

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

**2014 MSPB 2**

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Docket No. SF-0845-12-0702-I-1

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**Lwanda Okello,  
Appellant,**

**v.**

**Office of Personnel Management,  
Agency.**

January 16, 2014

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Lwanda Okello, Seattle, Washington, pro se.

Christopher H. Ziebarth, Washington, D.C., for the agency.

**BEFORE**

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

**OPINION AND ORDER**

¶1 Mr. Okello petitioned for review of an initial decision dismissing his Federal Employees' Retirement System (FERS) benefit appeal for lack of jurisdiction. For the reasons set forth below, we GRANT the petition for review, VACATE the initial decision, and REMAND this appeal to the regional office for adjudication of the merits.

**BACKGROUND**

¶2 This case has a long and complicated procedural history, involving several different Office of Personnel Management (OPM) decisions and several different

Board appeals over the course of more than 6 years. Although it may not be necessary to know every detail of this procedural history in order to understand our decision, it is nevertheless necessary to know generally what has occurred in this case.

¶3 Mr. Okello retired from the Equal Employment Opportunity Commission and began receiving a FERS basic annuity on September 16, 2006. *Okello v. Office of Personnel Management*, MSPB Docket No. SF-0845-09-0267-I-1 (0267), Initial Appeal File (IAF), Tab 3, Subtab 5 at 4-5. On November 4, 2007, OPM issued a notice informing Mr. Okello that his annuity to date had been overpaid by \$11,949.62 due to an alleged miscalculation of interim pay.<sup>1</sup> 0267 IAF, Tab 3, Subtab 5 at 16-17, 21. It proposed to collect the overpayment in installments. *Id.* at 17. The notice was returned to sender for unknown reasons, but OPM began to collect the alleged overpayment anyway through withholdings from Mr. Okello's annuity. 0267 IAF, Tab 3 at 1, Subtab 5 at 26. OPM eventually collected \$4,313.80 (\$3,319.30 in scheduled withholdings plus \$994.50 in withheld accrued annuity) before it reopened the case, apparently in reaction to Mr. Okello's correspondence. 0267 IAF, Tab 3 at 1.

¶4 After reopening the case, on November 1, 2008, OPM issued a new notice informing Mr. Okello that it proposed to collect the remaining \$7,635.82 on a new repayment schedule. 0267 IAF, Tab 3, Subtab 4. Mr. Okello requested a waiver, but, on January 27, 2009, OPM issued a final decision denying the waiver request, affirming its decision to collect the \$7,635.82 as scheduled, and informing Mr. Okello of his Board appeal rights. 0267 IAF, Tab 3, Subtabs 2-3.

¶5 After the appellant appealed to the Board, OPM rescinded its January 27, 2009 final decision. 0267 IAF, Tab 10. OPM indicated that it would return the \$4,313.80 already collected to the appellant and issue a new final decision on the

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<sup>1</sup> At the heart of this entire dispute appears to be whether Mr. Okello should receive credit for certain service prior to his service with the Equal Employment Opportunity Commission. 0267 IAF, Tab 3, Subtab 3 at 8-9.

total amount of the alleged overpayment (\$11,949.62). *Id.* In light of OPM's rescission, on April 2, 2009, the administrative judge dismissed the appeal for lack of jurisdiction. 0267 IAF, Tab 14.

¶6 Shortly thereafter, on April 25, 2009, OPM issued Mr. Okello a letter stating that it would begin withholding \$212.10 from his monthly annuity "because we paid you too much annuity." 0267 Petition for Review (PFR) File, Tab 1 at 4. The letter did not notify Mr. Okello of any right to seek reconsideration or of any right to appeal to the Board. *Id.* Nevertheless, in light of the letter, Mr. Okello filed a motion to reopen his Board appeal. 0267 PFR File, Tab 1. In the meantime, OPM had collected 2 months' worth of scheduled withholdings from his annuity, or \$414.20. 0267 PFR File, Tab 3 at 1. However, OPM returned that money to Mr. Okello on June 18, 2009. *Id.* Because it appeared to Mr. Okello that the matter had been resolved and that OPM intended to issue a new decision, he withdrew his petition for review. 0267 PFR File, Tabs 3, 4.

¶7 After more than 6 months passed without any further action from OPM, Mr. Okello filed another Board appeal on January 4, 2010, arguing that the Board should take jurisdiction over the appeal in light of OPM's failure to issue a final decision in the case. *Okello v. Office of Personnel Management*, MSPB Docket No. SF-0845-10-0317-I-1 (0317), IAF, Tab 1. OPM responded that, although it had not yet issued a final decision, this was attributable to its preoccupation with Mr. Okello's "premature litigation" before the Board and that it intended to issue a new decision "promptly." 0317 IAF, Tab 5. On February 25, 2010, the administrative judge dismissed the appeal for lack of jurisdiction on the basis that OPM had not yet issued a final decision but still intended to do so. 0317 IAF, Tab 11. The appellant petitioned for review, and, on July 8, 2010, the Board affirmed the dismissal. 0317 PFR File, Tabs 1, 7.

¶8 More than a year and a half passed with no further action from either party. Then, on February 24, 2012, OPM issued Mr. Okello another letter stating that it

had adjusted his annuity upward due to its receipt of a military service deposit. *Okello v. Office of Personnel Management*, MSPB Docket No. SF-0845-12-0401-I-1 (0401), IAF, Tab 1 at 9. The letter went on to state that OPM would deposit into his account a lump sum adjustment of \$18,274.88 (\$35,788.00 in gross annuity due minus \$11,949.62 in “advance annuity” minus \$994.50 “paid to annuitant” minus \$4,569.00 in federal tax). *Id.* The letter did not inform Mr. Okello of any reconsideration or Board appeal rights from the determination. *Id.* Nevertheless, by letters dated March 5 and March 8, 2012, Mr. Okello requested clarification from OPM as to how it arrived at the adjusted annuity rate. *Id.* at 7-8. He also challenged the deductions from the adjustment as an attempt to collect the alleged overpayment that was the subject of his previous Board appeals and was still in dispute. *Id.* The appellant filed a Board appeal on March 24, 2012. *Id.* at 1.

¶9 OPM moved to dismiss the appeal for lack of jurisdiction on the basis that it had not yet issued a final appealable decision on the appellant’s annuity. 0401 IAF, Tab 8 at 5. Nevertheless, it: (1) acknowledged its February 24, 2012 letter; (2) stated that it would construe the appellant’s letters of March 5 and March 8, 2012, as requests for reconsideration; and (3) asserted that it would issue a final decision containing notice of Board appeal rights. 0401 IAF, Tab 16 at 3. On June 11, 2012, the administrative judge dismissed the appeal for lack of jurisdiction, finding that OPM had not yet issued a final appealable decision in the matter but that it intended to do so. 0401 IAF, Tab 18. Mr. Okello did not petition for review.

¶10 On August 6, 2012, OPM issued Mr. Okello another letter stating that the calculations in the February 24, 2012 letter were incorrect. MSPB Docket No. SF-0845-12-0702-I-1 (0702), IAF, Tab 4. It went on to state: “Shortly, and by separate cover you will again receive a new notice regarding the correct amount of annuity due you . . . retroactive to September 16, 2006.” Despite promising the forthcoming “new notice,” the letter purported to be “OPM’s final decision in

this matter.” *Id.* It did not contain notice of reconsideration or Board appeal rights.

¶11 On August 8, 2012, the appellant filed the instant appeal requesting a resolution of the matter and complaining about OPM’s failure to issue a final decision as it had promised to do in April 2009. 0702 IAF, Tabs 1, 3, 4. OPM moved to dismiss the appeal for lack of jurisdiction on the basis that its August 6, 2012 letter was not a final, appealable decision and that such a decision would be forthcoming. 0702 IAF, Tab 8. On November 8, 2012, the administrative judge dismissed the appeal for lack of jurisdiction, finding that, despite its confusing language, OPM’s August 6, 2012 letter was not an appealable final decision and that OPM still intended to issue such a decision. 0702 IAF, Tab 18.

¶12 Mr. Okello filed a petition for review, renewing his request that the Board take jurisdiction over and adjudicate this matter. 0702 PFR File, Tab 1. On July 9, 2013, while the petition was still pending, Mr. Okello died. 0702 PFR File, Tab 5 at 3. His surviving spouse, Phyllis Okello, moved to be named the substitute appellant. 0702 PFR File, Tab 7. In her motion, dated November 26, 2013, Mrs. Okello stated that she continued to contact OPM after her husband’s death but had not received a final decision. 0702 PFR File, Tab 7 at 2. On remand, the administrative judge should determine whether Phyllis Okello is the proper party for substitution under [5 C.F.R. § 1201.35](#)(a).

### ANALYSIS

¶13 The Board’s jurisdiction to adjudicate FERS appeals derives from statute:

[A]n administrative action or order affecting the rights or interests of an individual or the United States under [FERS] administered by [OPM] may be appealed to the Merit Systems Protection Board under procedures prescribed by the Board.

[5 U.S.C. § 8461](#)(e)(1).

¶14 For purposes of OPM decisions under FERS, the Board has recognized three situations in which OPM is deemed to have issued an appealable decision. *See*

*Ghannam v. Merit Systems Protection Board*, 527 F. App'x 862, 864-65 (Fed. Cir. 2013) (nonprecedential). Two of those situations are prescribed by OPM's regulations: OPM may either (1) issue a reconsideration decision under [5 C.F.R. § 841.306](#) or (2) issue an initial decision without reconsideration rights under [5 C.F.R. § 841.307](#). Either type of decision is final and appealable to the Board under [5 C.F.R. § 831.308](#).<sup>2</sup> See [5 C.F.R. §§ 831.306\(e\), .307](#). The third situation derives from Board case law. Specifically, the Board will take jurisdiction over an appeal concerning a retirement matter in which OPM has refused or improperly failed to issue a final decision. *E.g.*, *McNeese v. Office of Personnel Management*, [61 M.S.P.R. 70](#), 74, *aff'd*, 40 F.3d 1250 (Fed. Cir. 1994) (Table). In other words, even an initial decision subject to reconsideration or the absence of any decision at all may, under appropriate circumstances, constitute a final “administrative action or decision” under [5 U.S.C. § 8461\(e\)\(1\)](#).<sup>3</sup>

¶15 In this case, it is undisputed that OPM has not issued a final decision under [5 C.F.R. § 841.308](#). Nevertheless, we find that, under the totality of the circumstances, OPM's failure to act on this matter constitutes an appealable administrative action affecting the appellant's rights under FERS and that the Board has jurisdiction over this appeal. See [5 U.S.C. § 8461\(e\)\(1\)](#). In reaching our decision, we have considered that this matter has been going on for a very

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<sup>2</sup> By contrast, an OPM initial decision subject to reconsideration is not a final decision appealable to the Board under OPM's regulations. [5 C.F.R. § 831.305\(b\)](#).

<sup>3</sup> The Board has sometimes treated “final decision” and “reconsideration decision” synonymously. See, *e.g.*, *Adkins v. Office of Personnel Management*, [104 M.S.P.R. 206](#), ¶ 5 (2006) (“[T]he Board ordinarily lacks jurisdiction to consider an issue not addressed by OPM in a reconsideration decision.”); *Turner v. Office of Personnel Management*, [60 M.S.P.R. 55](#), 60-61 (1993) (“It is well settled that the Board has jurisdiction over a retirement appeal only where OPM has issued a reconsideration decision.”). As explained above, the Board has jurisdiction over an OPM “final decision” regardless of whether it was issued in the form of a “reconsideration decision.” The relevant inquiry is whether OPM has issued a “final decision” under [5 C.F.R. § 841.308](#)—not whether it has issued a “reconsideration decision” under [5 C.F.R. § 841.306](#).

long time—more than 6 years since OPM first determined that Mr. Okello had received an annuity overpayment. 0267 IAF, Tab 3, Subtab 5 at 16-17; *see Easter v. Office of Personnel Management*, [102 M.S.P.R. 568](#), ¶ 9 (2006) (it appeared from an 18-month delay in addressing the appellant’s disability retirement application that OPM had simply declined to adjudicate it). We have also considered that Mr. Okello diligently sought a final decision from OPM throughout that period, but to no avail. *See Ramirez v. Office of Personnel Management*, [114 M.S.P.R. 511](#), ¶ 10 (2010). We have considered OPM’s representation that it still intends to issue a further decision in this matter. 0702 IAF, Tab 8. This would normally weigh significantly against the Board taking jurisdiction over the appeal. *See Rorick v. Office of Personnel Management*, [109 M.S.P.R. 597](#), ¶ 5 (2008). However, in light of the facts described above, especially OPM’s promise well over a year ago to issue a new decision “shortly,”<sup>4</sup> 0702 IAF, Tab 4, we have little confidence that OPM will follow through with its stated intention.

¶16 OPM is the agency with primary statutory authority to adjudicate FERS annuity cases and to issue related regulations. [5 U.S.C. § 8461](#)(b), (c), (g). We will not lightly assume jurisdiction over a FERS annuity appeal outside the explicit language of those regulations. Nevertheless, the Board has statutory

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<sup>4</sup> According to the administrative judge, it appears to be OPM’s custom not to issue decisions in retirement cases that are in active litigation before the Board. 0702 IAF, Tab 18 at 8 n.3. Although this may be true, and although it may be a sensible policy in general, we find that it is not an adequate justification for the delays in this case. Specifically, OPM has instigated much of the litigation in this matter, including the instant appeal, by issuing and then rescinding decisions, erroneously notifying Mr. Okello that an informational letter was a “final decision,” and notifying Mr. Okello of actions against his annuity without informing him of reconsideration rights. *Supra* ¶¶ 3-11. Litigation resulting from OPM’s own administrative missteps is not a sufficient reason for it to avoid issuing a final decision for more than 6 years. Moreover, OPM’s policy of suspending administrative processing during active litigation does not explain why it did not issue a final decision during the 19-month period from July 2010 to February 2012, during which there was no litigation, especially since it had promised to issue such a decision “promptly.” *See supra* ¶¶ 7-8.

mandates of its own, including the mandate to adjudicate appeals of OPM actions or decisions affecting FERS annuitants, [5 U.S.C. §§ 1204\(a\)\(1\)](#), 8461(e)(1), and the mandate to expedite the proceedings before it, [5 U.S.C. § 7701\(i\)\(4\)](#); *see Phillips v. Veterans Administration*, [21 M.S.P.R. 409](#), 412 (1984). Moreover, Mr. Okello had a right to have this case adjudicated under the law, and a dismissal at this stage could effectively prevent an appellant from obtaining adjudication of his claim. *See McLaughlin v. Office of Personnel Management*, [62 M.S.P.R. 536](#), 546-47 (1994), *aff'd*, 47 F.3d 1181 (Fed. Cir. 1995) (Table). Under the unusual and compelling circumstances of this case, we find that OPM has effectively abdicated its role of adjudicating this claim. OPM's inaction is tantamount to an administrative action or order affecting the appellant's rights under FERS, *see* [5 U.S.C. § 8461\(e\)\(1\)](#), and, therefore, this matter is properly before the Board.

### ORDER

¶17 We remand this appeal for an adjudication of the merits. Because OPM has failed for 6 years to render and stand behind even an initial decision in this case, the administrative judge shall determine whether Phyllis Okello is the proper party for substitution and adjudicate the matter in the first instance. *See Easter*, [102 M.S.P.R. 568](#), ¶ 9.

FOR THE BOARD:

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