UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2012 MSPB 11

Docket No. DC-831E-10-0812-I-1

Clarisa Hicks Henderson,

Appellant,

v.

Office of Personnel Management,

Agency.

January 31, 2012

Neil C. Bonney, Esquire, Virginia Beach, Virginia, for the appellant.

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 appellant has filed a petition for review of the initial decision that affirmed the Office of Personnel Management's (OPM's) reconsideration decision denying her application for disability retirement benefits. For the reasons set forth below, we GRANT the appellant's petition for review, REVERSE the initial decision, and DO NOT SUSTAIN OPM's reconsideration decision.

BACKGROUND

¶2 The appellant, 49-years old, is a 25-year employee of the U.S. Postal Service who applied for disability retirement from her position as a PS-6 Sales

and Service Associate. Initial Appeal File (IAF), Tab 6, Subtab IID at 1-5. She based her application on her ongoing intolerance to heat, explaining that she is unable to diffuse internal heat due to nerve damage throughout her body, and so can stand temperatures only in the low-to-mid 60s. *Id* at 1. She stated that, when she becomes overheated, she becomes nauseated and dizzy and cannot think, that she experiences an extremely rapid heart rate at temperatures over 70 degrees, and that she will "pass out" if the external heat cannot be regulated, but that, since it is Postal policy to keep the temperature at 78 degrees, for her, there is no relief anywhere. *Id.* She added that she must keep her house at "60 degrees to vacuum and [that] sitting around temperature is about 62-63 [degrees]."[1] *Id*. at 4.

¶3 With her application, the appellant submitted extensive medical documentation, including an entire file of reports and test results from Robert C. Blackwood, M.D., her personal care physician.[2] *Id.* at 70-142. Dr. Blackwood noted at the outset of his period of care that, according to the appellant, she "has been having heat intolerance" since 1991, that it "consists of air on 67 all day long, even in winter," and that "over 70 wants to throw up." *Id*. at 74.

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[1] The appellant also referenced nerve damage from prior neck injuries, an injury to her left wrist, and head trauma from two serious motor vehicle accidents. IAF, Tab 6, Subtab IID at 3. She stated that her conditions have rendered her increasingly debilitated and that her many neurological symptoms include insomnia, sleep apnea, muscle spasms, memory problems, vision changes, chronic headaches, loss of control over manual articulation, chest pain and arrhythmia, kidney and liver problems, indiscriminate pain throughout her body, numbness in her feet, legs, and hands, muscle weakness and loss of muscle tone, and muscle tremors. *Id*. at 3-4.

[2] The appellant also submitted medical reports and lab tests from various visits she made to Chesapeake General Hospital between 2001 and 2009 wherein she complained, inter alia, of "feeling hot," IAF, Tab 6, Subtab IID at 155; Sentara Medical Group in 2007 - 2008 wherein she stated that "she feels 'hot' all the time," *id*. at 202, 218; Dr. Craig S. Koenig, Allergy & Asthma Specialists, whom she consulted in 2008 for, inter alia, "a great deal of heat tolerance [sic]," *id.* at 220-22; NDC Medical Center, Division of Endocrinology, where she was referred in 2007 "feeling like hot all the time," *id.* at 225-28; and Dr. Eric C. Lipton, Family Practitioner, whom she consulted in 2008 for heat intolerance, *id.* at 415, 419.

Dr. Blackwood also noted the appellant's other symptoms including chest pain, dizziness, exhaustion, and headaches, and he ordered a stress test, echocardiogram, and full blood workup. *Id.* He subsequently ordered further testing, including a liver ultrasound and a neuroendocrine workup. *Id.* at 78. He also referred the appellant to Dr. Aaron I. Vinik, Director of Research at the Eastern Virginia Medical School Strelitz Diabetes Center and Center for Endocrine and Metabolic Disorders, who first saw the appellant on November 26, 2008. *Id.* at 89; *see id.* at 30, 35. Dr. Vinik ordered a comprehensive metabolic profile and at least a dozen other tests. *Id.* at 30-35; *see id.* at 36-67. The appellant continued to complain of heat intolerance and various other symptoms, prompting Dr. Vinik to do a "lupus workup . . . with immunoelectrophoresis and protein electrophoresis to rule out any Raynaud's phenomenon." *Id.* at 27-29. During subsequent visits, Dr. Vinik consistently acknowledged the appellant's continued heat intolerance, which did not seem to respond to any prescribed regimen. *Id.* at 14-25. He ultimately diagnosed her as suffering from, inter alia, autonomic nerve dysfunction.[3] IAF, Tab 6, Subtab D at 14.

¶4 OPM initially denied the appellant's application, finding that her claimed heat intolerance was totally subjective and unsubstantiated and that "no answer to this symptom has been found." *Id.*, Tab 6, Subtab C at 2. OPM found the appellant's several diagnoses, including autonomic nerve dysfunction, to be unproven. *Id.*

¶5 With her April 16, 2010 request for reconsideration, the appellant submitted additional medical documentation in support of her claim.[4] *Id.*, Subtab

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[3] This is defined as a dysfunction of the autonomic nervous system, which regulates numerous body functions involving various multiple organ systems, for which there is no cure. http://healthline.com/galecontent/autonomic-dysfunction#definition.

[4] The appellant also resubmitted a number of documents that she had submitted with her original application for benefits.

IIB at 8-469. She submitted an October 2, 2008 report from Dr. Paul Mansheim, Riverpoint Psychiatric Associates, who reported that she consulted him for her symptom of feeling hot all of the time, noting that, according to her, she had had numerous medical evaluations with no results. *Id.* at 116-117. The appellant also submitted a report from Dr. Donald Holzer, Center for Pain Management, whom she saw for evaluation of her heat intolerance. *Id.* at 287-288. Dr. Holzer noted Dr. Vinik's diagnosis of autonomic neuropathy and suggested that the appellant be evaluated for that condition and hypohidrosis (inability to sweat normally, also known as anhidrosis). *Id.* at 288.

¶6 Consistent with its earlier denial, OPM denied the appellant's request for reconsideration, finding that her medical records did not support a finding that her conditions had worsened or precluded her from attending the workplace or performing useful and efficient service in her position. IAF, Tab 6, Subtab IIA.

¶7 After filing her appeal, the appellant submitted additional reports.[5] *Id.*, Tab 7, Subtabs A-N. She also explained her abnormal sweating response whereby she does not perspire on her head or face, but does so unevenly on other parts of her torso, with the result that her body is unable to properly cool itself. *Id.* at A8. Dr. Blackwood noted the appellant's continued heat intolerance, *id.* at F4, but indicated that "[w]e have to this day, not been able to come up with a diagnosis other than some autonomic dysfunction." *Id.* at 15. The appellant also submitted a report from Dr. Kamal Chemali, Cleveland Clinic Neurological Institute, who diagnosed her as suffering from a small fiber neuropathy which "probably can explain her lack of sweating," although he indicated that the exact cause of the neuropathy could not be determined. *Id.* at B29.[6] And, the appellant

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[5] Again, the appellant also resubmitted some documents that she had submitted with her application for benefits and request for reconsideration.

[6] The appellant also submitted additional documentation related to, and her own narrative description of, her other ailments, including abdominal pain, sinusitis, urinary

submitted statements from three of her friends who described how her condition has adversely affected her quality of life. *Id.* at C1-7.

¶8 Following the hearing, the appellant submitted an additional report from Dr. Chemali who certified the appellant's diagnosis as an autonomic small fiber neuropathy of unknown cause, resulting in impairment of her sweating abilities and intolerance to normal room temperatures. IAF, Tab 11. Dr. Chemali stated that there is no known treatment for this condition, except avoiding environments where the temperature is greater than 65 degrees "(number noticed by the patient herself)." *Id.*

¶9 After weighing the documentary and testimonial evidence, the administrative judge concluded that the appellant had failed to meet her burden of establishing her entitlement to disability retirement under the Civil Service Retirement System (CSRS).[7] Initial Decision (ID) at 5-15. The administrative judge acknowledged the appellant's subjective evidence of pain and suffering, but found that she had not presented competent medical evidence in support. *Id.* at 11-12. The administrative judge referred to specific medical reports from the appellant's various doctors, but found that none indicated how her impairments prevented her from doing her job. *Id.* at 12-13. He also found that she failed to explain how her psychological condition precluded her from performing her

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tract infection, wrist and other mechanical injuries, abnormal liver enzymes, kidney function, heart symptoms, and back pain. IAF, Tab 7, Subtabs G-N.

[7] We note that certain evidence the agency submitted suggests that the appellant retired under the Federal Employees' Retirement System (FERS). *See, e.g.*, IAF, Tab 6, Subtab IIE; Subtab IIC. However, the agency stipulated that the appellant met the statutory condition for length of service for retirement under the CSRS, 5 U.S.C. § 8337(a), *id.*, Tab 8, and has not challenged the administrative judge's finding in accord. Under the circumstances, we cannot determine definitively which retirement system applies in this case. However, our inability to make such a finding does not affect the appellant's entitlement to a retirement annuity inasmuch as the applicable statutory and regulatory standards governing disability retirement under the CSRS and FERS are essentially identical. *Compare* 5 U.S.C. § 8337(a) and 5 C.F.R. § 831.1203(a)(2), *with* 5 U.S.C. § 8451(a)(1)(B) and 5 C.F.R. § 844.103(a)(2).

duties or why her problems were not capable of being controlled with medication and therapy. *Id.* at 13.

¶10 On review,[8] the appellant argues that the administrative judge improperly required that a specific label be attached to her condition since she clearly demonstrated that she cannot perform useful and efficient service due to her need for 60 degree temperatures at all times. Petition for Review (PFR) File, Tab 3 at 4. The appellant further argues that the administrative judge improperly required her to establish that her condition precludes her from performing specific requirements of her position. *Id.* at 6.[9]

ANALYSIS

The only rules governing entitlement to disability retirement are the ones set out in statute and regulation.

¶11 The Board has frequently stated that a medical provider's conclusion that an employee is disabled is persuasive only if the provider explains how the medical condition affects the employee's specific work requirements. *E.g., Tan-Gatue v. Office of Personnel Management*, 90 M.S.P.R. 116, ¶ 9 (2001), *aff'd*, 52 F. App'x 511 (Fed. Cir. 2002); *Tanious v. Office of Personnel Management*, 34 M.S.P.R. 107, 111 (1987). In *Mullins-Howard v. Office of Personnel Management*, 71 M.S.P.R. 619 (1996), the Board was presented with a disability retirement appeal by a computer programmer who suffered from depression and anxiety following an automobile accident. Her condition rendered her unable to leave her home, see visitors, or drive, and she had great difficulty managing ordinary household tasks such as cooking and doing laundry.

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[8] Pro se below, the appellant is represented by counsel on petition for review. Petition for Review File, Tab 3.

[9] After the record closed on review, the appellant submitted a copy of a decision by the Social Security Administration's Office of Disability Adjudication and Review finding her disabled and awarding her benefits. PFR File, Tab 5.

Mullins-Howard, 71 M.S.P.R. at 627. In denying the appellant's motion for attorney fees,[10] the administrative judge found that the medical evidence at the time of OPM's initial denial of benefits failed to demonstrate how her psychological impairments prevented her from performing the specific duties of her position. *Id.* at 625. Reversing that finding, the Board observed that "[t]his is not a case, however, where the appellant's entitlement to disability retirement turned on finely tuned correlations between particular medical impairments and specific job requirements." *Id.* at 627.

¶12 In *Bynum v. Office of Personnel Management*, 89 M.S.P.R. 1, ¶ 14 (2001), the Board stated that

> [t]he *Mullins-Howard* approach creates an exception to the rule that medical evidence itself must show that the medical condition affects specific job duties and requirements. Where the Board is presented with the position description and with medical evidence that unambiguously and without contradiction indicates that the appellant cannot perform the duties or meet the requirements of the position, the Board may link the medical evidence to the job duties and requirements and find that the appellant is entitled to disability retirement. In such circumstances, the Board may make this finding in the absence of reference in the medical evidence to specific job duties or requirements. Considering medical evidence in this way is part of the Board's role as the ultimate decision maker with the authority to independently evaluate the probative value of medical evidence in the absence of contradictory medical evidence from another source.

(emphasis added).

¶13 However, the Board did not state in *Mullins-Howard* that it was creating an exception to a general rule, nor that medical evidence must be unambiguous and without contradiction. Nor did several subsequent cases that followed

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[10] During adjudication of Ms. Mullins-Howard's appeal, following OPM's denial of her application for disability retirement, OPM reversed its earlier finding and concluded that she was entitled to benefits, whereupon the administrative judge dismissed the appeal as moot. *Mullins-Howard*, 71 M.S.P.R. at 624.

Mullins-Howard. *See Detwiler v. Office of Personnel Management*, 90 M.S.P.R. 77, ¶ 9 (2001); *Suter v. Office of Personnel Management*, 88 M.S.P.R. 80, ¶ 19 (2001); *Cole v. Office of Personnel Management*, 88 M.S.P.R. 54, ¶¶ 7-9 (2001).

¶14 Notwithstanding this point, a number of cases decided subsequent to *Bynum* have relied upon it for the proposition that, in proving a claim of entitlement to disability retirement, the "general" rule requires the appellant to show a nexus between her medical condition and her specific job duties, and the "exception" to that rule, sometimes called the *Mullins-Howard* exception, allows the Board to link the medical evidence to the job duties where such evidence unambiguously and without contradiction indicates that the appellant cannot perform the duties or meet the requirements of her position.[11] *See, e.g.*, *Lydon v. Office of Personnel Management*, 105 M.S.P.R. 152, ¶¶ 8, 16 (2007); *Musser v. Office of Personnel Management*, 102 M.S.P.R. 18, ¶ 8 (2006); *Mitchell v. Office of Personnel Management*, 97 M.S.P.R. 514, ¶ 10 (2004); *Treziok v. Office of Personnel Management*, 89 M.S.P.R. 361, ¶¶ 12-13 (2001).

¶15 It is our view that *Bynum* and its progeny reflect a way of analyzing an appellant's entitlement to disability retirement benefits that is contrary to both statute and regulation. We take this opportunity to explain why, and to now clarify the proper way to analyze such a claim. In so doing, we follow and adopt the reasoning of then-Member Slavet's separate opinion in *Craig v. Office of Personnel Management*, 92 M.S.P.R. 449, 459-64 (2002).

¶16 Under 5 U.S.C. § 8337(a), an applicant for disability retirement under CSRS must be "unable, because of disease or injury, to render useful and

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[11] Other cases have stated that a correlation between the medical condition and specific job duties is not required when the medical evidence is unambiguous, although they have not additionally stated that it must be without contradiction. *See, e.g., Surma v. Office of Personnel Management*, 90 M.S.P.R. 98, ¶ 8 (2001) (citing *Bynum*, 89 M.S.P.R. 1, ¶ 14 and *Mullins-Howard*, 71 M.S.P.R. at 627); *Davis v. Office of Personnel Management*, 89 M.S.P.R. 690, ¶ 12 (2001) (citing *Bynum*, 89 M.S.P.R. 1, ¶¶ 13-14).

efficient service in the employee's position."[12] OPM's implementing regulation explains the statutory requirement as follows:

> The individual must, while employed in a position subject to the [CSRS], have become disabled because of a medical condition, resulting in a service deficiency in performance, conduct, or attendance, or if there is no actual service deficiency, the disabling medical condition must be incompatible with either useful or efficient service or retention in the position.

5 C.F.R. § 831.1203(a)(2). The regulation thus sets out two ways to meet the statutory requirement: (1) by showing that the medical condition caused a deficiency in performance, attendance, or conduct; or (2) by showing that the medical condition is incompatible with useful and efficient service or retention in the position. *See Gometz v. Office of Personnel Management*, 69 M.S.P.R. 115, 121 (1995) (finding that, although the appellant's disability did not result in a documented service deficiency, it was incompatible with either useful or efficient service or retention in her position). Under the first method, an appellant can establish entitlement by showing that the medical condition affects her ability to perform specific work requirements, or prevented her from being regular in attendance or caused her to act inappropriately. Under the second method, an appellant can establish entitlement by showing that the medical condition is inconsistent with working in general, working in a particular line of work, or working in a particular type of setting. But regardless of the particular method of establishing an inability to render useful and efficient service, the burden of proof in every case is by a preponderance of the evidence, i.e., more likely true than not. 5 C.F.R. § 1201.56(a), (c)(2). To require medical evidence that is

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[12] The statute additionally provides that an employee is not eligible for disability retirement if she is qualified for reassignment, under procedures prescribed by OPM, to a vacant position in the agency which is at the same grade or level and in which the employee would be able to render useful and efficient service. 5 U.S.C. § 8337(a). In this instance, the agency certified that reassignment was not possible. IAF, Tab 6, Subtab IID at 525-26.

unambiguous and without contradiction is to impose a much higher burden of proof, one that is not authorized by law or regulation.

¶17 As then-Member Slavet posited, it appears that the source of confusion in this matter may have begun as an observation about the probative value of expert opinion evidence, which was later viewed as a substantive rule governing entitlement to disability retirement. The *Tanious/Tan-Gatue* line of decisions focuses on the persuasiveness of a medical provider's opinion as to a patient's disability. *See Tan-Gatue*, 90 M.S.P.R. 116, ¶ 9; *Tanious*, 34 M.S.P.R. at 111. But in *Bynum*, the focus shifted to the content of the medical evidence itself. *See Bynum*, 89 M.S.P.R. 1, ¶ 14 ("medical evidence itself must show that the medical condition affects specific job duties and requirements"). The basic idea behind the *Tanious/Tan-Gatue* line of decisions is simply that a medical opinion unsupported by medical evidence, e.g., a diagnosis, clinical findings, etc., is not very persuasive. *See, e.g., Gonzales v. Office of Personnel Management*, 91 M.S.P.R. 46, ¶ 5 (where a psychologist opined that the appellant was mentally incompetent but provided no facts or explanation to support his opinion, the Board found that the psychologist's opinion on the issue of the appellant's mental incompetence was not persuasive), *aff'd*, 48 F. App'x 747 (Fed. Cir. 2002). But to go from that proposition to the proposition that an appellant is not entitled to disability retirement unless her medical provider explains specifically how her medical condition affects specific work requirements is unwarranted.

¶18 We therefore overrule *Bynum* and its progeny to the extent that they state that the Board's decision in *Mullins-Howard* reflects an "exception" to a "general rule" that medical evidence must unambiguously and without contradiction show how the medical condition affects specific job duties or indicate that the appellant cannot meet the requirements of her position.

¶19 The Board has always stated that it will consider all pertinent evidence in determining an appellant's entitlement to disability retirement: objective clinical findings, diagnoses and medical opinions, subjective evidence of pain and

disability, and evidence relating to the effect of the applicant's condition on her ability to perform the duties of her position. *See, e.g.*, *Dunn v. Office of Personnel Management*, 60 M.S.P.R. 426, 432 (1994), *dismissed*, 91 F.3d 169 (Fed. Cir. 1996) (Table). However, nothing in the law mandates that a single provider tie all of this evidence together. For example, if the medical provider provides clinical findings, a diagnosis, and a description of how the medical condition affects the appellant's activities in general terms, the Board could consider that evidence, together with the appellant's subjective account of how the condition has affected her ability to do her job and her daily life, testimony or statements from supervisors, co-workers, family members, and friends, and the appellant's position description. From that, the Board could conclude that the medical condition caused deficiencies in the employee's performance, conduct, or attendance, *or* that the medical condition is incompatible with useful and efficient service in her position, either because the appellant is unable to perform critical elements of her position, *or* because she cannot work at any job, in a particular line of work, or in a particular type of work setting.

¶20 The ultimate question, based on all relevant evidence, is: Do the employee's medical impairments preclude her from rendering useful and efficient service in her position? And this question must be answered in the affirmative if the totality of the evidence makes that conclusion more likely to be true than not true.

The appellant has established that her medical condition is incompatible with useful and efficient service or retention in her position.

¶21 As noted, the appellant has exhaustively sought treatment from a variety of medical professionals for her numerous medical conditions and symptoms, but with little or no success. She has been largely compliant, except when certain medications are problematic for her. *See, e.g.*, IAF, Tab 7, Subtab D1. There has been no suggestion that she is a malingerer. Her account of her debilitating heat intolerance is well corroborated, and her evidence of such is unchallenged by any

contradictory evidence. *See Vanieken-Ryals v. Office of Personnel Management*, 508 F.3d 1034, 1040-44 (Fed. Cir. 2007) (an appellant is not required to submit objective medical evidence to establish entitlement to disability retirement but may rely on subjective evidence, including the appellant's own description of her own symptoms as reported to a medical professional). Her most recent medical report from Dr. Chemali has provided a diagnosis for her heat intolerance, autonomic small fiber neuropathy, but according to him, there is no known treatment for the condition, except avoiding environments where the temperature is greater than 65 degrees. IAF, Tab 11.

¶22 The undisputed record evidence shows that the appellant's condition has deteriorated such that she is significantly limited in her ability to leave her home because it is only there that she can control the temperature. IAF, Tab 6, Subtab IIB at 2-3, compact disc (sworn statement and testimony of LaDonna Gardner); Subtab IIB at 5, compact disc (statement and testimony of Brenda Sodervick); Subtab IIB at 7, compact disc (statement and testimony of Greg Cowles); Tab 7, Subtab C5 (letter from Janis Whitehurst). All these individuals supported the appellant's claim as to how her body reacts to temperatures above 65 degrees (her skin gets red and "mottled;" she becomes nauseated and disoriented; she gets headaches; recovery takes 2-3 days). Notably, the administrative judge found the appellant's witnesses to be honest and forthright in their testimony. ID at 14.

¶23 The appellant herself testified to her lengthy medical history, including the many and varied diagnoses she has received over the years she has struggled with her health. Compact Disc. She explained that her heat intolerance and other conditions, with their accompanying symptoms, leave her exhausted and depressed. *Id.* The administrative judge found the appellant to be credible. ID at 14. It is well established that subjective evidence, i.e., testimony or written statements regarding symptoms that is submitted by the applicant, "may be entitled to great weight on the matter of disability, especially where such evidence is uncontradicted by the record." *Chavez v. Office of Personnel*

Management, 6 M.S.P.R. 404, 422 (1981); *see also Biscaha v. Office of Personnel Management*, 51 M.S.P.R. 304, 309 (1991).

¶24 The record includes a job description for the appellant's position as Sales and Service Associate. IAF, Tab 6, Subtab IID at 527. It requires her to perform distribution and a variety of sales and customer support services for products, maintain pleasant and effective public relations with customers and others, and have a general familiarity with postal laws, regulations, and procedures commonly used. *Id*. The appellant's duties are performed in a postal "store" at a retail window. *Id*. Her numerous medical conditions, as attested to by the many physicians she has consulted, are inconsistent with carrying out such responsibilities, notably her documented inability to withstand temperatures over 65 degrees.

¶25 Evidence from the appellant's supervisor corroborates her claim that she cannot perform her duties in that work environment. Her supervisor certified that she has been absent from work since August 2009. IAF, Tab 6, Subtab IID at 6. Although absences from work do not conclusively establish that an employee is incapable of rendering useful and efficient service, they are nonetheless a factor worthy of consideration in judging disability. *See, e.g.*, *Moran v. Office of Personnel Management*, 72 M.S.P.R. 138, 142-43 (1996). In addition, the appellant's supervisor certified that the agency was unable to accommodate the appellant "due to operational paremeters [sic] concerning temperature." IAF, Tab 6, Subtab IID at 6.

¶26 The administrative judge found that the appellant failed to show how her psychological condition precluded her from performing her duties or why her problems were not capable of being controlled with medication or therapy, suggesting that "[i]t would appear from the record that [the appellant] would benefit from such treatment." ID at 13. The administrative judge relied upon an October 2, 2008 clinical evaluation during which it was noted that the appellant "was at first not very happy with the idea of psychiatric referral." *Id.*, n.12; IAF,

Tab 6, Subtab IIB at 116. Dr. Mansheim, the psychiatrist to whom the appellant was referred, diagnosed her as suffering from dysthymic disorder,[13] but recommended only that she change from Wellbutrin, two tablets per day, for depression, to the "once a day Wellbutrin," and stated that she was amenable to that change. IAF, Tab 6, Subtab IIB at 116. Dr. Mansheim made no further recommendations. *Id.* at 116-17. None of the many other physicians the appellant consulted has recommended that she undergo therapy. Thus, we see no basis upon which to find that her failure to do so precludes her from receiving disability retirement. *See Treziok*, 89 M.S.P.R. 361, ¶ 23.

¶27 In sum, we conclude that the appellant has shown that she cannot render useful and efficient service in her particular work environment, and that she has therefore met her burden of establishing an entitlement to disability retirement.

ORDER

¶28 We ORDER the Office of Personnel Management (OPM) to grant the appellant's application for disability retirement. OPM must complete this action no later than 20 days after the date of this decision.

¶29 We also ORDER OPM to tell the appellant promptly in writing when it believes it has fully carried out the Board's Order and to describe the actions it took to carry out the Board's Order. We ORDER the appellant to provide all necessary information OPM requests to help it carry out the Board's Order. The appellant, if not notified, should ask OPM about its progress. *See* 5 C.F.R. § 1201.181(b).

¶30 No later than 30 days after OPM tells the appellant it has fully carried out the Board's Order, the appellant may file a petition for enforcement with the office that issued the initial decision on this appeal if the appellant believes that

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[13] Dysthymic disorder is a chronic depressive mood disorder. http://emedicine.medscape.com/article/290686-overview.

OPM did not fully carry out the Board's Order. The petition should contain specific reasons why the appellant believes OPM has not fully carried out the Board's Order, and should include the dates and results of any communications with OPM. *See* 5 C.F.R. § 1201.182(a).

¶31 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 RIGHT TO REQUEST ATTORNEY FEES AND COSTS

You may be entitled to be paid by the agency for your reasonable attorney fees and costs. To be paid, you must meet the requirements set out at Title 5 of the United States Code (5 U.S.C.), sections 7701(g), 1221(g), or 1214(g). The regulations may be found at 5 C.F.R. §§ 1201.201, 1201.202 and 1201.203. If you believe you meet these criteria, you must file a motion for attorney fees WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION. You must file your attorney fees motion with the office that issued the initial decision on your appeal.

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:

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