UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2013 MSPB 61

Docket No. CH-831E-11-0862-I-2

Margie A. Bemiller,

Appellant,

v.

Office of Personnel Management,

Agency.

August 13, 2013

Margie A. Bemiller, Pataskala, Ohio, pro se.

Matthew D. MacIsaac, Washington, D.C., for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member
Member Robbins issues a separate dissenting opinion.

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, which affirmed the reconsideration decision of the Office of Personnel Management (OPM) denying her application for disability retirement. For the reasons discussed below, we GRANT the appellant's petition for review, REVERSE the initial decision, and DO NOT SUSTAIN OPM's reconsideration decision.[1]

[1] Except as otherwise noted in this decision, we have applied the Board's regulations that became effective November 13, 2012. We note, however, that the petition for

BACKGROUND

¶2 The appellant applied for disability retirement under the Civil Service Retirement System (CSRS) based on fibromyalgia and chronic pain. *Bemiller v. Office of Personnel Management*, MSPB Docket No. CH-831E-11-0862-I-1, Initial Appeal File (IAF I-1), Tab 1, Tab 4 at 19. Until her resignation on September 21, 2010, to avoid removal, she was a Management Assistant, GS-0344-07, with the Defense Logistics Agency (DLA) and had 32 years of service. IAF I-1, Tab 4 at 87, 81-82, 98-105. Based on evidence from 2003 through 2010, the administrative judge determined that the appellant had documented the deficiencies in conduct and attendance that led to DLA's removal action but did not show that the medical conditions upon which her application was based caused these deficiencies. *Bemiller v. Office of Personnel Management*, MSPB Docket No. CH-831E-11-0862-I-2, Initial Appeal File (IAF I-2), Tab 13, Initial Decision (ID) at 5. The administrative judge thus concluded that the appellant did not establish that her symptoms of fibromyalgia and chronic pain prevented her from performing the critical and essential elements of her position. ID at 7.

¶3 The appellant updated her medical evidence with a December 2011 assessment from her physician and an evaluation by a specialist in physical medicine, Gordon J. Korby, D.O. IAF I-2, Tab 1 at 6-11. Although the doctors agreed that the appellant was permanently unemployable, Dr. Korby devoted significant discussion to the leg, ankle, and knee injuries she sustained in a June 2010 automobile accident. *Id.* at 6, 8, 10; *see* IAF I-1, Tab 4 at 95. The administrative judge concluded that these injuries were unrelated to the conditions cited in her disability retirement application and thus were beyond the

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review in this case was filed before that date. Even if we considered the petition under the previous version of the Board's regulations, the outcome would be the same.

Board's jurisdiction. ID at 7-8. She affirmed OPM's reconsideration decision. ID at 8.

¶4 The appellant has filed a petition for review. Petition for Review (PFR) File, Tab 3. The agency has filed a response.[2] PFR File, Tab 5.

ANALYSIS

¶5 To be eligible for a disability retirement annuity under the CSRS, an employee must have completed 5 years of civilian service, must be unable, because of disease or injury, to render useful and efficient service in her position, and must not be qualified for reassignment to a vacant position in the agency at the same grade or level in which she could render useful and efficient service. 5 U.S.C. § 8337(a); *see also* 5 C.F.R. § 831.1203(a). OPM's implementing regulations further require that the disabling medical condition be expected to continue for at least 1 year from the date the application is filed and that the employing agency be unable to accommodate the disabling medical condition in the appellant's former position or in an existing vacant position. 5 C.F.R. § 831.1203(a).

¶6 Because the appellant meets the other requirements to receive a disability retirement annuity, the only matter at issue here is whether the evidence shows she is unable, because of disease or injury, to render useful and efficient service in her position. *See* 5 U.S.C. § 8337(a); *see also* 5 C.F.R. § 831.1203(a). An applicant for disability retirement may meet this statutory requirement in two ways: (1) by showing that the medical condition from which she suffers caused a deficiency in performance, attendance, or conduct; or (2) by showing that the

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[2] On review, the appellant included with her petition several pages of medical records, all of which pre-date the close of the record below and pertain to her leg injuries. *See* PFR File, Tab 3, Att. 2. These records are neither new nor material to the medical conditions upon which her application is based. *See Avansino v. U.S. Postal Service*, 3 M.S.P.R. 211, 214 (1980).

medical condition is incompatible with useful and efficient service or retention in her position. *Henderson v. Office of Personnel Management*, 117 M.S.P.R. 313, ¶ 16 (2012); 5 C.F.R. § 831.1203(a)(2). Under the first method, an applicant may establish her entitlement to an annuity by showing that the medical condition affected her ability to perform specific work requirements, prevented her from being regular in attendance, or caused her to act inappropriately. *Henderson*, 117 M.S.P.R. 313, ¶ 16. Under the second method, she may show that the medical condition is inconsistent with working in general, in a particular line of work, or in a particular setting. *Id.*

¶7 In determining whether an applicant is disabled under CSRS, the Board considers the following evidence: (1) objective clinical findings, (2) diagnoses and medical opinions, (3) subjective evidence of pain and disability, (4) evidence relating to the effect of her condition on her ability to perform in the grade or class of position last occupied, and (5) evidence that she was not qualified for reassignment to a vacant position at the same grade or level as the position she last occupied. *Dunn v. Office of Personnel Management*, 60 M.S.P.R. 426, 432 (1994), *appeal dismissed*, 91 F.3d 169 (Fed. Cir. 1996) (Table). Nothing in the law, however, mandates that a single provider tie all of the evidence together. *See Henderson*, 117 M.S.P.R. 313, ¶ 19. The ultimate question, based on all relevant evidence, is: Do the applicant's medical impairments preclude her from rendering useful and efficient service in her position? *Id.*, ¶ 20. 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. *Id.*

¶8 When the administrative judge affirmed the reconsideration decision, she based her analysis on the first method in *Henderson* and considered whether the appellant's medical condition had caused a deficiency in performance, attendance, or conduct. The administrative judge considered the opinion of her physician, Raymond C. Gruenther, M.D., regarding her various medical conditions, which included altered mental status, neuropathy, acute and chronic

pain syndromes, fibromyalgia, and depression, as well as her subjective reports of a limited attention span and frequent drowsiness. ID at 5-6; *see* IAF I-1, Tab 4 at 24-27, 30, 59-61, Tab 8 at 5-9, 34-37. The administrative judge cited reports from family members regarding the appellant's frequent inability to stay awake and their difficulty in rousing her once she fell asleep. ID at 6; *see* IAF I-1, Tab 8 at 38-41. The administrative judge, however, also characterized the appellant as "opioid-dependent," and noted that she was a smoker with high cholesterol, high blood sugar, and a history of reporting fatigue. ID at 2. Because the appellant admitted to exceeding her prescribed dosage of Oxycodone, *see* IAF I-1, Tab 8 at 5, the administrative judge concluded that her misconduct was "caused by prescription drug misuse rather than fibromyalgia/chronic pain," ID at 5. She also concluded that, because the appellant admitted that she stopped seeing a psychologist in 2008 for her depression and anxiety, she had refused to accept reasonable treatment. ID at 7; *see* IAF I-1, Tab 8 at 35. The administrative judge similarly pointed out that the appellant had not lost weight as her doctors had recommended. ID at 7.

¶9 On review, the appellant takes issue with these conclusions. She explains that job stress exacerbated her fibromyalgia and other chronic pain by adding to her level of systemic inflammation, increasing her need for medication. PFR File, Tab 3, Att. 1 at 1-4; *see also* IAF I-1, Tab 4 at 24. She explains that non-sedating drugs did not control her pain. PFR File, Tab 3, Att. 1 at 3-4; *see also* IAF I-1, Tab 8 at 7, 9; IAF I-2, Tab 1 at 10. Nevertheless, she avers, she recognized her dependence on Oxycodone and Oxycontin and asked to be weaned from those drugs. PFR File, Tab 3, Att. 1 at 5; *see* IAF I-1, Tab 8 at 11; IAF I-2, Tab 1 at 9. We further note that other prescribed medicines she was taking at the time, e.g., Gabapentin, may cause drowsiness, inattention, or mood changes to one degree or another. *See* IAF I-1, Tab 8 at 6-7, 10, 15-16, 22, 27-28; IAF I-2, Tab 1 at 10. Even after she was weaned from Oxycodone and Oxycontin, *see* PFR File, Tab 3, Att. 1 at 5; IAF I-2, Tab 1 at 9, her excessive drowsiness,

inattention, and mood problems persisted, *see* IAF I-1, Tab 8 at 39, 41; IAF I-2, Tab 1 at 10. Thus, we find that the administrative judge's assessment that the appellant's "opioid-dependent" condition caused her attendance and conduct deficiencies is speculative.

¶10 The appellant also takes issue with OPM's conclusion (inherently affirmed in the initial decision) that she could perform her duties regardless of her medical condition because her job was sedentary and allowed her to alternate between sitting and standing throughout the day. PFR File, Tab 1, Att. 1 at 1-3; *see* IAF I-1, Tab 4 at 14-15, 67-72. She argues that the ability to shift positions would not have been enough to allow her to perform successfully because the pain itself and the side effects of trying to control it, as well as stress and anxiety over her physical limitations, affected her performance. PFR File, Tab 3, Att. 1 at 1-3; *see also* IAF I-1, Tab 8 at 5-6, 31, 33.1, 34-36; IAF I-2, Tab 1 at 10. She avers that the Supervisor's Statement with her application shows that her performance deficiencies went beyond the attendance and disciplinary issues the DLA identified when it sought to remove her. PFR File, Tab 3, Att. 1 at 2-3. For instance, the statement says that the appellant "sometimes require[d] supervisory assistance or intervention to function effectively in the role of a customer service and support representative." IAF I-1, Tab 4 at 22. She argues that the DLA certified that it was unable to accommodate her because of her medical condition and the physical requirements of her position. PFR File, Tab 3, Att. 1 at 3; *see* IAF I-1, Tab 4 at 63.

¶11 The record bears out the appellant's claim that the sedentary nature of her position is not controlling. Her position description shows that, even if her job was largely sedentary, she was responsible for tracking and manipulating a broad range of information and for producing complex analyses and reports. *See* IAF I-1, Tab 4 at 67-76. Such duties required considerable attention to detail and mastery of several computer and tracking systems. *See, e.g.*, *id.* at 73-75. The Supervisor's Statement is consistent with her claims that the medical conditions

underlying her application diminished her ability to concentrate on her work, which affected her performance beyond the attendance and conduct issues identified in the notice of proposed removal. The statement says, for instance, that the appellant missed deadlines, made numerous errors on reports, produced poor quality work, and responded to customer requests too slowly. *Id.* at 22; *see also* IAF I-2, Tab 1 at 8. The evidence before the administrative judge thus showed that the appellant's medical conditions affected her ability to perform specific work requirements, as well as her attendance and conduct. *See Henderson*, 117 M.S.P.R. 313, ¶ 16.

¶12 The appellant's updated medical assessments from December 2011 tip the evidentiary balance in her favor.[3] These assessments include a December 6, 2011 report by Dr. Gruenther, IAF I-2, Tab 1 at 6, and Dr. Korby's December 15, 2011 report, *id.* at 7-11. The administrative judge emphasized that Dr. Korby's report covered the post-surgical condition of the appellant's injured leg, a condition not part of her disability retirement application. ID at 7-8. In doing so, the administrative judge overlooked significant evidence regarding the conditions that *are* covered by her application.

¶13 Although Dr. Korby addressed the injuries the appellant sustained in the accident, he clearly distinguished these conditions from the chronic pain and

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[3] We agree with Member Robbins that post-separation medical reports are probative only if they "link the individual's condition at the time of examination back to her condition while employed." Dissent, ¶ 3. We respectfully disagree with his conclusion that the appellant's December 2011 medical reports fail to make the requisite link. In our view, those reports adequately establish a connection between the appellant's condition at time of examination and her condition while employed. For example, the report prepared by Dr. Korby notes that the appellant's "severe fibromyalgia" was first diagnosed in 2003 and that she had received medical treatment from other physicians for a number of years for this chronic condition. IAF, I-2, Tab 1 at 7-8. Thus, we find that the new medical evidence presented by the appellant on appeal corroborates the appellant's claims in her 2010 retirement application that she was suffering from chronic, disabling pain when she separated from employment.

fibromyalgia that are the basis for her disability retirement application. *See*, *e.g.*, IAF I-2, Tab 1 at 7-8, 10. Dr. Korby reported that her chronic pain and fibromyalgia continue, though the fibromyalgia is "slightly better" without workplace stress. *Id.* at 8, 10. The appellant's blood work and other diagnostic tests are still consistent with fibromyalgia, and another form of neuropathic pain has developed in her abdominal muscles. *Id.* at 8.

¶14 Dr. Korby reported that the appellant continued to experience widespread moderate to severe pain (ranging from 4 to 9 on an analog scale) daily even while taking medication. *Id.* He reported that she had tried several different pain medications without success, but all with attendant side effects, as well as other modalities. *Id.* at 8, 10. Dr. Korby reported that the appellant was currently taking Flexeril, Gabapentin, Savella, and Tramadol. *Id.* at 8. These medications, we note, can cause drowsiness and an altered mental state and aggravate mood disorders even when taken at standard dosages.[4] *See* IAF I-1, Tab 8 at 16, 22-23, 29; *Tramadol*, DRUGS.COM, http://www.drugs.com/tramadol.html (last visited May 24, 2013). The appellant still reported problems with excessive sleepiness and attentiveness, as well as nighttime sleep disruptions. IAF I-2, Tab 1 at 8, 10. Dr. Korby adjudged her ability to perform the normal functions of day-to-day living to be "significantly compromised to the point of disability." *Id.* at 8. He reported that her depression secondary to pain and acute stress reaction have also persisted but noted that she "has been under the care of a psychologist for the management" of those conditions, and he recommended that she continue cognitive behavioral therapy. *Id.* at 9-10.

¶15 Dr. Korby concluded by reiterating that the appellant's physicians had made multiple attempts to control her pain, and the most successful efforts so far

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[4] There was no indication that the appellant was exceeding the standard dosage of these drugs, and Dr. Korby affirmatively stated that the appellant had overcome her dependence on Oxycontin and Oxycodone. IAF I-2, Tab 1 at 9.

caused significant side effects that further degraded her ability to function. *Id.* at 10. Her mobility issues, extra weight, and "substantially deconditioned" state limited any benefit physical therapy or other modalities could provide. *Id.*

¶16 The December 2011 assessments illuminate and tie together the other record evidence. The appellant is no longer dependent on Oxycodone and Oxycontin, and no other prescription drug misuse has been reported. However, the medications she currently takes to function physically, even at a basic level, affect her mood, attentiveness, and sleep patterns. In other words, some of her disabling conditions flow from efforts to control her disabling pain. Her physicians have tried several alternatives to control her pain and are unable to do more for her. *Cf. Smedley v. Office of Personnel Management*, 108 M.S.P.R. 31, ¶ 23 (2008) (an applicant for disability retirement must establish the extent to which her disability can or cannot be controlled). Her most recent medical assessment suggests that she is addressing the depression and anxiety that are secondary to her primary disabling conditions. *See* IAF I-2, Tab 1 at 9-10; *cf. Smedley*, 108 M.S.P.R. 31, ¶ 23 (when an employee fails or refuses to follow or to accept normal treatment, her disability flows, not from the disease or injury itself, as the statute requires, but from her voluntary failure or refusal to take the available corrective or ameliorative action). Although the leg injury has complicated efforts to manage her condition, she would be disabled even without the injury. Based on all the relevant evidence, we find that the appellant has satisfied the second method of analysis under *Henderson*, if not the first. She has shown that her medical condition would preclude her from rendering useful and efficient service in her last position with the DLA. *See Henderson*, 117 M.S.P.R. 313, ¶¶ 16, 19-20. Accordingly, we REVERSE the initial decision and DO NOT SUSTAIN OPM's reconsideration decision.

ORDER

¶17 We ORDER the Office of Personnel Management 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.

¶18 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).

¶19 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 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).

¶20 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 the date of this order. *See* 5 U.S.C. § 7703(b)(1)(A) (as rev. eff. Dec. 27, 2012). 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) (as rev. eff. Dec. 27, 2012). You may read this law as well as other sections of the United States Code, at our website, http://www.mspb.gov/appeals/uscode/htm. 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.

DISSENTING OPINION OF MEMBER MARK A. ROBBINS

in

Margie A. Bemiller v. Office of Personnel Management

MSPB Docket No. CH-831E-11-0862-I-2

¶1 The majority orders the Office of Personnel Management (OPM) to grant the appellant's application for disability retirement under the Civil Service Retirement System (CSRS). I respectfully dissent.

¶2 The appellant filed her application for disability retirement after the agency decided to remove her in 2010, following a series of progressively severe disciplinary actions, for five specifications of sleeping on duty, one specification of AWOL, and one specification of falsifying her time and attendance record. The appellant admitted in a settlement agreement that the agency had grounds to remove her. *See* I-1 File, Tab 3 at 81-86. This sequence is relevant, and detracts from the force of her application for disability retirement. *Anderson v. Office of Personnel Management*, 96 M.S.P.R. 299, ¶ 22 (2004). The majority acknowledges that the appellant missed deadlines, made many mistakes, produced poor quality work, responded to customer requests too slowly, and based on this, that her health conditions caused a deficiency in performance.

¶3 However, in its opinion, the majority relies heavily on doctors' assessments from December 2011, which was 15 months after the appellant was separated from her employing agency. *See* I-2 File, Tab 1 at 6-11. The issue at hand, though, is whether the appellant became disabled while employed under the CSRS. 5 C.F.R. § 831.1203(a)(2). Post-separation medical reports are probative only if, alone or in combination with other evidence, they link the individual's condition at the time of examination back to her condition while employed. The amount of time between the individual's separation from employment and the assessment is a relevant factor in determining the weight to be given to the assessment. *See Reilly v. Office of Personnel Management*, 571 F.3d 1372,

1381-83 (Fed. Cir. 2009). In this case, the medical reports, when read as a whole, seem more relevant to the appellant's condition 15 months after her separation than to her condition while employed.

¶4 The appellant's failure to follow her doctors' advice to lose weight also weakens her claim for disability retirement benefits. *Baker v. Office of Personnel Management*, 782 F.2d 993, 994 (Fed. Cir. 1986). The appellant's apparent difficulty focusing at work was due in large part to sleepiness, which seems to have been caused by her sleep apnea; her apnea may very well have improved if she had lost weight. *See* I-2 File, Tab 1 at 10.

¶5 I would sustain the denial of the appellant's application by OPM and the findings of and decision by the administrative judge below.

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Mark A. Robbins
Member