

**UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD  
DENVER FIELD OFFICE**

ROSEMARIE AMARAL,  
Appellant,

DOCKET NUMBER  
DE-844E-05-0315-I-1

v.

OFFICE OF PERSONNEL  
MANAGEMENT,  
Agency.

DATE: August 5, 2005

(CSA8231109)

Mitchell Kastner, Esquire, Somerset, New Jersey, for the appellant.

Peggy G. Smith, Washington, D.C., for the agency.

**BEFORE**

James A. Kasic  
Administrative Judge

**INITIAL DECISION**

The appellant untimely appealed from the June 21, 2004 reconsideration decision by the Office of Personnel Management (OPM) that denied her application for disability retirement benefits under the provisions of the Federal Employees' Retirement System (FERS). *See* 5 U.S.C. § 8451(a)(2)(C) and 5 C.F.R. § 841.308 (the Board has jurisdiction over a final OPM decision affecting an individual's rights and interests under FERS). The hearing in this appeal was held telephonically on July 28, 2005, and the record closed at the conclusion of the hearing. For the reasons discussed below, OPM's decision is REVERSED.

## ANALYSIS AND FINDINGS

### Good cause to excuse untimely filing

During the processing of this appeal, OPM moved to dismiss the appeal as untimely filed, noting that its reconsideration decision was issued on June 21, 2004, and the appeal was not filed until May 5, 2005, over nine months late. *See* 5 C.F.R. § 1201.22(b) (an appeal is to be filed within 30 days of receipt of OPM's decision). Although I erred by not previously documenting my ruling in the record, I found during my June 22, 2005 telephonic conference with the parties that the appellant had shown good cause to excuse the untimely filing. *See* Appeal File, Tab 10.

The appellant did so by showing that: 1) after receiving OPM's initial denial of her disability claim in early April 2004, she filed for reconsideration and submitted more information with the assistance of a Postal Service human resources specialist (HR specialist); 2) in late June 2004, the HR specialist informed her that OPM would likely take six months to respond to the reconsideration request; 3) she contacted the HR specialist in August 2004 to see if the HR specialist had heard anything from OPM and to notify the HR specialist that she was moving from New York to Colorado; 4) the HR specialist did not inform her that OPM had issued its reconsideration decision; 5) she attempted on numerous occasions in September, October, and November to contact OPM at a listed telephone number but could neither speak with a live person or leave a message; 6) on December 14, 2004, she wrote OPM and notified it of her new address in Colorado; 7) in January 2005, the appellant sent OPM a letter requesting information on the status of her disability-retirement claim; 8) in late February 2005, an OPM representative informed the appellant that OPM had denied her claim; 9) she asked for a copy of that decision, but did not receive one until April 22, 2005; and 10) the appellant retained counsel and filed her appeal on May 5, 2005. *See* Appellant's Affidavit, at Appeal File, Tab 8; *see also*

Appellant's December 14, 2004 notification of change of address, at Appeal File, Tab 9, Subtab A, at p. 10.

I find that the facts set forth above show that the appellant was diligent in checking on the status of her reconsideration request and took reasonable steps to inform OPM of her change of address. Yet, through administrative error, OPM did not provide her with a copy of its June 2004 reconsideration decision until late April 2005 and she promptly filed her appeal within two weeks of her receipt of the decision. Thus, I find that she has shown good cause to excuse the untimely filing of the appeal. *See Woodyard-Hamilton v. Office of Personnel Management*, 64 M.S.P.R. 150, 155 (1994) (the delayed delivery of an OPM reconsideration decision is a factor in determining whether good cause exists for the untimely filing of a petition for appeal).

Applicable law as to the merits of the appeal

In an appeal from OPM's denial of a voluntary disability retirement application, an appellant bears the burden of persuasion by a preponderance of the evidence. *See* 5 C.F.R. § 1201.56(a)(2); *Chavez v. Office of Personnel Management*, 6 M.S.P.R. 404, 417 (1981). To qualify for disability retirement benefits under FERS, an appellant must establish that: 1) she has completed 18 months of creditable civilian service; 2) while employed in a position subject to FERS, she has become disabled because of a medical condition resulting in a deficiency in performance, conduct, or attendance, or, if there is no such deficiency, the disabling medical condition is incompatible with either useful and efficient service or retention in the position; 3) the disabling medical condition is expected to continue for at least one year from the date the application for disability retirement is filed; 4) accommodation of the disabling medical condition in the position is unreasonable; and 5) she has not declined a reasonable offer of reassignment to a vacant position. *See* 5 U.S.C. § 8451; 5 C.F.R. § 844.103(a); *Wilkey-Marzin v. Office of Personnel Management*, 82 M.S.P.R. 200, ¶ 4 (1999). Further, as OPM stresses in this case, the Board has uniformly

held that the relevant position for determining whether an appellant is entitled to disability retirement is her position of record (*i.e.*, the position to which she was officially assigned before ceasing to work at her employing agency). *See Ancheta v. Office of Personnel Management*, 92 M.S.P.R. 640, 647 (2002) (citing *Norvell v. Office of Personnel Management*, 79 M.S.P.R. 350, 352 (1998), *after remand*, 95 M.S.P.R. 343 (2003)).

#### Background and position of the parties

The instant case presents a unique factual situation. For several years, ending on March 12, 2004, the appellant worked as a Data Conversion Operator, at the U.S. Postal Service's Remote Encoding Center in Fishkill, New York. In this position, she typed or "keyed in" mailing addresses that could not be read by the Postal Service's automated systems, thus enabling the delivery of previously undeliverable mail. Ultimately, however, advances in the Postal Service's automated systems made the Fishkill facility obsolete and the Postal Service set March 12, 2004, as the date for its closure. In closing the Fishkill facility, rather than running a reduction-in-force (RIF) action, the Postal Service set in place a process to reassign all Fishkill employees to other positions.

Here, like other employees, the appellant was informed of letter carrier, mailhandler, and clerk positions within the commuting area and afforded the opportunity to bid on those positions based on her seniority. In fall of 2003, she successfully bid a window clerk position at a Postal Service Store in the Palisades Mall, in West Nyack, New York. Prior to being placed in this position, however, the Postal Service required her to be found physically qualified to perform the duties of the clerk position. Based on her long-standing asthmatic condition, the Postal Service's medical review board accepted the findings of Gerald Signer, M.D., a Board-certified internist who contracted with the Postal Service to examine employees, that the appellant could not meet the physical requirement necessary to be a window clerk (or for that matter any other clerk, letter carrier, or mailhandler position). Specifically, the Board accepted Dr. Signer's findings

that the appellant could not meet the physical requirements for the window clerk position because she could not: 1) work in an environment with any dust or chemical odors; 2) walk or stand for more than two hours per shift; 3) lift more than 20 pounds on a repeated basis; 4) be exposed to cold air; 5) bend, stoop, or twist for more than one hour per shift; and 6) work any overtime. *See* Hearing Testimonies of Gerald Signer, M.D., and Rosemarie Amaral, at Hearing Tape, Appeal File, Left Inside Cover.

As a result, effective March 13, 2004, the day after her data clerk position (and the Fishkill facility) ceased to exist, the Postal Service removed the appellant for “failure to meet the requirements of available positions for which you are eligible.” *See* Appellant’s Exhibit 4, at Appeal File, Tab 14.

Given this background, OPM argues that the appellant’s position of record was her data clerk position and that it correctly denied her disability-retirement application because she successfully performed her duties in that job until the Fishkill facility closed. *See Ancheta*, 92 M.S.P.R. at 647 (the relevant position for determining whether an appellant is entitled to disability retirement is her position of record). In contrast, the appellant contends that her data transcription position no longer existed when she was removed for failing to physically qualify for any craft position with the Postal Service. Thus, she contends that because the Postal Service removed her for physical-inability-to-perform reasons, she is entitled to the requested disability-retirement annuity. *See Bruner v. Office of Personnel Management*, 996 F.2d 290, 294 (Fed. Cir. 1993) (an employee’s removal for physical inability to perform the essential functions of his position constitutes prima facie evidence that he is entitled to disability retirement).

The appellant has proven her entitlement to disability retirement benefits.

Clearly, OPM is correct that a long line of Board cases establish that an employee’s position of record that is controlling when determining that employee’s entitlement to disability-retirement benefits. On the unique facts of this case, however, I disagree with OPM that the appellant’s position of record

was the data clerk position. Rather, as noted above: 1) the data clerk position had ceased to exist when the appellant was removed, since the Fishkill facility closed the day before she was removed; 2) the Postal Service removed the appellant for “failure to meet the requirements of available positions for which you are eligible;” 3) prior to taking this action, the Postal Service had gone through an extended process where it afforded either clerk, letter carrier or mailhandler positions to all Fishkill employees found physically qualified for those positions;<sup>1</sup> and 4) based on her seniority, the appellant successfully bid for the window clerk position at the Palisades Mall, but was ultimately denied the opportunity to perform in that position based on the Postal Service’s determination that she could not perform the duties of that or other available positions. I find that these facts show that the appellant was in the unusual position of not having a position of record at the time she was removed. Further, as discussed more fully below, she presented overwhelming evidence that she could not perform any of the many available positions that the Postal Service offered to all Fishkill employees. In such a unique situation, I find that she has shown that she is entitled to the requested disability-retirement annuity as an employee who had no position of record and who was physically unable to perform any of the available vacant positions for which she otherwise qualified.

Specifically, as to her inability to perform the duties of the clerk, letter carrier, or mailhandler positions, I accept the testimony of Dr. Signer. As a contract physician with the Postal Service for eighteen years, he was well-versed in the physical requirements for clerks, letter carriers, and mailhandlers. Further, as noted above, he found that the appellant’s longstanding asthma prevented the

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<sup>1</sup> In such a situation, these vacant positions met the definition of vacant positions set forth by the Federal Circuit in *Bracey v. Office of Personnel Management*, 236 F.3d 1356, 1359 (Fed. Cir. 2001), inasmuch as they were established positions that were graded and classified and not informal assignments of work. *See also Ancheta*, 95 M.S.P.R. at 349-52 (applying *Bracey* to Postal Service employees).

appellant from performing the common duties of all of the available positions which involved moderate, yet repeated lifting, bending, and twisting, walking and standing for periods, and some exposure to cold weather and various odors. Indeed, Dr. Signer's findings were confirmed by a Postal Service Medical Board. *See* Hearing Testimony of Gerald Signer, M.D.; *see also* Appellant's Exhibits 1 and 2, at Appeal File, Tab 14. Finally, Dr. Signer's findings are consistent with the testimonies of the appellant and her supervisor in the data clerk position that even to accomplish the less physically demanding duties of that job, she was afforded several accommodations, including: 1) the liberal granting of approved absences (the appellant was permitted to use over thirty days of sick or uncompensated leave in the year before her removal); and 2) moving the appellant to different locations in the Fishkill facility when she was affected by the perfume, hairspray or other mild odors from coworkers. *See* Hearing Testimonies of Elizabeth McNear and Rosemarie Amaral.

In sum, I find that the appellant has shown that 1) she has completed over eight years of creditable civilian service; 2) although she lacked a position of record when removed from her employing agency, she has satisfied the requirement of becoming disabled because of a medical condition that is incompatible with either useful and efficient service or retention all vacant positions to which she had entitlement while employed; 3) the disabling medical condition has continued for far more than one year from the date the application for disability retirement was filed; 4) accommodation of the disabling medical condition in the position is unreasonable; and 5) she did not decline a reasonable offer of reassignment to a vacant position. Accordingly, she is entitled to the requested FERS-based disability retirement.

### **DECISION**

OPM's reconsideration decision is REVERSED.