

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

**2009 MSPB 119**

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Docket No. PH-844E-08-0616-I-1

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**Anita L. Alford,  
Appellant,**

**v.**

**Office of Personnel Management,  
Agency.**

OPM Claim No. CSA 4 371 058

June 24, 2009

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Edwin O. Wenck, Esquire, Baltimore, Maryland, 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 of an initial decision affirming the Office of Personnel Management's (OPM's) reconsideration decision denying her application for disability retirement benefits. For the reasons set forth below, we DENY the appellant's petition for review because it does not meet the criteria for review set forth at [5 C.F.R. § 1201.115](#). We REOPEN this appeal on our own motion under 5 C.F.R. § 1201.118, however, and AFFIRM the initial decision as MODIFIED, still AFFIRMING OPM's reconsideration decision.

## BACKGROUND

¶2 The appellant had worked for the Social Security Administration (SSA) beginning in 1982, as a GS-5 Claims Assistant<sup>1</sup> at the SSA office in Baltimore, Maryland. Initial Appeal File (IAF), Tab 1; Tab 3, Subtab IID at 21-33. On February 15, 2007, SSA removed her from her position for failure to follow its rules for requesting and obtaining leave and for absence without leave.<sup>2</sup> IAF, Tab 3, Subtab IID at 36-40. Shortly before her removal, she filed an application for a disability retirement annuity under the Civil Service Retirement System (CSRS) with OPM. IAF, Tab 3, Subtab IID at 1. She claimed that she was permanently disabled due to arthritis, depression, anxiety, ulcerative colitis, irritable bowel syndrome, sinus problems, menstrual cramps, chronic bronchitis, dizziness, and a tumor. *Id.*

¶3 OPM denied the appellant's application, finding that her medical conditions were not disabling. IAF, Tab 3, Subtab IIC. The appellant requested reconsideration and submitted additional medical documentation in support of her application. IAF, Tab 3, Subtab IIB. OPM, however, sustained its denial in a reconsideration decision. IAF, Tab 3, Subtab IIA.

¶4 The appellant appealed the reconsideration decision to the Board. IAF, Tab 1. She requested a hearing. *Id.* at section 11. After holding the appellant's requested hearing, the administrative judge issued an initial decision affirming OPM's reconsideration decision and finding that the appellant failed to establish entitlement to a disability retirement annuity because she failed to prove that her medical conditions were disabling. IAF, Tab 12.

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<sup>1</sup> The position is alternatively called a Development and Support Examiner. IAF, Tab 3, Subtab IID at 21-33. The appellant testified that her position was sedentary and largely required her to sit and type. IAF, Hearing Tapes.

<sup>2</sup> The appellant also filed an equal employment opportunity complaint challenging SSA's actions in denying her leave. IAF, Tab 1, Attachment.

¶5 The appellant has filed a timely petition for review. Petition for Review File (PFRF), Tab 1. OPM has filed a timely response. PFRF, Tab 3.

#### ANALYSIS

¶6 We deny the appellant's petition for review because it does not establish error by the administrative judge that affects the appellant's substantive rights, and the petition does not offer new and material evidence that, despite due diligence, was not available when the record closed below. *Chapman v. Office of Personnel Management*, [110 M.S.P.R. 423](#), ¶ 7 (2009); [5 C.F.R. § 1201.115](#).

¶7 We reopen this appeal on our own motion, however, because the administrative judge erred in applying the Federal Employees' Retirement System (FERS) legal standard in adjudicating the appellant's case where the appellant was covered under CSRS rather than FERS. However, the administrative judge's error did not affect the appellant's substantive rights. *See Panter v. Department of the Air Force*, [22 M.S.P.R. 281](#), 282 (1984) (adjudicatory error which is not prejudicial to a party's substantive rights provides no basis for reversing the initial decision).

#### Legal Standard

¶8 The appellant was covered under CSRS. IAF, Tab 1 at Section 21, Tab 8 at 1-2. To be eligible for a disability retirement annuity under CSRS, an employee must have completed five years of civilian service, must, while employed in a position subject to CSRS, have become unable, because of disease or injury, to render useful and efficient service in her position, and must not be qualified for reassignment to a vacant position in the agency at the same grade or level in which she could render useful and efficient service. [5 U.S.C. § 8337\(a\)](#); *Luzi v. Office of Personnel Management*, [109 M.S.P.R. 79](#), ¶ 7 (2008); *see also* [5 C.F.R. § 831.1203\(a\)](#). OPM's implementing regulations further require that the disabling medical condition be expected to continue for at least one year from the date the application is filed and that the employing agency be unable to accommodate the

disabling medical condition in the appellant's former position or in an existing vacant position. *Luzi*, [109 M.S.P.R. 79](#), ¶ 7; *see also* 5 C.F.R. § 831.1203(a).

¶9 However, the administrative judge determined the appellant's possible entitlement to disability benefits under FERS. IAF, Tab 12 at 2. To qualify for disability retirement under FERS, the appellant must show that: (1) She has completed at least 18 months of creditable service; (2) while employed in a position covered by FERS, she became disabled due to a medical condition, resulting in a service deficiency in performance, conduct, or attendance, or if there is no service deficiency, the disabling condition is incompatible with either useful and efficient service or retention in the position; (3) the disabling condition is expected to last for at least 1 year from the date of the disability retirement application; (4) accommodating the disabling condition in the position held is unreasonable; and (5) she did not decline a reasonable offer of reassignment to a vacant position. [5 U.S.C. § 8451](#); *Henderson v. Office of Personnel Management*, [109 M.S.P.R. 529](#), ¶ 8 (2008); *see also* [5 C.F.R. § 844.103\(a\)](#).

¶10 In applying the incorrect standard, the administrative judge made an error of law. *See Chapman*, [110 M.S.P.R. 423](#), ¶ 8. However, the basis for the administrative judge's decision was that the appellant failed to prove that she suffered from a disabling medical condition, and that is the only issue that the appellant challenges in her petition for review. IAF, Tab 12; PFRF, Tab 1. Because the legal standard for establishing a disabling condition is essentially the same under both FERS and CSRS, the administrative judge's error was harmless. *See Chapman*, [110 M.S.P.R. 423](#), ¶ 9; *Nash v. Office of Personnel Management*, [92 M.S.P.R. 527](#), ¶ 5 n.1 (2002).

#### The Evidence of a Disabling Condition

¶11 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; and (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. *Group v. Office of Personnel Management*, [109 M.S.P.R. 5](#), ¶ 8 (2008). The Board will find an appellant is disabled if the appellant can show that her condition(s) renders her unable to perform the specific work required by her position. *Id.* 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. *Tanious v. Office of Personnel Management*, [34 M.S.P.R. 107](#), 111 (1987).<sup>3</sup>

¶12 The appellant testified that she could do very little, and that she generally sat at home and watched television all day. IAF, Hearing Tapes. The appellant also stated that her job required her to sit and type most of the day, and the arthritis in her hands and back made this difficult and she frequently needed to use the restroom. IAF, Tab 3, Subtab IID at 1-3. However, when asked what specific duties she could not perform, the appellant said that she could not sit, stand, or type "all day" because of pain in her hands and back. IAF, Hearing Tapes. In addition, when asked if she could simply take breaks and walk or stretch if she had been sitting or typing too long, the appellant said that she was "basically confined to her desk," but could not elaborate as to what she meant. *Id.*

¶13 An applicant's own evidence concerning her medical condition is entitled to weight in a disability retirement case when it is supported by competent medical evidence. *Reilly v. Office of Personnel Management*, [108 M.S.P.R. 360](#),

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<sup>3</sup> The appellant recounts a series of errors by the administrative judge, such as misidentifying the physician that filled out a particular report and incorrectly stating that the appellant had taken a particular medication. PFRF, Tab 1. While it appears that the administrative judge did make such errors, they were immaterial to the outcome of the appeal. *See Panter*, 22 M.S.P.R. at 282.

¶ 10 (2008). Here, the other evidence of record provides no support for the appellant's claim.

¶14 The medical documentation submitted with her application, while confirming that the appellant suffers from various medical conditions, does not indicate that she has a disabling medical condition. Notably, in his June 29, 2005, Certificate of Healthcare Provider, Robert Roby, M.D., stated that the appellant suffered from moderate to severe irritable bowel syndrome and osteoarthritis. IAF, Tab 3, Subtab IIB at 22-24. However, he also stated that she was not incapacitated and would only need to be absent from work approximately four times a year, for 3-4 days per occurrence, during "flare-ups." *Id.* Similarly, Dr. Roby's letter of February 21, 2007, also makes no mention of a disabling medical condition and again notes her irritable bowel syndrome results in only sporadic absences from work. IAF, Tab 3, Subtab IID at 8.<sup>4</sup> In addition, her colonoscopy results were normal. *Id.* at 10-19. This evidence does not suggest a disabling condition. *See Reilly*, [108 M.S.P.R. 360](#), ¶ 9 (treatment notes indicating that condition was sporadic or controlled by medication does not support a finding of disability).

¶15 Furthermore, the appellant's condition did not impair her performance on the job. The appellant testified that her work performance was always exemplary, and that the only accommodation that she had asked for was a transfer to get a "fresh start." IAF, Hearing Tapes. The SSA's materials also show her performance was good, including the supervisor's statement submitted with her

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<sup>4</sup> On March 27, 2007, SSA certified that the appellant could not be accommodated due to the severity of her medical condition, but SSA provided no explanation and noted the appellant no longer worked for the agency. IAF, Tab 3, Subtab IID at 21-22. This certification is also contradictory to the contemporaneous supervisor's statement and the appellant's most recent performance appraisal, both of which showed no performance deficiency. IAF, Tab 3, Subtab IID at 4-5, 35.

application for benefits and her performance review of October 2, 2006. IAF, Tab 3, Subtab IID at 4-5, 35.

¶16 The appellant did establish that she had attendance problems — she used several hundred hours of sick leave, leave without pay, and absence without leave every year from 1999 to 2006. IAF, Tab 3, Subtab IIB at 7-15. However, absences from work, standing alone, do not establish that the employee suffers a disabling condition. *Dunbar v. Office of Personnel Management*, [107 M.S.P.R. 32](#), ¶ 7 n.8 (2007). Here, the appellant may have had an attendance deficiency, but she has not shown that the deficiency resulted from a disabling medical condition. *See generally Reilly*, [108 M.S.P.R. 360](#), ¶ 12.

¶17 Significantly, the appellant’s supplemental evidence filed with the request for reconsideration and on appeal to the Board is dated from November 21, 2007 to August 20, 2008, approximately 9 to 18 months after her removal. IAF, Tab 3, Subtab IIB; Tab 7; Tab 10. But under CSRS, the appellant must have become disabled while employed in a position subject to CSRS, *Reilly*, [108 M.S.P.R. 360](#), ¶ 7, and it is error to rely on medical documentation post-dating the appellant’s removal unless the documentation addresses the appellant’s condition at the time of her removal, *Luzi*, [109 M.S.P.R. 79](#), ¶ 10; *Reilly*, [108 M.S.P.R. 360](#), ¶¶ 7-8. Because none of these materials, with one exception,<sup>5</sup> refers to her condition when she worked for SSA, they are not probative.

¶18 Even were we to consider these materials, they would not advance the appellant’s position. Indeed, the two most significant documents in the materials come from Donald Bousel, M.D.,<sup>6</sup> but neither provides material support for a

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<sup>5</sup> The one exception is the appellant’s reference to back spasms occurring 3-4 times per week beginning in 2006 in an intake report. IAF, Tab 10 at 5. However, the report contains no medical assessment suggesting disability and includes a physician’s note that the appellant is a “vague historian” regarding her condition. *Id.*

<sup>6</sup> The other materials generally showed unremarkable test results and recitations of symptoms without helpful explanations or diagnoses. IAF, Tab 7, Tab 10. The one

finding of disability. Dr. Bousel's letter of May 12, 2008, which was prepared in support of her application for state medical assistance, simply states: "Ms. Anita Alford is treated for Ulcerative Colitis and Depression, which make her feel weak, tired, and have difficulty concentrating. She is not able to work due to her conditions and is permanently disabled." IAF, Tab 3, Subtab IIB at 2; Hearing Tapes. However, this letter provides no reasoned explanation regarding how her condition affects her duties. *See Musser v. Office of Personnel Management*, [102 M.S.P.R. 18](#), ¶ 9 (2006) (a letter conclusorily stating that an appellant is "disabled" without explaining how the condition affects the appellant's duties is unpersuasive). Similarly, Dr. Bousel's Medical Report Form (also dated May 12, 2008) indicates (via a check in a box) that the appellant's condition prevents her from working. IAF, Tab 3, Subtab IIB at 6. That notwithstanding, on the same form, Dr. Bousel notes that her functional limitations are generally moderate, that she can sit for a good portion of a work day, and that she can freely engage in repetitive hand actions. *Id.* at 4-5. Thus, on balance, the form does not support a conclusion that the appellant was incapable of engaging in her typical duties. *See generally Reilly*, [108 M.S.P.R. 360](#), ¶ 10 (the evidence did not support a finding that the applicant could not perform his duties).

¶19 The appellant presented a description of her ailments without any explanation of how they affected her ability to perform her duties and without competent medical support. This is insufficient to establish a disabling medical condition by a preponderance of the evidence. *See Anderson v. Office of Personnel Management*, [96 M.S.P.R. 299](#), ¶¶ 14-16, 21-22 (2004), *aff'd*, 120 F. App'x 320 (Fed. Cir. 2005); *see also Dunbar*, [107 M.S.P.R. 32](#), ¶¶ 7-9.

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possible exception was a cranial MRI showing a "high signal area" that was possibly due to the appellant's cocaine use. IAF, Tab 10 at 3, 7. However, Dr. Bousel did not indicate this issue was of particular consequence.



¶20 Because the appellant has failed to meet her burden to establish that she is entitled to a disability retirement annuity under CSRS, the administrative judge correctly affirmed OPM's reconsideration decision denying the appellant disability retirement benefits and her error in applying the FERS legal standard rather than the CSRS legal standard did not prejudice the appellant's substantive rights. Therefore, it does not warrant a different outcome in this case. *See Panter*, 22 M.S.P.R. at 282.

### ORDER

¶21 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](http://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:

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