UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2009 MSPB 210

Docket No. CH-844E-08-0637-I-1

Robert L. King, Jr.,

Appellant,

v.

Office of Personnel Management,

Agency.

OPM Claim No. CSA 8 350 686

October 19, 2009

Angie S. Neatherton, Englewood, Ohio, for the appellant.

Camela Green-Brown, 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 the initial decision that affirmed the Office of Personnel Management's (OPM) final decision denying his disability retirement application as untimely. For the reasons set forth below, we DENY the petition for review for failure to meet the review criteria set forth at 5 C.F.R. § 1201.115(d). We REOPEN the appeal on our own motion under 5 C.F.R. § 1201.118, however, and AFFIRM the initial decision as MODIFIED by this Opinion and Order.

BACKGROUND

¶2 Effective November 15, 1996, the Defense Commissary Agency removed the appellant from his Store Worker position on charges of failure to follow instructions, absence without leave, and failure to follow leave requesting procedures. Initial Appeal File (IAF), Tab 7 at 3-4, 6-7. Shortly before his removal, the appellant had undergone inpatient treatment for alcohol abuse. IAF, Tab 15, Subtab D at 12-22, 24-29. Over 10 years later, on October 4, 2007, OPM received the appellant's application for disability retirement under the Federal Employees' Retirement System (FERS). *Id.*, Subtab D at 1, Subtab E at 5-13. OPM denied the appellant's application as untimely. *Id.*, Subtab A.

¶3 The appellant filed a Board appeal of OPM's decision, arguing that the disability retirement application deadline should be waived based on his mental incompetence. IAF, Tabs 1, 5. After a hearing, the administrative judge issued an initial decision affirming OPM's final decision. IAF, Tab 16, Initial Decision (ID) at 1, 5. The administrative judge found, based in part on the testimony of the appellant's treating psychologist, Dr. Emanuel Papadakis, that even if the appellant was mentally incompetent at the time of his removal, the appellant regained competency in 2002. ID at 4-5. She therefore found that the appellant's October 2007 disability retirement application was untimely because it was not filed within 1 year after the appellant's restoration to competency in 2002. ID at 5. The administrative judge also found that, because the appellant's employing agency removed him for disciplinary rather than medical reasons, OPM's regulations did not require the employing agency to inform the appellant of his potential eligibility for disability retirement benefits, and therefore the employing agency's failure to provide the appellant with such information provided no basis to waive the disability retirement filing deadline. ID at 2-3.

¶4 The appellant filed a petition for review, arguing that the administrative judge erred in finding that he regained competency in 2002. Petition for Review File (PFRF), Tab 3 at 4-5, 7. In support of his argument, the appellant has filed a

letter from Dr. Papadakis, stating that the appellant was not able to file for disability retirement until 2007. *Id*. at 10. He also argues that his employing agency should have notified him of his option to apply for disability retirement when it removed him. *Id*. at 5.

ANALYSIS

¶5 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. *See Russo v. Veterans Administration*, 3 M.S.P.R. 345, 349 (1980); 5 C.F.R. § 1201.115(d).

¶6 We reopen this appeal on our own motion, however, because the administrative judge erred in applying 5 U.S.C. § 8337(b) and 5 C.F.R. § 831.1205, which are provisions governing disability retirement applications under the Civil Service Retirement System (CSRS). ID at 2-5. The record shows that the appellant was covered under FERS at the time of his removal. IAF, Tab 15, Subtab E at 1-5. Therefore, the administrative judge should have applied 5 U.S.C. § 8453 and 5 C.F.R. part 844, subpart B, which are the relevant provisions governing disability retirement applications under FERS. *See Larson v. Office of Personnel Management*, 93 M.S.P.R. 433, ¶ 6 (2003) (the administrative judge incorrectly applied provisions governing CSRS when the record indicated that the appellant was covered under FERS).

¶7 Notwithstanding the administrative judge's error, the relevant statutory and regulatory requirements for applying for and establishing entitlement to a disability retirement under CSRS and FERS are "broadly similar." *Chapman v. Office of Personnel Management*, 110 M.S.P.R. 423, ¶ 9. An application for disability retirement under FERS must be filed with an employee's employing agency before the employee separates from service or with the former employing agency or with OPM within 1 year after the employee's separation. *See* 5 U.S.C.

§ 8453; *Pittman v. Office of Personnel Management*, 99 M.S.P.R. 297, ¶ 6 (2005); 5 C.F.R. § 844.201(a)(1); *see also* 5 U.S.C. § 8337(b) (an employee covered under CSRS must file his application for disability retirement prior to his separation or within 1 year thereafter); 5 C.F.R. § 831.1203(a)(5) (same). Under both CSRS and FERS, the 1-year time limit for filing a disability retirement application following an employee's separation from service may be waived if the employee is mentally incompetent at the date of separation or within 1 year thereafter and if the application is filed with OPM within 1 year from the date the employee is restored to competency or is appointed a fiduciary, whichever is earlier. *Chapman*, 110 M.S.P.R. 423, ¶ 9; *see* 5 U.S.C. §§ 8337(b), 8453; *Pittman*, 99 M.S.P.R. 297, ¶ 6; 5 C.F.R. §§ 831.1204(d), 844.201(a)(4). It is the employee's burden to prove by preponderant evidence that he was mentally incompetent during the relevant filing period. *Chapman*, 110 M.S.P.R. 423, ¶ 9; 5 C.F.R. § 1201.56(a)(2).

¶8 On review, the appellant argues that, to the extent that he did not provide sufficient evidence of his incompetency after 2002, this was because he was unaware that he was required to prove his incompetency after that date. PFRF, Tab 3 at 4. It appears that the appellant is correct that he did not receive proper notice of the time period for which he was required to prove his incompetency. In addition, OPM's final decision, which found that the appellant failed to show that he was mentally incompetent on the date of separation or within 1 year thereafter, referred only to the period from November 15, 1996, to November 15, 1997. IAF, Tab 15, Subtab A at 2. Nevertheless, any deficiency in notice has been cured by the initial decision, which was sufficient to inform the appellant that he was required to prove his incompetency until 1 year prior to his disability retirement application.[1] ID at 2, 5; *see Easterling v. U.S. Postal Service*, 110

[1] The initial decision incorrectly stated that the appellant was required to prove his incompetency up until October 2007. ID at 5. Because the appellant filed his disability retirement application on or about October 4, 2007, IAF, Tab 15, Subtab D at 1, he was

M.S.P.R. 41, ¶ 11 (2008) (a deficiency in notice can be cured if the initial decision puts the appellant on notice of his burden, thus giving him the opportunity to meet his burden on review).

¶9 Now aware of the entire time period in question, the appellant argues that the administrative judge misinterpreted Dr. Papadakis's testimony to mean that he regained competency in 2002, PFRF, Tab 3 at 4; ID at 4-5; Hearing Tape (HT), Side A, and he submits a new letter in which Dr. Papadakis purports to clarify his opinion, PFRF, Tab 3 at 10. The letter reads in relevant part:

> [The appellant] was under severe problems with depression, had difficulty with comprehension and judgment, and was not able to advocate for himself to obtain federal disability from his federal employer until 2007. . . . [The appellant's] cognitive improvement in judgment that took place in 2007 helped him become aware that he can file for [disability retirement] for the first time and indeed he filed for [disability retirement] from the federal government in 2007. He did not get better enough until 2007 to have good enough judgment and understanding so he can understand that he can get federal disability from his federal employer. It was not until 2007 when he fully became aware that he can file for disability from the federal government and filed for disability at that time.

Id.

¶10 Although the Board will consider previously available evidence submitted for the first time on review when the party was not put on notice of the nature of a dispositive issue until the issuance of the initial decision, *Miller v. U.S. Postal Service*, 110 M.S.P.R. 550, ¶ 8 (2009), Dr. Papadakis's letter is insufficient to warrant an outcome different from that of the initial decision. His statement that the appellant "was not able to advocate for himself to obtain federal disability . . . until 2007," directly contradicts his hearing testimony that in 2002, the

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only required to prove his incompetency up until October 2006, *see* 5 U.S.C. § 8453 (the filing deadline is 1 year after the claimant's restoration to competency). However, the notice in the initial decision was still sufficient because the time period identified by the administrative judge encompassed the entire period for which the appellant was actually required to prove his incompetency.

appellant was "able to function much better," and that "he could have, cognitively, [filed for disability retirement] as long as he was aware that he qualified for such benefits." HT, Side A. The Board has found that, where an affidavit submitted on review contradicts the affiant's hearing testimony, the "live testimony in an adversarial context, subject to cross-examination, [is] inherently more credible than [a] subsequent affidavit repudiating [the] former testimony, without a reasonable explanation for doing so." *Kuwada v. Department of the Navy*, 12 M.S.P.R. 9, 11 (1982) (footnote omitted). This rationale applies with stronger reason where the statement on review is unsworn, as is the case here. PFRF, Tab 3 at 10; *see Social Security Administration v. Whittlesey*, 59 M.S.P.R. 684, 692 (1993) (a sworn statement has greater weight than one that is not), *aff'd*, 39 F.3d 1197 (Fed. Cir. 1994) (Table). Dr. Papadakis's letter, therefore, does not satisfy the "new and material evidence" criterion for granting a petition for review because it is not of sufficient weight to warrant an outcome different from that of the initial decision. *See Kuwada*, 12 M.S.P.R. at 11.

¶11 Although the evidence shows that the appellant suffered from serious psychological conditions for several years after his removal, IAF, Tab 5 at 12-18, 28, Tab 15, Subtab D at 2-7; HT, Side A (testimony of Dr. Papadakis), the administrative judge correctly found that the evidence showed that the appellant was restored to competency in 2002, ID at 5; HT, Side A (testimony of Dr. Papadakis). If the administrative judge's finding were based on a *lack* of evidence of incompetency after 2002, the matter might be different, in light of the deficient notice that the appellant received regarding the time period at issue. However, the administrative judge's finding was based on *affirmative* evidence from Dr. Papadakis that the appellant was restored to competency in 2002, ID at 4-5; HT, Side A, and as explained above, the evidence that the appellant has submitted on review does not warrant a contrary finding. The evidence shows that the appellant could have filed for disability retirement after 2002 if he had

been aware of his potential eligibility, and that his failure to apply for disability retirement until 2007 was due to his unawareness of his potential eligibility. IAF, Tab 15, Subtab D at 11; HT, Side A (testimony of Dr. Papadakis). The appellant's ignorance of his potential eligibility for disability retirement does not constitute mental incompetence that would warrant waiving the statutory deadline under 5 U.S.C. § 8453; ignorance of the law does not equate to incompetence. *See French v. Office of Personnel Management*, 810 F.2d 1118, 1120 (Fed. Cir. 1987) (for purposes of waiving the disability retirement application deadline, "mental incompetence" means that the applicant had no more than "some minimal capacity to manage his own affairs").

¶12 Under certain circumstances, however, when an agency removes a FERS employee, it is required to inform the employee of his possible eligibility for disability retirement and of the time limit for filing an application. 5 C.F.R. § 844.202(a)-(b)(1). The appellant argues that the disability retirement application deadline should be waived because his employing agency was required to afford him such information when it removed him, but it failed to do so. PFRF, Tab 3 at 5.

¶13 The administrative judge mischaracterized the law by suggesting that, because the appellant was removed for disciplinary rather than medical reasons, the agency's notice obligation under 5 C.F.R. § 844.202(b)(1) could not have been triggered. ID at 2-3. The plain language of the regulation does not support this construction; rather, the regulation requires the agency to act when it appears that the basis for the removal was caused by a medical condition, regardless of whether the removal was for disciplinary or other reasons. 5 C.F.R. § 844.202(b)(1) (Where a "removal is based on reasons apparently caused by a medical condition, the agency must advise the employee in writing of his or her possible eligibility for disability retirement and of the time limit for filing an application."). The current record is not sufficiently developed to determine

whether the agency was required to afford the appellant notice under 5 C.F.R. § 844.202(b)(1). [2]

¶14 We decline to remand the appeal for further findings on this issue, however, because even if the agency were required by 5 C.F.R. § 844.202(b)(1) to inform the appellant of his potential disability retirement option, the agency's failure to do so would not provide a basis to waive the statutory 1-year filing deadline under 5 U.S.C. § 8453. In *Jeter v. Office of Personnel Management*, 71 M.S.P.R. 495, 498-501 (1996), the Board considered whether an agency's failure to notify an appellant of the deadline for filing a disability retirement application when required by 5 C.F.R. § 844.202(b)(1) provides a basis for waiving the filing deadline. The Board determined that it does not, stating:

> [I]t is true that OPM's regulation [5 C.F.R. § 844.202(b)] required the [appellant's employing agency] to inform the appellant of the deadline for filing a disability retirement application and that it did not do so. Accepting this failure to satisfy a notice obligation imposed by OPM as an independent basis for waiver of the statutory deadline, when Congress has already defined the only basis for such waiver, would essentially permit OPM to vary the filing requirements set by Congress in the statute. OPM, however, only has such authority as has been granted or delegated to it under the specific terms prescribed by Congress in the delegating statute. *See Killip v. Office of Personnel Management*, 991 F.2d 1564, 1569-70 (Fed. Cir. 1993). When Congress has mandated specific timeliness requirements regarding the filing of an application or election and a particular filing does not meet those requirements, therefore, OPM lacks the authority to consider it. *See Deerinwater v. Office of Personnel Management*, 78 F.3d 570, 571-73 (Fed. Cir. 1996) (upholding disallowance of application under 5 U.S.C. § 8453 as untimely filed); *Killip*, 991 F.2d at 1570 (upholding disallowance of appellant's election where it was made after date prescribed by Congress).

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[2] Under some circumstances, the regulation may require the agency to file a disability retirement application on behalf of the employee. *See* 5 C.F.R. § 844.202(a). Those conditions do not appear to be met here, however, and the appellant does not argue that they are.

Jeter, 71 M.S.P.R. at 500; *see also Overall v. Office of Personnel Management*, 52 M.S.P.R. 15, 17 (1991) ("OPM cannot be estopped from denying the appellant benefits because of any failure on the part of the agency to notify her of a right to file a disability retirement application."); *cf. Hawes v. Office of Personnel Management*, 51 M.S.P.R. 330, 333 (1991) (OPM could not be estopped from enforcing the 1-year statutory filing period for applying for disability retirement even where the filing delay was caused by the negligence of the appellant's former employing agency).

¶15 We note that the facts of the instant appeal are distinguishable from the facts in *Johnston v. Office of Personnel Management*, 413 F.3d 1339, *revised on recons.*, 430 F.3d 1376 (Fed. Cir. 2005). In *Johnston*, the United States Court of Appeals for the Federal Circuit remanded the appeal for a determination of whether the appellant's employing agency failed to afford him notice of his removal as required by statute as well as notice of his potential eligibility for disability retirement as required by regulation. *Johnston*, 413 F.3d at 1341-43; *see* 5 U.S.C. § 7513(b); 5 C.F.R. § 831.1205(b)(1). Thus, *Johnston* involved the employing agency's failure to give notice required by statute as well as notice required by regulation. Here, unlike *Johnston*, there is no indication that the appellant's employing agency failed to give him notice, required by statute, of the event that triggered the 1-year deadline for filing a disability retirement application.

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:

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