

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

**2012 MSPB 125**

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Docket No. DC-844E-12-0086-I-1

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**Gale Anderson Fletcher,  
Appellant,**

**v.**

**Office of Personnel Management,  
Agency.**

November 9, 2012

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Robert H. Silberman, Esquire, Camp Springs, Maryland, for the appellant.

Thomas L. Styer, Washington, D.C., 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 of the December 16, 2011 initial decision which dismissed her appeal for lack of jurisdiction. For the reasons set forth below, we AFFIRM the initial decision.

**BACKGROUND**

¶2 The appellant applied for disability retirement under the Federal Employees' Retirement System (FERS) based on a number of medical conditions. Initial Appeal File (IAF), Tab 7 at 8-12. The Office of Personnel Management (OPM) subsequently notified the appellant that it was approving her application

on the basis of only one claimed condition, i.e., chronic obstructive pulmonary disease. *Id.* The appellant thereafter sent numerous letters to OPM requesting that it amend its determination so as to include her other claimed disabilities, i.e., lumbar disc, right heel, and psychological conditions. IAF, Tab 1 at 11, 15-16, 19.

¶3 In response, OPM issued a September 28, 2009 letter denying the appellant's request to amend the basis upon which OPM approved her disability retirement application. IAF, Tab 7 at 13-14. After receiving subsequent requests by the appellant, on January 25, 2011, OPM again notified her that it would not amend its decision regarding her retirement application as requested and that it considered the matter closed. IAF, Tab 7 at 15. The appellant filed an appeal seeking review of OPM's denial of her requests to amend its decision. IAF, Tab 1 at 1-2.

¶4 The administrative judge advised the appellant that the Board may not have jurisdiction over her appeal and ordered her to file evidence and argument showing that the Board has the requisite jurisdiction. IAF, Tab 8 at 1. Thereafter, the administrative judge issued an initial decision dismissing the appeal for lack of jurisdiction, in part, on the ground that no legal authority provides for an appeal of OPM's decision not to amend the medical conditions that formed the basis for an approved disability retirement. IAF, Tab 10, Initial Decision (ID) at 2, 4-5. The appellant timely filed a petition for review. Petition for Review (PFR) File, Tab 1.

#### ANALYSIS

¶5 If OPM has not issued a reconsideration decision on an appellant's entitlement to a retirement benefit, the Board generally lacks jurisdiction over an appeal of that matter. *Fagone v. Office of Personnel Management*, [85 M.S.P.R. 49](#), ¶ 9 (2000). However, the Board may take jurisdiction over a retirement appeal in the absence of a reconsideration decision if the appellant has made

“repeated requests” for such a decision and the evidence indicates that OPM does not intend to issue a final decision. *Id.*

¶6 In light of the appellant’s repeated requests for a final decision regarding her other allegedly disabling medical conditions, we believe that OPM’s January 25, 2011 letter was tantamount to a final decision by OPM on this matter. IAF, Tab 1 at 11, 15-16, 19, Tab 7 at 15; *see Sims v. Office of Personnel Management*, [94 M.S.P.R. 102](#), ¶ 11 (2003) (the appellant made repeated requests for a decision, and OPM’s letter explaining its position was tantamount to a reconsideration decision). Accordingly, the Board is not deprived of jurisdiction over the appeal based on OPM’s failure to issue a reconsideration decision. Rather, as we discuss below, the Board lacks authority to adjudicate the instant appeal because OPM has not taken an action or made a decision that affects the appellant’s rights or interests under FERS.

¶7 The Board’s jurisdiction over final decisions of OPM in administering FERS derives from [5 U.S.C. § 8461](#)(e)(1). *Niederhofer v. Office of Personnel Management*, [115 M.S.P.R. 211](#), ¶ 5 (2010). That section provides that “an administrative action or order affecting the rights or interests of an individual . . . under the provisions of this chapter administered by [OPM] may be appealed to the Merit Systems Protection Board . . . .” *Id.* We interpret this language as meaning that the Board’s statutory authority under [5 U.S.C. § 8461](#)(e)(1) extends only to OPM actions or orders that *adversely* affect an individual’s rights or interests under FERS. Because the appellant in this case has failed to show how OPM has adversely affected her rights or interests under FERS, the Board lacks jurisdiction over her appeal.

¶8 Specifically, it is undisputed that OPM approved the appellant’s disability application under FERS and has not terminated its approval. IAF, Tab 7 at 5, 8-11. If OPM were to determine that the appellant was no longer entitled to a disability retirement annuity, it would first issue the appellant notice and allow her the opportunity to challenge that decision. IAF, Tab 7 at 5-6. Only after

OPM has issued a decision terminating the appellant's disability retirement would the issue be ripe for the Board's consideration. *See Johnson v. Office of Personnel Management*, [113 M.S.P.R. 118](#), ¶ 14 (2010) (only after OPM issues a decision determining that the appellant has received an overpayment would the appellant be able to request reconsideration and, if necessary, file a Board appeal regarding that issue).<sup>1</sup>

¶9 Further, the Board has the authority to consider evidence relating to a medical condition on which the appellant based her application. *See Hunt v. Office of Personnel Management*, [105 M.S.P.R. 264](#), ¶ 18 n.5 (2007) (the Board may consider medical evidence that was not submitted to OPM so long as it is related to a medical condition which formed the basis of the appellant's application). *But see Ballenger v. Office of Personnel Management*, [101 M.S.P.R. 138](#), ¶ 13 (2006) (the Board may not consider whether an appellant is entitled to reinstatement of a disability retirement annuity due to a medical condition that was neither the basis for the appellant's application nor the basis for OPM's decision to grant disability retirement). Here, the appellant is requesting that OPM find her disabled based on medical conditions listed in her disability retirement application. *Compare* IAF, Tab 1 at 11, 15-16, 19, *with* IAF, Tab 7 at 12. Thus, if OPM were to revoke the appellant's disability annuity, the Board would have the authority to consider medical evidence regarding these other allegedly disabling medical conditions. *See Hunt*, [105 M.S.P.R. 264](#), ¶ 18 n.5.

¶10 Accordingly, based on the circumstances of this case, OPM has not taken an action or made a decision which adversely affected the appellant's rights or

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<sup>1</sup> While *Johnson* is a case that arose under the Civil Service Retirement System (CSRS), we have cited to it because the regulatory requirements for establishing disability retirement claims under CSRS and FERS are broadly similar. *See Thomas v. Office of Personnel Management*, [54 M.S.P.R. 686](#), 689 n.2 (1992). Further, the differences that do exist between these systems do not affect the applicability of *Johnson* to this appeal.

interests under FERS. The Board therefore lacks authority under [5 U.S.C. § 8461](#)(e)(1) to adjudicate this appeal.<sup>2</sup>

¶11 Further, the Board need not consider the documents the appellant submits for the first time on review because they fail to show that OPM took an action which adversely affected the appellant's rights or interests under FERS and, accordingly, are not material to the outcome of the appeal. PFR File, Tab 1 at 10-28; *see Russo v. Veterans Administration*, [3 M.S.P.R. 345](#), 349 (1980) (the Board will not grant a petition for review based on new evidence absent a showing that it is of sufficient weight to warrant an outcome different from that of the initial decision). In addition, many of the documents the appellant submits on review are already part of the record and, therefore, are not new. *See Meier v. Department of the Interior*, [3 M.S.P.R. 247](#), 256 (1980) (evidence that is already a part of the record is not new). *Compare* PFR File, Tab 1 at 6-9, *with* IAF, Tab 9 at 17, 20-22. Thus, they do not provide a basis to disturb the initial decision.

#### ORDER

¶12 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 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:

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<sup>2</sup> Because the Board lacks jurisdiction over the appeal, it need not address the issue of the timeliness of the appellant's initial appeal. *See Tardio v. Department of Justice*, [112 M.S.P.R. 371](#), ¶ 30 (2009).

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:

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