UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2011 MSPB 61

Docket No. DA-0752-09-0427-I-1

Danny Vaughan,

Appellant,

v.

Department of Agriculture,

Agency.

June 13, 2011

Danny Vaughan, Durango, Colorado, pro se.

Patricia Washington, Beltsville, Maryland, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member
Member Rose issues a dissenting opinion.

OPINION AND ORDER

¶1 The appellant has petitioned for review of an initial decision that dismissed his appeal under the doctrine of collateral estoppel. For the reasons discussed below, we VACATE the initial decision and REMAND the appeal for further proceedings consistent with this Opinion and Order.

BACKGROUND

¶2 The appellant filed the present Board appeal on April 16, 2009. Initial Appeal File (IAF), Tab 1. He indicated that he was appealing an involuntary retirement, and that he was appealing from a final agency decision (FAD)

concerning an equal employment opportunity (EEO) complaint he had filed. *Id.* at 3. He stated that he had received the FAD on March 19, 2009. *Id.* at 5. He also alleged that the agency had discriminated against him on the basis of disability, committed both harmful procedural error and prohibited personnel practices, and that the agency's action was not in accordance with law. *Id.* at 4, 6-9. He requested a hearing. *Id.* at 2.

¶3 In her acknowledgment order, the administrative judge informed the appellant that he appeared to be attempting to appeal a claim that had already been adjudicated, and that the doctrine of collateral estoppel might therefore bar the appeal. IAF, Tab 2 at 2. She ordered the appellant to show cause why his appeal should not be dismissed. *Id.* In his response to the acknowledgment order, the appellant argued that the issues raised in the present appeal were not addressed in his prior Board appeal. IAF, Tab 3 at 4. In the prior appeal, which was an individual right of action (IRA) appeal under the Whistleblower Protection Act, another administrative judge ordered corrective action with regard to some of the personnel actions raised by the appellant, but found that he had failed to establish jurisdiction over his claim of involuntary disability retirement. *Vaughan v. Department of Agriculture*, MSPB Docket No. DA-1221-07-0521-W-2, slip op. at 19-21 (Initial Decision, Mar. 31, 2009).

¶4 On July 10, 2009, the administrative judge issued an Order to Show Cause in which she set forth the standards for the application of collateral estoppel and identified the issue to be whether the voluntariness of the appellant's disability retirement had been litigated in his prior Board appeal. IAF, Tab 8. In his response to the Order to Show Cause, the appellant argued that the issue of "the existence of the hostile environment created by the agency" had not been actually litigated in the prior Board appeal, and that he had been denied an opportunity to present medical evidence that would have "conclusively demonstrated that retaliatory actions of the agency directly resulted in appellant's involuntary retirement." *Id.*, Tab 10 at 2-3. The appellant further argued that

accommodations for his disability were available prior to his illness becoming severe, but were never offered to him. *Id.* He contended, "[h]ad the agency properly addressed appellant's health issues, rather than exploit them, he could have continued his employment in some useful capacity." *Id.* The appellant continued that, subsequent to his IRA appeal, he had "obtained additional medical evidence that fully supports the claim that appellant's health issues were caused and aggravated by the hostile conditions of his employment." *Id.* at 5.

¶5 On August 11, 2009, the administrative judge issued an initial decision dismissing the appeal without holding the appellant's requested hearing. IAF, Tab 12. She found that each of the requirements for the application of collateral estoppel were met, and that the appellant was therefore barred from relitigating the voluntariness of his disability retirement. *Id.* at 9-12.

¶6 The appellant filed a timely petition for review of the initial decision. Petition for Review (PFR) File, Tab 1. On petition for review, he stated that he had received preliminary notice from the Office of Workers' Compensation Programs (OWCP) of a determination that the medical conditions that led to his disability retirement were the result of his conditions of employment. *Id.* at 6. Before the record closed, the appellant filed a supplement to his petition for review, to which he attached a copy of an OWCP Award of Compensation dated September 16, 2009. PFR File, Tab 3 at 8-10. The agency did not respond to the petition for review.

ANALYSIS

¶7 Collateral estoppel, or issue preclusion, is appropriate when: (1) An issue is identical to that involved in the prior action; (2) the issue was actually litigated in the prior action; (3) the determination on the issue in the prior action was necessary to the resulting judgment; and (4) the party against whom issue preclusion is sought had a full and fair opportunity to litigate the issue in the prior action, either as a party to the earlier action or as one whose interests were

otherwise fully represented in that action. *McNeil v. Department of Defense*, 100 M.S.P.R. 146, ¶ 15 (2005).

¶8 In his prior IRA appeal, the appellant was required to prove by preponderant evidence that his retirement constituted a personnel action within the meaning of 5 U.S.C. § 2302(a)(2)(A). Because retirements are presumed to be voluntary, the appellant had to show that his retirement was involuntary in order to meet his burden of proving that it was a personnel action.* *See Mintzmyer v. Department of the Interior*, 84 F.3d 419, 423 (Fed. Cir. 1993). The legal standard for meeting the burden in an IRA appeal is the same as the legal standard for proving that that a retirement is involuntary in the context of a constructive removal appeal, such as this one. *Id.*

¶9 In the IRA appeal, the appellant acknowledged that he was unable to perform the duties of his position. But he contended that the agency's actions subjected him to such stress that his condition deteriorated and, but for the agency's improper actions, he would still be able to work. *Vaughan*, MSPB Docket No. DA-1221-07-0521-W-2, slip op. at 20. Following the Board's general approach to jurisdiction in involuntary disability retirement appeals, the administrative judge found that the appellant's retirement was not involuntary because he had failed to inform the agency that he had medical limitations that required accommodation, that he wished to continue working, that a reasonable accommodation was available that would have enabled him to continue working, or that the agency unjustifiably failed to offer him the accommodation. *Id.* at 21. As noted in the background above, the appellant reiterates his claim of

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* The Board subsequently held in *Covarrubias v. Social Security Administration*, 113 M.S.P.R. 583, ¶ 11 n.2 (2010), that an appeal in which an appellant alleges that he involuntarily retired constitutes an "otherwise appealable action" and that the standards for establishing jurisdiction over an IRA appeal do not apply. Instead, an appeal of an alleged involuntary retirement with a claim of whistleblower retaliation should be adjudicated under 5 U.S.C. chapter 75, treating the whistleblower reprisal claim as an affirmative defense. This change in the law has no effect on our ruling in this appeal.

involuntary disability retirement in the instant appeal. Relying on the principle that an appellant may prevail on an involuntary disability retirement claim only if the agency failed to reasonably accommodate the alleged disability, and finding that the issue of reasonable accommodation had previously been litigated in the appellant's IRA appeal, the administrative judge understandably applied the doctrine of collateral estoppel to dismiss this appeal.

¶10 In the narrow circumstances of this appeal, we find that the requirements of collateral estoppel have not been met because the appellant did not have a full and fair opportunity to litigate his involuntary disability retirement claim pursuant to the correct standard we announce today. *McNeil*, 100 M.S.P.R. 146, ¶ 15. The dissent fears that our decision will undermine the general principles of collateral estoppel, specifically asserting that "whenever the law changes, parties whose cases were decided under the legal standard that existed prior to the change will not be precluded from relitigating their cases before the Board." This fear is unfounded. The law of retroactivity precludes the new legal principle we announce today from being applied to cases that are already closed. *See Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 752, 758 (1995); *Harper v. Virginia Department of Taxation*, 509 U.S. 86, 97 (1993). In the present appeal, however, the appellant timely filed a Board appeal challenging the FAD that decided his formal discrimination complaint alleging that his disability retirement was involuntary. His involuntary retirement appeal, therefore, is plainly and properly pending before the Board as we issue this new, controlling interpretation of federal law. Further, even if all the requirements of collateral estoppel were otherwise satisfied, we do not believe it is improper to decline to give collateral estoppel effect to the decision in the appellant's earlier IRA appeal that was based on standards for involuntary disability retirement that we find today to be fundamentally flawed. *See Kroeger v. U.S. Postal Service*, 865 F.2d 235, 239 (Fed. Cir. 1988) (it would not be error to decline to apply collateral estoppel even when its requirements are met).

¶11 As explained more fully below, we believe that the appellant's claim of involuntary disability retirement due to a hostile work environment falls within a narrow exception to our typical approach to involuntary disability retirement claims. Generally, an appellant may overcome the presumption that a resignation or retirement is voluntary by showing that it resulted from misinformation or deception by the agency or was the product of coercion by the agency. *Terban v. Department of Energy*, 216 F.3d 1021, 1024 (Fed. Cir. 2000). The touchstone of the "voluntariness" analysis is whether, considering the totality of the circumstances, factors operated on the employee's decision-making process that deprived him of freedom of choice. *Coufal v. Department of Justice*, 98 M.S.P.R. 31, ¶ 22 (2004); *Heining v. General Services Administration*, 68 M.S.P.R. 513, 519-20 (1995). Thus, in order to establish involuntariness on the basis of coercion, an appellant must show that the agency effectively imposed the terms of the resignation or retirement, that the appellant had no realistic alternative but to resign or retire, and that the appellant's resignation or retirement was the result of improper acts by the agency. *Id*. Consistent with this approach, the Board will find a retirement to be involuntary where the employee demonstrates that the employer engaged in a course of action that made working conditions so difficult or unpleasant that a reasonable person in that employee's position would have felt compelled to resign or retire. *Markon v. Department of State*, 71 M.S.P.R. 574, 577-78 (1996).

¶12 However, the Board typically takes a different approach when addressing the question of voluntariness in the context of a *disability* retirement. Specifically, to invoke the Board's jurisdiction in such a case, the appellant must raise nonfrivolous allegations that, if proven, would show that an accommodation was available between the time the appellant's medical condition arose and the date of his separation that would have allowed him to continue his employment; the appellant communicated to the agency his desire to continue working but that

his medical limitations required a modification of his working conditions or duties; and the agency failed to provide the appellant that accommodation. *See Okleson v. U.S. Postal Service*, 90 M.S.P.R. 415, ¶¶ 7-8 (2001); *Nordhoff v. Department of the Navy*, 78 M.S.P.R. 88, 91 (1998), *aff'd*, 185 F.3d 886 (Fed. Cir. 1999) (Table), and *clarified by Rule v. Department of Veterans Affairs*, 85 M.S.P.R. 388, ¶ 13 (2000). The Board's rationale for this approach, as explained by the administrative judge in this case, is that

> an appellant who meets the statutory requirements for disability retirement has no true choice between working (with or without accommodation) and not working . . . . If accommodation was impossible, then the appellant's disability retirement was not a constructive removal. Other theories cannot lead to a different conclusion because the essence of claims of involuntariness based upon coercion, duress, or intolerable working conditions is that the employee had a choice between retiring or continuing to work but was forced to choose retirement by improper acts of the agency. An employee who is unable to work because of a medical condition that cannot be accommodated simply does not have such a choice.

Id. at 9-10. Thus, the Board generally limits its jurisdiction over allegedly involuntary disability retirement claims to cases where the agency improperly denied an appellant's request for accommodation.

¶13 This standard is correct to determine the Board's jurisdiction in most involuntary disability retirement appeals. However, in unusual circumstances, we have applied the Board's regular principles for determining jurisdiction over alleged involuntary retirements to assess the voluntariness of a disability retirement. *See Hosford v. Office of Personnel Management*, 107 M.S.P.R. 418, ¶¶ 8-9 (2007) (finding the appellant's disability retirement was involuntary on the basis of misinformation).

¶14 Similarly, in this case we find that the appellant has alleged a type of involuntary disability retirement that should be considered under the general jurisdictional test for an involuntary retirement. Specifically, the appellant has alleged that the agency created a discriminatory, hostile work environment, which

not only led to intolerable working conditions, but which caused or exacerbated the medical conditions underlying his disability retirement. In effect, he has alleged that he was coerced into retirement because the agency's discriminatory conduct caused him to become disabled. Under these limited circumstances, and because we find that the appellant has made nonfrivolous allegations casting doubt on the presumption of voluntariness, IAF, Tab 9, Subtab 5 (FAD), we also find that the appellant is entitled to an opportunity to prove that his retirement was involuntary under the general principles for finding a constructive discharge. He is entitled to a jurisdictional hearing. *Coufal*, 98 M.S.P.R. 31, ¶ 23; *see Garcia v. Department of Homeland Security*, 437 F.3d 1322, 1344 (2006) (en banc).

ORDER

¶15 Accordingly, we VACATE the initial decision and REMAND the appeal for further proceedings consistent with this Opinion and Order.

FOR THE BOARD:

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

DISSENTING OPINION OF MARY M. ROSE

in

Danny Vaughan v. Department of Agriculture

MSPB Docket No. DA-0752-09-0427-I-1

¶1 I believe that the administrative judge correctly dismissed this appeal under the doctrine of collateral estoppel, but I disagree with the majority's decision to exercise its discretion to consider the underlying issues. The majority appears to intend that this case will not undercut the general principles of collateral estoppel, but I fear that it will. At bottom, the majority's decision means that it will not apply collateral estoppel when it wishes to reach the underlying issues, particularly when it believes that the party's arguments are persuasive. It will also mean that, whenever the law changes, parties whose cases were decided under the legal standard that existed prior to the change will not be precluded from relitigating their cases before the Board. This is so because, when a legal standard changes, *no one* whose case was heard under the prior law has had a full and fair opportunity to litigate his claim pursuant to the new, correct standard. If parties who have already litigated their cases to conclusion can reopen them whenever a legal standard changes, then parties cannot rely on the finality of any Board decision. I am also concerned that the majority's approach to collateral estoppel, absent objective standards or principles, is impossible to apply in a neutral manner. Therefore, I would dismiss this appeal under the doctrine of collateral estoppel without reaching the question of whether the Board should re-examine the test for determining when a disability retirement is involuntary.

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Mary M. Rose
Member