

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

2011 MSPB 86

Docket No. NY-831E-10-0017-X-1

**Robert Pace,
Appellant,**

v.

**Office of Personnel Management,
Agency.**

September 29, 2011

Robert F. Hermann, Esquire, Westfield, New Jersey, and Delores Pace,
Brooklyn, New York, for the appellant.

Evelyn K. Payne, 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 the appellant's petition to enforce a final decision of the Board ordering the Office of Personnel Management (OPM) to grant the appellant's application for disability retirement and provide the appellant with benefits. For the reasons discussed below, we find the agency in partial noncompliance with the Board's final order.

BACKGROUND

¶2 The appellant was removed from his position as an Air Traffic Controller with the Federal Aviation Administration (FAA) effective March 26, 1999. Initial Appeal File (IAF), Tab 6, Subtab G (Individual Retirement Record). In 2006, he applied for disability retirement under the Civil Service Retirement System (CSRS). *Id.*, Subtab E. OPM denied his application as untimely filed. *Id.*, Subtab A. The appellant appealed OPM's decision to the Board. The administrative judge held that the appellant was mentally incompetent at the time he was removed by the FAA and remanded to OPM for a decision on the merits of his application for disability retirement. *Pace v. Office of Personnel Management*, MSPB Docket No. NY-831E-07-0307-I-1 (Initial Dec., Nov. 16, 2007). The Board denied OPM's petition for review. *Pace v. Office of Personnel Management*, [108 M.S.P.R. 576](#) (March 20, 2008) (Table).

¶3 Despite the Board's final decision, OPM issued an initial decision on September 5, 2008, denying the appellant's application based on its conclusion that the appellant had produced no evidence that he was mentally incompetent during the year following his removal. IAF, Tab 13 at 3. The appellant sought reconsideration, but when he had not received an OPM reconsideration decision as of May 15, 2009, he again appealed to the Board. IAF, Tab 1. The appellant subsequently withdrew his appeal on July 7, 2009 based on assurances from OPM that it would issue a final decision within 90 days from the date of the administrative judge's decision dismissing the appeal. IAF, Tab 13 at 4-5. When he did not receive a reconsideration decision within that time period, the appellant refiled his appeal. *Id.* at 5.

¶4 On February 12, 2010, the administrative judge reversed OPM's decision based on her determination that the medical evidence established that the appellant's multiple sclerosis, coupled with the side effects associated with the debilitating disease, was so severe that he could not work in his position and was not qualified for reassignment to a vacant position with his employing agency at

the same grade or level in which he could render useful and efficient service. *Pace v. Office of Personnel Management*, MSPB Docket No. NY-0831E-10-0017-I-1 (Initial Dec., Feb. 12, 2010); IAF, Tab 13 at 17. The administrative judge ordered OPM to grant the appellant's application for disability retirement and to provide the appellant with the appropriate benefits. *Id.* at 18. The administrative judge directed OPM to accomplish this task no later than 20 calendar days after the date the initial decision became final, and to inform the appellant in writing of all actions taken to comply with the Board's order. *Id.* The initial decision became final on March 19, 2010, when neither party filed a petition for review by that date. *Id.*

¶5 OPM filed an untimely petition for review on March 25, 2010. Petition for Review File (PFRF), Tab 1. The Board dismissed the petition as untimely with no showing of good cause for the delay. *Pace v. Office of Personnel Management*, [113 M.S.P.R. 681](#) (2010); PFRF, Tab 4. The Board ordered OPM to award the appellant disability retirement no later than 20 days from the date of its decision. *Id.* ¶ 15. The order also informed the appellant of his right to file a petition for enforcement if he believed that OPM had not fully carried out the Board's order. *Id.* ¶ 17.

¶6 In a letter dated June 17, 2010, OPM informed the appellant that his application for disability retirement had been approved. Compliance File (CF), Tab 1, Ex. 1. A separate letter, dated June 18, 2010, stated that the appellant had been placed in an interim pay status while OPM processed his application. *Id.*, Ex. 2 at 1. While these two letters were sent to the appellant, OPM did not send copies to his attorney, Robert Hermann, even though Mr. Hermann had represented the appellant in the proceedings before the Board. Meanwhile, Mr. Hermann attempted to communicate with OPM regarding the status and computation of the appellant's annuity. He states that his telephone inquiries were unsuccessful, *see* CF, Tab 1 at 4, and that his letters dated March 18, 2010;

June 14, 2010; August 24, 2010; and December 10, 2010, went unanswered, *see id.*, Tab 1, Exs. 4, 5, 6, 7.

¶7 OPM wrote to the appellant on October 22, 2010, and stated, among other things, that the appellant was eligible to continue both his federal health insurance and life insurance into retirement, but he needed to make an election. Compliance Referral File (CRF), Tab 4, Ex. 2. The letter stated that the appellant not only had basic but all of the optional life insurance coverage that was available. *Id.* The letter attached Standard Form 2818, the OPM form for making elections to continue or cancel any or all of his coverage. *Id.* The instructions to the form state that if the annuitant does not want coverage during retirement, he must mark “No” in item 7 on the form, which asks whether the annuitant wants Basic Life Insurance. *Id.* As with the June 2010 correspondence, OPM failed to send a copy of the letter or election form to Mr. Hermann.

¶8 Subsequently, Mr. Hermann, on behalf of the appellant, filed a petition for enforcement. CF, Tab 1. He indicated that he repeatedly attempted to contact OPM but received no response. CF, Tab 1 at 4-6. He stated that “OPM has not communicated with [the appellant’s] representative regarding health insurance, life insurance, redeposit and tax withholding issues, all of which have to be addressed in finalizing [the appellant’s] disability retirement.” *Id.* at 6. He noted that the appellant “may elect not to reinstate life insurance coverage in retirement” *Id.* OPM failed to respond to the petition for enforcement or any of the administrative judge’s orders. *See* CF, Tab 10 at 5.

¶9 In her recommendation, the administrative judge found that OPM was not in compliance and directed OPM to take the following actions: (1) provide the appellant with a check for the difference owed in disability retirement benefits for the period of March 27, 2009 through 2010, including a calculation of retroactive benefits, showing all deductions and explaining what the deductions are for; (2) provide an explanation of the appellant’s current annuity, including an explanation of any deductions; (3) provide the basis for withholding \$463.73 per

month for life insurance, which is contrary to the appellant's wishes of not carrying life insurance into his retirement; and (4) provide an explanation as to why OPM is currently not withholding any health insurance benefit costs. *Pace v. Office of Personnel Management*, MSPB Docket No. NY-0831E-10-0017-C-1 (Recommendation, March 4, 2011); IAF, Tab 13 at 17; CF, Tab 10 at 9-10. The case was then forwarded to the Board for enforcement purposes. See [5 C.F.R. § 1201.183\(b\)](#).

¶10 On March 11, 2011, Mr. Hermann again wrote to OPM to indicate that the appellant did not want life insurance during retirement. CRF, Tab 4, Ex. 5. OPM responded that, because the appellant is mentally incapacitated, an "Application for Representative Payee" must be completed by an individual responsible for the care of the appellant. CRF, Tab 5 at 3. On May 19, 2011, the appellant sent OPM a completed representative payee application authorizing the appellant's sister as payee. CRF, Tab 6, Ex. 3. Upon receiving that form, OPM cancelled the appellant's basic and optional life insurance coverages and stopped withholding the associated deductions from his monthly annuity. OPM did not, however, refund the prior withholdings. In a letter dated July 7, 2011, OPM states:

This is in response to an inquiry from your attorney that you did not want to carry life insurance into retirement and your request for all the deductions for life insurance be refunded to you.

We did not receive a written request from you cancelling your life insurance prior to or at retirement. We did not received [sic] your request to cancel your life insurance until May of 2011. Your life insurance was cancelled effective June 1, 2011 which would have paid for the month of May 2011.

CRF, Tab 7, Ex. 1.

¶11 The appellant states that the only outstanding compliance issue is whether he is entitled to a refund of the deductions withheld for life insurance. See CRF, Tab 7 at 1-2. OPM asserts that the Board does not have jurisdiction over the matter. CRF, Tab 8 at 2.

ANALYSIS

¶12 The agency bears the burden of proving that it has complied with a final Board order. *See Spates v. United States Postal Service*, [70 M.S.P.R. 438](#), 441 (1996). Compliance must be supported by relevant, material, and credible evidence. *Id.* at 443. Here, the issue presented is whether OPM properly withheld deductions for life insurance from the appellant's annuity.

Jurisdiction

¶13 OPM asserts that the Board does not have authority to address the life insurance issue because Federal Employee Group Life Insurance (FEGLI) claims must be brought in District Court or the Court of Federal Claims. CRF, Tab 8 at 2. While it is true, as a general matter, that the Board does not have jurisdiction over OPM decisions concerning the administration of FEGLI issues, there are exceptions. *See Chamblin v. Office of Personnel Management*, [112 M.S.P.R. 266](#) ¶ 10 (2009). Pursuant to [5 U.S.C. § 1204\(a\)\(2\)](#), the Board has jurisdiction to consider an appellant's claim of agency noncompliance with a Board order. *Kerr v. National Endowment for the Arts*, [726 F.2d 730](#), 733 (Fed. Cir. 1984). This authority encompasses claims of noncompliance from an order directing OPM to grant an appellant's disability retirement annuity. *See Lua v. Office of Personnel Management*, [102 M.S.P.R. 108](#), ¶¶ 7-8 (2006).

¶14 In *Lua*, the Board found jurisdiction under circumstances similar to those present in the instant case -- the appellant petitioned for enforcement of a final Board decision ordering approval of her disability retirement application. *Id.*, ¶ 6. The appellant in *Lua* claimed that OPM had not adequately explained its deduction of life insurance premiums from her disability retirement annuity that encompassed the period she was in a non-pay status. *Id.* OPM, as it does here, argued that the Board was without authority to address the FEGLI issue. *Id.*, ¶ 7. The Board disagreed and explained that it had jurisdiction because the appellant was not challenging her election under FEGLI, but rather was questioning whether OPM's computation of her annuity included OPM's retroactive

deductions of certain FEGLI premiums from her annuity during the period of time when she had been removed and was in a non-pay status. *Id.*, ¶ 8. Here, as in *Lua*, the Board has jurisdiction over an issue of compliance from its final decision ordering OPM to grant the appellant's disability retirement annuity.

OPM Improperly Bypassed The Appellant's Representative

¶15 It is undisputed that the appellant was covered by life insurance at the time of his termination. *See, e.g.*, CF, Tab 1 at 2. In OPM's view, its October 22, 2010 letter to the appellant was sufficient notice that, if the appellant no longer wanted the insurance, he must make a written election to cancel it. CRF, Tab 3 at 3. OPM states that "because the appellant did not respond to this request by January 7, 2011, OPM processed the appellant's annuity with life insurance coverage." *Id.* We disagree with OPM's assessment. The appellant, through his attorney, contacted OPM prior to January 7, 2011, with phone calls, letters, and eventually the instant petition for enforcement which was filed on December 22, 2010. CF, Tab 1. OPM disregarded all of these communications, which were relevant to the question of whether the appellant desired to carry life insurance, and did not even respond to the petition for enforcement until the case was referred to the full Board.

¶16 Pursuant to the Board's final order and its regulations, OPM was required to inform the appellant promptly of the actions it had taken to comply with the Board's order, and to notify the appellant when it believed it had completed its compliance. *See* IAF, Tab 13 at 17; [5 C.F.R. § 1201.181\(b\)](#). Where, as here, the appellant has a representative, documents must be served on the representative as well as the appellant. *Id.* at §§ 1201.26(b)(2), 1201.183(a). The service requirement is especially important when an appellant is mentally incompetent and relying on the assistance of counsel. "[I]t is patently unreasonable and fundamentally unfair to require or allow an incompetent to act as advocate in such a setting where even a sane attorney would be confronted with a difficult task." *French v. Office of Personnel Management*, [810 F.2d 1118](#), 1119 (Fed.

Cir. 1987). OPM was on notice from two final Board decisions that found the appellant to be mentally incompetent and suffering a debilitating brain disease, as well as the regular correspondence from the appellant's attorney, that the appellant required the assistance of his chosen representative. OPM nevertheless failed to provide the appellant's representative with vital documents relating to the election of life insurance during the appellant's retirement, and it ignored the representative's diligent attempts to communicate with OPM about the computation of the annuity.

¶17 Under these circumstances, we find that OPM erred by not contacting the appellant's representative *before* computing the appellant's disability retirement annuity. If OPM had contacted the appellant's representative, it would have found, as the administrative judge did in her recommendation, that the deductions for life insurance were "contrary to the appellant's wishes of not carrying life insurance into his retirement." CF, Tab 10 at 10. OPM must refund the deductions that were improperly withheld from the appellant's disability benefits for the unwanted life insurance.

ORDER

¶18 Accordingly, OPM is ORDERED to refund the money withheld from the appellant's disability retirement annuity for life insurance. Satisfactory evidence of compliance with this Opinion and Order shall be submitted to the Office of the Clerk of the Board within 20 calendar days of the date of this Opinion and Order. If evidence of compliance is not received, the agency shall show cause why sanctions, pursuant to [5 U.S.C. § 1204\(a\)\(2\)](#) and (e)(2)(A), and [5 C.F.R. § 1201.183\(c\)](#), should not be imposed against **William Zielinski, Deputy Associate Director for Retirement and Insurance Programs**, the responsible agency official.

NOTICE TO THE APPELLANT

Following the agency's submission of evidence, you may respond no later than 15 calendar days after the date shown on the agency's certificate of service.

All submissions should be made to:

Clerk of the Board
Merit Systems Protection Board
1615 M Street, NW
Washington, DC 20419

If you do not respond, the Board will assume you are satisfied and will dismiss the petition for enforcement as moot.

FOR THE BOARD:

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