

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

**2011 MSPB 8**

---

Docket No. DE-844E-08-0296-X-1

---

**Armida G. Chavez,  
Appellant,**

**v.**

**Office of Personnel Management,  
Agency.**

January 21, 2011

---

Armida G. Chavez, Mora, New Mexico, pro se.

Charlretta T. McNeill, 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 on a Recommendation finding the agency in noncompliance with a final Board Opinion and Order that directed the Office of Personnel Management (OPM) to retroactively award the appellant Federal Employees' Retirement System (FERS) disability benefits. *Chavez v. Office of Personnel Management*, MSPB Docket No. DE-844E-08-296-C-1 (Aug. 31, 2010), Compliance File (CF), Tab 15, Recommendation. For the reasons set forth below, we find the agency in compliance and DISMISS the appellant's petition for enforcement.

## BACKGROUND

¶2 OPM denied the appellant's application for disability retirement from her position as a U.S. Postal Service employee and the administrative judge affirmed OPM's decision. *Chavez v. Office of Personnel Management*, [111 M.S.P.R. 69](#), ¶ 7 (2009). In an Opinion and Order dated March 26, 2009, the Board reversed the administrative judge's decision and OPM's final reconsideration decision. *Id.* It ordered OPM to award the appellant a disability retirement annuity within 20 days of the date of the Board's decision. [111 M.S.P.R. 69](#), ¶ 16.

¶3 The appellant filed a petition for enforcement dated December 14, 2009, in which she asked, "where is my back pay, my medical insurance and an explanation as to my [] monthly benefits?" CF, Tab 1. OPM responded that it authorized interim benefits and provided documentation reflecting annuity payments. OPM, however, was unable to finalize the appellant's FERS disability annuity because the appellant had not completed her health benefit and life insurance forms despite a phone call and two letters from OPM requesting that the appellant advise OPM of her wishes. CF, Tab 5. The appellant, however, informed the administrative judge that she could not make an election of benefits without knowing how much she would be charged for retroactive premiums. CF, Tab 11 at 2. The administrative judge agreed that the appellant needed this information and ordered OPM to provide estimates of the potential reduction to the appellant's annuity for her benefit elections and show that it intends to award her an annuity retroactive to her last day in pay status. *Id.*

¶4 OPM provided no written response to the administrative judge's order but advised the administrative judge in a telephone call that it was unable to provide the estimates requested because the agency's computers would require an actual election before generating the requested calculations. CF, Tab 15, Recommendation at 4. Due to OPM's failure to provide the requested information and show that it had granted the appellant FERS annuity benefits

retroactive to her last day in pay status, April 27, 2007,<sup>1</sup> the administrative judge granted the appellant's motion for sanctions and drew an adverse inference with regard to the information that OPM failed to provide, that is, the appellant's FERS annuity award was not made retroactive to her last day in pay status. CF, Tab 15, Recommendation at 5.

¶5 In the absence of evidence of compliance, the administrative judge granted the appellant's petition for enforcement and directed OPM to award the appellant FERS disability benefits retroactive to April 27, 2007, and provide the appellant with: 1) a calculation of her net monthly FERS annuity benefit; 2) an estimate of the amount her net monthly annuity benefit would be reduced to provide for Federal Employees Health Benefits (FEHB) and/or Federal Employees' Group Life Insurance (FEGLI) retroactively and prospectively; and 3) an estimate of any back-premiums she might owe if she were to elect FEHB and/or FEGLI retroactively. *Id.* at 6. The administrative judge ordered OPM to set a deadline for the final adjudication of the appellant's annuity after providing the appellant with the required information. The administrative judge also informed the parties that OPM should submit evidence of compliance or disagreement with the Recommendation to the Clerk of the Board and provided the time limit for doing so – 15 days for evidence of compliance and 30 days for arguments supporting disagreement. *Id.* at 7. The administrative judge also informed the appellant that she should submit a response to any OPM evidence of compliance within 20 days of the date of service of OPM's submission or risk dismissal of her petition for enforcement. *Id.*

---

<sup>1</sup> The Board, in granting the appellant's FERS disability annuity benefits, had noted that her last day in pay status was April 27, 2007. [111 M.S.P.R. 69](#), ¶ 2 n.1.

### ANALYSIS

¶6 The agency has the burden of establishing compliance with a final Board order. *Spates v. U.S. Postal Service*, [70 M.S.P.R. 438](#), 441 (1996). It can meet this burden by producing relevant, material, and credible evidence of compliance in the form of documentation or affidavits. *Id.* at 443 (1996). The appellant may rebut this evidence only by producing nonconclusory and supported allegations to the contrary. *King v. Department of the Navy*, [98 M.S.P.R. 547](#), 551 (2005).

¶7 On November 15, 2010, OPM, after being issued a show cause order due to its failure to provide a timely response to the administrative judge's Recommendation, requested a one-day extension of time to respond. *Chavez v. Office of Personnel Management*, MSPB Docket No. DE-844E-08-0296-X-1, Compliance Referral File (CRF) Tabs 3 and 4. OPM stated that it had received notification on November 12, 2010, from the appellant's last employer, the U.S. Postal Service, that the appellant's last day in pay status was March 28, 2007, rather than April 27, 2007, the date cited by the Board in its March 26, 2009 Opinion and Order. CRF, Tab 4. According to OPM, the U.S. Postal Service is responsible for providing the official last day in pay status and therefore the March 28, 2007 date provided by the U.S. Postal Service must be used for calculating the appellant's annuity. *Id.* We agree that it is proper to rely upon the appellant's former employing agency to provide information relating to the appellant's pay status for purposes of determining her annuity.<sup>2</sup> See [5 C.F.R. § 841.106](#). Furthermore, the appellant has not contested the date.

---

<sup>2</sup> The date relied upon the Board as the last day in pay status was based on an Individual Retirement Record (IRR) that was stamped "Preliminary" and was dated July 17, 2007. See *Chavez v. Office of Personnel Management*, MSPB Docket No. DE-844E-08-0296-I-1, Initial Appeal File, Tab 6, Subtab II-E at 4. OPM subsequently submitted a page of OPM's IRR dated April 16, 2009, that states the appellant's last day in pay status as August 1, 2008. CRF, Tab 5, Ex. 2. As indicated above, the U.S. Postal Service has now indicated that the proper date for the appellant's last day in pay status is March 28, 2007.

¶8 Additionally, OPM has demonstrated that it has taken all the actions listed by the administrative judge in the Recommendation. OPM has calculated the appellant's gross monthly annuity as \$1,049.00 with a deduction of \$30.55 for life insurance.<sup>3</sup> CRF, Tab 7. OPM also provided an estimate of the monthly premium for appellant's health benefits beginning November 1, 2010 - \$209.12. *Id.* Thus, if the appellant were to elect to continue health and life insurance benefits, her net monthly annuity would be \$809.33. Additionally, OPM estimated that the appellant would have to pay \$5,582.18 to restore her health benefits retroactive to May 28, 2008,<sup>4</sup> and \$4,275.04 to restore her health benefits retroactive to January 1, 2009. *Id.* OPM provided this information to the appellant in a letter dated November 18, 2010, and attached a form which it requested the appellant to complete and return by December 18, 2010. *Id.* at Ex. 3. Finally, OPM submitted computer printouts showing that it has paid the appellant an annuity for the period beginning March 29, 2007, through November 30, 2010. *Id.* at Ex. 2.<sup>5</sup>

¶9 The appellant has not responded to the agency's evidence of compliance despite being notified by the administrative judge and the Board's

---

<sup>3</sup> OPM stated that, with respect to life insurance, "an employee is automatically insured on the date he/she becomes eligible for insurance" pursuant to [5 U.S.C. § 8702](#). CRF, Tab 7 at 4. It is not clear, however, that this provision applies to the appellant who is no longer an employee. To the extent the provision applies to the appellant, she may request cancellation of the insurance if she does not wish to continue receiving coverage. If she believes that OPM incorrectly calculated her annuity by extending coverage for life insurance, she should request a decision from OPM on this issue. *See Mercado v. Office of Personnel Management*, [115 M.S.P.R. 65](#), ¶ 7 (2010) (a challenge to OPM's calculations must be raised to OPM in the first instance).

<sup>4</sup> According to OPM's letter to the appellant dated November 18, 2010, the appellant's agency terminated her health benefits on May 27, 2008. CRF, Tab 7, Ex. 3.

<sup>5</sup> OPM's explanation of its interim payments appears to contain a typographical error for the payment made on April 28, 2010, as it lists the payment as \$998.80 but the computer printout lists the payment as \$989.80. CRF, Tab 7 and Ex. 2.

Acknowledgment Order of the opportunity to do so. *See* CF, Tab 15, Recommendation at 7; CRF, Tab 2 at 2. The administrative judge and the Board's Order also advised the appellant that if she did not respond to the agency's evidence of compliance within 20 days of the date of service of the agency's evidence, the Board might assume she was satisfied and dismiss her petition for enforcement. As the appellant has not responded and the agency has now complied with the Board's Final Order in this appeal, we DISMISS the appellant's petition for enforcement.

#### ORDER

¶10 This is the final decision of the Merit Systems Protection Board in this enforcement proceeding. Title 5 of the Code of Federal Regulations, section 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.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:

---

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