

OPINION AND ORDER

This case is before us on the Office of Personnel Management's (OPM) petition for review of an addendum decision in which the presiding official awarded attorney fees to an applicant for disability retirement.

Appellant's application for disability retirement was disallowed by OPM. On appeal to the Board's Washington, D.C. Regional Office, the presiding official reversed OPM's determination and found appellant totally disabled for the performance of the duties of his position. Appellant timely filed for attorney fees pursuant to 5 C.F.R. § 1201.37(a).

In his addendum decision, the presiding official concluded that under the standards set out by the Board in *Allen v. U.S. Postal Service*, 2 MSPB 582, 593 (1980), for determining the appropriateness of an award of attorney fees, appellant was entitled to an award of attorney fees in the interest of justice. He further held that OPM should not have denied appellant's disability application since it had sufficient evidence available to support a finding that he was disabled for his position. Moreover, the presiding official found that OPM should have known that it would not prevail in its appeal before the Board.

In its petition for review, OPM fails to address the specifics of the presiding official's finding that attorney fees are warranted in this case. Rather, it contends that the provisions of section 7701 are inapplicable to the review of its retirement determinations and that the presiding official improperly awarded attorney fees here under 5 U.S.C. § 7701(g). Although we find no merit to OPM's jurisdictional arguments, we agree that the award of attorney fees was improper here.

Subchapter II of chapter 83, title 5, U.S. Code, relates to civil service retirement. Section 8347 provides OPM with the authority to administer this subchapter and to determine questions of disability arising under the subchapter. Under section 8347(d), an administrative action or order affecting the rights or interests of an individual under this subchapter may be appealed to the Merit Systems Protection Board under procedures prescribed by the Board.

The Board is provided with de novo review authority by 5 U.S.C. § 7701, which applies expressly and unequivocally to all matters

which are appealable to the Board "under any law, rule, or regulation." See *Chavez v. Office of Personnel Management*, 6 MSPB 343 (1981); *Hein v. OPM*, 1 MSPB 396 (1980). Subsection 8347(d) clearly is a "law" under which applicants in disability retirement cases may submit an appeal to the Board, and section 7701 governs such appeals. As we noted in *Chavez, supra*, at 349, the statute contains no provision for Board consideration of "appeals," whether authorized under that act or under some other statutory or regulatory authority, which are not to be governed by section 7701. Accordingly, we conclude that section 7701(g) also applies to disability retirement cases. See *Kirkpatrick v. Office of Personnel Management*, 5 MSPB 97 (1981).

With respect to federal employee appeals in which there is no finding of prohibited discrimination, as here, 5 U.S.C. § 7701(g)(1) provides in pertinent part:

[T]he Board, or an administrative law judge or other employee of the Board designated to hear a case, may require payment by the agency involved of *reasonable attorney fees incurred* by an employee . . . if the employee . . . is the *prevailing party* and the Board, administrative law judge, or other employee, as the case may be, determines that payment by the agency is *warranted in the interest of justice*, including any case in which a prohibited personnel practice was engaged in by the agency or in any case in which the agency's action was clearly without merit. [Emphasis supplied].

As we stated in *Allen v. U.S. Postal Service, supra*, at 586, the statutory language demands that each of the following requirements be met:

1. The appellant must be the "prevailing party;"
2. The award of attorney fees must be "warranted in the interest of justice;" and
3. The fees awarded must be "reasonable."

While section 7701 applies to all disability retirement matters, it is necessary to consider whether an award of attorney fees to an applicant for disability retirement can be warranted in the interest of justice. The Board is accorded substantial discretion in determining when an award is warranted. *Allen, supra*, at 591. However, we conclude that Congress did not contemplate attorney fees awards to be in the interest of justice in employee-initiated disability retirement cases.

The legislative history of section 8347(d) as well as section 7701(g) of 5 U.S.C. is silent with respect to Congressional intent concerning the award of attorney fees in disability retirement cases. Moreover, none of the committee reports refers to disability retirement in terms of attorney fees. While the legislative history fails to provide a

precise definition of the "interest of justice" standard, the various statements contained in the reports only refer to adverse action cases.

Senator Mathias, who originally advocated a bare "warranted in the interest of justice" standard, explained his proposal to the Senate Committee mark-up session as follows:¹

The standard doesn't mean that it requires the agency to pay attorney fees for an employee who wins an adverse action case but, rather, this is an attempt to allow the court or the board the discretion to choose cases *where the employee has been dragged through a lengthy and costly legal proceeding while in fact he was innocent of the charges when it was some procedural error or where the agency knew or should have known it would not prevail on the merits.*

Asked by Senator Percy to be more specific, Senator Mathias elaborated:²

Number one, *where he is substantially innocent of the charges that are leveled against him, or where the agency acted in bad faith, or where there was some gross procedural error, or where the agency knew or should have known that it couldn't prevail on the merits when it brought the proceeding.* I think when elements of that sort exist, then I think the question of acting in the interest of justice would be appropriate.

The policy reasons behind enacting this section are less persuasive in the disability retirement situation. In fact, it is difficult to see how a disability retirement applicant could meet these criteria. Applicants who voluntarily file for disability retirement cannot be said to have been dragged through a lengthy and costly legal proceeding while substantially innocent of the charges leveled against them. Moreover, OPM does not level any charges against such applicants and clearly does not initiate the proceedings. Except in cases involving agency initiated disability retirement proceedings, the employee himself initiates the legal proceeding in order establish his entitlement to benefits.

The Board further notes that the U.S. Court of Appeals for the D.C. Circuit has recently stated in regard to an award of attorney fees in Special Counsel Corrective Action proceedings that the policy underlying the attorney fees provision contained in section 7701(g) is applicable to proceedings in which an aggrieved employee seeks to vindicate rights conferred by the Civil Service Reform Act. *Frazier, v. Merit Systems Protection Board*, No. 80-1067, slip op. at 38-39

¹Transcript of Senate Committee on Governmental Affairs' Mark-up Session on S.2640, 95th Cong., 2nd Sess. 124, 128. (Emphasis supplied.)

²*Id.* at 124-25. (Emphasis supplied.)

(D.C. Cir. March 2, 1982). Disability retirement applicants who appeal an OPM disallowance cannot be considered aggrieved employees, since they initiated the statutory proceedings voluntarily.

Accordingly, we find that an administrative decision on an appellant's claim of entitlement to disability retirement annuity cannot be considered an "agency action" within the meaning of section 7701(g).³ Therefore, an award of attorney fees to an individual in a disability retirement proceeding can only be in the interest of justice in cases involving agency initiated disability retirement actions taken pursuant to Part 831L of 5 C.F.R. In that involuntary disability retirement proceedings are similar to adverse action proceedings, fees may be awarded only against the agency that initiated the proceeding, rather than OPM. This holding is consistent with Congress's characterization of involuntary disability retirements as "adversarial actions based on an employee's performance" and its statement that these actions "merit the same degree of judicial review as removals."⁴

OPM's petition for review of the addendum decision is hereby GRANTED, and the addendum decision is VACATED.

This is the final order of the Merit Systems Protection Board. 5 C.F.R. § 1201.113(c).

Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. § 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

ERSA H. POSTON.

WASHINGTON, D.C., *July 19, 1982*

³We are also cognizant of Congress's concern for protecting the civil service retirement fund from expensive litigation techniques. See Transcript of Hearing on H.R. 2510, House Committee on Post Office and Civil Service, Subcommittee on Compensation and Employee Benefits, 96th Cong., 1st Sess. 4.

⁴These comments are contained in the legislative history of PL 96-500, codified as an amendment to 5 U.S.C. § 8347(d). See H.R. Rep. No. 96-1080 at 8, 96th Cong., 2d Sess. 2; S. Rep. No. 96-1004 at 5, 96th Cong., 2d Sess. 1.