

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

2008 MSPB 62

Docket No. DE-831E-07-0359-I-1

**Sylvia M. Reilly,
Appellant,**

v.

**Office of Personnel Management,
Agency.**

OPM Claim No. CSA 4 322 579

March 14, 2008

Sylvia M. Reilly, Goodyear, Arizona, pro se.

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

BEFORE

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

OPINION AND ORDER

¶1 The Office of Personnel Management (OPM) has petitioned for review of an initial decision that reversed its reconsideration decision denying the appellant's application for disability retirement benefits. For the reasons set forth below, we GRANT OPM's petition for review, REVERSE the initial decision, and SUSTAIN OPM's reconsideration decision.

BACKGROUND

¶2 The appellant resigned from her position as a letter carrier with the U.S. Postal Service, effective March 15, 2006, citing "ill health." Initial Appeal File

(IAF), Tab 7 at 5. She subsequently applied for disability retirement under the Civil Service Retirement System (CSRS) based on chronic asthma. IAF, Tab 4, Subtab II(D) at 1-2. OPM denied the application, finding that the appellant did not show a deficiency in performance, attendance or conduct, and that her medical evidence did not establish a medical condition of the severity to prevent her from performing in her position and to warrant her exclusion from the workplace. *Id.*, Subtab II(C). It affirmed this decision on reconsideration. *Id.*, Subtab II(A).

¶3 On appeal to the Board, the administrative judge (AJ) reversed OPM's decision, finding that the appellant had proven her entitlement to disability retirement benefits. IAF, Tab 12. In his initial decision (ID), the AJ found that the appellant, while still employed in her CSRS-covered position, became disabled as a result of her chronic asthma and the dust and other impurities she would come into contact with while working on her route, and that her asthma resulted in deficiencies in her conduct, performance, and attendance. *Id.* at 6. He further found that the appellant's asthma could not be effectively controlled and that the agency was unable to accommodate her. *Id.* at 7-8.

¶4 OPM has filed a timely petition for review (PFR), arguing that the AJ misinterpreted or failed to apply precedential case law and relevant regulations. PFR File (PFRF), Tab 1. The appellant did not respond to the PFR.

ANALYSIS

¶5 In order to qualify for disability retirement under the CSRS, an individual must meet the following requirements: (1) The individual must have completed at least 5 years of creditable service; (2) the individual must, while employed in a position subject to the CSRS, have become disabled because of a medical condition, resulting in a service deficiency in performance, conduct, or attendance, or if there is no actual deficiency, the disabling medical condition must be incompatible with either useful and efficient service or retention in the

position; (3) the disabling medical condition must be expected to continue for at least 1 year from the date the application for disability retirement is filed; (4) the employing agency must be unable to accommodate the disabling medical condition in the position held or in an existing vacant position; and (5) the application must be filed with the employing agency before the individual separates from service, or with the employing agency or OPM within 1 year thereafter. 5 C.F.R. § 831.1203(a)(1)-(5). A determination regarding entitlement to disability retirement benefits must consider the following evidence: (1) objective clinical findings; (2) diagnoses and medical opinions; (3) subjective evidence of pain and disability; (4) evidence relating to the effect of the applicant's condition on his ability to perform in the grade or class of position last occupied; and (5) evidence that the applicant was not qualified for reassignment to a vacant position at the same grade or level as the position he last occupied. *Musser v. Office of Personnel Management*, 102 M.S.P.R. 18, ¶ 7 (2006).

¶6 On PFR, OPM argues that the AJ erred in finding that the appellant met the requirements for disability retirement because he relied on medical evidence dated after the appellant had already resigned her position, when she was no longer covered under the CSRS. PFRF, Tab 1 at 2. Specifically, OPM takes issue with the following statement in the ID:

As of July 31, 2007, the latest diagnosis of the appellant's condition is that she has developed Chronic Obstructive Pulmonary Disease (COPD) and was exhibiting "decreased breath sounds" upon auscultation.

Id. (citing ID at 4).

¶7 In order to show entitlement to a disability annuity under the CSRS, the appellant must have become disabled *while employed in a position subject to the CSRS*. 5 C.F.R. § 831.1203(a)(2); *cf. Schwaier v. Office of Personnel Management*, 61 M.S.P.R. 49, 52-53 (1994) (to qualify for a disability annuity, the employee had to show that he became disabled while in a position subject to the Federal Employees Retirement System). In connection with this requirement,

we found in *Hardy v. Office of Personnel Management*, 98 M.S.P.R. 323, ¶ 11, *aff'd*, 157 F. App'x 302 (Fed. Cir. 2005), that the AJ erred in citing to and relying on medical evidence dated after the applicant for disability retirement had been removed from her position to find that she was entitled to such benefits, without making a finding of whether the appellant was disabled at the time of her separation.

¶8 It is not clear whether the AJ specifically relied on the statement quoted above in finding that the appellant became disabled while she was employed in her CSRS-covered position. This statement was in the “Background” section of the ID, not in the “Analysis” section. In fact, the AJ does not cite to any specific medical evidence in the “Analysis” section. However, in the “Background” section he mentions not only the July 31, 2007 diagnosis, but also an April 25, 2006 report characterizing the appellant’s asthma as “severe”; a June 20, 2006 X-ray showing that the appellant had “mild pleural/parenchymal alterations at the left lung base”; and a July 7, 2006 report diagnosing the appellant with “minimal small airway disease.” ID at 3-4. Because all of this evidence post-dates the appellant’s resignation, and does not address her condition at the time of her resignation, to the extent that the AJ relied on it to determine that the appellant was disabled, this was error. *See Hardy*, 98 M.S.P.R. 323, ¶ 11.

¶9 OPM also argues on PFR that the AJ erred in finding that the appellant’s evidence showed that she had a disabling medical condition at the time she resigned from her position. PFRF, Tab 1 at 3. The record contains a Certification of Health Care Provider form from Dr. Michael Keller, M.D., in support of the appellant’s request for leave under the Family and Medical Leave Act, dated January 11, 2006, indicating that the appellant had severe asthma and that she faced one to two episodes of incapacity per month lasting one to three days each. IAF, Tab 7 at 14-16. A report from Dr. Keller regarding an examination of the appellant on February 23, 2006, also notes that the appellant’s asthma is severe. IAF, Tab 4, Subtab II(D) at 16. However, this report further

states that she was on multiple medications and that her asthma had “improved.” *Id.* Moreover, progress notes from Dr. Keller, dated February 7, 2006, and February 23, 2006, indicate that the appellant’s asthma was “moderate.” *Id.*, Subtab II(B) at 16-17. A report of a physical examination on February 7, 2006, indicates that the appellant had only “mild diffuse wheezing” and “no rhonci” and “no respiratory distress.” *Id.*, Subtab II(D) at 17. A report from February 23, 2006, contains similar observations, although it also notes that there was no wheezing. *Id.* at 16. Reports dated February 27, 2006, and March 1, 2006, contain the same observations as the February 23 report. *Id.* at 10, 14. The notes and reports do not indicate that the appellant was disabled or suggest that she was suffering from any symptoms significant enough to prevent her from performing the duties of her position. *See Tanious v. Office of Personnel Management*, 34 M.S.P.R. 107, 111 (1987) (a physician’s conclusion that an employee is disabled is persuasive only if the physician explains how the medical condition affects the employee’s specific work requirements). In this regard, we note that they do not indicate that the appellant was given any restrictions on any activities. Although the appellant submitted an August 23, 2006 letter from one of her physicians restricting her from riding in or operating vehicles that are dusty in the interior, *id.*, Subtab II(B) at 10, this letter post-dates the appellant’s March 15, 2006 resignation, and does not address her condition at the time of her resignation. We therefore do not find it persuasive on the issue of whether the appellant was disabled when she resigned.

¶10 In her response to OPM’s interrogatories, the appellant asserted that while working she would wheeze and feel a tightness in her chest, and that her condition caused her to slow down in the office and while making deliveries. IAF, Tab 7 at 21. She also stated that she was harassed for not doing her work on time, she was given numerous proficiency tests, and she needed “street help” almost every day. *Id.* An employee’s own evidence concerning her medical condition is entitled to weight in a disability retirement case when it is supported

by competent medical evidence. *Weaver v. Office of Personnel Management*, 92 M.S.P.R. 330, ¶ 8 (2002). In this case, however, there is little supportive competent medical evidence indicating she was disabled, i.e., unable to perform the critical or essential elements of her position acceptably. See 5 C.F.R. § 831.1202.

¶11 Further, it is well settled that a disability annuitant claimant must establish the extent to which her disability can or cannot be controlled. *Wilkey-Marzin v. Office of Personnel Management*, 82 M.S.P.R. 200, ¶ 15 (1999). The appellant did not submit any evidence on this issue. The record contains one prescription note from Dr. Keller, dated August 23, 2006, which states that the appellant's asthma was "improved but not cured" with medications. IAF, Tab 4, Subtab II(B) at 11. This note does not indicate, however, the extent to which her asthma improved.¹

¶12 Based on the foregoing, we agree with OPM that the appellant has not proven by preponderant evidence that she was disabled at the time that she resigned. Further, although it appears from evidence in the record that the appellant may have had an attendance deficiency,² we find that the medical and other evidence in the record fails to show persuasively that this deficiency resulted from her asthma.³ Because we find that the appellant failed to show that

¹ OPM argues on PFR that, if anything made the appellant's asthma worse at times, it was her cigarette smoking. PFRF, Tab 1 at 3. It is not clear from the evidence in the record, however, what impact the appellant's smoking has had on her asthma.

² On March 1, 2006, the appellant received a letter of warning because she had been absent on 11 occasions between October 3, 2005, and February 4, 2006. IAF, Tab 7 at 8-9. The letter states that the absences were not FMLA-protected, although we note that it also acknowledges that the appellant indicated that she was having trouble getting her FMLA leave requests approved. *Id.*

³ The AJ also found that the appellant had conduct and performance deficiencies, although he did not identify them. ID at 6. We note that, according to an affidavit by Gary Sherman, a witness for the appellant, the appellant was frequently given proficiency tests because she was not performing up to standards. IAF, Tab 11 at 6.

she was disabled when she resigned, we need not address the AJ's finding that the agency was unable to accommodate her.

¶13 Accordingly, we REVERSE the initial decision and SUSTAIN OPM's reconsideration decision denying the appellant's application for disability retirement.

ORDER

¶14 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

There is no evidence from the agency indicating that the appellant had any performance deficiencies, however. In fact, the Supervisor's Statement filed in connection with the appellant's application for disability retirement indicates that the appellant had no such deficiencies. IAF, Tab 4, Subtab II(D) at 3. With regard to conduct deficiencies, we note that the appellant's supervisor did not properly complete the Supervisor's Statement on this issue; rather than checking the "Yes" or "No" box in response to a question about whether the appellant had such deficiencies, the supervisor wrote "No Condition." *Id.* at 4. There is no record evidence that she had such deficiencies.

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.