

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

2010 MSPB 178

Docket No. AT-0831-08-0779-M-1

**Wayne C. Wall,
Appellant,**

v.

**Office of Personnel Management,
Agency.**

August 31, 2010

Wayne C. Wall, Jackson, Mississippi, pro se.

Peggy G. Smith, 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 United States Court of Appeals for the Federal Circuit vacated the Board's April 17, 2009 final decision in this appeal, and remanded the appeal for reconsideration. For the reasons explained below, we REOPEN the case on our own motion under [5 C.F.R. § 1201.118](#), and AFFIRM the initial decision as MODIFIED by this Opinion and Order. We also AFFIRM the final decision of the Office of Personnel Management finding the appellant ineligible for a disability retirement annuity under the Civil Service Retirement System (CSRS).

BACKGROUND

¶2 The Department of Veterans Affairs (VA) terminated the appellant from the position of Claims Assistant, GS-06, at a VA Medical Center (VAMC) on August 17, 2007, during his probationary period. Initial Appeal File (IAF), Tab 3, Subtab II-D at 5-6; Subtab II-E at 1. He previously was employed by the U.S. Postal Service from November 1972 through September 1991, when he was removed after 1 year in a non-pay status. *Id.*, Subtab II-E at 3-5. The appellant applied for a disability retirement annuity under CSRS 4 days prior to his termination from the Claims Assistant position. *Id.*, Subtab II-D at 1-4.

¶3 The appellant asserted in his application for retirement benefits that he was disabled by arthritis and ankylosis (i.e., stiffness) in his right ankle, tension and migraine headaches, hypertension, sinusitis and diabetes. *Id.* OPM issued initial and final decisions finding that the appellant did not show he was disabled by a medical condition that caused his service deficiencies. IAF, Tab 3, Subtabs II-A, II-C. On appeal, the administrative judge affirmed OPM's final decision denying the appellant a disability retirement annuity. *Id.*, Tab 9, Initial Decision (ID). The administrative judge found that the appellant's medical conditions, separately or jointly, rendered him incapable of useful and efficient service. ID at 5. However, the administrative judge held that the appellant's claim for disability retirement failed because he became disabled prior to, not during, his probationary appointment. *Id.* at 6.

¶4 The appellant filed a petition for review of the initial decision. Petition for Review (PFR) File, Tab 1. The Board reopened the appeal on its own motion and affirmed the initial decision as modified, affirming OPM's final decision that the appellant failed to establish he was disabled. *Wall v. Office of Personnel Management*, [111 M.S.P.R. 122](#), ¶¶ 6, 15 (2009). Subsequent to the issuance of this decision, the U.S. Court of Appeals for the Federal Circuit issued its decision in *Reilly v. Office of Personnel Management*, [571 F.3d 1372](#) (Fed. Cir. 2009). The court vacated and remanded the Board's decision in this appeal for

reconsideration under the legal standard announced in *Reilly*. *Wall v. Office of Personnel Management*, 348 F. App'x 576 (Fed. Cir. 2009).

ANALYSIS

¶5 The Federal Circuit held in *Reilly* that post-separation evidence of an appellant's medical condition may be considered in determining eligibility for a disability retirement annuity. 571 F.3d at 1380-81. The court rejected the Board's determination in the case that medical opinions rendered after an employee's separation are admissible only if they are based on pre-separation tests, observations, interviews, and medical examinations, and address the employee's pre-separation condition. *Id.* at 1380. The court stated that the Board's holding in *Reilly* "contradicts the general rule that 'OPM [and the Board] must consider all of an applicant's competent medical evidence.'" *Id.* at 1381 (citing *Vanieken-Ryals v. Office of Personnel Management*, [508 F.3d 1034](#), 1041 (Fed. Cir. 2007)). The court held that post-separation medical evidence can be probative of whether the appellant became disabled while serving in a CSRS position "[w]here proximity in time, lay testimony, or some other evidence provides the requisite link to the relevant period." 571 F.3d at 1382.¹

¶6 To be eligible for a disability retirement annuity under CSRS, an employee must have completed 5 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 his position, and must not be qualified for reassignment to a vacant position in the agency at the same grade or level in which he could render useful and efficient service. *Alford v. Office of Personnel*

¹ The appellant in *Reilly* suffered from chronic asthma, had been regularly treated by a physician, had sought accommodation from her employing agency for the condition, and ultimately resigned after being issued a letter of warning for absences due to the condition. *Id.* at 1373-74. She subsequently applied for a disability retirement annuity and submitted a report from a pulmonary specialist, based on examination and testing conducted after her resignation. *Id.* at 1374.

Management, [111 M.S.P.R. 536](#), ¶ 8 (2009), *aff'd*, 361 F. App'x 131 (Fed. Cir. 2010); *see* [5 U.S.C. § 8337\(a\)](#); [5 C.F.R. § 831.1203\(a\)](#). “Useful and efficient service means (1) acceptable performance of the critical or essential elements of the position; and (2) satisfactory conduct and attendance.” [5 C.F.R. § 831.1202](#). OPM’s implementing regulations further require that the disabling medical condition be expected to continue for at least 1 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. *Alford*, [111 M.S.P.R. 536](#), ¶ 9; *see* [5 C.F.R. § 831.1203\(a\)](#). A determination on eligibility for disability retirement must take into account all competent medical evidence, including both objective clinical findings and qualified medical opinions based on the applicant’s symptoms. *Vanieken-Ryals*, 508 F.3d at 1041-42. An applicant’s own subjective evidence of disability is also entitled to weight where it is uncontradicted or corroborated by competent medical evidence. *Id.*; *Alford*, [111 M.S.P.R. 536](#), ¶ 13.

¶7 The position description for a Claims Assistant states that the job entails processing invoices for veterans’ medical care from non-VA providers and notifying the veterans whether their claims were authorized. IAF, Tab 3, Subtab II-D at 102-105. The position is sedentary, requiring use of a computer and lifting files, and is performed in “an adequately lighted, quiet and controlled atmosphere[.]” *Id.* at 105. The appellant was terminated from the position on August 17, 2007, after serving in it for 7 months, based on two unapproved absences and his inability to master the duties of the position. *Id.* at 5-6, 9; Subtab E at 1. The Supervisor’s Statement accompanying the appellant’s disability retirement application stated as follows:

Employee went to sleep during training . . . [and] had an altercation with another employee and intimidated that employee. . . . Employee was trained in several different positions within the scope of his position description in an attempt to find a match for his

abilities. He did not demonstrate satisfactory performance in any area. . . .

Mr. Wall was initial [sic] trained to develop folders for appellant cases. He did not master the requirement of that position and he was reassigned and train [sic] on assignments requiring the least amount of knowledge and skill including answering phones, assembling claim folders. His performance remained unsatisfactory.

IAF, Tab 3, Subtab IID at 6. The Supervisor's Statement also said that the appellant had two unapproved leave episodes during his brief period of employment and that the high volume of claims being processed meant that an employee's absences required redistribution of workload.² *Id.*

¶8 As stated above, the appellant has asserted he is disabled by arthritis and ankylosis in his right ankle, tension and migraine headaches, hypertension, sinusitis and diabetes. IAF, Tab 3, Subtab II-D at 1-4. He has submitted progress notes from his treatment at the VAMC during April 2005 through August 2007. *Id.* at 9-94. The appellant has also submitted two letters from a nurse practitioner regarding his headaches, dated August 21, 2007, and September 29, 2008, and the appointment notes on which the second letter is based. IAF, Tab 3, Subtab II-D at 10; Tab 8 at 4-9. These letters and notes post-date his August 17, 2007 termination.

¶9 The appellant has stated that his ankle causes him constant pain, affecting his concentration, and that medications he takes for it cause extreme fatigue, dizziness, headaches and vision problems. *Id.*, Tab 1 at 23; Tab 3, Subtab II-D at 3. The appellant has a VA disability rating of 20 percent for loss of motion in his ankle, and x-rays of the ankle taken in September 2006 revealed he has advanced arthritis. *Id.*, Tab 3, Subtab IID at 11, 82. At that time, he complained

² The dates for the unapproved absences are not specified. The appellant's leave record shows leave without pay for May 18, July 2-3, July 6 and August 2, 2007. IAF, Tab 3, Subtab II-D at 121. The appellant stated on appeal that he requested sick leave for July 2-3, received no response, and was later charged absence without leave for those dates. *Id.*, Tab 1 at 10.

of constant pain, but only took Tylenol when the pain was at its worst and did not use a cane or other assistive device. *Id.* at 93-94. There is no indication in the medical records that the appellant received additional medication or other treatment for this condition until August 20, 2007, i.e., 3 days after his probationary termination, when he requested a cane. *Id.* at 18. He returned the next day for pain medication. *Id.* at 14.

¶10 Upon the appellant's initial evaluation at the VAMC in April 2005, it was noted that he had a history of hypertension and was taking medication for it. IAF, Tab 3, Subtab IID at 66, 71. As of November 2006, the condition was considered to be controlled with medication. *Id.* at 41-42. The appellant has asserted that the condition and the medication for it caused constant fatigue, dizziness, headaches and edema. IAF, Tab 1; Tab 3, Subtab II-D at 3. However, this is not reflected in any of the VAMC medical records.

¶11 The appellant was diagnosed with diabetes in November 2006 and was given oral medication for it, as well as advice on diet and weight loss. IAF, Tab 3, Subtab II-D at 35, 37, 40. The appellant has asserted that, because of this condition, he had to take frequent restroom breaks at work, his sleep was disturbed because he had to get up at night to urinate, and that his diabetes medication caused him to have headaches, dizziness, nausea, numbness, tingling and fatigue. *Id.*, Tab 1 at 23; Tab 3, Subtab II-D at 3. None of these complaints, however, is corroborated in the medical records.

¶12 The appellant argued that his sinusitis caused irritability, headaches, fatigue and altered sleep patterns. IAF, Tab 1 at 24; Tab 3, Subtab II-D at 4. The only reference to the condition in his medical records, however, is a diagnosis in September 2006, stating it was seasonal, chronic and severe. *Id.*, Tab 3, Subtab II-D at 92. There is no mention of the symptoms the appellant describes in the medical records.

¶13 The general rule in disability retirement cases is that an appellant's medical evidence must show how his condition affects the ability to perform specific job

duties and requirements. *Alford*, [111 M.S.P.R. 536](#), ¶ 11; *Tanious v. Office of Personnel Management*, [34 M.S.P.R. 107](#), 111 (1987). Alternatively, where the medical evidence does not specifically address the job requirements, but it shows unambiguously and without contradiction that the appellant cannot perform the duties of the position, the Board can draw the linkage and find the appellant entitled to disability retirement. *Bynum v. Office of Personnel Management*, [89 M.S.P.R. 1](#), ¶ 14 (2001) (citing *Mullins-Howard v. Office of Personnel Management*, [71 M.S.P.R. 619](#), 627 (1996)).

¶14 In this appeal, there is no medical evidence that supports the appellant's contentions that he became disabled from his position as a Claims Assistant by arthritis and ankylosis in his right ankle, hypertension, diabetes or sinusitis. Neither the April 2005 to August 2007 progress notes, nor the nurse practitioner's letters, describes the debilitating symptoms the appellant reports or provides any indication of how these conditions would affect his ability to perform his job. The only evidence in support of the appellant's claim for disability retirement on the basis of these conditions is his own descriptive statements. IAF, Tab 1 at 23-24; Tab 3, Subtab II-D at 1, 3-4. Without corroborating medical evidence, however, we do not find the appellant's statements persuasive. *See Reilly*, 571 F.3d at 1380 (noting "OPM's regulatory requirement that all claims for disability must be supported by medical documentation"); *Alford*, [111 M.S.P.R. 536](#), ¶¶ 13-14 (finding that the medical documentation confirmed that the appellant had a medical condition but not that it was disabling).

¶15 Moreover, we are cognizant of the fact that the appellant did not apply for disability retirement until days before his termination and did not assert that he had significant pain or interference with functioning in his job until he filed the application. The Board has held that "an appellant's application for disability retirement in the face of an impending removal for misconduct may cast doubt upon the veracity of his application." *Henderson v. Office of Personnel Management*, [109 M.S.P.R. 529](#), ¶ 9 (2008); *see also Anderson v. Office of*

Personnel Management, [96 M.S.P.R. 299](#), ¶ 22 (2004) (an individual's failure to apply for disability retirement until he is removed is a factor discounting the force of the application), *aff'd*, 120 F. App'x 320 (Fed. Cir. 2005). We find that doubt as to the veracity of the appellant's assertions of disability is appropriate in this case, because his assertions coincide with his termination.

¶16 With regard to the appellant's headaches, the records first show a report to his medical providers in May 2007 that he was having headaches twice a month that lasted about a half-day. IAF, Tab 3, Subtab II-D at 29. He denied any nausea or light sensitivity and was not taking pain medication. *Id.* There is no indication that he received a prescription. *Id.* The appellant called the VAMC on August 6, 2007, to complain that he was having more headaches due to work stress. *Id.* at 20. At this time, he was given a prescription. *Id.* It was not until after his termination, however, i.e., on August 21, 2007, that the appellant reported regular, frequent and serious headaches to his medical provider. *Id.* at 12. He said he was having a low-grade migraine daily, with exacerbations a few times a month, and he received a new prescription. *Id.* at 12-13. A VAMC nurse practitioner wrote a letter "to whom it may concern," also dated August 21, 2007, stating that the appellant was fired due to his migraine headaches, which had worsened in number and symptoms over the past year. IAF, Tab 1 at 16; Tab 3, Subtab II-D at 10. The letter also stated that he had daily headaches that "resulted in debility and include[d] nausea, vomiting, light sensitivity and noise sensitivity along with the need of bed rest." *Id.* In his August 2008 appeal, the appellant asserted that he had exacerbations three times per week, during which he could not get out of bed or function and that his medications caused mood changes, headaches, drowsiness, weakness, nausea, difficulty in concentrating, and problems with movement and speech. IAF, Tab 1 at 24. In an October 2008 submission, the appellant stated he had migraine pain four times a month, lasting 3 days each, and reiterated numerous side effects from his medication. *Id.*, Tab 8 at 1. A September 29, 2008, letter from the nurse practitioner also reported four

exacerbation headaches per month, resulting in cognitive dysfunction and requiring bed rest. *Id.* at 4. She stated that the appellant has had migraines for 35 years, that they worsened since 2005, and that he had gotten little relief from medication. *Id.*

¶17 The nurse practitioner's letters of August 21, 2007, and September 29, 2008, show that she credited the appellant's assertions that he had a long history of migraines and that they became debilitating around the time he was terminated and thereafter. We are not persuaded, however, that the appellant has shown he was disabled by this condition while he was a Claims Assistant.

¶18 As discussed above, we find the appellant's assertion of disability suspect because the assertion arose only after the decision was made to terminate him for unapproved absences and performance deficiencies. *See Henderson*, [109 M.S.P.R. 529](#), ¶ 9; *Anderson*, [96 M.S.P.R. 299](#), ¶ 22. As of August 6, 2007, only a few weeks before his termination was effected, the appellant reported a worsening of his headaches, but not that they were disabling. IAF, Tab 3, Subtab II-D at 20. Neither the nurse practitioner, nor the appellant, has explained the sudden deterioration of his condition, and his symptoms at a later time do not per se show that the appellant was disabled prior to his termination. Thus, neither the nurse practitioner's letters, nor the appellant's description of his severe symptoms on appeal, establishes the necessary evidentiary link to the period before his termination. Therefore, this evidence does not show that he became disabled while in a position subject to CSRS. *Cf. Reilly*, 571 F.3d at 1382. Further, neither the medical evidence, nor the appellant's own statement, explains how his migraines specifically affected his ability to perform his job duties and meet attendance requirements prior to his termination. *See Hardy v. Office of Personnel Management*, [98 M.S.P.R. 323](#), ¶ 11, *aff'd*, 157 F. App'x 302 (Fed. Cir. 2005). Therefore, the evidence does not substantiate the existence of a pre-termination disability that had a causal relationship to the appellant's unapproved absences or inability to master the duties of his job. *Id.*, ¶ 15.

¶19 We therefore find that the appellant has not proven that he was disabled from useful and efficient service as a Claims Assistant. OPM's decision to deny his application for a disability retirement annuity is therefore AFFIRMED.

ORDER

¶20 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:

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