

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

2013 MSPB 99

Docket No. SF-844E-12-0334-I-1

**Algene L. Ott,
Appellant,**

v.

**Office of Personnel Management,
Agency.**

December 30, 2013

Randy Gonzalez, Albuquerque, New Mexico, for the appellant.

Linnette Scott, 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 initial decision, which affirmed a reconsideration decision of the Office of Personnel Management (OPM) denying her application for disability retirement under the Federal Employees' Retirement System (FERS).¹ For the reasons discussed below, we

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 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.

GRANT the appellant's petition for review, VACATE the initial decision, and REMAND the case to OPM for a new reconsideration decision.

BACKGROUND

¶2 The appellant applied for disability retirement under FERS, listing on the Statement of Disability her medical conditions of adrenal fatigue, low thyroid T3, hip pain, tight neck and shoulders, stress, and irritable bowel syndrome. Initial Appeal File (IAF), Tab 4 at 60, 119-22. The appellant's supporting medical documentation also demonstrated that she has permanent hearing loss. *Id.* at 11, 24, 29, 34, 66, 72. OPM denied the appellant's application and reaffirmed that denial in its reconsideration decision, concluding that the appellant provided insufficient evidence to demonstrate that her medical conditions, as listed on the Statement of Disability, disabled her from performing the duties of her position of Equal Opportunity Specialist. *Id.* at 7-9, 54-56. Neither OPM's denial nor reconsideration decision made any findings related to the appellant's hearing loss. *Id.* at 7-9, 54-56.

¶3 The appellant appealed OPM's reconsideration decision, IAF, Tab 1, which the administrative judge affirmed in his initial decision, IAF, Tab 20. On review, the appellant reasserts, among other things, that she is disabled, in part, by her permanent hearing loss and that she included supporting medical documentation of her hearing loss with her disability retirement application. Petition for Review (PFR) File, Tab 3 at 4. OPM has responded in opposition. PFR File, Tab 4.

ANALYSIS

¶4 Generally, the Board has jurisdiction over retirement issues only once they have been the subject of an OPM reconsideration decision. *Kilpatrick v. Office of Personnel Management*, [94 M.S.P.R. 609](#), ¶ 8 (2003). However, when OPM fails to adjudicate all the claims and dispositive issues before it, the Board has jurisdiction to consider the non-adjudicated claims and issues, and may remand

the case for OPM to complete a full review of the matter. *Byrum v. Office of Personnel Management*, [618 F.3d 1323](#), 1332-33 (Fed. Cir. 2010).

¶5 We find this case analogous to *Byrum*, [618 F.3d 1323](#), in which our reviewing court instructed the Board to remand the case to OPM based upon OPM's failure to adjudicate all the claims contained in an appellant's application for her mother's FERS death benefits. *See id.* at 1332-33. The appellant in *Byrum* indicated on the Application for Death Benefits form that she was claiming her mother's FERS death benefits only in her capacity as her mother's "child," but the supplemental documentation to the application clearly indicated that the appellant was also applying in her capacity as "assignee" of the benefits, pursuant to a court-ordered assignment executed by her mother's spouse. *Id.* at 1326-27. OPM denied the appellant's application on the narrow grounds that she was not the deceased employee's spouse and failed to address whether the appellant was entitled to her mother's FERS death benefits by way of the assignment. *Id.* at 1327. Because of OPM's failure to address the latter issue, our reviewing court remanded the case for OPM to conduct a full and complete review of all of claims in the appellant's application. *Id.* at 1333.

¶6 Here, similar to *Byrum*, OPM limited its reconsideration decision to only those medical conditions set forth in the appellant's Statement of Disability form, IAF, Tab 4 at 54-56, 60, and failed to address the appellant's hearing loss that was clearly raised as a potentially disabling medical condition in the supplemental documentation to her application, *id.* at 11, 24, 29, 34, 66, 72; *see also* PFR File, Tab 4 at 5 (OPM's Response to the Petition for Review, conceding that OPM did not adjudicate the appellant's hearing loss because it was not raised as a disabling condition on her "Applicant's Statement"). By not addressing her hearing loss, OPM effectively failed to adjudicate all of the claims set forth in the appellant's disability retirement application. *See Byrum*, 618 F.3d at 1332. Accordingly, as in *Byrum*, we find that this case should be remanded to OPM to determine whether the appellant's medical conditions, including hearing loss, as

raised in her application materials² entitle her to disability retirement benefits.³ *See id.* at 1333.

¶7 We further note that OPM failed to consider in its initial denial and subsequent reconsideration decision the appellant's receipt of Social Security disability benefits, of which OPM was aware. IAF, Tab 4 at 7-9, 54-57, 112-14. Although the appellant's receipt of Social Security disability benefits is not dispositive of her eligibility for FERS disability retirement benefits, OPM must consider on remand her receipt of those benefits. *See Trevan v. Office of Personnel Management*, [69 F.3d 520](#), 526 (Fed. Cir. 1995).

¶8 Finally, we note that the Department of Agriculture (USDA) appears to have provided OPM with incomplete information regarding the reasons for the appellant's removal. IAF, Tab 4 at 63-64; PFR File, Tab 3 at 6. On review, the appellant provided evidence stating that the USDA removed her for a "Medical Inability to Perform" her position of Equal Opportunity Specialist. PFR File, Tab 3 at 6. Although the Board generally will not consider evidence submitted for the first time with a petition for review, OPM should consider this evidence on remand given the nature of disability retirement cases and the high priority the Board has placed on resolving such cases on the merits. *See Matson v. Office of Personnel Management*, [105 M.S.P.R. 547](#), ¶¶ 15-16 (2007); *Karker v. Office of Personnel Management*, [80 M.S.P.R. 235](#), ¶ 9 (1998).

² The appellant's supplemental documentation demonstrates that she was also asserting her Irlen Syndrome as another disabling medical condition. IAF, Tab 4 at 11-15. On remand, OPM shall consider whether the appellant's Irlen Syndrome, along with her other medical conditions set forth in her application materials, entitles her to disability retirement benefits. *See Byrum*, 618 F.3d at 1332.

³ In light of our decision to remand this matter to OPM for a new reconsideration decision, we do not address the appellant's remaining allegations of error by the administrative judge.

ORDER

¶9 On remand, OPM shall issue a new reconsideration decision addressing whether the appellant's medical conditions, including hearing loss, as raised in her application materials entitle her to disability retirement benefits. OPM shall issue the new reconsideration decision within 60 calendar days from the date of this Remand Order and shall advise the appellant of her right to file an appeal with the Board's Western Regional Office if she disagrees with that new decision. *See Litzenberger v. Office of Personnel Management*, [88 M.S.P.R. 419](#), 424 (2001).

¶10 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).

¶11 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).

FOR THE BOARD:

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