost consideration is whether the appellant's medical condition renders her incapable of performing the essential duties of her position. *Id.* at 123-24. Here, I believe that the evidence clearly establishes that it does, and therefore it is not necessary to resolve the conflict between Drs. Klees and Ziem as to the exact diagnosis for the symptoms from which the appellant suffers.

Based on the evidence regarding the appellant's attendance, the medical evidence establishing her inability to work because of the various severe symptoms from which she suffers, and her statements that continuous exposure to the allergens in the workplace affected her ability to perform her duties, under the circumstances of this case, I would find that the appellant has established that she is disabled from performing in her position, that the disability was expected to continue one year from the time she filed her disability application, and that she has remained unable to function in the workplace. *See Moran v. Office of Personnel Management*, 72 M.S.P.R. 138, 143 (1996) (finding that appellant established his disability, for retirement purposes, through evidence regarding his lack of attendance, medical evidence establishing his inability to work due to his severe panic disorder, and his statements about the history of his condition and his inability to work).

An employee shall be considered disabled if, among other things, the employee is not qualified for reassignment to a vacant position in the agency at the same grade level in which she would be able to render useful and efficient service. 5 U.S.C. § 8337(a). Thus, the employing agency must be unable to accommodate the employee's disabling medical condition in her current position or in an existing vacant position. 5 C.F.R. § 831.1203(a)(4).

"Accommodation" means an adjustment to an employee's job or work environment that enables the employee to perform the duties of the position. *See 5 C.F.R. § 831.1202*. According to the regulations, reasonable accommodation may include modifying the

worksit; adjusting the work schedule; restructuring the job; obtaining or modifying equipment or devices; providing interpreters, readers or personal assistants; and reassigning or training the employee. *Id.* Dr. Ziem provided the agency with a list of items that she found "medically necessary to reduce significant illness caused by trace exposures to petrochemicals and combustion products." IAF, Tab 4, Subtab B. She also recommended that the appellant be trained as a window clerk where she would be away from the solvents. *Id.*

With respect to accommodation efforts, according to the Supervisor's Statement, the agency moved the appellant to another building as part of a "limited duty" assignment in her current position. IAF, Tab 4, Subtab C. However, she continued to suffer from the same symptoms because she was exposed to the same workplace allergens in the other building. IAF, Tab 4, Subtab B. The Supervisor's Statement indicates that the appellant was not reassigned to a new permanent position because the limited duty assignment was available in the other building. Thus, I would find that the agency was unable to accommodate the appellant's condition in her current position or through reassignment, and that she has therefore established her entitlement to a disability retirement annuity. It should be noted that once the appellant receives disability retirement benefits, she is subject to further examination at OPM's direction in order to retain those benefits. *See* 5 C.F.R. § 831.1208(a).

MAR 1 1999

Date

Beth S. Slavet
Vice Chair