

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

2012 MSPB 105

Docket No. NY-0831-12-0063-I-1

**Michael Anthony Mandarino,
Appellant,**

v.

**Department of Homeland Security,
Agency.**

September 14, 2012

Michael Anthony Mandarino, Glen Cove, New York, pro se.

Jean M. Del Colliano, Esquire, and Rafik Alidina, New York, New York,
for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

OPINION AND ORDER

¶1 The appellant has filed a petition for review in this case asking us to reconsider the initial decision issued by the administrative judge. For the reasons discussed below, we GRANT the appellant's petition for review, REVERSE the initial decision, and REMAND the case to the regional office for further adjudication in accordance with this Order.

BACKGROUND

¶2 The appellant, a GS-1801-13 National Analysis Specialist with Customs and Border Protection, seeks retirement coverage under Pub. L. No. 110-161,

§ 535(a)(4)(A), 121 Stat. 2075 (2007). Insofar as is relevant here, that law, enacted in 2007, amended [5 U.S.C. § 8336\(c\)\(1\)](#) to make “customs and border protection officers” (CBPO) eligible for enhanced retirement benefits available to law enforcement officers. Regulations implementing Pub. L. No. 110-161 issued by the Office of Personnel Management (OPM) define CBPO as an individual encumbering a position in the 1895 job series and provide for enhanced retirement coverage on a “primary” basis for an individual who holds such a position. [5 C.F.R. § 831.1602](#). The regulations also provide for enhanced retirement coverage for those in “secondary” positions, that is, those who supervise CBPOs or who hold “administrative” positions “for which experience in a primary [CBPO] position is a prerequisite.” *Id.*; *see also* 76 Fed. Reg. 41993 (Jul. 18, 2011) (the preface to OPM’s implementing regulations states that “[s]econdary coverage is not limited to positions in the GS-1895 series”).

¶3 The appellant submitted a request for enhanced retirement coverage under Pub. L. No. 110-161 to his agency. By letter dated July 23, 2008, the Assistant Commissioner for Human Resources Management, Customs and Border Protection, denied his request and advised him of his right to seek reconsideration within 30 days of his receipt of the decision. Initial Appeal File (IAF), Tab 9 at 5-6. The appellant submitted a request for reconsideration dated February 7, 2009, and explained therein that he did not receive the decision denying his initial request until February 6, 2009. IAF, Tab 11 at 6-7.

¶4 The appellant filed this appeal on January 3, 2012, claiming entitlement to enhanced retirement coverage in a secondary CBPO position. In support of his claim, he alleged that his position is similar in all relevant respects to a large group of positions in another organizational unit for which the agency has already granted secondary coverage. IAF, Tab 1 at 6. The administrative judge informed the appellant that it appeared the appeal was not ripe for adjudication because the agency had not issued a decision on his request for reconsideration. IAF, Tab 12. In response, the appellant asked that the administrative judge take jurisdiction

because it was unclear that the agency would ever issue a reconsideration decision. IAF, Tab 15. The agency argued that the appeal should be dismissed. It asserted that it had not made a decision on the appellant's request for reconsideration and explained that it could not make a decision without a delegation of authority from the Secretary of the Department of Homeland Security. According to the agency:

The Agency understands that the authority to make determinations on enhanced retirement benefits will be delegated from the Secretary of the Department of Homeland Security to the Agency. . . . However, the agency has not received a timeframe on when the authority will be delegated or what the composition of the delegat[ed] authority will be.

IAF, Tab 16 at 4 & n.1.

¶5 The administrative judge dismissed the appeal on the ground that the appellant had yet to receive a decision on his request for reconsideration. The administrative judge acknowledged that the Board may take jurisdiction in a retirement case in the absence of a reconsideration decision when there is evidence that the agency involved does not intend to issue one, but found that, here, the agency does intend to issue a reconsideration decision once it receives a delegation of authority. IAF, Tab 17.

¶6 The appellant argues on review that the Board should take jurisdiction in the absence of a reconsideration decision because he has been waiting for years for a determination on his request for enhanced retirement coverage. Petition for Review (PFR) File, Tab 3. The agency argues that the appeal is “premature” and that the appellant's petition for review should therefore be denied. PFR File, Tab 4.

ANALYSIS

¶7 The Board has jurisdiction over an appeal from “an administrative action or order affecting the rights or interests of an individual” under the Civil Service

Retirement System (CSRS). [5 U.S.C. § 8347\(d\)\(1\)](#).¹ Ordinarily such an appeal is from an OPM decision, but when an employing agency makes a decision on a request for enhanced retirement coverage under a delegation of authority from OPM, it “stands in OPM’s place,” and the appeal is from the employing agency’s decision. *Fitzgerald v. Department of Defense*, [80 M.S.P.R. 1](#), 19 (1998), *aff’d*, 230 F.3d 1373 (Fed. Cir. 1999) (Table). At the time the appellant made his request for enhanced retirement coverage under the 2007 amendment to [5 U.S.C. § 8336\(c\)\(1\)](#), OPM’s regulations delegated to agencies the authority to make enhanced retirement coverage determinations for law enforcement officers and firefighters, but not CBPOs. *See* 5 C.F.R. Part 831, Subpart I.

¶8 On July 18, 2011, OPM issued a Final Rule governing enhanced retirement coverage determinations for CBPOs, codified at 5 C.F.R. Part 831, Subpart P. The preface to the final rule stated that “the final authority on position coverage for retirement purposes is OPM, although [the authority for making] coverage determinations [for CBPOs under Pub. L. No.110-161 is] delegated to the Department of Homeland Security.” 76 Fed. Reg. 41993. The final rule provides for OPM oversight of coverage determinations, requiring the Department to notify OPM whenever it determines that a position should receive primary or secondary CBPO coverage; the rule goes on to state that OPM “retains the authority” to overrule any grant of coverage. [5 C.F.R. § 831.1611\(a\)](#). The rule further provides that an individual may submit a request for CBPO retirement coverage to “the agency head,” [5 C.F.R. § 831.1606](#), and that the “final decision of the agency head” may be appealed to the Board, [5 C.F.R. § 831.1610](#).

¶9 Given the agency’s uncontested representations that it lacks authority to decide a request for CBPO retirement coverage, it does not appear that the July 23, 2008 decision of the agency’s Assistant Commissioner for Human

¹ The record indicates that the appellant is covered by the CSRS. IAF, Tab 1 at 4; Tab 10 at 4.

Resources Management can be considered an appealable “administrative action or order” under [5 U.S.C. § 8347\(d\)\(1\)](#). Apart from that, when the appellant filed this appeal in 2012, the applicable regulation provided that a “final decision of the agency head” on CBPO coverage is appealable. [5 C.F.R. § 831.1610](#). The July 23, 2008 decision was not issued by an “agency head,” and by its own terms it was not “final.” IAF, Tab 9 at 6. As stated above, the appellant submitted a request for reconsideration of the July 23, 2008 determination. The question before us is whether he must continue to wait for an appealable decision.

¶10 Where OPM has not issued a reconsideration decision on a claim for retirement benefits and does not intend to do so, its initial decision serves as a final decision that may be appealed to the Board. *Johnson v. Office of Personnel Management*, [113 M.S.P.R. 118](#), ¶ 10 (2010); *McNeese v. Office of Personnel Management*, [61 M.S.P.R. 70](#), 73-74, *aff'd*, 40 F.3d 1250 (Fed. Cir. 1994) (Table). This principle does not apply directly to the instant appeal, since there is no evidence that the agency “does not intend” to issue a final decision on the appellant’s request for CBPO retirement coverage.

¶11 Nevertheless, the reason that the agency gives for its delay in issuing a decision—it is awaiting a delegation of authority from the Secretary of the Department of Homeland Security—indicates that dismissing this appeal as premature would serve no purpose. OPM’s regulations provide that the authority to deny CBPO retirement coverage may be delegated by the Secretary to a “representative” “at any level within the Department,” but that a decision to approve coverage may only be made by a “department headquarters-level official who reports directly to the Secretary . . . or to the Deputy Secretary . . . , and who is the sole such representative for the entire department.” [5 C.F.R. § 831.1602](#). It would be futile to continue to wait for the agency to receive a delegation of authority from the Secretary to decide requests for CBPO retirement coverage, since that delegation would include the power to deny the appellant’s request but

not to grant it.² It has been over four years since the appellant first asserted his claim for a retirement benefit granted by statute, the agency admits that the “timeframe” for issuing a decision on his claim is unknown, IAF, Tab 16 at 4, and the result of allowing further consideration of his claim at the agency level is foregone. Under the unique circumstances of this case, we deem the Department of Homeland Security to have denied the appellant’s request for CBPO retirement coverage and take jurisdiction under [5 U.S.C. § 8347](#)(d)(1). The agency is not prejudiced by this ruling because our review is de novo. *See Elias v. Department of Defense*, [114 F.3d 1164](#), 1167 (Fed. Cir. 1997). This means that the agency would not have received deference had it issued an express decision on the appellant’s request and that the lack of a full evidentiary record developed at the agency level is immaterial since the parties may submit whatever relevant evidence they wish to present to the administrative judge.

ORDER

¶12 For the reasons discussed above, the initial decision is REVERSED. We REMAND this case to the regional office for further adjudication in accordance with this Opinion and Order.

FOR THE BOARD:

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

² The agency concedes that it does not know what the “composition” of the expected delegation of authority will be. IAF, Tab 16 at 4.