

**UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD**

89 M.S.P.R. 1

JUDITH BYNUM,  
Appellant,

DOCKET NUMBER  
DC-831E-00-0093-I-1

v.

OFFICE OF PERSONNEL  
MANAGEMENT,  
Agency.

DATE: June 29, 2001

(CSA 3 778 179)

Judith Bynum, Richmond, Virginia, pro se.

Thomas L. Styer, Washington, D.C., for the agency.

**BEFORE**

Beth S. Slavet, Chairman  
Barbara J. Sapin, Vice Chairman  
Susanne T. Marshall, Member

**OPINION AND ORDER**

¶1 The Office of Personnel Management (OPM) has filed a petition for review (PFR) of the initial decision (ID) that reversed its reconsideration decision and ordered it to grant the appellant's application for disability retirement. The Board DENIES OPM's petition for failure to meet the criteria for review, but REOPENS the case on its own motion under 5 C.F.R. § 1201.118, AFFIRMING the ID as MODIFIED. OPM's reconsideration decision is NOT SUSTAINED.

## BACKGROUND

¶2 Effective March 7, 1997, the appellant was removed from her position as a GS-6 Rehabilitation Technician (Alcohol and Drug Dependence) with the Department of Veterans Affairs (DVA) based on charges of absence without leave, submitting false documents to support her absence, and failure to follow leave-requesting procedures. Initial Appeal File (IAF), Tab 3, Subtab IID. On appeal to the Board, (MSPB Docket No. DC-0752-97-0482-I-1), the appellant and the DVA reached a settlement which provided, in pertinent part, that the reason for the appellant's removal would be changed to reflect "termination/disability," and that it was understood by the parties that she was terminated due to a physical inability to perform her job. *Id.*

¶3 On July 10, 1997, the appellant filed an application for disability retirement under the Civil Service Retirement System (CSRS) based on "injuries to her head, neck, and back," claiming that she became disabled on May 16, 1996, when she suffered an on-the-job injury. *Id.* OPM denied her application, initially and on reconsideration, *id.* at Subtabs IIC and IIA, finding that she had not provided a complete, clear, and consistent history of objective medical evidence to support her claim.

¶4 On appeal, the appellant generally challenged OPM's findings. *Id.* at Tabs 1, 6, and 9. In her ID based on the written record (the appellant did not request a hearing), the administrative judge (AJ) found that the appellant's removal for physical inability to perform the duties of her position constituted prima facie evidence of her entitlement to disability retirement benefits, ID at 4-5, and that the totality of the evidence established that she was, in fact, disabled, *id.* at 6-12. Accordingly, the AJ ordered OPM to grant the appellant the benefit she sought.

¶5 In its PFR, OPM alleges that the AJ erred in: accepting the appeal as timely filed; applying the presumption that the appellant is entitled to disability retirement based on her removal for physical inability to perform; and finding,

based on the record, that she is disabled. Petition for Review File (PFRF), Tab 1. The appellant has not responded to OPM's petition.

### ANALYSIS

¶6 We find preliminarily that, although OPM argues that the AJ erred in finding that the appellant established good cause for her brief, 9-day, delay in filing her appeal, the challenge constitutes mere disagreement with the AJ's well-reasoned findings in this regard, ID at 1 n.1, and provides no basis upon which to overturn them. *See Weaver v. Department of the Navy*, 2 M.S.P.R. 129, 133-34 (1980), *review denied*, 669 F.2d 613 (9th Cir. 1982) (per curiam).

¶7 An employee who appeals from OPM's decision on a voluntary disability retirement application 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 qualify for disability retirement under CSRS, an employee must establish that: (1) She has completed 5 years of creditable civilian service; (2) while employed in a position subject to CSRS, she became disabled because of a medical condition, resulting in a service deficiency in performance, conduct, or attendance, or, if there is no such actual service deficiency, the disabling medical condition is incompatible with either useful or efficient service or retention in the position; (3) the disabling medical condition is expected to continue for a least 1 year from the date the disability retirement application is filed; (4) the employing agency is unable to accommodate the disabling medical condition in the position held or in an existing vacant position of the same grade or pay level and tenure for which the employee is qualified for reassignment, located in the same commuting area, and one in which she would be able to render useful and efficient service; and (5) the application was filed with the employing agency before the employee separated from service, or with the former agency or OPM within 1 year thereafter. *See* 5 U.S.C. § 8337(a); 5

C.F.R. § 831.1203(1); *Moore v. Office of Personnel Management*, 57 M.S.P.R. 318, 321 (1993).

¶8 The AJ found that the appellant had more than 5 years of service, thereby satisfying the first criterion. ID at 3 n.2. The record reflects that the fifth criterion is satisfied because the appellant's disability retirement application was filed within 1 year of the date of her removal. IAF, Tab 3, Subtab IID. In addition, the fourth criterion is satisfied by the employing agency's certification that reassignment was not possible because no appropriate vacant positions existed for which the appellant was qualified. *Id.* The AJ implicitly found that the second and third criteria were established, and, while we agree, we address those criteria further below.

¶9 OPM charges that the AJ erred in finding that the appellant established a prima facie case of her entitlement to a disability retirement because she considered that the true basis for the appellant's removal was physical inability to perform, when, in fact, that reason was "fictitious, fabricated, and fraudulent." PFRF, Tab 1. In so arguing, OPM challenges the AJ's application of the *Bruner* presumption which provides that an employee's removal for disability, i.e., medical inability to perform her job duties, establishes a rebuttable prima facie case of her entitlement to disability retirement, and shifts the burden to OPM to produce sufficient evidence to support a finding that she is not entitled to disability retirement benefits. *See Bruner v. Office of Personnel Management*, 996 F.2d 290, 293-94 (Fed. Cir. 1993). The *Bruner* presumption further provides that, if OPM satisfies this burden of production, the totality of the evidence is considered to determine whether the employee satisfied her ultimate burden of establishing, by preponderant evidence, her entitlement to disability retirement. *Id.* at 294.

¶10 Although she did not specifically cite to *Bruner*, the AJ applied the presumption, based on the reason for the appellant's removal as agreed to by the

parties in the document they signed in settlement of the appeal of her removal. ID at 4-5; IAF, Tab 3, Subtab IID. The Board has held that it will generally give effect to the terms of a settlement agreement between an applicant for disability retirement and her employing agency in determining the applicant's entitlement to disability retirement. *Jordan v. Office of Personnel Management*, 77 M.S.P.R. 610, 614-17 (1998), *recons. denied*, 86 M.S.P.R. 144 (2000). The resolution of an appeal between an appellant and his employing agency based upon a settlement constitutes a final decision under the Board's appellate jurisdiction, and the Board has authority to enforce the settlement agreement once it becomes a part of the Board record. *Id.* at 615.

¶11 Because the appellant and her employing agency resolved the appeal of her removal by entering into a settlement agreement, and because that resolution became a final decision of the Board, we therefore find that the AJ properly applied the *Bruner* presumption, and that the appellant established a rebuttable prima facie case of her entitlement to disability retirement. As indicated below by the record, the appellant's evidence indicates that she suffered a medical condition with debilitating effects on her life as well as her job. OPM's PFR raises argument, but pure argument, which constitutes mere disagreement with the ID. *Weaver, supra*.

¶12 OPM further argues on review that the AJ erred in finding that it failed to rebut the *Bruner* presumption. OPM claims that, in fact, it demonstrated, in the record before the AJ, a lack of objective medical evidence providing a reasoned explanation of how certain aspects of the appellant's condition render her unable to perform her duties, and that the lack of such evidence was sufficient to rebut the *Bruner* presumption. OPM relies on the Board's general rule that the persuasiveness of a medical report stems from its explanation of how certain aspects of a particular condition render the employee unable to perform specific

work requirements. *Tanious v. Office of Personnel Management*, 34 M.S.P.R. 107, 111 (1987).

¶13 While OPM correctly cites the standard for rebutting the *Bruner* presumption, there are limited circumstances under which such a specific showing is not required. In *Mullins-Howard v. Office of Personnel Management*, 71 M.S.P.R. 619, 627 (1996), for example, an employee who was a computer programmer applied for disability retirement based on depression and acute anxiety. Her medical reports stated that she was unable to leave her home or talk to anyone other than her family and that she was unable to concentrate to the point of being unable to sort the laundry or cook without fear of setting the house on fire. OPM initially denied her application on the ground that the evidence failed to demonstrate how her psychological impairments prevented her from performing the specific duties of her position. On her appeal, OPM reversed its decision and the appellant sought attorney fees. In discussing whether the appellant had demonstrated that an award of fees would be in the interest of justice, the Board pointed out that an employee's entitlement to disability retirement does not always "turn[] on finely tuned correlations between particular medical impairments and specific job requirements." The Board found that OPM was in a position to conclude that the appellant's condition precluded her from performing her job duties based on the position description, the medical reports, and the appellant's personal account of the effects of her psychological condition. The Board awarded attorney fees to the appellant. *See also Chappell v. Office of Personnel Management*, 79 M.S.P.R. 302 (1998) (despite failure of employee and her doctors to more explicitly link the claims based on the overall effect of her physical and mental conditions on her ability to perform useful and efficient service, the Board found the record sufficiently demonstrated likelihood of a causal relationship between those conditions and remanded for further development of the issue).

¶14 The *Mullins-Howard* approach creates an exception to the rule that medical evidence itself must show that the medical condition affects specific job duties and requirements. Where the Board is presented with the position description and with medical evidence that unambiguously and without contradiction indicates that the appellant cannot perform the duties or meet the requirements of the position, the Board may link the medical evidence to the job duties and requirements and find that the appellant is entitled to disability retirement. In such circumstances, the Board may make this finding in the absence of reference in the medical evidence to specific job duties or requirements. Considering medical evidence in this way is part of the Board's role as the ultimate decision maker with the authority to independently evaluate the probative value of medical evidence in the absence of contradictory medical evidence from another source. *Irlanda v. U.S. Postal Service*, 23 M.S.P.R. 289, 291 (1984).

¶15 The situation presented in this case falls within the *Mullins-Howard* exception. Dr. Prakash Ettigi was the appellant's psychiatrist whom she consulted after being treated by an orthopedist and a neurologist. In Dr. Ettigi's report of July 23, 1997, he diagnosed the appellant as suffering from "depression secondary to obsessive compulsive disorder" due to preoccupation with her physical ailments. IAF, Tab 3, Subtab IID. He determined that her prognosis was "questionable at the present time." *Id.* As a Rehabilitation Technician, the appellant worked with alcohol and drug-dependent clients. Her duties included observing symptoms of drug and alcohol withdrawal and related nervous disorders, counseling clients in individual and group settings, and otherwise directing their therapy. An express requirement of her position is that she possess "emotional stability." *Id.* Although in his report Dr. Ettigi improperly identified the appellant as having served as a "supervisor in maintenance," and did not expressly indicate how her medical condition affected her ability to perform the specific duties of her position, *id.*, his diagnosis of depression and obsessive

compulsive disorder with a questionable prognosis constitutes evidence that the appellant is not emotionally stable, and thus cannot meet a specific requirement of her position.

¶16 The appellant retains the ultimate burden of persuasion at all times to establish her entitlement to disability retirement. *See Trevan v. Office of Personnel Management*, 69 F.3d 520, 527 (Fed. Cir. 1995). In this case, she met that burden because the medical evidence unambiguously indicates that her medical condition as diagnosed by her psychiatrist renders her unable to meet the requirement of her position that she be emotionally stable. *Compare Wilkey-Marzin v. Office of Personnel Management*, 82 M.S.P.R. 200, ¶¶ 10-11 (1999) (evidence of the appellant's post-traumatic stress disorder did not indicate how the disorder affected the performance of her duties as a Letter Carrier); *Kibble v. Office of Personnel Management*, 80 M.S.P.R. 62, ¶ 6 (1998) (medical evidence that the appellant suffered from major depression did not indicate how her condition affected her ability to perform in her position of Inventory Management Specialist).

¶17 We conclude, therefore, that the AJ was correct in finding that OPM failed to rebut the *Bruner* presumption, and that, for the reasons set forth above, the appellant met her ultimate burden of establishing her entitlement to disability retirement.

### **ORDER**

We ORDER OPM to award the appellant disability retirement benefits. OPM must complete this action no later than 20 days after the date of this decision.

We also ORDER OPM to tell the appellant promptly in writing when it believes it has fully carried out the Board's Order and of the actions it took to carry out the Board's Order. We ORDER the appellant to provide all necessary

information OPM requests to help it carry out the Board's Order. The appellant, if not notified, should ask OPM about its progress. *See* 5 C.F.R. § 1201.181(b).

No later than 30 days after OPM tells the appellant it has fully carried out the Board's Order, the appellant may file a petition for enforcement with the office that issued the initial decision on this appeal if the appellant believes that OPM did not fully carry out the Board's Order. The petition should contain specific reasons why the appellant believes OPM has not fully carried out the Board's Order, and should include the dates and results of any communications with OPM. *See* 5 C.F.R. § 1201.182(a).

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 RIGHT TO REQUEST  
ATTORNEY FEES AND COSTS**

You may be entitled to be paid by the agency for your reasonable attorney fees and costs. To be paid, you must meet the requirements set out at Title 5 of the United States Code (5 U.S.C.), sections 7701(g), 1221(g), or 1214(g). The regulations may be found at 5 C.F.R. § 1201.202. If you believe you meet these criteria, you must file a motion for attorney fees **WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION**. You must file your attorney fees motion with the office that issued the initial decision on your appeal.

**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 other related material at our web site, <http://www.mspb.gov>.

FOR THE BOARD:

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Robert E. Taylor  
Clerk of the Board

Washington, D.C.