

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

2008 MSPB 191

Docket No. AT-844E-08-0071-I-1

**Tony Henderson,
Appellant,**

v.

**Office of Personnel Management,
Agency.**

OPM Claim No. CSA 8 320 606

August 4, 2008

Daniel M. Goodkin, Esquire, Westlake Village, California, for the
appellant.

Evelyn K. Payne, Washington, D.C., for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant has filed a petition for review (PFR) of an initial decision (ID) that affirmed an Office of Personnel Management (OPM) reconsideration decision disallowing his application for disability retirement under the Federal Employees' Retirement System (FERS). For the reasons set forth below, we GRANT the PFR under 5 C.F.R. § 1201.115, REVERSE the ID, and DO NOT SUSTAIN OPM's reconsideration decision.

BACKGROUND

¶2 The appellant was a GS-11 Senior Border Patrol Agent for the Department of Homeland Security (DHS). Initial Appeal File (IAF), Tab 1 at 1, Tab 3, Subtab II-D at 3, 168. On June 7, 2006, the appellant was arrested in the workplace and charged with distribution of marijuana. IAF, Tab 3, Subtab II-A at 1, Subtab II-D at 5, 10; Tab 7 at 8. On July 30, 2006, DHS placed the appellant on indefinite suspension pending the outcome of the criminal charge. IAF, Tab 3, Subtab II-D at 173-74, Subtab II-E at 1-2. The appellant was ultimately convicted via a guilty plea and removed from service effective January 5, 2008. IAF, Tab 7 at 8-9.

¶3 During his suspension, the appellant filed an application for disability retirement, alleging that he was unable to perform his job duties due to a back injury and psychological problems. IAF, Tab 3, Subtab II-D at 1. The appellant included with his application a psychologist's report describing the appellant's psychological condition, *id.* at 10-11, as well as various medical records regarding the appellant's back condition, *id.* at 12-164. OPM disallowed the appellant's disability retirement application, finding that the appellant failed to provide evidence showing that his conditions were not amenable to appropriate treatment and therapy, that the appellant's physician did not report any medical restrictions that would prevent the appellant from performing the essential duties of his position, that there was no evidence to show that the appellant's conditions resulted in any actual service deficiency, and that the appellant failed to provide medical evidence establishing that his conditions were severe enough to prevent him from providing useful and efficient service in his position. IAF, Tab 3, Subtab II-C at 2-3.

¶4 The appellant requested reconsideration, and submitted further medical records. IAF, Tab 3, Subtab II-B. OPM affirmed its initial decision, summarizing a radiologist's interpretation of a July 25, 2006 magnetic resonance imaging (MRI) of the appellant's lumbar spine, and finding that the interpretation

did not show the appellant's condition to be disabling. IAF, Tab 3, Subtab II-A at 2, Subtab II-D at 160-61. OPM further found that a strength test conducted on July 31, 2006, showed that the appellant had "minimal changes in [his] back and arms," and that a strengthening program was suggested because it had benefited the appellant in the past. IAF, Tab 3, Subtab II-A at 2, Subtab II-B at 42-45. Finally, OPM found that the psychological evidence provided by the appellant failed to establish that he was disabled by any mental disorder. IAF, Tab 3, Subtab II-A at 2, Subtab II-D at 10-11.

¶5 The appellant filed an appeal of OPM's reconsideration decision, arguing that the disallowment of his disability retirement application was contrary to the evidence and applicable law. IAF, Tab 1 at 5-7. The administrative judge (AJ) conducted a hearing in which the appellant and his treating physician, Dr. L. Allen Smith, testified that the appellant began having physical problems at work prior to his June 7, 2006 arrest, but that the appellant's condition was not disabling at that time because he was able to limit his physical activities and his coworkers would occasionally cover for him when he was unable to accomplish physical tasks. They stated that the appellant's disability appeared to have begun after a physical altercation during the appellant's arrest aggravated his condition. Hearing Tape (HT); IAF, Tab 10 (ID) at 4.¹ However, the agency witness, who

¹ A telephonic hearing in this appeal was held on January 10, 2008, but the portion of the hearing tape containing the cross-examination of the appellant, all of the appellant's supervisor's testimony, and the parties' closing arguments is garbled beyond all comprehension, HT, and there is no transcript or backup tape available. Although some of the evidence cited in the ID appears to be contained in the garbled portion of the hearing tape and nowhere else in the record, we find it unnecessary to remand this appeal for a rehearing because the parties do not contest the AJ's characterization of the testimony. See *Schmidt v. U.S. Postal Service*, 42 M.S.P.R. 563, 570 (1989). In addition, there is no indication that the testimony contained in the garbled portion of the hearing tape would be material to the outcome of this appeal or that the appellant's substantive rights have been prejudiced. See *Kane v. Defense Personnel Support Center*, 21 M.S.P.R. 358, 360 (1984) (where portions of the record were blank but the missing testimony was not significant, there was no evidence of a material adverse effect on the appellant's rights, and remedial action was not required). Therefore,

was the appellant's former supervisor, testified that she saw the appellant every day, the appellant had no visible signs of back problems, the appellant had no attendance deficiency, and there was no indication that the appellant was in pain or otherwise physically restricted. ID at 4. The appellant's supervisor also testified that she was never informed that the appellant was unable to accomplish his full range of duties or that other agents were covering for him, and that the appellant successfully completed a physically rigorous assignment immediately prior to his arrest. ID at 4-5. The supervisor also testified that she had been told there was no altercation involved in the appellant's arrest, and that the appellant was not even handcuffed. ID at 5. The supervisor admitted to not being present at the arrest. ID at 5.

¶6 The AJ then issued an ID affirming OPM's decision. The AJ found that, though the appellant did appear to have back problems, "Dr. Smith's opinion of the extent of the appellant's pain and physical limitations is based on the anecdotal reports of the appellant." *Id.* The AJ also found that the supervisor's testimony was more credible than the appellant's because the supervisor had no incentive to fabricate or color her testimony, but the appellant had a strong incentive to testify in a light most favorable to his own case. The AJ therefore found that the supervisor's testimony regarding the appellant's ability to perform his duties cast serious doubt on the veracity of the appellant's testimony and his reporting to Dr. Smith. *Id.* The AJ found especially compelling the contradiction between the appellant's testimony that his arrest resulted in a violent altercation and the supervisor's testimony that no such altercation occurred. He stated, "In my view, the appellant, after his arrest, began exaggerating his pain and physical limitations in his reports to Dr. Smith in an attempt to find an honorable way to end his career without waiting for ... the agency to initiate an adverse action." *Id.*

wherever the hearing tape is garbled, we cite the AJ's summary of the testimony as found in the ID in lieu of the hearing tape itself.

Finally, the AJ found that the evidence regarding the appellant's psychological problems indicated that he is being favorably treated, and did not establish that his psychological condition was disabling. ID at 5-6.

¶7 The appellant filed a PFR, arguing that the AJ erred by: (1) Failing to accord Dr. Smith's testimony and medical reports proper weight, Petition for Review File (PFRF), Tab 1, PFR at 2-6; (2) basing his finding that the appellant's testimony was not credible on the appellant's supervisor's hearsay testimony, especially with regard to the appellant's medical condition after he ceased active service, *id.* at 6-8; (3) excluding one of the appellant's witnesses, *id.* at 8-9; and (4) denying the appellant's motion to compel discovery, *id.* at 9-10. The appellant does not contest the AJ's finding that the appellant's psychological condition was not disabling. The agency filed a response, arguing that the PFR should be denied for failure to meet the review criteria, PFRF, Tab 3, and the appellant replied to the agency's response, arguing that his PFR meets the review criteria because it constitutes more than mere disagreement with the ID, PFRF, Tab 4.²

ANALYSIS

¶8 An employee bears the burden of proving by preponderant evidence his entitlement to disability retirement. *Snow v. Office of Personnel Management*, 74 M.S.P.R. 269, 273 (1997); 5 C.F.R. § 1201.56(a)(2). To qualify for disability retirement benefits under FERS, an individual must meet the following requirements: (1) The individual must have completed 18 months of creditable civilian service; (2) the individual must, while employed in a position subject to FERS, have become disabled because of a medical condition resulting in a

² The Board's regulations do not provide for submissions beyond the PFR and the response thereto, unless those submissions are based on previously unavailable evidence. *See* 5 C.F.R. § 1201.114(i). Because the appellant's reply is not based on previously unavailable evidence, the Board has not considered it. *See Pimentel v. Department of the Treasury*, 107 M.S.P.R. 67, ¶ 3 n.* (2007).

deficiency in performance, conduct, or attendance, or if there is no such 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) accommodation of the disabling medical condition in the position held must be unreasonable; and (5) the individual must not have declined a reasonable offer of reassignment to a vacant position. 5 U.S.C. § 8451; *Lydon v. Office of Personnel Management*, 105 M.S.P.R. 152, ¶ 5 (2007); 5 C.F.R. § 844.103(a).

¶9 Removal for misconduct does not preclude an individual's receipt of disability retirement benefits if he can show that he was disabled from performing useful and efficient service in his position prior to the effective date of his removal. *Delceg v. Office of Personnel Management*, 100 M.S.P.R. 467, ¶ 6 (2005) *disagreed with on other grounds by Gooden v. Office of Personnel Management*, 471 F.3d 1275 (Fed. Cir. 2006); *cf. Delgado v. Office of Personnel Management*, 21 M.S.P.R. 453, 455 (1984) (an appellant may not be awarded disability retirement on the basis of a medical condition that disables him from performing the duties of a position from which he was separated for cause prior to the onset of the condition).³ However, an appellant's application for disability retirement in the face of an impending removal for misconduct may cast doubt upon the veracity of his application. *See Tan-Gatue v. Office of Personnel Management*, 90 M.S.P.R. 116, ¶ 12 (2001), *aff'd*, 52 F. App'x 511 (Fed. Cir. 2002); *Burckley v. Office of Personnel Management*, 80 M.S.P.R. 617, ¶ 8 (1999), *modified on other grounds by Sangenito v. Office of Personnel Management*, 85 M.S.P.R. 211, ¶ 15 n.* (2000).

¶10 There is no dispute that the appellant has satisfied the service requirements for disability retirement under FERS, and that he has not declined any reasonable

³ Thus, the appellant must have been disabled by January 5, 2008.

offer of reassignment. Therefore, the only issues in this appeal relate to the appellant's medical condition and its effects on his ability to perform in his former position, i.e., eligibility criteria (2), (3), and (4).

¶11 In affirming OPM's decision, the AJ relied heavily on the testimony of the appellant's former supervisor, who testified that the appellant never exhibited any performance, attendance, or conduct deficiencies prior to his arrest, and that the appellant's arrest was unlikely to have caused his alleged disability. ID at 4-5. However, the appellant appears to agree that he was not disabled prior to his arrest, stating that, though he was suffering from back problems at the time, he was able to accommodate his own condition by limiting his activities and by procuring the assistance of his coworkers. HT; PFRF, Tab 1, PFR at 6-8. Rather, the appellant alleged that his disability began after his arrest, while he was still employed by DHS but was no longer in duty status. HT; IAF, Tab 3, Subtab II-B at 9, 11; PFRF, Tab 1, PFR at 6-8. Because the appellant was not on duty at any time after the onset of his alleged disability, his alleged disability would not have resulted in any performance, conduct, or attendance deficiencies. Therefore, the relevant question is whether the appellant's medical condition is incompatible with either useful and efficient service or retention in his former position. *See Gometz v. Office of Personnel Management*, 69 M.S.P.R. 115, 121 (1995) (finding that, although the appellant's disability did not result in a documented service deficiency, it was incompatible with either useful and efficient service or retention in her position); 5 C.F.R. § 844.103(a)(2). Similarly, though the parties dispute whether the appellant's arrest could have aggravated or did aggravate his back condition, the cause of the alleged disability is not relevant in determining whether the appellant is eligible for disability retirement. *See Marucci v. Office of Personnel Management*, 89 M.S.P.R. 442, ¶ 9 (2001). Therefore, the testimony of the appellant's former supervisor is largely immaterial in determining whether

the appellant is entitled to disability retirement.⁴ Indeed, her testimony regarding the circumstances surrounding the arrest is hearsay, while the appellant's testimony is from direct observation and participation in the arrest itself

¶12 A determination of disability must be based on the probative value of all of the evidence, including: (1) Objective clinical findings; (2) diagnoses and medical opinions; (3) subjective evidence of pain and disability; and (4) all evidence relating to the effect of the employee's condition on his ability to perform in the position he last occupied. *See Orosco v. Office of Personnel Management*, 100 M.S.P.R. 668, ¶ 5 (2006); *Chavez v. Office of Personnel Management*, 6 M.S.P.R. 404, 421, 423 (1981). "OPM must consider all of an applicant's competent medical evidence, and an applicant may prevail based on medical evidence that ... consists of a medical professional's conclusive diagnosis, even if based primarily on his/her analysis of the applicant's own descriptions of symptoms and other indicia of disability." *Vanieken-Ryals v. Office of Personnel Management*, 508 F.3d 1034, 1041 (Fed. Cir. 2007).

¶13 With regard to objective clinical findings, the appellant presented: (1) Radiologists' interpretations of two MRI scans, which were taken on February 4, 2002, and July 25, 2006, respectively, indicating that a disk protrusion identified in the first scan had diminished in size by the time of the second scan, but that a new disk bulge had since appeared, IAF, Tab 3, Subtab II-D at 158, 160-61; (2)

⁴ On review, the appellant argues that the AJ erred in excluding a witness who was to testify regarding the appellant's symptoms and job performance prior to the appellant's departure from active duty. PFRF, Tab 1, PFR at 8-9; IAF, Tab 8 at 2. However, because the appellant does not allege that he became disabled prior to his departure from active duty on June 7, 2006, PFRF, Tab 1, PFR at 6-8; IAF, Tab 3, Subtab II-D at 1, the appellant has not shown that this testimony would have been material to the outcome of the appeal. *See Franco v. U.S. Postal Service*, 27 M.S.P.R. 322, 325 (1985) (an AJ has wide discretion to exclude witnesses where it has not been shown that their testimony would be relevant, material, and nonrepetitious). Furthermore, even if the AJ abused his discretion in excluding the appellant's witness, the appellant has not shown that the exclusion prejudiced his substantive rights. *See Lamb v. U.S. Postal Service*, 46 M.S.P.R. 470, 477 (1990).

radiological interpretations of x-ray examinations taken on January 31, 2002, and February 19, 2002, indicating abnormalities in the appellant's spine, *id.* at 157, 159; (3) the results of strength and flexion tests that the appellant underwent between July 26, 2006, and March 21, 2007, *id.* at 97-116; (4) physical therapy records dating from March 7, 2006, to April 9, 2007, documenting observations of the appellant's condition made during physical therapy sessions, IAF, Tab 3, Subtab II-B at 34-45, Subtab II-D at 36-96, 117-53; (5) Dr. Smith's office notes dating from March 7, 2006, to March 12, 2007, documenting observations taken during physical examinations of the appellant, including the results of orthopedic tests, observations regarding the appellant's limitations in flexing, extending, and laterally moving his lumbar spine, and the absence of tenderness and spasm during those examinations, IAF, Tab 3, Subtab II-B at 33, Subtab II-D at 12-22.

¶14 With regard to diagnoses and medical opinions, the appellant presented: (1) A medical report from Dr. Smith dated February 19, 2002, diagnosing the appellant's back condition as right sciatica, radicular neuralgia, and low back pain, IAF, Tab 3, Subtab II-D at 156; (2) a second report from Dr. Smith, dated October 20, 2006, outlining the history and treatment of the appellant's back condition, and opining that the appellant suffers from permanent physical impairment from herniated disks and is at maximum medical improvement, *id.* at 162-64; (3) a third report from Dr. Smith, dated May 9, 2007, outlining the history and treatment of the appellant's back condition, IAF, Tab 3, Subtab II-B at 9-10, opining that the appellant reached maximum medical improvement on October 25, 2006, *id.* at 9, that the appellant's back problems became more severe after his arrest, and that the appellant was not malingering, *id.* at 11; (4) testimony from Dr. Smith reiterating the findings set forth in the three reports and stating that the appellant's impairment was expected to last indefinitely, HT; and (5) physical therapy records dating from March 7, 2006, to April 2, 2007, documenting the type and extent of the appellant's impairment as well as the progress of his treatment, IAF, Tab 3, Subtab II-B at 34-45, Subtab II-D at 36-96.

¶15 With regard to evidence of subjective pain and disability, the appellant presented: (1) Dr. Smith's office notes dating from March 7, 2006, to March 12, 2007, recounting the subjective complaints that the appellant made during office visits, IAF, Tab 3, Subtab II-B at 33, Subtab II-D at 12-22; (2) physical therapy reports dating from March 7, 2006, to April 9, 2007, recounting the subjective complaints that the appellant made during his physical therapy sessions, IAF, Tab 3, Subtab II-B at 34-45, Subtab II-D at 36-96, 117-53; and (3) the appellant's own testimony regarding his pain and physical limitations, HT.

¶16 With regard to the effect of the appellant's condition on his ability to perform in his former position, the appellant presented: (1) Descriptions of the duties and physical requirements of his former position, which include "regular surveillance which involves a considerable amount of walking, bending, stooping or climbing," occasionally lifting and carrying moderately heavy objects, working long hours in adverse conditions, IAF, Tab 3, Subtab II-B at 49, apprehending illegal aliens and smugglers, and handling firearms, *id.*, Subtab II-D at 170-71;⁵ (2) a medical report from Dr. Smith, dated October 20, 2006, stating that the appellant "should refrain from strenuous activities like running, prolonged stooping, bending, or lifting in excess of 25 pounds from ground level," *id.* at 164; (3) another medical report from Dr. Smith, dated May 9, 2007, recommending that the appellant avoid sitting, walking, or standing for more than 2 hours, that he avoid lifting or carrying anything more than 20 pounds, and that the appellant avoid heights, as well as pushing, pulling, bending, and kneeling, and opining that the appellant cannot do a full-time competitive job that requires

⁵ On review, the appellant quoted an excerpt from OPM's Operating Manual for Qualification Standards for General Schedule Positions, giving the medical requirements for the Border Patrol Agent series. PFRF, Tab 1, PFR at 2. However, the Board has not considered this evidence because the appellant filed it for the first time on review without explaining why it was unavailable before the close of the record below. *See Avansino v. U.S. Postal Service*, 3 M.S.P.R. 211, 214 (1980); 5 C.F.R. § 1201.115(d)(1).

activity on a sustained basis and that an average patient with the appellant's back and neck problems could be expected to be absent from work due to his conditions approximately three times per month, IAF, Tab 3, Subtab II-B at 10-11; (4) testimony by Dr. Smith that he recommended restrictions on sitting, standing, walking, looking at computer screens, riding in vehicles, and lifting up to 20 pounds, that the appellant should refrain from climbing ladders, getting in and out of boats, carrying objects over 20 pounds, and apprehending suspects, and opining that regular breaks during the appellant's activities would help him, but that the appellant would still have difficulty in working 8 hours per day, HT; and (5) testimony by the appellant that his work duties included climbing stairs, climbing ladders onto boats, riding in vehicles, pushing vehicles, lifting heavy objects, kneeling, prolonged standing, and chasing and apprehending suspects, and that he became unable to perform these tasks after he left active duty, HT.

¶17 Considering all of the evidence that the appellant presented with regard to his medical condition and its effect on his ability to perform in his former position, we find that the appellant's medical condition is incompatible with either useful and efficient service or retention in his former position. *See* 5 C.F.R. § 844.103(a)(2). In early 1990, the appellant began experiencing back problems, which became progressively worse until he sought treatment from Dr. Smith in February 2002. HT (testimony of the appellant); IAF, Tab 3, Subtab II-B at 9. Starting in February 2002, the appellant underwent treatment for his back condition, the symptoms of which were essentially resolved by December 2003, though the appellant continued palliative care after that date. IAF, Tab 3, Subtab II-B at 9. However, following his June 7, 2006 arrest, the appellant's pain again worsened, as reflected by the appellant's subjective reports, which were corroborated by Dr. Smith's objective observations and a July 2006 MRI, which revealed a new disk bulge. IAF, Tab 3, Subtab II-B at 9, 33, Subtab II-D at 12-22, 160-61. Dr. Smith reported that during this time the appellant was treated for neck pain, which causes occasional tingling in both hands, and that the

appellant's low back pain continues to radiate towards his right groin with numbness and tingling in the right leg and foot. IAF, Tab 3, Subtab II-B at 10. The appellant resumed physical therapy and continued his pain, anti-arthritis, and anti-inflammatory medications; however, these medications have not completely relieved his pain, and they cause an increase in fatigue and dizziness. *Id.* at 9-10. The appellant's symptoms improved until October 2006, when he reached maximum medical improvement, but the appellant continues to experience pain, discomfort, reduced strength, and reduced range of motion, which limits his physical activities considerably. The appellant is not expected to achieve further significant recovery. *Id.* at 9-11.

¶18 In stating that "Dr. Smith's opinion of the extent of the appellant's pain and physical limitations is based on the anecdotal reports of the appellant," ID at 5, the AJ failed to consider that a large amount of objective medical evidence also forms the basis for Dr. Smith's opinion, *see supra* ¶ 13. Because the appellant's subjective reports of pain and physical limitations are corroborated by objective clinical findings, they are entitled to substantial weight. *See Rozar v. Office of Personnel Management*, 61 M.S.P.R. 136, 141 (1994); *Chavez*, 6 M.S.P.R. at 422. Furthermore, though the AJ was correct that the appellant has the incentive to testify in a light most favorable to him, ID at 5, because the appellant's subjective reports of pain and disability are supported by competent medical evidence, they cannot be dismissed as solely self-serving. *See Easterwood v. Office of Personnel Management*, 48 M.S.P.R. 125, 129, *aff'd*, 950 F.2d 731 (Fed. Cir. 1991) (Table); *see also Dec v. Office of Personnel Management*, 47 M.S.P.R. 72, 78 (1991) (an appellant's testimony should not be discredited simply because it is self-serving since most testimony that an appellant is likely to give, other than admissions, can be characterized as self-serving) (citing *Gamble v. U.S. Postal Service*, 6 M.S.P.R. 578, 580-81 (1981)).

¶19 In addition, we find no basis in the record to discount the appellant's medical evidence. OPM has not called into question Dr. Smith's, the

radiologists' or the appellant's physical therapist's professional competence, and has not alleged that their professional opinions and diagnoses failed to take relevant factors into account, are not sufficiently specific, are not based on established diagnostic criteria, or are inconsistent with generally accepted professional standards. *See Vanieken-Ryals*, 508 F.3d at 1042-43. Furthermore, OPM has failed to present any medical evidence contrary to that presented by the appellant. *See Bridges v. Office of Personnel Management*, 21 M.S.P.R. 716, 719 (1984) (while not automatically establishing that the appellant has met his burden, the failure of OPM to present evidence to counter that of appellant is a factor for consideration). We also find Dr. Smith's medical conclusions persuasive because they are based on a 5-year familiarity with the appellant and his condition. *See Tan-Gatue*, 90 M.S.P.R. 116, ¶ 11 (the Board gives greater weight to medical conclusions based on a long familiarity with a patient than to those based on a brief association or single examination).

¶20 Dr. Smith's recommended restrictions with regard to walking, running, stooping, kneeling, sitting, standing, pushing, pulling, bending, lifting, carrying, riding in vehicles, climbing ladders, getting in and out of boats, getting up on heights, and apprehending suspects, HT; IAF, Tab 3, Subtab II-B at 10-11, Subtab II-D at 164, are incompatible with the appellant's work duties, which include the performance of many of these activities on a sustained basis, HT (testimony of the appellant); IAF, Tab 3 Subtab II-B at 49, Subtab II-D at 170-71. In addition, Dr. Smith's opinion that the appellant's back condition would likely cause his absence from work about three times per month indicates that the appellant's condition would likely result in an attendance deficiency as well. IAF, Tab 3, Subtab II-B at 11. Dr. Smith has also opined, without contradiction, that the appellant is at maximum medical improvement and that his condition is expected to last indefinitely. HT; IAF, Tab 3, Subtab II-B at 9, Subtab II-D at 164. Finally, DHS has stated, without contradiction, that the appellant cannot be

accommodated in his former position, IAF, 7 at 12, Tab 9 at 3, and the record as a whole supports DHS's conclusion.

¶21 Though the timing of the appellant's disability retirement application is suspect, we find that he has presented an overwhelming body of consistent and competent medical evidence that corroborates his subjective complaints, and has established that his medical condition is incompatible with either useful and efficient service or retention in his former position. We also find that the appellant has satisfied the service requirements for disability retirement under FERS, that his disabling condition is expected to last for more than 1 year from the date of his disability retirement application, that he cannot reasonably be accommodated in his former position, and that he has not declined any reasonable offer of reassignment. We therefore find that the appellant has proven by preponderant evidence his entitlement to disability retirement under 5 U.S.C. § 8451 and 5 C.F.R. § 844.103(a).⁶

ORDER

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

¶23 We also ORDER OPM to tell the appellant promptly in writing when it believes it has fully carried out the Board's Order and to describe 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

⁶ Although the appellant argues that the AJ erred in failing to grant his motion to compel discovery, PFRF, Tab 1, PFR at 9-10, the appellant has failed to explain how the evidence he hoped to obtain through his motion would have helped him meet his burden in this appeal, and has failed to establish that the denial of the motion affected his substantive rights, *see White v. Government Printing Office*, 108 M.S.P.R. 355, ¶ 9 (2008) (the Board will not find reversible error in an AJ's discovery rulings absent an abuse of discretion that prejudiced the appellant's substantive rights).

appellant, if not notified, should ask OPM about its progress. *See* 5 C.F.R. § 1201.181(b).

¶24 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).

¶25 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. §§ 1201.201, 1201.202 and 1201.203. 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 the Board's regulations and other related material, at our website, <http://www.mspb.gov>. Additional information is available at the court's website, www.cafc.uscourts.gov. 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.