

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

2009 MSPB 57

Docket No. AT-0831-08-0779-I-1

**Wayne C. Wall,
Appellant,**

v.

**Office of Personnel Management,
Agency.**

OPM Claim No. CSA 4 397 578

April 17, 2009

Wayne C. Wall, 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 timely filed a petition for review of an initial decision (ID) that affirmed the final decision of the Office of Personnel Management (OPM) to deny his application for disability retirement under the Civil Service Retirement System (CSRS). For the reasons set forth below, we DENY the petition for failure to meet the criteria for review under 5 C.F.R. § 1201.115(d), REOPEN the appeal on our own motion under 5 C.F.R. § 1201.118, and AFFIRM the ID as MODIFIED, and AFFIRM OPM's final decision.

BACKGROUND

¶2 The appellant applied for disability retirement under the CSRS on August 13, 2007, 4 days prior to his removal, during probation, from the position of Claims Assistant, GS-06, at the Department of Veterans Affairs Medical Center (VAMC) in Jackson, Mississippi. Appeal File (AF), Tab 3, Subtab II-D at 1-4; Subtab II-E at 1. He had received a Veterans Readjustment Act (VRA) appointment to the position. *Id.*, Subtab II-D at 113. The appellant served as a Claims Assistant for approximately 7 months and was removed on August 17, 2007, for absence without leave (AWOL) and inability to master the duties of the position. *Id.* at 5-6; Subtab II-E at 1.¹ The appellant had previously been employed by the U.S. Postal Service from November 1972, until he was removed in September 1991 after 1 year in a non-pay status. AF, Tab 3, Subtab II-E at 3-5.

¶3 The appellant asserted in his application for retirement benefits that he was disabled by arthritis and ankylosis (i.e., stiffness) in his right ankle, tension headaches and migraines, hypertension, sinusitis and diabetes. AF, Tab 3, Subtab II-D at 1-4. OPM issued initial and reconsideration decisions finding that the appellant did not show he was disabled by a medical condition that caused his service deficiencies. *Id.*, Subtabs II-A, II-C. On appeal, the administrative judge (AJ) to whom the appeal was assigned affirmed the OPM decision. *Id.*, Tab 9 (ID). The AJ found that the appellant's medical conditions, separately or jointly, rendered him incapable of useful and efficient service. ID at 5. However, the AJ held that the appellant's claim for disability retirement failed because he became disabled prior to, not during, his probationary appointment. *Id.* at 6.

¹ His supervisor stated in the disability retirement application that the appellant went to sleep during training, had an altercation with another employee, and was trained in several different areas within the scope of his position description in an attempt to find a match for his abilities but remained unsatisfactory. AF, Tab 3, Subtab II-D at 6. The appellant was AWOL on July 2 and 3, 2007. *Id.*, Tab 1; Tab 3, Subtab II-D at 121.

¶4 The appellant has filed a petition for review (PFR) in which he asserts that he is a qualified person with a disability (QUID) under the Rehabilitation Act of 1973, entitled to reasonable accommodation from his former employing agency, and that the agency did not show it would have been an undue hardship to accommodate him. Petition for Review File (RF), Tab 1. The appellant asserts that the ID was incorrect in requiring him to prove that he became disabled while working in a CSRS position, because he was hired into the position as a disabled veteran. *Id.*² He also argues that his service deficiencies were caused by the progression of his medical conditions. *Id.* The agency has filed a response in opposition to the PFR. RF, Tab 4.

ANALYSIS

¶5 The appellant has not submitted new and material evidence, nor has he shown that the AJ made an error of law or regulation affecting the outcome of his appeal. The appellant's argument regarding the Rehabilitation Act is raised for the first time on PFR and, therefore, will not be considered. *Banks v. Department of the Air Force*, 4 M.S.P.R. 268, 271 (1980). In any case, his claim for disability retirement is not an equal employment opportunity claim and so whether he is a QUID is not relevant. *Bracey v. Office of Personnel Management*, 83 M.S.P.R. 400, 423 (1999) (Vice Chair Slavet, dissenting) (noting that the disability retirement statutes and the Rehabilitation Act have different purposes and different standards), *rev'd and remanded*, 236 F.3d 1356 (Fed. Cir. 2001).³ Moreover, the AJ correctly held, ID at 5, that the appellant

² The appellant's postal employment was under CSRS, and he was placed in the CSRS Offset System upon being hired as a Claims Assistant. AF, Tab 3, Subtab II-E at 9. Thus, his entitlement to disability retirement must be adjudicated under CSRS. *See Group v. Office of Personnel Management*, 109 M.S.P.R. 5, ¶ 8 n.3 (2008) (citing 5 C.F.R. § 831.1001).

³ We also note that veterans receiving VRA appointments may be, but are not necessarily, disabled. *See* 5 C.F.R. §§ 307.102, 103.

must prove that he became disabled while serving in a CSRS position. *Reilly v. Office of Personnel Management*, 108 M.S.P.R. 360, ¶ 7 (2008). Finally, the record does not support the appellant's contention that conditions predating his employment worsened and caused his service deficiencies as a Claims Assistant. Therefore, the appellant's PFR does not meet the criteria of 5 C.F.R. § 1201.115(d) and must be denied.

¶6 We reopen the case on our own motion under 5 C.F.R. § 1201.118, however, because we find the AJ erred in finding that the appellant had disabling medical conditions. This does not change the outcome of the case, since the AJ affirmed OPM's determination that the appellant was not eligible for a disability retirement annuity. *See Panter v. Department of the Air Force*, 22 M.S.P.R. 281, 282 (1984) (an adjudicatory error that is not prejudicial to a party's substantive rights provides no basis for reversal of an initial decision). Nevertheless, we reopen the appeal to clarify that the appellant did not qualify for disability retirement benefits because he did not show he was disabled.

The appellant did not prove he was disabled from useful and efficient service.

¶7 To be eligible for a CSRS disability retirement annuity, the appellant must establish that, while employed in a position subject to the CSRS, he became 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 is incompatible with useful and efficient service or retention in the position. 5 U.S.C. § 8337(a); *Reilly*, 108 M.S.P.R. 360, ¶ 5; *Musser v. Office of Personnel Management*, 102 M.S.P.R. 18, ¶ 7 (2006); 5 C.F.R. § 831.1203(a).

¶8 A determination on eligibility for disability retirement should take into account all competent medical evidence, including both objective clinical findings and qualified medical opinions based on the applicant's symptoms. *Vanieken-Ryals v. Office of Personnel Management*, 508 F.3d 1034, 1041-42 (Fed. Cir. 2007) (citing *Chavez v. Office of Personnel Management*, 6 M.S.P.R.

404, 418-23 (1981)). In addition, the determination should include consideration of the applicant's own subjective evidence of disability and any other evidence of the effect of his condition on the ability to perform in the position last held. *Henderson v. Office of Personnel Management*, 109 M.S.P.R. 529, ¶ 12 (2008); *Balmer v. Office of Personnel Management*, 99 M.S.P.R. 199, ¶ 9 (2005).

¶9 In this case, the appellant provides extensive subjective complaints regarding his conditions, their effects, and the negative side effects of his medications. AF, Tabs 1, 8. Subjective evidence is entitled to serious consideration where it is supported by competent medical evidence. *Selby v. Office of Personnel Management*, 102 M.S.P.R. 217, ¶ 15 (2006); *Balmer*, 99 M.S.P.R. 199, ¶ 10. We find, however, that the appellant's subjective evidence is not supported or corroborated by competent medical evidence, based on an examination of the progress notes regarding his medical care that are available starting from his initial evaluation at the VAMC in April 2005. AF, Tab 3, Subtab II-D at 12-94. Moreover, as noted above, the appellant did not apply for disability retirement until days before his removal, and his medical records show he made no complaints to his medical providers of significant pain or interference with functioning until after he had been removed. *Id.* at 12, 14, 18. The Board has held that "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." *Henderson*, 109 M.S.P.R. 529, ¶ 9. We find that such doubt is appropriate in this case.

¶10 As stated above, the appellant has claimed he is disabled by arthritis and ankylosis in his right ankle, tension headaches and migraines, hypertension, sinusitis and diabetes. AF, Tab 3, Subtab II-D at 1-4. He has stated that his ankle causes him constant pain, affecting his concentration, and that medications he takes for it cause extreme fatigue, dizziness, headaches and vision problems. *Id.*, Tab 1; Tab 3, Subtab II-D at 3. The appellant has a VA disability rating of 20 percent for loss of motion in this ankle, and x-rays of the ankle taken in

September 2006 revealed he has advanced arthritis. IAF, Tab 3, Subtab II-D at 11, 82. At that time, he complained of constant pain but only took Tylenol when the pain was at its worst and did not use a cane or other assistive device. *Id.* at 93-94. There is no indication in the medical records that the appellant received medication or other treatment until August 20, 2007, when he requested a cane. *Id.* at 18. This is 3 days after his probationary termination.

¶11 Upon the appellant's initial evaluation at the VAMC in April 2005, it was noted that he had a history of hypertension and was taking medication for it. AF, Tab 3, Subtab II-D at 66, 71. As of November 2006, the condition was considered to be controlled with medication. *Id.* at 42. The appellant complained on appeal that the condition and the medication for it caused constant fatigue, dizziness, headaches and edema. AF, Tab 1; Tab 3, Subtab II-D at 3. There is no indication in the medical records, however, that he reported this to the VAMC.

¶12 The appellant was diagnosed with diabetes in November 2006 and was given oral medication for it, as well as advice on diet and weight loss. AF, Tab 3, Subtab II-D at 35, 37, 40. The appellant has asserted that, because of this condition, he had to take frequent restroom breaks at work and his sleep was disturbed, because he had to get up at night to urinate, and that his diabetes medication caused him to have headaches, dizziness, nausea, numbness and tingling and fatigue. *Id.*, Tab 1; Tab 3, Subtab II-D at 3. None of these complaints, however, are reflected in his medical records.

¶13 The appellant argued that his sinusitis caused irritability, headaches, fatigue and altered sleep patterns. *Id.* The only reference to the condition in his medical records, however, is a diagnosis in September 2006, stating it was seasonal, chronic and severe. AF, Tab 3, Subtab II-D at 92. Again, there is no reference to the symptoms and effects the appellant describes in support of his disability retirement application.

¶14 With regard to the appellant's headaches, the records first show a report to his medical providers in May 2007 that he was having headaches twice a month

that lasted about a half-day. *Id.* at 29.⁴ He denied any nausea or light sensitivity and was not taking pain medication. *Id.* There is no indication that he received a prescription. *Id.* The appellant called the VAMC on August 6, 2007 (1 week before his probationary termination) to complain that he was having more headaches due to work stress, and he stated was on probation. AF, Tab 3, Subtab II-D at 20. At this time, he was given a prescription. *Id.* It was not until after his termination, however, i.e., on August 21, 2007, that the appellant reported serious headaches to his medical provider. *Id.* at 12. At that time, he also reported a history of migraines, stating that they had gotten worse as he aged. *Id.* He said he was having a low-grade headache daily, with exacerbations to more severe pain a few times a month. *Id.* New medication was prescribed. *Id.* A nurse practitioner wrote a letter, also dated August 21, 2007, in support of the appellant's disability retirement application, stating that he was fired due to his migraine headaches, which had worsened in number and symptoms over the past year. *Id.* at 10. The letter also stated that his daily headaches "resulted in debility and include[d] nausea, vomiting, light sensitivity and noise sensitivity along with the need of bed rest." *Id.* There is no explanation for the difference between the statement of the frequency of his exacerbations in the medical notes and in the letter. The appellant expanded his description of his symptoms in his disability retirement application and on appeal, stating that migraines caused his head to throb all day, that he had exacerbations 3 times a week, and that his medications caused mood changes, headaches, drowsiness, weakness, nausea, difficulty in concentrating, and problems with movement and speech. AF, Tab 1;

⁴ The ID stated at 6 that "the medical documentation supports a finding that the appellant began suffering from debilitating migraines in 2005." We see no such documentation in the progress notes. A September 2008 letter from a nurse practitioner says "[h]is headaches worsened since 2005, and he began to see neurology in march [sic] 2007." AF, Tab 8. We also see no support for this statement in the progress notes.

Tab 3, Subtab II-D at 4. None of the medical evidence, however, shows that the appellant had serious migraine or other headache symptoms or side effects from medication prior to his termination.

¶15 In short, the medical evidence does not support the appellant's subjective complaints. Further, his medical providers have not explained how any of his conditions affected his ability to perform his work requirements prior to his termination. *See Hardy v. Office of Personnel Management*, 98 M.S.P.R. 323, ¶ 12 (2005) (citing *Craig v. Office of Personnel Management*, 92 M.S.P.R. 449, ¶ 10 (2002)). The evidence does not substantiate the existence of a pre-termination disability that had a causal relationship to the appellant's AWOL or inability to master the duties of his job. *Hardy*, 98 M.S.P.R. 323, ¶ 15; *Farragon v. Office of Personnel Management*, 51 M.S.P.R. 63, 71 (1991). For all these reasons, we find that the appellant did not show that he was disabled because of a medical condition, resulting in a service deficiency in performance, conduct or attendance. Therefore, the conclusion in the ID that the appellant was disabled from useful and efficient service prior to being hired as a Claims Assistant was in error. OPM correctly determined that the appellant did not have a disabling medical condition.

ORDER

¶16 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, 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.