

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ATLANTA REGIONAL OFFICE

DOCKET NUMBER

Appellant,

v.

OFFICE OF PERSONNEL
MANAGEMENT,
Agency.

DATE:

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Paul H. Felser, Esquire, Savannah, Georgia, for the appellant.

Washington, D.C., for the agency.

BEFORE

Administrative Judge

INITIAL DECISION

INTRODUCTION AND JURISDICTION

On _____, the appellant, timely appealed from
a _____ reconsideration decision issued by the Office of Personnel
Management (OPM), denying her application for disability retirement. The
Board has jurisdiction over the appellant's appeal. 5 U.S.C. § 8461(e)(1); 5
C.F.R. § 841.306.

The hearing the appellant requested was held on _____, in
Savannah, Georgia. For the reasons stated below, OPM's reconsideration
decision is REVERSED.

Standard and burden of proof

To qualify for disability retirement under FERS, an employee must meet the following requirements: 1) she must have completed 18 months of creditable civilian service; 2) she must, while employed in a position subject to FERS, have 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 must be incompatible with either useful and efficient service or retention in the position; 3) the disabling medical condition must be expected to continue for at least one year from the date of application for disability retirement; 4) accommodation of the disabling medical condition in the position held must be unreasonable; and 5) the individual must not have declined a reasonable offer of reassignment to a vacant position. 5 U.S.C. § 8451; 5 C.F.R. § 844.103; *Huttman v. Office of Personnel Management*, 48 M.S.P.R. 174, 177 (1991).

The appellant has the burden of proving that she is entitled to disability retirement. *Cheesman v. Office of Personnel Management*, 791 F.2d 138, 141 (Fed. Cir. 1986, *cert. denied*, 479 U.S. 1037 (1987)). A disability determination must be based on all the evidence, taking into account objective clinical findings, diagnoses and expert medical opinion, subjective evidence of pain and disability, and all evidence relating to the effect of the appellant's condition on her ability to perform in the grade or class of position last occupied. *Id.* at 420-23.

The basis of the appellant's claim

On _____, the appellant, who has been employed by the _____ for _____ years, filed an application for disability retirement stating that degenerative disc disease of the cervical and lower spine, hypothyroidism, Raynaud's Phenomenon, and Fibromyalgia rendered her unable to perform the duties of her Part-time Flexible Carrier position. She explained that she experienced pain with the constant lifting and carrying of heavy mail trays and

the constant twisting and turning and repetitive motions required in sorting and delivering the mail. She also stated that the Raynaud's caused spasm in her feet, and it was impossible to drive while experiencing such a spasm.

In support of her application, the appellant presented medical evidence reflecting that she suffers from the conditions identified on her application for disability retirement. Additionally, the record contains a letter, dated

by M.D., stating that the pain caused by the appellant's degenerative arthritis, and the chronic insomnia and fatigue related to the appellant's fibromyalgia render the appellant unable to perform the duties of her position as a carrier. Dr. medical notes indicate that the appellant's duties at work aggravate her medical condition, and that she has failed to obtain relief from heat, ice, massage, and chiropractic care. He also indicates that pain medication has been ineffective because of sedation problems. Appeal File, Tab 6, Agency File, Tab II B, pp. 10-11.

At the hearing, the appellant testified that as a Part-time Flexible Carrier, she is required to perform both Clerk and Carrier duties, and it is the constant heavy lifting, twisting, bending, stretching and repetitive motions required by her position, which includes sorting and delivering the mail, that causes her pain. She explained that she is required to sort mail into cubbyholes and doing such requires her to constantly twist, bend, reach, and stretch. Additionally, she is required to lift trays of mail and flats, containing materials larger than letters, such as catalogs and magazines. Her lifting requirement is 70 pounds, and she is regularly required to lift parcels or flats of mail weighing 35 or 40 pounds. She is also required to unload containers and hampers, which she testified she has difficulty even pushing. Furthermore, when reading the labels on cubbyholes, because she wears bi-focal glasses, she is constantly required to throw her head back so that she can read from the bottom part of her lenses, which causes her great pain.

When driving to deliver the mail, in addition to having to constantly turn her head and stretch and lean to see in her outside mirrors, she was also required to cross railroad tracks at least six times daily, which jarred her neck and caused great pain. She testified that even releasing and setting the hand brake, which she found stiff and difficult to set, would jar her neck and cause pain.

As to the Raynaud's disease, the appellant testified that fluctuations in temperature cause her to experience muscle spasms, which are temporarily incapacitating. She stated that if she goes from a warm temperature inside to a cold temperature outside or from a hot temperature outside to a cold indoor temperature, her blood vessels constrict and cut off blood circulation in her hands, fingers, feet, toes, nose, ears, and lips, causing them to turn blue. Additionally, she may experience spasms in her feet. When this occurs, she cannot drive because she cannot use her feet. She did experience a spasm in her right foot while driving, on at least one occasion, but was able to pull off the road without incident. She fears that another foot spasm might occur while driving, and she will not be able to get off of the road without injury to herself or others. The appellant testified that her physician wanted to prescribe calcium blocker for her to improve the Raynaud's systems; however, she could not take the blocker because she also needs to take calcium supplements for her osteopenia, an early stage of osteoporosis, and the calcium blocker would counteract the calcium supplement.

The appellant further testified that the fibromyalgia from which she suffers causes widespread chronic pain. It also causes insomnia which keeps her from getting to the restful, restorative stage of sleep. She is, therefore, frequently tired, as the fibromyalgia episodes may last days or weeks.

The appellant testified that she has taken large doses of Tylenol in an effort to control the pain, but eventually had to cut back on her dosage because of the kidney and liver damage which long-term excessive use of Tylenol can cause. She has also tried to take Ibuprofen but cannot because it causes her severe

stomach pain. The appellant stated that when she took a break from work, she would start to feel some relief; however, whenever she went back, the symptoms returned in full. She further testified that she wanted to work 20 years until retirement, but the more she worked, the worse her symptoms became until finally she could not work any longer. She did not ask to be placed in another position because there was no other position in which to place her, as there were only Clerk and Carrier positions at the post office where she was employed.

The appellant's husband, _____, testified that appellant complains of sharp, burning pains on a daily basis, and that she begins her day with a warming pad on her shoulders to ease the pain. Additionally, the pain often keeps her from sleeping at night. Her condition has affected her ability to do housework, open doors, shop for groceries, and drive a car. _____ testified that that the appellant no longer drives, unless she absolutely must. If she does drive, she cannot park in any situation that would cause her to back up because she cannot twist her head to back up.

_____ a 40-year Part-time Flexible Clerk at the _____ testified that he worked with the appellant on a daily basis for the entire _____ years the appellant was employed at the _____. He observed that during the first few years of the appellant's employment, she had no difficulty performing the duties of her position. During the later part of her employment, although the appellant never complained to him, he noticed that she had great difficulty performing the duties of her position. He noticed her struggling with hampers of mail and struggling to disperse the mail in the proper location. When he asked her what was wrong, she told him she was in pain. He stated that anyone who looked at her could see that she was in pain. He also noticed that she was heavily bundled in clothing when everyone else was working in short sleeves. When he asked about it, the appellant told him she was cold. When _____ noticed the appellant struggling, he would on occasion attempt to help her. But because of the demands of his own duties, he could not assist her on a regular basis.

The appellant has established that her medical condition is incompatible with useful and efficient service in a part-time letter carrier position.

Based upon the evidence described above, I find that the appellant has established that she suffers from a condition which is incompatible with useful and efficient service as a Part-time Flexible Carrier. In reaching this conclusion, I note that in addition to the appellant's testimony regarding the pain and difficulty she experiences in performing the duties of her position, there is corroborating evidence of the appellant's pain and difficulty performing her job duties by the appellant's husband and coworker. Additionally, the record contains objective medical evidence in the form of radiographs reflecting that the appellant has mild degenerative changes in the cervical spine. Furthermore, X-rays taken in ... show a progression of cervical joint fixation at the C6 and C7 areas of the spine. Appeal File Tab 6, Agency File, Tab II B, pp. 16 and 31.

OPM argues that the appellant has not established that she is entitled to disability retirement because notwithstanding the pain, the appellant was able to continue to perform the duties of her position. It points out that the appellant's supervisor certified that the appellant had no performance deficiency, and the appellant's coworkers testified that the appellant performed her duties even though she was obviously in pain. OPM's position, however, overlooks the fact that there did come a time when notwithstanding the appellant's significant and pain inducing efforts, the appellant could no longer perform, and therefore, ceased coming to work. The record reflects that she has not worked since

She testified that she stopped coming to work because she simply could not do the job anymore, and her doctor agreed that she had pushed herself beyond a reasonable level.

OPM's position also overlooks the medical opinions of the appellant's physicians stating that the appellant's duties were aggravating her medical symptoms. Although the statements of the appellant's physicians could have

been more specific regarding what duties were aggravating what symptoms, when the medical statements are read in conjunction with the appellant's testimony it becomes clear that the required constant repetitive motion of twisting, turning, bending, reaching, and the required heavy lifting aggravated the painful symptoms of the appellant's degenerative disc disease and fibromyalgia. The appellant's testimony also makes clear that it is the temperature fluctuations, having to work both outside and inside, when weather conditions are severe, which aggravated her Raynaud's. The evidence is clear and uncontroverted that the appellant's condition is chronic, and that the appellant has been unable to obtain relief through any of the recommended therapies, including medication, exercise, heat applications, and physical therapy. Moreover, the evidence does not reflect that there are any adjustments that can be made to the position to allow the appellant to perform the critical elements of the position.

Based upon all these factors, including the subjective evidence of the appellant's pain and inability to perform the duties of her position, the objective evidence consisting of x-rays reflecting degenerative cervical spine changes, and her physicians' medical opinions that her duties were aggravating her symptoms, I find that the appellant has established that her medical condition and symptoms are incompatible with either useful and efficient service or retention in her Part-time Flexible Carrier position. 5 C.F.R. § 844.103(a)(2); *see also Gometz v. Office of Personnel Management*, 69 M.S.P.R. 115, 121 (1995).

The appellant has established that she was not qualified for reassignment to a vacant position at the same grade or pay.

The appellant testified, without contradiction, that there were only two positions at the post office where she was employed, Clerk and Carrier, and the appellant was required to perform the duties of both in her position as a Part-time Flexible Carrier. The appellant also testified, without contradiction, that both positions require heavy lifting, repeated bending, stooping, stretching, reaching,

and twisting, which she cannot do. Under these circumstances, where the only positions available were the positions she was already performing, I find that the appellant has established that she was not qualified for reassignment to a vacant position at the same grade or pay.

The appellant has established her entitlement to disability retirement.

Inasmuch as the appellant has established that she cannot perform useful and efficient service in the position last held; she cannot perform the critical or essential functions of that position with adjustments; and she is not qualified for reassignment to a vacant position, I find that she has established her entitlement to disability retirement.

DECISION

The agency's reconsideration decision is REVERSED.

ORDER

I order the agency to grant the appellant's application for disability retirement. This action must be accomplished no later than 20 calendar days after the date this initial decision becomes final.

OPM is further ORDERED to inform the appellant in writing of all actions taken to fully comply with the Board's Order and the date on which it believes it has fully complied. If not notified, the appellant should ask the agency about its efforts to comply.

FOR THE BOARD:

Administrative Judge