

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

2009 MSPB 115

Docket No. DC-844E-09-0188-I-1

**Phillip R. Brickhouse,
Appellant,**

v.

**Office of Personnel Management,
Agency.**

OPM Claim No. 8358534

June 23, 2009

Gale Brickhouse, Chesapeake, Virginia, 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 asked the Board to review an initial decision (ID) affirming the final decision of the Office of Personnel Management (OPM) that denied his application for disability retirement benefits under the Federal Employees' Retirement System (FERS) as untimely filed. We GRANT the petition for review (PFR) under [5 C.F.R. § 1201.115](#), REVERSE the ID, and find that OPM's reconsideration decision is NOT SUSTAINED. We REMAND the appellant's application to OPM for a determination of the appellant's entitlement to disability retirement benefits.

BACKGROUND

¶2 The appellant separated from his position with the Department of the Navy on November 24, 2006. Initial Appeal File (IAF), Tab 1, Att. at 1. OPM received his application for a FERS disability retirement on December 28, 2007. *Id.* OPM issued a reconsideration decision that denied his application as untimely filed under [5 U.S.C. § 8453](#) and he filed this appeal. IAF, Tab 1.

¶3 The administrative judge (AJ) apprised the appellant of his burden of proof in his appeal and ordered him to submit evidence and argument to show either that he filed his application timely or that he was mentally incompetent when he separated from employment on November 24, 2006. IAF, Tab 2 at 2, Tab 3. In response, the appellant's designated representative denied that the appellant is mentally incompetent. IAF, Tab 1 at 11, Tab 4 at 4. The appellant asserted that he met with a retirement specialist at his former employing agency on November 21, 2007, and submitted his application for disability retirement benefits to his former employing agency at that time. IAF, Tab 1 at 7, Tab 4 at 4-5. He claimed that he was harmed by his former employing agency's advice that it could receive his disability retirement application and by its delay in forwarding the completed application to OPM. IAF, Tab 1 at 7, Tab 4 at 4-5.

¶4 Because the appellant did not request a hearing, IAF, Tab 1 at 3, the AJ decided the appeal on the written record, ID at 1. The AJ affirmed OPM's reconsideration decision, reasoning that the appellant failed to establish that he had timely filed his application for disability retirement benefits within one year after his separation under [5 U.S.C. § 8453](#). ID at 3-4.

¶5 The appellant has filed a petition for review (PFR). PFR File (PFRF), Tab 1. OPM has not submitted a response.

ANALYSIS

¶6 On review, the appellant reasserts that he submitted his FERS disability retirement application to his former employing agency's Norfolk Naval Shipyard

prior to the statutory filing deadline of [5 U.S.C. § 8453](#). He states that he was instructed to do so by Beverly McGee, a retirement counselor at the shipyard, and that he did not send his application directly to OPM, but instead allowed his former employing agency to forward the application to OPM. PFRF, Tab 1 at 3; IAF, Tab 1 at 6-7, Tab 4 at 4-5. The appellant contends that he should be deemed to have met the statutory filing deadline. PFRF, Tab 1 at 4.

¶7 The statute governing the timely submission of disability retirement applications under FERS states:

A claim may be allowed under this subchapter only if application is filed with [OPM] before the employee or Member is separated from the service or within 1 year thereafter. This time limitation may be waived by [OPM] for an employee or Member who, at the date of separation from service or within 1 year thereafter, is mentally incompetent if the application is filed with [OPM] within 1 year from the date of restoration of the employee or Member to competency or the appointment of a fiduciary, whichever is earlier.

[5 U.S.C. § 8453](#). Where an applicant fails to meet this one-year filing deadline or qualify for waiver under the statute, OPM lacks the authority to award disability retirement benefits. *See Deerinwater v. Office of Personnel Management*, [78 F.3d 570](#), 572-73 (Fed. Cir. 1996). Our reviewing court, the U.S. Court of Appeals for the Federal Circuit, has strictly construed the statutory filing deadline for disability retirement and found that it may be waived only on the basis set forth in the statute, mental incompetence. *See id.* As addressed herein, OPM has promulgated regulations interpreting section 8453 at [5 C.F.R. § 844.201](#).

¶8 The appellant submitted below an undisputed letter from his former employing agency that supports his claims about his meeting with McGee and that agency's submission of his disability retirement application to OPM.* IAF,

* OPM untimely submitted its response file below after the close of the record and the issuance of the ID. IAF, Tab 2 at 7, Tab 3 at 3, Tabs 5-6. However, we note that OPM's reconsideration decision and narrative response to the appeal did not dispute the appellant's evidence and argument in his appeal that he also raised before OPM in his

Tab 4 at 5. The January 20, 2009 letter states that the appellant met with a retirement specialist at the Civilian Benefits Center, Norfolk Naval Shipyard, on November 21, 2007, and presented his application for disability retirement benefits at that time. *Id.* After receiving the appellant's application, the Civilian Benefits Center obtained his official personnel file from the National Personnel Records Center and forwarded his completed application to OPM on December 24, 2007. *Id.* In its reconsideration decision, OPM acknowledged receiving the application on December 28, 2007. *Id.* at 6.

¶9 In finding the appellant's application to be untimely filed, the AJ cited *Deerinwater*, 78 F.3d at 572-73, for the proposition that the court had already rejected arguments similar to the one the appellant is making regarding the former employing agency's erroneous advice, ID at 3-4. *Deerinwater* is factually similar to the case now before the Board. An employee relations specialist at the appellant's former employing agency told her attorney's office that her FERS disability retirement application should be filed no later than April 29, 1992, one year after her separation. *Deerinwater*, 78 F.3d at 571. The appellant submitted the application to the former employing agency on April 29, 1992, but that agency did not forward it to OPM until June 3, 1992. *Id.* The former employing agency submitted with the application a letter to OPM stating that it had received the application on April 29, 1992, yet OPM deemed the application untimely filed. *Id.* The Board affirmed OPM's final decision. *Id.* The Federal Circuit affirmed the Board's decision. *Deerinwater*, 78 F.3d at 573-74. The court relied upon the plain language of [5 C.F.R. § 844.201\(a\)\(1\)](#) at the time, which stated:

An application for disability retirement must be filed, on a form prescribed by the Office of Personnel Management (OPM), with the employing agency before the employee or Member separates from service or with OPM within 1 year thereafter. A separated employee

request for reconsideration of OPM's initial decision. IAF, Tabs 1, 4, Tab 6, section 1, subtabs A, B at 1, 28-29, D at 43-44.

who submits an application to the former employing agency, rather than with OPM, will meet the filing deadline *only if OPM receives the application from the agency within 1 year after the separation.*

[5 C.F.R. § 844.201](#)(a)(1) (emphasis added); *see Deerinwater*, 78 F.3d at 571-72. The court found that the plain language of section 844.201(a)(1) “conform[ed] precisely with [5 U.S.C. § 8453](#)” and gave effect to “the unambiguously expressed intent of Congress.” *Deerinwater*, 78 F.3d at 573.

¶10 Under the plain language of [5 C.F.R. § 844.201](#)(a)(1) as it existed in 1992, the appellant’s application for a FERS disability retirement in this case would have been untimely filed. On April 8, 1998, however, OPM revised its regulations governing the timely application for disability retirement. Among other things, the revised regulations were intended to “establish standards for determining the date on which an application for disability retirement has been filed.” Revised Application Procedures for Disability Retirement Under CSRS and FERS, 63 Fed. Reg. 17,049 (1998) (codified at [5 C.F.R. §§ 831.1203 – .1204](#), [5 C.F.R. § 844.201](#)); *see Hall v. Office of Personnel Management*, [83 M.S.P.R. 130](#), ¶ 3 (1999). OPM adopted several recommendations made by commenters on the proposed revised regulations, including provisions “to meet the regulations’ intent of allowing former employees to file applications for disability retirement with their former employing agencies within one year of separation,” and “to ensure that procedures for determining the date on which a disability retirement application is filed apply equally in all filing situations.” 63 Fed. Reg. 17,089. The regulations for both CSRS and FERS disability retirement applications were revised accordingly, and the FERS regulation at 5 C.F.R. § 844.201(a) took its current form at the time. The court’s decision *Deerinwater* thus construes a now outdated regulatory provision and its reasoning does not support the conclusions of law in the ID.

¶11 The current OPM regulation states, in relevant part:

(2) An application for disability retirement that is filed with OPM, an employing agency or former employing agency by personal

delivery is considered filed on the date on which OPM, the employing agency or former employing agency receives it. . . .

(3) An application for disability retirement that is filed with OPM or the applicant's former employing agency within 1 year after the employee's separation, and that is incompletely executed or submitted in a letter or other form not prescribed by OPM, is deemed timely filed. OPM will not adjudicate the application or make payment until the application is filed on a form prescribed by OPM.

[5 C.F.R. § 844.201\(a\)\(2\), \(3\)](#); *see also Hall*, [83 M.S.P.R. 130](#), ¶ 3.

¶12 Under the undisputed facts of this case, the appellant falls within the group of FERS disability retirement applicants covered by these subsections. The record shows that he filed his FERS disability retirement application with his former employing agency on November 21, 2007, which is less than a year after his separation date of November 24, 2006. Under [5 C.F.R. § 844.201\(a\)\(2\)](#), his application is considered filed on the day it was received by his former employing agency. Under [5 C.F.R. § 844.201\(a\)\(3\)](#), the appellant's application filed with his former employing agency within one year after his separation is deemed timely filed, even though his former employing agency had to await receipt of his official personnel file prior to forwarding the completed application to OPM for adjudication. Therefore, we find that the appellant timely filed his application for a FERS disability retirement under [5 U.S.C. § 8453](#) and 5 C.F.R. § 844.201(a)(2),(3).

ORDER

¶13 Accordingly, OPM's reconsideration decision is NOT SUSTAINED. We REMAND this matter to OPM for a determination of the appellant's entitlement to FERS disability retirement benefits and the issuance of a new reconsideration decision.

FOR THE BOARD:

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