

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

69 M.S.P.R. 115

Docket Number PH-831E-95-0106-I-2

**KAREN R. GOMETZ, Appellant,**

**v.**

**OFFICE OF PERSONNEL MANAGEMENT, Agency.**

**(CSA 3 554 180)**

Date: July 12, 1995

Charles H. Allenberg, Esquire, Neil C. Bonney & Associates, Virginia Beach, Virginia, for the appellant.

Thomas Styer, Washington, D.C., for the agency.

**BEFORE**

Ben L. Erdreich, Chairman  
Beth S. Slavet, Vice Chair  
Antonio C. Amador, Member

**OPINION AND ORDER**

This case is before the Board upon a timely petition by the Office of Personnel Management (OPM) seeking review of the June 13, 1995 initial decision that reversed its reconsideration decision denying the appellant's application for disability retirement. For the reasons discussed below, we DENY OPM's petition for failure to meet the criteria for review under 5 C.F.R. § 1201.115. We REOPEN this case on the Board's own motion under 5 C.F.R. § 1201.117, however, and AFFIRM the initial decision as MODIFIED by this Opinion and Order, still REVERSING OPM's reconsideration decision.

**BACKGROUND**

The appellant, a WG-10 Sheet Metal Mechanic, timely appealed OPM's reconsideration decision that denied her application for disability retirement, which she based on a pinched nerve in her neck that affected both of her hands and forearms. Appeal File (AF), Tab 1 and Tab 4, Subtab A. The

appellant's appeal was dismissed without prejudice based on medical reasons, and she timely refiled her appeal. See AF, Tab 13; Appeal File 2 (AF 2), Tab 1. The appellant's disability retirement application was dated August 3, 1994, prior to her September 12, 1994 separation by reduction in force (RIF). See AF, Tab 4, Subtab B.

In denying the appellant's disability retirement application, OPM's reconsideration decision stated the following reasons: (1) The appellant's supervisor did not document a service deficiency in her performance, attendance, or conduct, stating that she was successfully performing her duties prior to her RIF and that he was unaware that she had medical restrictions; (2) the medical evidence established that the appellant had "a history of Syringomyelia, cervical cord that required surgery on June 25, 1986," but did not establish that her condition was sufficiently severe to prevent her from continuing to perform useful and efficient service in her position; and (3) her employing agency's obligation to accommodate her or to reassign her to a suitable position was contingent upon her demonstration of a disabling medical condition and, because she did not show that she had such a condition, accommodation or reassignment was not warranted. AF, Tab 4, Subtab B. The appellant requested and was granted a hearing.

In the initial decision, the administrative judge reversed OPM's reconsideration decision. She found that the appellant established that she was disabled for her position, that she was reasonably accommodated based on the assistance provided her by her co-workers, and that her accommodation did not continue because she was separated by RIF. Therefore, the administrative judge concluded that the appellant was entitled to disability retirement. Initial Decision at 3-11.

In its petition for review, OPM contends that the administrative judge erred by finding that the appellant was disabled for useful and efficient service and by finding that, although the appellant was accommodated, she was entitled to disability retirement based on the RIF. OPM also contends that the administrative judge's decision is inconsistent with Board precedent and other initial decisions. The appellant has timely responded in opposition to the petition for review. Both OPM and the appellant have filed untimely additional submissions.

## **ANALYSIS**

The appellant established that she is entitled to disability retirement because she showed that she is suffering from a medical condition that is incompatible with useful and efficient service in her Sheet Metal Mechanic position and, irrespective of the RIF, her employing agency had no continuing accommodations for her.

In order to prove entitlement to disability retirement, an employee must show, *inter alia*, that the employee is "unable, because of disease or injury, to render useful and efficient service in the employee's position and is not qualified for reassignment ... to a vacant position which is in the agency at the same grade or level and in which the employee would be able to render useful and efficient service." 5 U.S.C. § 8337(a). "The [employee] must ... have become disabled because of a medical condition, resulting in a service deficiency in performance, conduct, or attendance, or if there is no actual service deficiency, the disabling medical condition must be incompatible with either useful and efficient service or retention in the position." 5 C.F.R. § 831.1203(a)(2). Also, if this criteria is met, the employee must also show that "[t]he employing agency must be unable to accommodate the disabling medical condition in the position held or in an existing vacant position." 5 C.F.R. § 831.1203(a)(4). A determination of disability is to be based on: (1) Objective clinical findings; (2) diagnoses and expert medical opinions; and (3) subjective evidence of pain and disability, as well as all evidence showing the effect of the appellant's condition upon her ability to perform in the grade or class of position she last occupied. *Biscaha v. Office of Personnel Management*, 51 M.S.P.R. 304, 311 (1991).

Here, in finding that the appellant established that she was unable to render useful and efficient service in her position, the administrative judge relied on medical opinions, clinical findings, physical therapy reports, the appellant's own testimony, and the testimonies of other witnesses. See Initial Decision at 4-9. Specifically, the administrative judge relied on a July 26, 1994 report by Dr. Berkley Rish. In that report, Dr. Rish diagnosed the appellant with "syringomyelia, cervical spinal cord, Arnold Chiari I malformation, status posterior fossa, and cervical spine decompression, evacuation of syrinx and shunting." AF, Tab 4, Subtab B; AF 2, Tab 1. Dr. Rish found that the appellant was suffering from "wasting of the muscles of the right hand with numbness, plus associated numbness and weakness of the left hand," and "pain across the base of her neck and shoulders." AF, Tab 4, Subtab B; AF 2, Tab 1. Dr. Rish also noted that his findings were supported by Magnetic Resonance Imaging (MRI) scanning. AF, Tab 4, Subtab B; AF 2, Tab 1. Further, Dr. Rish reported that the appellant underwent surgery for her condition and that she was progressing satisfactorily and was stable, but stated that she suffers from permanent neurological problems, i.e., "atrophy of the right forearm and hand ... minimal atrophy and weakness (4/5) of the left hand," and "disassociated sensory loss involving both hands." AF, Tab 4, Subtab B; AF 2, Tab 1. Dr. Rish concluded that the appellant could work under specified physical restrictions. AF, Tab 4, Subtab B; AF 2, Tab 1; See also Initial Decision at 4-5.

The administrative judge also relied on an April 26, 1994 medical report by Dr. Jerry Penix. See Initial Decision at 5. In his report, Dr. Penix stated that MRIs of the appellant's cervical spine performed subsequent to the appellant's June 1986 surgery showed, inter alia, that the appellant still had Chiari I malformation. AF, Tab 4, Subtab B. Dr. Penix further found that the appellant had "exhibit[ed] the residuals of symptomatic intramedullary c[er]vical cord expansion with persistence of intrinsic muscle atrophy in her hands, right worse than left, with sensory dissociation pattern" and that "those deficits [were] fixed and permanent." *Id.* He stated that whether the appellant was disabled depended on her job description and assignments. *Id.* See also Initial Decision at 5.

Further, the administrative judge relied on a January 9, 1995 report by Dr. Laurie Lindblom. Initial Decision at 5. In her report, Dr. Lindblom stated that the appellant's disability in her right hand was stable and permanent and that she was not qualified for the Sheet Metal Mechanic position because she could not safely perform the duties, which Dr. Lindblom had reviewed, because of the appellant's coordination, strength, and sensory deficiencies. AF 2, Tab 1; See also Initial Decision at 5.

In addition, the administrative judge considered May 21, 1986 and November 4, 1994 physical therapy reports, which stated, inter alia, that the appellant showed "extremely promising hand coordination and speed" but that she had decreased strength and motion range in her fingers and dull responses to stimuli. Initial Decision at 6; See also, e.g., AF 2, Tab 1.

Together with the medical and physical therapy evidence, the administrative judge considered the appellant's testimony regarding her condition and her requests for assistance, the assistance provided her in performing her duties, the lighter duties provided her by her supervisor, as well as the testimonies of her co-workers, all of which supported her claim of a service deficiency. The administrative judge noted that the appellant's first-level supervisor testified that the appellant did not inform him of her medical restrictions but that he admitted that he never observed the appellant lift objects over 45 pounds or perform work over her shoulders, and that he never assigned her such duties. The administrative judge further noted that the appellant's second-level supervisor stated that he also was unaware of the appellant's medical restrictions but that he nevertheless acknowledged that those restrictions would have made it difficult for her to perform in her Sheet Metal Mechanic position and that he would not have assigned her to that position given her medical restrictions. The administrative judge noted, moreover, that the appellant's second-level supervisor also never observed her lift over 45 pounds, and the appellant stated that she was not aware that he ever observed her using tools. Thus, the administrative judge concluded that the appellant was disabled for her position. Initial Decision at 6-9.

OPM does not challenge the medical evidence documenting the appellant's medical condition. OPM contends, however, that the administrative judge misinterpreted 5 U.S.C. § 8337(a) by finding that the appellant could not render useful and efficient service in her position. It argues that the appellant was performing her duties successfully, with assistance, and was never required to work outside her restrictions. OPM maintains that the administrative judge erred by finding that, because the appellant was not performing the full range of her duties, she was not performing useful and efficient service. OPM further contends that the administrative judge erred by concluding that, even though the appellant's employing agency had accommodated her, she was nevertheless entitled to disability retirement based on her RIF. It argues that the appellant's accommodation would have continued but for the RIF and that her separation was due, not to the agency's inability to accommodate her, but to the RIF. OPM therefore maintains that the appellant did not meet her burden of proving that her accommodation would not have continued but for the RIF. Petition for Review (PFR) File, Tab 1 at 7-8, 11-12.

We find that, although the appellant's disability did not result in a documented service deficiency in performance, attendance or conduct, it was incompatible with either useful and efficient service or retention in her Sheet Metal Mechanic position. See 5 U.S.C. § 8337(a); 5 C.F.R. § 831.1203(a). In addition to the above medical evidence considered by the administrative judge, we note that the position description for Sheet Metal Mechanic requires numerous skills for which hand and finger dexterity is essential, including: Using geometry and trigonometry to lay out flat forms which must be bended, seamed, and joined to form three-dimensional shapes; joining parts by riveting, bolting, screwing, spotwelding, and soldering; assembling, modifying, installing, and repairing various sections into sheet-metal products; and using punches, drills, tops, chisels, groovers, hammers, mallets, rivet rolls, saws, brakes, bending machines, notch and punch machines, and other metal working machines. The physical requirements of the position included: Lifting and carrying objects of 45 pounds or over; reaching above the shoulder; having use of fingers and both hands and both legs; and performing in extreme heat and cold. AF, Tab 4, Subtab B, Exhibit 3.

In her disability retirement application, the appellant alleged that she had "surge" in her head, neck, and back that caused pain. She stated that she was unable to use her right hand on a continual basis to write, type, hold objects, perform work that required strength or dexterity, or pick up or manipulate small objects. She claimed that she did not have full use of her fingers and could not maintain a continuous grip such as was necessary to use a hammer, pliers, or screwdriver, or pneumatic or electrical tools. She also stated that she was unable to work in moderate cold and was unable to

work with vibrating tools, carry objects on stairs, work on or climb ladders, or work on slippery or uneven work surfaces. The appellant asserted that she was prone to cuts and burns because of loss of feeling in her hands and that she could not work with her arms above her shoulders or work with her head, neck, shoulders, and arms in awkward positions. AF, Tab 4, Subtab B. The medical reports buttress the appellant's claims. For instance, the appellant was permanently medically restricted in: Working or reaching above shoulder level; working with the head, neck, and shoulders in cramped or awkward positions; lifting or carrying while on ladders or stairwells; and lifting or carrying over 30 pounds at floor level. See AF, 2, Tab 1, Dr. Rish's April 7, 1993 report. Thus, we find that the appellant established that she is disabled for her Sheet Metal Mechanic position.

An applicant for disability retirement who can perform assigned limited duties as an accommodation must, however, show by preponderant evidence that such limited-duty status will not continue and that there is no suitable vacant position to which the applicant can be reassigned. *Malan v. Department of the Air Force*, 55 M.S.P.R. 283, 295-96 (1992); *Thomas v. Office of Personnel Management*, 30 M.S.P.R. 153, 155-56 (1986); See also *Benjamin v. Office of Personnel Management*, 45 M.S.P.R. 187, 191 & n.2 (1990); *Noyer v. Office of Personnel Management*, 44 M.S.P.R. 336, 339 (1990).

Here, the administrative judge found that the appellant was entitled to disability retirement because her accommodation did not continue as a result of the RIF. See Initial Decision at 10-11. We find, however, that, where a RIF is not conducted with respect to a position or class of positions that was provided for purposes of accommodation, e.g., light-duty positions, or is not limited to a regular position which was affording accommodation, the fact that the RIF occurred does not establish that an appellant is entitled to disability retirement merely because accommodation will not continue; if the RIF would have occurred regardless of the accommodation being afforded to the appellant, the appellant does not, by mere virtue of the RIF, meet the requirements for disability retirement. This holding is consistent with our decisions in *Benjamin*, 45 M.S.P.R. at 192 (the appellant was entitled to disability retirement because he could not perform the duties of his regular position and the light-duty assignments afforded him as accommodation were temporary); and *Thomas*, 30 M.S.P.R. at 156 (the appellant was entitled to disability retirement because he could not perform the duties of his regular position, his light-duty position was eliminated by RIF, and there were no other positions to which he could be assigned).

In this case, the fact that the appellant's second-level supervisor testified that he was unaware of her restrictions, would not have assigned her to sheet metal duties had he known of them, and was unaware of the accommodation being given to her is indicative of the fact established by

other testimony that the accommodation afforded the appellant was totally dependent on the good will and actions of her co-workers and, on occasion, her first-level supervisors. See Initial Decision at 6-9; Hearing Tape (HT), 1A-2A. There was no formal acknowledgment by the employing agency of any accommodation afforded the appellant. See Initial Decision at 6-9; HT, 1A-2A.

Further, the appellant established through testimony and documentation presented by the employing agency's employee relations specialist and responsible certifying official, William Cayton, that, at the time of her separation, there was no vacant position at the same grade and pay level as the WG-10 Sheet Metal Mechanic position to which the employing agency could have reassigned her. See *Park v. Office of Personnel Management*, 38 M.S.P.R. 426, 428 (1988). We note that, on the Agency Certification of Reassignment and Accommodation Efforts, Mr. Cayton stated that the appellant was separated by RIF and that accommodation was not applicable. See AF, Tab 4, Subtab B. While Mr. Cayton did not complete the section on reassignment efforts, See *id.*, he testified that the severity of the appellant's condition would have prevented her accommodation by the employing agency. HT, 1A.

Here, at the time of her application, the appellant's disability was such that her employing agency was unable to accommodate her in her Sheet Metal Mechanic position beyond temporary accommodations. Indeed, the appellant worked in a temporary position for the three months preceding her separation. See HT, 1B-2A. The Board has held, however, that temporary accommodation is not sufficient accommodation of a disability. See *Malan*, 55 M.S.P.R. at 295-96; *Benjamin*, 45 M.S.P.R. at 192. Further, the accommodation afforded the appellant was not only temporary but was also uncertain, haphazard, and informal. See HT, 1A-2A. Thus, we find that, in this case, the appellant qualifies for disability retirement, not because the RIF prevented continuing accommodation of her medical condition, but because she showed that, even in the absence of the RIF, she had a permanently disabling condition and there were no continuing accommodations for her in the position of Sheet Metal Mechanic. Accordingly, we find that the appellant is entitled to disability retirement irrespective of the RIF.

With respect to the parties' untimely additional submissions, See PFR File, Tabs 4-6, we have not considered them in reaching our decision. We find that the parties filed these submissions beyond the August 11, 1995 date for the close of the record set in the July 18, 1995 notice issued by the Clerk of the Board and that the parties have not shown that the information contained in their submissions was unavailable before the record closed on review. See 5 C.F.R. § 1201.114(i); PFR File, Tab 2.

## ORDER

We ORDER the agency to award the appellant disability retirement benefits. The agency must complete this action within 20 days of the date of this decision.

We also ORDER the agency to inform the appellant of all actions taken to comply with the Board's order and of the date on which it believes it has fully complied. See 5 C.F.R. § 1201.181(b). We ORDER the appellant to provide all necessary information that the agency requests in furtherance of compliance. The appellant should, if not notified, inquire about the agency's progress. *Id.*

Within 30 days of the agency's notification of compliance, the appellant may file a petition for enforcement with the regional office to resolve any disputed compliance issue or issues. The petition should contain specific reasons why the appellant believes there is insufficient compliance, and should include the dates and results of any communications with the agency about compliance. See 5 C.F.R. § 1201.182(a).

This is the Board's final order in this appeal. 5 C.F.R. § 1201.113(c).

### NOTICE TO APPELLANT REGARDING FEES

You may be entitled to be reimbursed by the agency for your reasonable attorney fees and costs. To be reimbursed, you must meet the criteria set out at 5 U.S.C. §§ 7701(g) or 1221(g), and 5 C.F.R. § 1201.37(a). If you believe you meet these criteria, you must file a motion for attorney fees WITHIN 35 CALENDAR DAYS OF THE DATE OF THIS DECISION. Your attorney fee motion must be filed with the regional office or field office that issued the initial decision on your appeal.

### NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. See 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals  
for the Federal Circuit  
717 Madison Place,  
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. § 7703(b)(1).

For the Board  
Robert E. Taylor, Clerk  
Washington, D.C.