

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

2010 MSPB 52

Docket No. DC-844E-09-0623-I-1

**Edward J. Simpkins,
Appellant,**

v.

**Office of Personnel Management,
Agency.**

March 18, 2010

Edward J. Simpkins, Greenbelt, Maryland, pro se.

Camela Green-Brown, Washington, D.C., for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The appellant petitions for review of the initial decision that affirmed the reconsideration decision of the Office of Personnel Management (OPM) denying his application for disability retirement under the Federal Employees' Retirement System (FERS). For the reasons set forth below, we DENY the petition, REOPEN the appeal on the Board's own motion under [5 C.F.R. § 1201.118](#), VACATE the initial decision, and REMAND the case to the Washington Regional Office for issuance of a new initial decision consistent with this Opinion and Order.

BACKGROUND

¶2 The appellant filed an application for disability retirement benefits under FERS on the bases of high blood pressure, heart disease, and chest pain. Initial Appeal File (IAF), Tab 3, Subtab IID. OPM denied the application, finding that the appellant's blood pressure was under control with medication and that his electrocardiogram (EKG) was normal. *Id.*, Subtabs IIA, IIC.

¶3 The appellant appealed OPM's decision. IAF, Tab 1. Based on the record developed by the parties, including the hearing held on September 2, 2009, the administrative judge found that the appellant failed to establish that his medical conditions prevented him from performing useful and efficient service in the position of Benefits Advisor with the Department of Labor (DOL). IAF, Tab 12 (Initial Decision (ID)). The administrative judge found that the appellant failed to show that his medical conditions caused his performance deficiencies, for which DOL removed him. ID at 11. The administrative judge also found that the appellant provided no objective clinical findings to support his subjective claim that his medical conditions have deteriorated from the date of his initial diagnosis. *Id.* He found that the appellant failed to produce the opinion of any physician that his medical conditions have deteriorated to the point that they prevent useful and efficient service in his position. *Id.*

¶4 The appellant petitions for review. Petition for Review File (PFR File), Tab 1. OPM has not responded.

ANALYSIS

¶5 In his petition, the appellant asserts that the administrative judge was biased. In making a claim of bias, a party must overcome the presumption of honesty and integrity that accompanies an administrative adjudicator. *Oliver v. Department of Transportation*, [1 M.S.P.R. 382](#), 386 (1980). An administrative judge's conduct during the course of a Board proceeding warrants a new adjudication only if the administrative judge's comments or actions evidence "a

deep-seated favoritism or antagonism that would make fair judgment impossible.” *Bieber v. Department of the Army*, [287 F.3d 1358](#), 1362-63 (Fed. Cir. 2002). The appellant's conclusory claims of bias, none of which involves extrajudicial conduct, do not overcome the presumption of honesty and integrity that accompanies an administrative judge. *See Wadley v. Department of the Army*, [90 M.S.P.R. 148](#), ¶ 6 (2001).

¶6 In an appeal from an OPM decision denying a voluntary disability retirement application, the appellant bears the burden of proof by preponderant evidence. [5 C.F.R. § 1201.56\(a\)\(2\)](#); *see Chavez v. Office of Personnel Management*, [6 M.S.P.R. 404](#), 417 (1981). To be eligible for a disability retirement annuity under FERS, an employee must show that: (1) He completed at least 18 months of creditable civilian service; (2) while employed in a position subject to FERS, he became disabled because of a medical condition, resulting in a deficiency in performance, conduct or attendance, or, if there is no such deficiency, the disabling medical condition is incompatible with either useful and efficient service or retention in the position; (3) the disabling medical condition is expected to continue for at least 1 year from the date that the application for disability retirement benefits was filed; (4) accommodation of the disabling medical condition in the position held must be unreasonable; and (5) he did not decline a reasonable offer of reassignment to a vacant position. [5 U.S.C. § 8451\(a\)](#); *Yoshimoto v. Office of Personnel Management*, [109 M.S.P.R. 86](#), ¶ 8 (2008); *Thorne v. Office of Personnel Management*, [105 M.S.P.R. 171](#), ¶ 5 (2007); 5 C.F.R. § 844.103(a).

¶7 As the administrative judge found, the appellant showed that he completed at least 18 months of creditable civilian service under FERS and that he did not decline a reasonable offer of reassignment. The appellant asserts that the administrative judge erred in finding that the appellant failed to show that he became disabled and that his disabling medical condition is incompatible with useful and efficient service in his position. The contends asserts that the

administrative judge failed to consider evidence of record, including specifically Dr. Joanna Rosen's addendum of June 2, 2009. Contrary to the appellant's assertion, the administrative judge carefully considered Dr. Rosen's addendum. Indeed, the administrative judge quoted it. ID at 5-6. In the addendum, Dr. Rosen references her earlier statement that the appellant's blood pressure was controlled and states that, as of June 2, 2009, the appellant's blood pressure was not controlled, but that cardiology recommended a change in the appellant's blood pressure regimen and the change had been ordered. IAF, Tab 1 at 10. Dr. Rosen states that she asked the appellant to return for a blood pressure check in 2 weeks and that she expects that, with the medication adjustment, he will accomplish goal blood pressure in the future. *Id.*

¶8 Based on the record evidence before him, the administrative judge found that the appellant failed to show that his medical conditions disabled him for useful and efficient service in the Benefits Advisor position. The administrative judge also found that the medical evidence did not support the appellant's contention that his medical condition had deteriorated to the point that he was unable to render useful and efficient service.

¶9 However, after the close of the record on petition for review, the appellant, who is a veteran of the United States Navy, submitted a Rating Decision and accompanying compensation letter from the Department of Veterans Affairs (DVA). PFR File, Tab 3. The Rating Decision and compensation letter determined that the appellant's hypertension with left ventricular hypertrophy had worsened and that the appellant's medical examination showed the presence of hypertensive heart disease. The Rating Decision increased the appellant's assigned compensation percentage for hypertension with left ventricular hypertrophy from 10% to 30% and the compensation letter stated that the appellant's overall combined rating is 80%. *Id.*

¶10 The Board and OPM must consider an award of benefits by the DVA based on the same medical conditions as the appellant's disability retirement

application, although this evidence may be outweighed by other evidence. *Sachs v. Office of Personnel Management*, [99 M.S.P.R. 521](#), ¶ 11 (2005). Further, where, as here, the DVA issued a Rating Decision after the administrative judge issued the initial decision, and thus neither the Board nor OPM has considered it, it is proper to remand the appeal to the administrative judge for reconsideration. *Id.*, ¶¶ 11-12, 15; *see also McCurdy v. Office of Personnel Management*, [96 M.S.P.R. 90](#), ¶¶ 9-11 (2004) (remanding a disability retirement appeal for consideration of a Social Security Administration benefits award that post-dated the initial decision). Because a medical condition that formed the basis of the appellant's application for disability retirement under FERS is the medical condition implicated in the Rating Decision issued by the DVA, we remand the appeal for consideration of the new evidence.

ORDER

¶11 Accordingly, we vacate the initial decision and remand the appeal to the Washington Regional Office to afford the parties the opportunity to submit evidence and argument, including a supplemental hearing, if requested, on the effect of the DVA's October 1, 2009 Rating Decision and accompanying October 6, 2009 compensation letter on the appellant's FERS disability retirement application and consideration of any relevant medical evidence that

¶12 was not previously available. After considering any additional evidence and argument as appropriate, the administrative judge shall issue a new initial decision consistent with the remand Opinion and Order.

FOR THE BOARD:

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