

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
2008 MSPB 53**

Docket No. AT-831E-07-0804-I-1

**Walter Youngblood, Jr.,
Appellant,**

v.

**Office of Personnel Management,
Agency.**

OPM Claim No. CSA 4 347 419

March 6, 2008

Walter Youngblood, Jr., Jackson, Mississippi, pro se.

Peggy G. Smith, Washington, D.C., for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman

OPINION AND ORDER

¶1 The appellant has petitioned for review of the initial decision that affirmed the June 6, 2007 reconsideration decision of the Office of Personnel Management (OPM) dismissing as untimely filed his application for disability retirement under the Civil Service Retirement System (CSRS). We GRANT the appellant's petition to consider his challenge to OPM's November 17, 2005 determination that he is not otherwise entitled to CSRS retirement benefits because he requested and received a lump-sum refund of his retirement deductions in 1992 after his separation from federal service. We AFFIRM the initial decision AS MODIFIED

by this Opinion and Order, still SUSTAINING OPM's June 6, 2007 reconsideration decision and SUSTAINING OPM's November 17, 2005 determination.

BACKGROUND

¶2 The appellant separated from federal service with the U.S. Postal Service (USPS) on June 20, 1991. Initial Appeal File (IAF), Tab 6, Subtab II.E at 2, 6. His application for disability retirement under CSRS was received by OPM more than 15 years later, on December 26, 2006. *Id.* at 6-8. The materials he submitted to OPM failed to identify his alleged disabling medical condition. *Id.*, Subtabs II.B, II.D, II.E. In a March 29, 2007 initial decision, OPM dismissed the appellant's application as untimely under 5 U.S.C. § 8337(b) because it was not filed with OPM within 1 year following the appellant's separation from service, informing the appellant that the deadline could be waived only if he established that he was mentally incompetent at the time of separation or became incompetent within 1 year thereafter. *Id.*, Subtab II.C at 1-2.

¶3 The appellant requested reconsideration of OPM's initial decision, but he did not seek a waiver due to mental incompetency nor allege that his application was otherwise timely filed. *Id.*, Subtab II.B. Rather, the appellant inquired about his eligibility for regular retirement:

Is there not an option to pay back the monies taken out at the time of separation and recoup the matching funds and retire? When monies were drew [sic] down when I separated from U.S. Postal Service employment there was no counseling or direction at the time explaining the process and that I would not be eligible for any retirement at all, nor was it explained that I had one year to apply for any type of benefits I possibly would be eligible for at that time.

Id. at 4. On June 6, 2007, OPM issued a reconsideration decision, which affirmed its initial decision that the appellant's application for disability retirement was untimely filed. *Id.*, Subtab II.A at 1-2. The reconsideration decision did not

address the appellant's request for advice concerning his eligibility for "regular retirement."

¶4 The appellant filed an appeal of OPM's final decision with the Board and requested a hearing, but he did not contend that OPM had erred in dismissing his application for disability retirement as untimely filed. IAF, Tab 1. Rather, the appellant claimed that he was either entitled to "regular retirement, a deferred retirement annuity, or [a] discontinued service annuity" based on his 25 years of service, or should be allowed to repay amounts he had "drawn down" in order to "recoup" such benefits. *Id.* at 5. OPM's response to the appeal included documents indicating that the appellant had contacted OPM in 2005 concerning his eligibility for CSRS retirement, IAF, Tab 6, Subtab II.E at 18, 21-22, and that OPM had informed him by letter dated November 17, 2005, that no further benefits were due because he had requested and received a refund of his retirement contributions in 1992, *id.* at 17; *see id.* at 5, 7, 9-10, 19-20, 23.¹

¶5 The appellant does not dispute that, during a telephonic prehearing conference, the administrative judge advised him that the only basis for waiving an untimely-filed disability retirement application was mental incompetence during the relevant time period, and that he responded that he was not claiming that he was mentally incompetent during that period. IAF, Tab 8, Initial Decision (ID) at 2. The administrative judge thereafter affirmed OPM's reconsideration decision without holding a hearing. ID at 1. The administrative judge found that the appellant "did not raise an issue that was cognizable in this proceeding" and concluded that, "[b]ecause the appellant does not argue that he was mentally incompetent during the one-year period following his 1991 separation, there is no basis to extend the statutory time limit for filing a retirement application."

¹ OPM reiterated this position in its responses to inquiries from the appellant's congressman concerning the appellant's eligibility for CSRS retirement. IAF, Tab 6, Subtab II.E at 13-14, 28, 32.

ID at 1-2. The initial decision did not address the appellant's claims related to his eligibility for non-disability CSRS retirement.

¶6 In his petition for review, the appellant has not alleged error in the initial decision. Rather, he requests that the Board advise him "as to any other avenues" to obtain any CSRS retirement benefits to which he may be entitled. Petition for Review File (PFRF), Tab 1 at 3. OPM has not responded to the appellant's petition.

ANALYSIS

The appellant's application for CSRS disability retirement was untimely filed.

¶7 We affirm the initial decision sustaining OPM's reconsideration decision dismissing his application for disability retirement under CSRS because the appellant's petition for review does not allege or establish error by the administrative judge, or offer new and material evidence that, despite due diligence, was not available when the record closed below. *See Lytle v. Department of Veterans Affairs*, 76 M.S.P.R. 388, 390 (1997); 5 C.F.R. § 1201.115(d). The administrative judge correctly determined that an application for disability retirement under CSRS must be filed with OPM before the employee is separated from service or within 1 year thereafter. ID at 2; *see* 5 U.S.C. § 8337(b). This time limit may be waived if the employee "at the date of separation from service or within 1 year thereafter is mentally incompetent, [and] if the application is filed with [OPM] within 1 year from the date of restoration of the employee . . . to competency or the appointment of a fiduciary, whichever is earlier." 5 U.S.C. § 8337(b).²

² OPM's regulation at 5 C.F.R. § 831.1205(b)(1) requires that, when an employee is removed from service for medical reasons, the employing agency must advise the employee in writing of his possible eligibility for disability retirement. Failure to provide such notice may also excuse an employee's noncompliance with timing provisions that depend on such notice. *Johnston v. Office of Personnel Management*, 413 F.3d 1339, 1342, *modified on reconsideration*, 430 F.3d 1376, 1377 (Fed. Cir.

¶8 In this case, it is undisputed that the appellant's disability retirement application was signed on December 15, 2006, and received by OPM on December 26, 2006, more than 14 years after the 1-year filing period had expired on June 20, 1992. IAF, Tab 6, Subtab II.E at 6-7. Although the appellant claims for the first time in his petition for review that he currently "has a serious medical condition that affects memory, physical and mental health resulting in ongoing permanent medical problems and treatment," PFRF, Tab 1 at 3, he has not specified the condition, alleged when it commenced, or provided any medical evidence to support this claim. Because the appellant does not contend that he suffered from such a condition when he separated from service or within 1 year thereafter, it does not provide a basis for waiving the statutory time limit set forth at 5 U.S.C. § 8337(b). The administrative judge therefore correctly determined that there was no basis to waive the statutory time limit for filing the application and that OPM's June 6, 2007 reconsideration decision must therefore be sustained. ID at 2-3.

The appellant is not entitled to non-disability CSRS retirement benefits.

¶9 Given the appellant's pro se status, we also construe his appeal as challenging OPM's November 17, 2005 determination that no further CSRS retirement benefits are due. *See Melnick v. Department of Housing & Urban Development*, 42 M.S.P.R. 93, 97 (1989) (noting that pleadings filed pro se are to be liberally construed), *aff'd*, 899 F.2d 1228 (Fed. Cir. 1990) (Table).

¶10 Because it appears that OPM has not issued a reconsideration decision on this question, the Board ordinarily would not have jurisdiction over it. *See*

2005). Because the appellant does not contend that he was removed from service for medical reasons, however, the USPS was under no obligation to inform the appellant of his possible eligibility for disability retirement. *See* IAF, Tab 6, Subtab II.E at 2 (Individual Retirement Record stating that the appellant resigned on June 6, 1991). Therefore, any failure to do so would not provide a basis for waiving the statutory time limit set forth at 5 U.S.C. § 8337(b).

Mulroy v. Office of Personnel Management, 92 M.S.P.R. 404, ¶ 8 (2002) (the Board generally has jurisdiction to adjudicate an individual's rights and interests under CSRS only after OPM has rendered a reconsideration decision on the issue in question); *see also* 5 C.F.R. §§ 831.109, .110. Nevertheless, the absence of a reconsideration decision does not preclude Board review of a retirement decision when OPM fails to advise the appellant of his right to request a reconsideration decision, and does not intend to issue any further decision on the appellant's application. *See Scallion v. Office of Personnel Management*, 72 M.S.P.R. 457, 461 (1996); *Richards v. Office of Personnel Management*, 29 M.S.P.R. 310, 312 (1985).

¶11 Here, OPM did not advise the appellant of any right to request a reconsideration decision or to file a Board appeal in its November 17, 2005 letter informing him that “[n]o further benefits are due,” and it appears that OPM does not intend to issue any further decision. Accordingly, we find that OPM's November 17, 2005 letter is tantamount to an appealable reconsideration decision that affects the appellant's rights or interests under CSRS, and that the Board therefore has jurisdiction to adjudicate any arguments that the appellant may raise regarding why he believes OPM is incorrect. *See Scallion*, 72 M.S.P.R. at 461. We find further that the record is sufficiently developed for the Board to decide this matter without a remand. *See Licausi v. Office of Personnel Management*, 350 F.3d 1359, 1364-65 (Fed. Cir. 2003) (“Because the Board engages in de novo consideration of the eligibility issue [in appeals from OPM reconsideration decisions involving retirement benefits], it is not confined to either upholding OPM’s decision on the ground invoked by OPM or remanding to OPM for further proceedings.”); *Williamson v. Office of Personnel Management*, 106 M.S.P.R. 146, ¶ 10 (2007) (resolving without remand legal issues that were not addressed

in OPM's appealable decision denying a claim for death benefits under the Federal Employees' Retirement System).³

¶12 As is discussed above, OPM determined that, despite the appellant's 25 years of service with USPS, he is not entitled to a deferred annuity because he requested and received a refund of his retirement deductions in 1992. IAF, Tab 6, Subtab II.E at 5, 7, 9-10, 13-14, 17. The appellant does not contest these facts on appeal. Rather, he contends that he is entitled to a deferred annuity based on agency matching funds contributed on his behalf to CSRS under 5 U.S.C. § 8334, or, in the alternative, he is entitled to redeposit his retirement refund and thereafter to receive a deferred annuity based on the amount redeposited and any agency matching funds. IAF, Tab 1 at 5, Tab 6, Subtab II.E at 18, 21. Because the appellant requested and received a refund of his contributions to the civil service retirement fund, and he has not been reemployed in a covered position in the federal service, any right he had to an annuity has been extinguished. *See* U.S.C. § 8342(a) (subject to exceptions not applicable in this case, "the receipt of the payment of the lump-sum credit by the employee . . . voids all annuity rights under this subchapter based on the service on which the lump-sum credit is based, until the employee . . . is reemployed in the service subject to this subchapter"); *Yarbrough v. Office of Personnel Management*, 770 F.2d 1056, 1060-61 (Fed. Cir. 1985). Further, because the appellant has not been reemployed in a position subject to the CSRS, he is also ineligible to make a redeposit of these contributions for the purpose of being allowed credit for his prior service. *See* 5

³ We note that a question exists concerning the timeliness of the appellant's challenge to OPM's November 17, 2005 determination. An appeal must generally be filed no later than 30 days after the effective date, if any, of the action being appealed, or 30 days after the date of receipt of the agency's decision, whichever is later. 5 C.F.R. § 1201.22(b). The appellant did not file his appeal until July 5, 2007, nearly 20 months after OPM issued its November 17, 2005 determination, which failed to inform him of his Board appeal rights. IAF, Tab 1, Tab 6, Subtab II.E at 17. We have not decided that issue because we conclude that the appeal is without merit.

U.S.C. § 8334(d)(1); *Sanchez v. Office of Personnel Management*, 47 M.S.P.R. 343, 346-47 (1991) (an employee who received a refund pursuant to 5 U.S.C. § 8342 may be allowed credit for his prior service under 5 U.S.C. § 8334(d) if “[w]hile subsequently reemployed in a covered position” he redeposits the amount received, with interest) (emphasis added). OPM therefore cannot accept his request to redeposit the withdrawn funds or to grant him a deferred annuity. *See Mahan v. Office of Personnel Management*, 47 M.S.P.R. 639, 641-42 (1991) (finding that no law permitted the appellant to redeposit her retirement contribution refund or to receive annuity benefits even though the appellant relied on the mistaken advice of a Social Security Administration official in withdrawing her retirement contributions).

¶13 In support of his position that he should be allowed to redeposit the withdrawn funds, the appellant alleges that, when he applied for the refund, “there was no counseling or direction at the time explaining the process and that [he] would not be eligible for any retirement at all.” IAF, Tab 6, Subtab II.B at 4. The appellant’s application for a refund of his retirement deductions, however, expressly notified, “If you have more than 5 years of service, you may be entitled to annuity rights which will be forfeited by payment of this refund unless you are later reemployed subject to the Civil Service Retirement law.” *Id.*, Subtab II.E at 10. Further, even if a claimant is denied benefits because of his reliance on the mistaken advice of a government official, the government cannot be estopped from denying monetary benefits not otherwise permitted by law. *Office of Personnel Management v. Richmond*, 496 U.S. 414, 425-34 (1990); *Mahan*, 47 M.S.P.R. at 641. The appellant therefore has not made nonfrivolous allegations that he is entitled to redeposit his retirement contribution refund or to receive annuity benefits. *See Mahan*, 47 M.S.P.R. at 642; *see also* 5 U.S.C. § 8342(a).

¶14 Because the appellant admittedly elected to receive and did receive a lump-sum refund of his retirement deductions, OPM’s denial of a retirement annuity must be sustained.

ORDER

¶15 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 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, <http://fedcir.gov/contents.html>. 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:

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