



3 of 5 DOCUMENTS

FAYETTA MULLINS-HOWARD, Appellant, v. OFFICE OF PERSONNEL MAN-
AGEMENT, Agency. CSA 8 053 099

DOCKET NUMBER DC-831E-95-0427-A-1

MERIT SYSTEMS PROTECTION BOARD

71 M.S.P.R. 619; 1996 MSPB LEXIS 961

October 7, 1996

COUNSEL:

[**1]

Leizer Z. Goldsmith, Esquire, Washington, D.C., for the appellant.

Charlretta T. McNeill, Washington, D.C., for the agency.

OPINION:

[*622] BEFORE

Ben L. Erdreich, Chairman

Beth S. Slavet, Vice Chair

Antonio C. Amador, Member

Member Amador issues a dissenting opinion.

OPINION AND ORDER

The appellant has petitioned for review of an initial decision, issued November 3, 1995, that denied her motion for attorney fees. For the reasons discussed below, we GRANT the appellant's petition, REVERSE the initial decision, FIND that an award of attorney fees is warranted in the interest of justice, and REMAND the case to the regional office for a determination as to the amount of attorney fees to be awarded.

BACKGROUND

The appellant was a Computer Specialist (Programmer), GS-13, with the Tax Division of the Department of Justice. On October 28, 1993, she sustained injuries in an automobile accident. She applied for disability retirement on July 5, 1994, citing both physical and psychological conditions. In support of her application, she submitted medical reports from two health care providers regarding her psychological condition: from Dr. [**2] Parviz Sahandy, a psychiatrist, and from Dr. Matthew McDonald, a psychologist. n1

n1 In a subsequent letter to OPM, the appellant clarified that she was claiming disability because of her psychological condition, and was not relying on her back condition. *See* Attorney Fees File, Tab 1, Ex. 7, at 4.

Dr. Sahandy, in a report dated June 27, 1994, stated that he was treating the appellant for depression and acute anxiety. Attorney Fees File (AFF), Tab 1, Ex. 2. Dr. Sahandy reported that the appellant had not yet stabilized in her treatment, that he had tried several medications to relieve her depression without success, and that he had just prescribed a

new medication. *Id.* He said the new medication dulled the appellant's mind, made her unable to concentrate, and shortened her attention span. *Id.* Based on his observation of the appellant in therapy sessions, Dr. Sahandy said it was highly probable that the appellant would have a mental breakdown if she was subjected to additional stress, and stated that the "stress of driving, job requirements and responsibilities, deadlines and other efforts to perform would place too much stress on her at this time." *Id.* Dr. [**3] Sahandy estimated that the appellant's recovery would "take at least a year but is really undetermined and depends on her motivation." *Id.*

In a report dated August 26, 1994, Dr. McDonald made the following observations, diagnosis, and prognosis:

Ms. Mullins reports her emotional problems have resulted in dramatic disturbances in psychosocial functioning on several levels, to the point where she is unable to leave her home, go to work or [*623] speak with anyone other than her own family members (either in person or on the phone).

...

Most recently Ms. Mullins worked as a computer programmer and specialist for the Department of Justice, Tax Division, reaching the level of GS 13-02, however, Ms. Mullins reports that she has not been able to return to work since the car accident, nor is she able to work at home due to her inability to concentrate.

...

Despite pharmacological interventions, Ms. Mullins continues to (currently) suffer from severe anxiety and panic as well as nightmares.

Ms. Mullins is preoccupied with persistent thoughts and fears of some horrible accident happening to her or to members of her family. Her fears, generalized [**4] anxiety and preoccupations have developed with such severity and constancy that she has been unable to return to her job. She reports her agitation and nervousness cause her to commit multiple mistakes when attempting to perform tasks, lose the ability to concentrate and develop severe disturbances in memory.

As a result of the impact these problems have had on her work place performance, Ms. Mullins reports attempting to work out of her home at one point. This too was unsuccessful due to her nervousness, agitation and inability to concentrate or perform the most simple of tasks. Ms. Mullins has isolated herself to her home and reports to spend the majority of her time in her room...

Summary

Since the car accident ... Ms. Mullins' life has deteriorated on several levels of psychosocial functioning. Once a competent individual professionally, personally and socially, she is now unable to perform routines and responsibilities of daily living. Ms. Mullins suffers an inability to concentrate or focus her attention and is easily overwhelmed by multiple stimuli. As a result of the Posttraumatic Stress Disorder and Generalized Anxiety Disorder, Ms. Mullins has become significantly [**5] depressed, causing further disturbances in her ability to concentrate and her tendency to withdraw... A previously competent individual, Ms. Mullins now suffers significantly from symptoms which lead to shame and embarrassment, causing her to withdraw and isolate herself from friends and family.

Treatment, Diagnosis and Prognosis

Ms. Mullins suffers from Generalized Anxiety Disorder (300.02), Posttraumatic Stress Disorder (309.81) and Dependent Personality Disorder (301.6). Ms. Mullins also suffers from depression and an [*624] addiction to Xanax, both of which are being treated by another provider.

Her prognosis at this time is guarded due to the severity of her symptoms and the degree of incapacitation suffered. She is clearly disabled and currently unable to work even in the home. Ongoing long term individual and group psychotherapy should be initiated immediately.

In a letter to OPM dated October 31, 1994, the appellant supplemented her doctor's reports with a personal statement of how the accident of October 28, 1993 had affected her:

Since [the accident] I have had panic attacks. I cannot leave my home, nor can [*6] I drive... I am afraid of people, and places. I shake and sweat when I make an encounter with anyone except my husband... I don't see any friends, I don't answer the telephone or the doorbell. How this effects [sic] my ability to work should be clear. I am afraid of people, and I cannot concentrate nor can I even pretend to perform. I am afraid to leave my house under any circumstance. I do not [do] housework. I can't keep my mind on what I am doing. I cannot make decisions as simple as how to sort the laundry. I don't cook because I forget what I'm doing. I have started a stove fire because of forgetting that something was on the stove. The simplest task send[s] me to tears... My psychological problem has crippled me in all my day to day functions. I am a recluse. I am a hermit. I hide from society. My days are spend [sic] in my room in bed. I do not come out of my room unless I absolutely must.

AFF, Tab 1, Ex. 5.

OPM issued a final decision denying the appellant's claim on February 28, 1995, AFF, Tab 1, Ex. 7, and she filed a timely appeal with the Board's Washington Regional Office. During that proceeding, OPM stated that, upon review of additional medical [**7] evidence submitted by the appellant, it now found that she had established her entitlement to disability retirement benefits. Initial Appeal File (IAF), Tab 5. The administrative judge thereupon dismissed the appeal as moot. IAF, Tab 6.

In denying the appellant's motion for attorney fees, the administrative judge rejected the appellant's contention that an award of attorney fees would be in the interest of justice because OPM knew or should have known that it would not prevail on the merits at the time it issued its final decision. She found that the evidence before OPM at the time of its final decision was deficient in two respects. First, she found that the evidence did not establish that the appellant's psychological impairment would last for at least a year, as required by OPM's [*625] regulation at 5 C.F.R. § 831.1203(a). The administrative judge observed in this regard that, although Dr. Sahandy estimated that recovery would take "at least a year," he also stated that the recovery period "is really undetermined and depends on her motivation." The administrative judge found that Dr. Sahandy's report did not establish unequivocally that the appellant's medical condition [**8] could be expected to last at least one year. Initial Decision at 3. The administrative judge found that this element was only firmly established by the report of Dr. Susan Siegel, which was not submitted until after an appeal had been filed with the Board. *Id.*

The second deficiency the administrative judge found in the evidence available to OPM at the time of its final decision was that it did not demonstrate how the appellant's psychological impairments prevented her from performing the specific duties of her position as a Computer Specialist. Initial Decision at 3-4. The administrative judge found that this defect was not cured until the appeal before the Board, in which Dr. Siegel's report stated that she had reviewed the requirements of the appellant's position and opined that the appellant could not resume her prior employment, even with restrictions, and the appellant presented an affidavit from her supervisor detailing the specific job duties that she was unable to perform because of her medical condition. *See id.* n2

n2 The administrative judge also found that the appellant failed to show that an award of attorney fees was warranted in the interest of justice on the basis that OPM's decision was "clearly without merit." Initial Decision at 4-5. Because we find below that an award of attorney fees is warranted because OPM knew or should have known that it would not prevail on the merits, we need not address whether an award of attorney fees is also warranted in the interest of justice under the "clearly without merit" category.

[**9]

ANALYSIS

In order to be entitled to an award of attorney fees under 5 U.S.C. § 7701(g)(1), the appellant must show that: (1) an attorney-client relationship exists pursuant to which counsel rendered legal service on the appellant's behalf in connection with a Board proceeding; (2) she was a "prevailing party"; (3) the award of attorney fees is "warranted in the interest of justice"; and (4) the fees requested are "reasonable." *Allen v. U.S. Postal Service*, 2 M.S.P.R. 420, 427 & n.9

(1980). It is undisputed in this case that the appellant incurred attorney fees in connection with her appeal, and that she was a prevailing party.

In employee-initiated disability retirement appeals, an award of attorney fees is warranted in the interest of justice either when OPM knew or should have known that it would not prevail on the merits at the time it issued its final decision, or when OPM's decision [*626] is clearly without merit. *Kent v. Office of Personnel Management*, 33 M.S.P.R. 361, 366-67 (1987). A determination that an award is warranted under the "knew or should have known" category focuses on the nature and weight [**10] of the evidence available to OPM at the time it issued its final decision. *See id.* at 367. We find that the evidence available to OPM at the time it issued its final decision clearly established the appellant's entitlement to disability retirement benefits.

OPM's regulation provides that, to be qualifying for disability retirement, the medical condition must be expected to last for at least a year. 5 C.F.R. § 831.1203(a)(3). In his medical report of June 27, 1994, Dr. Sahandy stated that "recovery will take at least a year but is really undetermined and depends on [the appellant's] motivation." AFF, Tab 1, Ex. 2. We concur with the appellant that the most reasonable reading of this language was that Dr. Sahandy felt he was unable to predict how much longer than one year the appellant's recovery would take, but that such recovery would in any event take "at least a year." *See* Petition for Review File, Tab 1, at 18.

We also note that OPM, in a letter dated October 27, 1994, asked the appellant to provide documentation to support her claim of a psychological condition. *See* AFF, Tab 1, Ex. 4. The appellant responded to this letter on October 31, 1994, attempting [**11] to provide the information and documentation requested, including Dr. Sahandy's report. *Id.*, Ex. 5. In a second letter also dated October 31, 1994, addressed to the claims examiner's supervisor, the appellant asked to be advised if her documentation was deficient in any way so that she could provide the necessary information. *See* AFF, Tab 1, Ex. 6. Under these circumstances, we conclude that, if OPM believed Dr. Sahandy's statement as to the expected duration of the disability was ambiguous or otherwise insufficient, it had a duty to apprise the appellant of this fact, so that she could address it with additional evidence. *See Haywood v. Office of Personnel Management*, 65 M.S.P.R. 603, 611 (1994) (as the agency charged with the responsibility of administering civil service retirement laws, OPM has an affirmative duty to fully and accurately inform claimants of their rights and obligations); *Beasley v. Office of Personnel Management*, 43 M.S.P.R. 70, 74 (1989) (same); *cf. Smith v. Office of Personnel Management*, 34 M.S.P.R. 40, 45 (1987) (a factor in determining whether an OPM decision regarding disability retirement was clearly [**12] without merit is whether its initial decision was sufficient under the circumstances to permit a reasonable person to identify the kind of evidence needed to prevail on reconsideration). At no time did OPM advise the appellant, prior to its final decision on February 28, 1995, that her evidence as to the expected duration of her disability was insufficient.

[*627] Turning to the nexus between the appellant's psychological impairment and her ability to perform the specific duties of her position, the Board has stated that a physician's conclusion that an employee is disabled is persuasive only if the physician explains how the medical condition affects the employee's specific work requirements. *E.g., Tanious v. Office of Personnel Management*, 34 M.S.P.R. 107, 111 (1987). This is not a case, however, where the appellant's entitlement to disability retirement turned on finely tuned correlations between particular medical impairments and specific job requirements. The medical reports of Drs. Sahandy and McDonald, which were credible and consistent with one another, confirmed the appellant's personal account as to the extent of her disability. According to these [**13] reports and her personal account, the appellant was unable to leave her home, see visitors, drive, and had great difficulty managing ordinary household tasks such as cooking and doing laundry. She was also taking medication that dulled her mind, made her unable to concentrate, and shortened her attention span. Under these circumstances, it was unnecessary for her doctors to have a detailed understanding of the appellant's specific duties as a GS-13 Computer Specialist (Programmer) in order to render an opinion that the appellant's psychological condition rendered her unable to perform successfully in her position. We further note that OPM had a copy of the appellant's position description when it denied the appellant's application for disability retirement. *See* AFF, Tab 1, Ex. 7, at 4. Given the medical reports and the appellant's personal account of the effects of her psychological condition, OPM was in a position to conclude that the appellant's condition precluded her from performing her job duties.

Accordingly, we find that the evidence before OPM at the time of its final decision was such that it knew or should have known that its decision would not be upheld on appeal [**14] to the Board, and that an award of attorney fees is warranted in the interest of justice. n3

n3 The appellant also contended below that OPM decided to reverse its denial and grant her disability retirement even before it received any new evidence on appeal to the Board, and she renews this contention on re-

view. *See* AFF, Tab 1, Memorandum of Law, at 8-9, 21-22; Petition for Review File, Tab 1, at 21-26. In light of our finding that the evidence before OPM at the time of its final decision was such that it knew or should have known that its decision would not be upheld on appeal to the Board, we need not make a finding as to whether OPM changed its decision before receiving new evidence.

ORDER

Because the administrative judge is in the best position to evaluate the documentation submitted by counsel to determine whether the amount requested is reasonable, and to evaluate the quality of the representation afforded by counsel, *Fleming v. Office of Personnel Management*, 62 M.S.P.R. 37, 41 (1994), we REMAND this matter to the Washington Regional Office for further adjudication of the appellant's motion for attorney fees consistent with this [**15] Opinion and Order.

DISSENT BY:

AMADOR

DISSENT:

DISSENTING OPINION OF ANTONIO C. AMADOR in *F. Mullins-Howard v. OPM*, DC831E950427A1

I respectfully dissent with respect to the Board majority's decision to award the appellant attorney fees. I believe that the administrative judge correctly found that the appellant had failed to establish her entitlement to disability retirement benefits in the "proceedings" before the Office of Personnel Management (OPM) and had, as a result, failed to establish her entitlement to attorney fees.

The burden of proof on both the merits of the appellant's application for disability retirement benefits and her request for attorneys fees rests with the appellant. *See Kenyon v. Department of Navy*, 57 M.S.P.R. 258, 260 (1993). The administrative judge correctly found that the appellant's evidence submitted to OPM prior to its February 28, 1995 final decision was insufficient to meet the appellant's burden of proof with respect to entitlement to disability retirement benefits. OPM had requested specific documentation relative to the appellant's claim, in an October 27, 1994 letter to the appellant. *See* Addendum Appeal File, [**16] Tab 1, Ex. 4. The appellant failed to respond with the requested documentation, i.e., medical evidence of a disabling psychological condition. *Id.* at Tab 6, pg. 2.

Moreover, the evidence submitted to OPM, including the appellant's personal statement, two doctor reports, and a supervisor statement, failed to meet the *Laswell* standard of proof for establishing entitlement to disability retirement: there must be a specific connection between an employee's underlying psychiatric condition and his/her "specific" performance failures. *Laswell v. OPM*, 30 M.S.P.R. 194, 195, n. * (1986). It was the information submitted during the MSPB appeal process (the Siegel medical report and the supervisor affidavit) which established the *Laswell* nexus, and was the basis for OPM's redetermination of the appellant's entitlement to disability retirement benefits. Accordingly, the appellant has failed to establish her entitlement to an award of attorney fees and I therefore dissent.

October 2, 1996

Antonio C. Amador, Member

Legal Topics:

For related research and practice materials, see the following legal topics:
 Administrative Law
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