

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

2010 MSPB 103

Docket No. AT-0831-09-0774-X-1

**Anthony Days,
Appellant,**

v.

**Office of Personnel Management,
Agency.**

June 4, 2010

Anthony Days, Lithonia, Georgia, pro se.

James Williams, Washington, D.C., for the agency.

BEFORE

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

OPINION AND ORDER

¶1 This case is before the Board based on a finding of noncompliance with an initial decision that became the Board's final decision. *Days v. Office of Personnel Management*, MSPB Docket No. AT-0831-09-0774-I-1 (Initial Decision, Sept. 29, 2009). For the reasons set forth below, we find the agency in compliance and DISMISS the appellant's petition for enforcement.

BACKGROUND

¶2 The Board's decision on the merits of this appeal ordered the Office of Personnel Management (OPM) to grant the appellant's application for disability

retirement no later than 20 calendar days after the initial decision became final, November 3, 2009. *Days v. Office of Personnel Management*, MSPB Docket No. AT-0831-09-0774-I-1, slip op. at 7, 9. The Board stated that the commencement date of the disability annuity was to be February 15, 2001. *Id.* slip op at 7.

¶3 On November 24, 2009, the appellant filed a petition for enforcement contending that the agency had failed to comply with the Board's order. *Days v. Office of Personnel Management*, MSPB Docket No. AT-0831-09-0774-C-1, Compliance File (CF), Tab 1. In response to the petition for enforcement, the agency contended that in order to comply with the Board's September 29, 2009, order it needed the following information from the appellant: (1) copies of the appellant's wage and tax statements for calendar years 2001 through 2008 to determine whether he had been returned to earning capacity; and (2) current medical evidence to determine whether he is still disabled. CF, Tab 3.

¶4 In a Recommendation dated February 9, 2010, the administrative judge granted the appellant's petition for enforcement. CF, Tab 7. The administrative judge found that even if OPM ultimately determined that the appellant was restored to earning capacity during 2001, pursuant to [5 C.F.R. § 831.1209\(a\)](#), the annuity would not have terminated until June 30, 2002. CF, Tab 7 at 5. The administrative judge ordered OPM to take the following actions: (1) calculate the amount of the appellant's disability retirement annuity for the period from February 15, 2001, through June 30, 2002, and pay this amount to the appellant, taking into account an improper refund of retirement contributions; (2) notify the appellant of any additional evidence OPM believes is necessary to determine the income the appellant earned from wages and self employment for calendar years 2001-2008; (3) make a final determination as to whether and when the appellant's annuity terminated due to the appellant's restoration to earning capacity; (4) make a final determination as to the amount of retroactive disability retirement benefits due the appellant; and (5) pay this amount to the appellant at the earliest practicable date. CF, Tab 7 at 6-7.

ANALYSIS

¶5 It is the agency's burden to establish compliance with a final Board Order. *Vargo v. U.S. Postal Service*, [78 M.S.P.R. 66](#), 73 (1998). It must produce relevant, material, and credible evidence of compliance in the form of documentation or affidavit. *Spates v. U.S. Postal Service*, [70 M.S.P.R. 438](#), 443 (1996).

¶6 On March 15, 2010, the agency filed its response to the Recommendation with the Board. Compliance Referral File ("CRF"), Tab 5. It stated that it had determined that the appellant was not restored to earning capacity for the years 2001 through 2009, and that it was in the process of determining whether the appellant continued to be disabled. *Id.* On April 15, 2010, the agency provided additional information to the Board showing that it authorized payment to the appellant on April 12, 2010, in the net amount of \$46,445.95, which represents the appellant's accrued annuity from February 15, 2001, through April 30, 2010, less deductions for federal income tax and life insurance, and collection of refunded retirement contributions. CRF, Tab 6. The agency also stated that the appellant will continue to receive a monthly disability annuity in the amount of \$1,173.00. The agency's documentation shows that the appellant received this amount for the period April 1, 2010, to April 30, 2010. *Id.* The agency's evidence demonstrates that it has taken the actions required by the administrative judge: (1) it calculated and paid the appellant a retroactive disability annuity for the period February 15, 2001, through June 30, 2002, taking into account the refund of retirement contributions; (2) it determined that the appellant has not been restored to earning capacity; and (3) it concluded that the appellant continues to be disabled. CRF, Tabs 5 and 6.

¶7 The appellant has not responded to the information supplied by the agency concerning its compliance with the Board's order, despite being notified that if he did not respond to the agency's evidence of compliance, the Board may assume he was satisfied and may dismiss his petition for enforcement. *See* CRF, Tab 2.

Accordingly, we find the agency in compliance and DISMISS the appellant's petition for enforcement.

ORDER

¶8 This is the final decision of the Merit Systems Protection Board in this compliance proceeding. Title 5 of the Code of Federal Regulations, sections 1201.183(b) ([5 C.F.R. § 1201.183\(b\)](#)).

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.ca9c.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.