UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 23-1713

In re: JULIAN R. ASH,

Petitioner.

On Petition for Writ of Mandamus to the United States District Court for the District of Maryland, at Baltimore. (1:22-cv-00649-GLR)

Submitted: August 24, 2023 Decided: August 28, 2023

Before QUATTLEBAUM and HEYTENS, Circuit Judges, and MOTZ, Senior Circuit Judge.

Petition denied by unpublished per curiam opinion.

Julian R. Ash, Petitioner Pro Se.

Unpublished opinions are not binding precedent in this circuit.

Appendix A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

JULIAN ASH,	*	
Plaintiff,	*	
v.	*	Civil Action No. GLR-22-649
OFFICE OF PERSONNEL MANAGEMENT,	*	
Defendant.	*	
	***	

ORDER

On January 9, 2023, the Court set a briefing schedule in the above referenced matter stating that Defendant Office of Personnel Management ("OPM") was to file a response to the Amended Petition no later than January 17, 2023, self-represented Plaintiff Julian Ash was to file an opposition to that response no later than February 10, 2023, and OPM could file a reply no later than March 10, 2023. (ECF No. 45).

On March 28, 2023, after requesting several extensions,[1] Defendant Office of Personnel Management filed a Motion to Dismiss or for Summary Judgment (ECF No. 61). That day, the Clerk notified Ash of his right to file an opposition in response to the Motion and he was forewarned that his case could be dismissed if he failed to oppose the Motion. (ECF No. 62). Also on March 28, 2023, Ash filed a Notice of Appeal to the Fourth Circuit

[1] The Court notes that OPM filed additional extension requests that are still pending. In its discretion, the Court will grant the Motions for Extension of Time as substantially justified. (ECF Nos. 56, 58, 60). As the Court will grant the Motions for Extension of Time, the Court will deny Ash's Motions for Sanctions (ECF Nos. 34, 38) based on purported delays by OPM.

Appendix B

IT IS FURTHER ORDERED that the Clerk shall CLOSE this case.

/s/
George L. Russell, III
United States District Judge

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
DALLAS REGIONAL OFFICE

JULIAN R. ASH,
Appellant,

v.

OFFICE OF PERSONNEL MANAGEMENT,
Agency.

DOCKET NUMBER
DA-844E-20-0536-I-1

DATE: April 27, 2021

Julian R. Ash, Baltimore, Maryland, pro se.

Jo Bell, Washington, D.C., for the agency.

BEFORE
Chizoma O. Ihekere
Administrative Judge

INITIAL DECISION

INTRODUCTION

On September 22, 2020, the appellant filed this appeal with the Merit Systems Protection Board (Board) from an Office of Personnel Management (OPM) reconsideration decision that denied his application for disability retirement benefits under the Federal Employees' Retirement System (FERS). Initial Appeal File (IAF), Tab 1.[1] The Board has jurisdiction over this appeal pursuant to 5 U.S.C. § 8461(e) and 5 C.F.R. § 841.308.

[1] The file tabs and related page numbers identified in this decision are based on the Board's electronic case file.

APPENDIX C

At the appellant's request, a telephonic hearing was conducted on March 18, 2021. IAF, Tab 26, Hearing Audio Recording (HAR). For the reasons discussed below, OPM's reconsideration decision is AFFIRMED.

ANALYSIS AND FINDINGS

Background and Record Evidence

Based on the appellant's Certified Summary of Federal Service, it appears that he served in a uniformed service military position with the United States Army between February 7, 1981 and March 31, 2004. IAF Tab 11 at 114. After he retired from the Army, the appellant received a Bachelor of Arts degree in 2008; he attended two additional semesters toward a Masters degree, but left the program early due to stress, anxiety, and decreased focus. *See* IAF, Tab 10 at 18. The appellant began working for the Federal Aviation Administration (FAA) in 2008. HAR (testimony of the appellant). On November 20, 2014, the appellant's Human Resources Specialist position was converted into an excepted service position in the agency's Aviation Careers Branch in Oklahoma City, Oklahoma. IAF, Tab 10 at 47. The appellant continued to work in the Human Resources Specialist position until his last day on the job on November 17, 2018; his resignation became official on December 1, 2018. IAF, Tab 11 at 48.

The appellant signed an application for an immediate FERS retirement on December 12, 2018. IAF, Tab 11 at 107. The appellant signed a Statement of Disability on December 12, 2018 (*Id.* at 42); the SF-50 documenting his resignation notes within the "Remarks" section "request resignation be effective December 1, 2018, in order to pursue disability retirement effective December 1, 2018" as the reason for resignation. IAF, Tab 11 at 48. During the hearing in this matter, the appellant testified that he resigned from his position because his duty station was a hostile work environment and because of stress. HAR (testimony of the appellant). When seeking disability benefits from the Veterans Administration (VA) due to mental disorder, the appellant reported that he

"resigned his job 11-2018, due to anger, frustration & agitation. He worked 10 years for the FAA, as a HR Specialists. He was having disagreements with his supervisor. They had 3 disagreements, in a relatively brief time frame. He was angry at the supervisor. He came home one day, angry at his boss, lost control of his anger & killed his dog in, 'a fit of rage' & resigned the next week" (grammar and punctuation as in the original). IAF, Tab 10 at 18.

The appellant's disability retirement application (signed on December 12, 2018) includes the appellant's statement on disability in which he reported that his disabling disease(es) and/or injury(ies) are Post Traumatic Stress Disorder (PTSD) and Arthritis, and that he became disabled for his position in November 2018. IAF, Tab 11 at 41-42. In addition, he stated that his disease(es)/injury(ies) interfere with performance of his duties, attendance, or conduct as follows: Insomnia results in trouble staying awake or alert at work; Arthritis results in discomfort sitting or standing; Alcohol abuse results in the need for frequent days off; and stress makes it harder to control his anger. *Id.*

The appellant reported the details regarding his injuries as:

> I served in the US Army on active duty for over 23 years. As part of the Field Artillery I also volunteered for Airborne and Air Assault assignments. In addition to the rigors of road marches and daily running I also performed over 60 combat training parachute jumps. On one jump in 1986 I landed on my left hip. I sought immediate medical treatment after the jump by going to the emergency room and again the following days and weeks for over a month. I was never properly treated as the injury was overlooked, even after I complained of blood in my shorts.
>
> In 2014 I finally got angry enough to demand an MRI because the pain in my hip was throbbing out of control. The MRI revealed I had a torn Labrum. In January 2019 the VA finally recognized this injury as service connected.
>
> ....
>
> In 2003 another soldier got stuck in a cargo net and once I freed his foot his body fell on the right side of my neck. I received physical therapy in 2008.

As of November 17, 2018 I couldn't take it anymore the neck pain was none stop and intensifying. The hip pain started causing pain in my back and other hip as well. Not just discomfort but pain.

In addition to my physical challenges I also experienced control disorders. It was becoming too difficult to control my frustrations. At the end of 2016 our agency brought in a new HR director. For two straight years prior to her arrival our office had exceeded goals which was a first in agency history.

In the spring of 2017 I bought two German Shepherd puppies from the new HR director. During the summer of 2017 my brother became ill. While at work I started getting phone calls to handle his affairs, it was afternoon so I asked my supervisor for the rest of the day off so I wouldn't drop a call. My supervisor denied my request and informed me of a new no leave policy so I stayed at work trying to do the best I could with phone reception in that building?

I got home from work the puppies made a huge mess and that was it I snapped, I found my dog dead the next morning, all I could do was sit and stare for hours at what I had done.

Right after that incident my office supervisor implemented another new policy no ear phones. I was begging her to reconsider but she was hell bent on enforcing the idea. I told her it helped keep me awake as well as focus. The next incident I snapped at a coworker.in front of everyone because she complained my speakers were too loud. At that moment I became concerned but didn't know what to do so I begged for the rest of the day off which was approved.

In my 23 years of military service ninety percent did not include females. My Artillery units were all male and when I had issues with leaders, peers, or subordinates they got cursed out. I couldn't do what I felt needed to be done because it wasn't my place to correct coworkers drill sergeant style. Telling someone they needed to get off their butt should not take an act of congress, It's truly painful to wallow in pettiness just because. Example: We had a coworker (Ms Micki Griffin) who would sit out on break for an hour at a time two and three times a day. The scenario dragged on for a year until she retired. We were constantly covering for her only to earn a no earphone policy supposedly to boost Morale? When I learned that the earphone policy was about morale I couldn't take it anymore. Our morale was shot because we were carrying dead weight. I was irate because our supervisor initially said it was because we were making too many mistakes, she was lying. My guess is she used that policy to add to her yearly evaluation to show she made some improvement,

totally unnecessary because we just had two straight years of exceeding goals!

I am one hundred percent certain that the entire office recognized my change in attitude from the moment I started complaining about Ms Griffins work and for doing other people's work who were habitually needing help. My problem was not with helping others, it was helping people who made more money than me and always taking advantage of my work ethic. If I stayed late on my own dime just to keep up then I shouldn't be asked to help others who sit around talking all day.

I am single live alone struggle to cut my grass "sciatic nerve lower back" can't run "arthritis feet and knees", can no longer ride my bike "pinched nerve in neck with bone spurs" can't sit or stand at the computer for more than 5 minutes before intense pain kicks in. Difficulty driving as turning to the right increases intensity.

Ultimately, I understand that I am aging and hope to maintain a firm grip on reality. I had at times questioned my own sanity with the events that have taken place these last few years. I didn't realize how much drinking I was doing or why. I kept telling my doctors I was having sleep issues and they offered sleeping pills. I refused because as a child I watched my mother abuse pills. I tried to avoid every pill they offered. It took a few years after military retirement for me to agree to cholesterol drugs, I kept promising to work out harder but the numbers wouldn't go down so I finally accepted it and gave in. I now know why my mother abused pills, she complained of arthritis all the time and with each injury I've endured intense pain in those specific areas. The overwhelming effect is stiffness so sitting at work eight to ten hours a day and trying to stand up is a challenge. There are times when I stand up to walk and it feels like my hip is going to pop out of the joint. It takes anywhere from half an hour to an hour to loosen up in the morning from back stiffness. If I do a strenuous activity like cutting grass I might need two or three days to recover, I am very careful to plan out my chores based on how much recovery time I have and how many hours I need to sit in the tub so the jets can soothe my aches, it is the only temporary relief I can afford. Last year I had to go the emergency room because I passed out after getting out of the tub, didn't know having low blood pressure and taking high blood pressure medications were dangerous with hot tubs!

Finally, my excess drinking didn't start until I retired in 2004, I was complaining of insomnia, but never figured out the cause? I was in

> school from 2004 to 2008 so at the time it didn't seem like a pressing matter. A couple of months before I resigned from the FAA I was reassigned to another office, I was told the office needed balance so I was moved. When I moved to my new cubicle it was right in front of my supervisor's door? If the cubicle had been empty prior to my move I would have thought nothing of it, but since a new employee got to move from that spot to a better spot right before my move it let me know they were keeping an I eye on me for sleeping. I could not blame leadership for this course of action as my neck pain was intolerable and with medications I could not fight the insomnia. This was the second time while serving in Aviation Careers that I had been moved due to sleep issues.

IAF, Tab 11 at 43-45 (grammar, spelling, and punctuation as in the original).

Before his resignation, the appellant was employed as a Human Resources Specialist. The Army's description for the appellant's Human Resources Specialist position indicates that the position requires to incumbent to be competent in the areas of problem identifying and decision making; customer service; interpersonal skills; oral and written communication; personnel and human resources; and planning and evaluation. *See* IAF, Tab 11 at 70-71.

In the Supervisor Statement provided as part of his disability retirement application, the agency stated that the appellant's performance was not less than successful in any critical element. IAF, Tab 11 at 118. Regarding any accommodation, the agency reported that it was not aware of any medical issues and no accommodation was requested by the employee. *Id.* at 119. Further, the agency noted that the appellant "abruptly resigned" without notice on November 17, 2018. *Id.* In his statement of disability, when asked what accommodations he had requested from the agency, the appellant stated that he could not "think of anything else after Vari desk did not work." *Id.* at 41. He also stated that he was currently undergoing physical therapy. *Id.*

At hearing, and in documents submitted throughout his appeal, the appellant took issue with the agency's claim that he had not reported any medical problems or requested any accommodations. HAR (testimony of the appellant);

IAF, Tab 1 at 3; IAF, Tab 17 at 4-20. In addition, the record contains a document dated March 21, 2017 signed by Christopher F. Vaughns, II, MD. IAF, Tab 9 at 118. The letter states the following:

> To Whom It May Concern:
>
> Julian Ash (DOB: 21 Aug 1960) is under my care here at Reynolds Army Health Clinic Department of Internal Medicine. He has left superior-lateral labral tear in left hip, and herniated disc in lumbar spine causing low back pain. Pain is made worse with standing and sitting for extending periods of time. Please allow patient to have ergonomic chair and desk during the work week. If you have any question, feel free to contact me at (580) 558 8404.

Id.

In documents dated January 29, 2020, submitted with his request for reconsideration to OPM, the appellant stated that since his resignation from the FAA, his service-connected Department of Veterans Affairs (DVA) disability rating went from 70% to 100%. IAF, Tab 11 at 17. The appellant also stated, "I have been diagnosed with Insomnia/Anxiety/Depression. I assumed PTSD, but terminology is irrelevant." *Id.* at 18. In addition, the appellant related the following:

> Conditions were manageable **up until** the point of my retirement. I realized I needed more time off to deal with physical pain and personal problems. But asking for a day off became a major point of contention and escalated my condition.
>
> Medical evidence does not show PTSD because that was my assumption at the time. Had no idea what the hell was going on except that I was getting worse.
>
> Medical evidence for alcohol abuse is also irrelevant, I admitted that it was a problem. Still I provided Oncologist statements denoting her concern about my ALCOHOL use? The only reason I wasn't treated by the VA is because I kept telling them I didn't want pills. Please see attachment #55.
>
> At time of retirement I was not diagnosed with Insomnia, but that doesn't mean I hadn't been complaining about it. The VA just has a way of not hearing complaints for monetary reasons.

Id. (emphasis added; grammar and punctuation as in the original). Further, during a doctor visit on December 19, 2018, the appellant denied receiving any mental health care or treatment before, during, or after his military service. IAF, Tab 10 at 97.

During the visit on December 19, 2018, the appellant was diagnosed with Alcohol Use Disorder, Adjustment Disorder with Mixed Disturbance of Mood and Behavior, and Insomnia. *Id.* at 94. The health provider noted that symptoms applicable to the appellant's diagnoses included: depressed mood; anxiety; chronic sleep impairment; difficulty in establishing and maintaining effective work and social relationships, and impaired impulse control, such as unprovoked irritability with periods of violence. *Id.* at 99.

During the visit, the appellant stated the following, regarding is reasons for leaving his job at the FAA:

> He reports that he just left that job and is now fully retired. He reports that he left his job in HR because he felt increasingly stressed regarding communication at work. He reports that he is spending-his time sleeping, caring for his dogs, going for walks, and otherwise trying to "relax and unwind."

IAF, Tab 10 at 96-97. After a complete evaluation of the appellant, the provider found that the appellant did not meet the criteria for PTSD. *Id.* at 100.

The record contains ample evidence that the appellant had suffered from arthritis, hip problems, a pinched nerve in his neck, and insomnia for several years. IAF, Tab 10 at 4-81; IAF, Tab 9 at 70-132. At the hearing, the appellant testified that, at the time of his resignation, his service-connected disability rating was 70%. Subsequently, in a letter dated November 17, 2019, the DVA issued a summary of the appellant's benefit entitlement. The letter stated that the appellant's combined service-connected evaluation was 100%, effective August 26, 2019. IAF, Tab 10 at 62. In a letter dated December 19, 2019 the DVA deemed the appellant totally and permanently disabled due to his service connected disabilities. IAF, Tab 10 at 86.

The record contains several documents and evaluations of the appellant's health after December 1, 2018. He was evaluated for the purpose of receiving benefits through the DVA; these evaluations were documented on several questionnaires in August and September 2019. *See* IAF, Tab 10 at 4-85. These questionnaires indicated that the appellant had major depressive disorder, depressive disorder due to chronic insomnia, hip and thigh injuries, back (thoracolumbar) injuries, and neck (cervical spine) injuries. It is undisputed that the appellant had several conditions, but there is no indication these impairments rendered him "disabled" within the meaning applied by OPM for purposes of disability retirement applications. It is important to note that the record is devoid of any evidence that while he was employed as a Human Resources Specialist, the appellant became unable to render useful and efficient service; that is, no health care provider stated that the appellant could not continue to work in the position he had occupied since 2008.

Applicable Law

In an appeal from an OPM final/reconsideration decision that denied an appellant's application for disability retirement benefits, the appellant bears the burden of proof a preponderance of the evidence. *Confer v. Office of Personnel Management*, 111 M.S.P.R. 419, ¶ 8 (2009); *Chavez v. Office of Personnel Management*, 6 M.S.P.R. 404, 417 (1981) and 5 C.F.R. § 1201.56(a)(2)). A preponderance of the evidence is that degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue. 5 C.F.R. § 1201.4(q).

To be eligible for a disability retirement annuity under FERS, an employee must establish that: (1) he completed at least 18 months of creditable civilian

service; (2) while employed in a position subject to FERS, he became disabled[2] 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 that the application for disability retirement benefits was filed; (4) accommodation of the disabling medical condition in the position held must be unreasonable; and (5) the employee did not decline a reasonable offer of reassignment to a vacant position.[3] *Confer*, 111 M.S.P.R. 419, ¶ 8; *Chavez v. Office of Personnel Management*, 111 M.S.P.R. 69, ¶ 6 (2009); *Yoshimoto v. Office of Personnel Management*, 109 M.S.P.R. 86, ¶ 8 (2008); 5 U.S.C. § 8451(a); 5 C.F.R. § 844.103(a).

A determination of disability must be based on the probative value of all of the evidence, including: (1) objective clinical findings; (2) diagnoses and medical opinions; (3) subjective evidence of pain and disability; and (4) all evidence relating to the effect of the employee's condition on his ability to perform in the position he last occupied. *See Henderson*, 109 M.S.P.R. 529, ¶ 12. Furthermore, a determination on eligibility for disability retirement should take into account all competent medical evidence, including both objective clinical findings and qualified medical opinions based on the applicant's symptoms. *See Vanieken-Ryals v. Office of Personnel Management*, 508 F.3d 1034, 1041-42 (Fed. Cir. 2007) (citing *Chavez*, 6 M.S.P.R. at 418-23 and *Confer*, 111 M.S.P.R.

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[2] "Disabled" means unable "because of disease or injury, to render useful and efficient service" in the employee's position. 5 C.F.R. § 844.102.

[3] An employee is not required to prove that he requested an accommodation but instead must only show that an accommodation was unreasonable. *Gooden v. Office of Personnel Management*, 471 F.3d 1275, 1279-80 (Fed. Cir. 2006) (citing 5 C.F.R. § 844.103(a)). Moreover, under FERS, there is no statutory or regulatory requirement providing that the appellant prove he was not qualified for reassignment. *Id.*, at 1280 (citing 5 U.S.C. § 8451 or 5 C.F.R. § 844.103).

419, ¶ 9). An appellant's subjective reports of pain and physical limitations are entitled to substantial weight if they are supported by objective clinical findings. *See Henderson*, 109 M.S.P.R. 529, ¶ 18.

Generally, 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. *See Harris v. Office of Personnel Management*, 110 M.S.P.R. 249, ¶ 15 (2008); *Anderson v. Office of Personnel Management*, 96 M.S.P.R. 299, ¶ 16 (2004), *aff'd*, 120 Fed.Appx. 320 (Fed. Cir. 2005); *Tanious v. Office of Personnel Management*, 34 M.S.P.R. 107, 111 (1987). Also, an applicant for a disability annuity must establish the extent to which his disability can or cannot be controlled through medication or other reasonable means. *Confer*, 111 M.S.P.R. 419, ¶ 21; *Yoshimoto*, 109 M.S.P.R. 86, ¶ 20; *Bray v. Office of Personnel Management*, 97 M.S.P.R. 209, ¶ 14 (2004); *Wilkey-Marzin v. Office of Personnel Management*, 82 M.S.P.R. 200, ¶ 15 (1999). Finally, "the Board must consider an award of Social Security benefits, and any underlying medical data provided to OPM by the Social Security Administration or employee, along with any other evidence of disability, in determining entitlement to FERS benefits." *Trevan v. Office of Personnel Management*, 69 F.3d 520, 526 (Fed. Cir. 1995); *see also Givens v. Office of Personnel Management*, 95 M.S.P.R. 120, ¶ 9 (2003) (an SSA decision to award social security benefits will be considered in adjudicating a disability retirement case where the conditions underlying the applications to OPM and SSA are the same).

The appellant has failed to establish his entitlement to disability retirement benefits under FERS.

After carefully considering the evidence in this case, I find the appellant has failed to prove that he is entitled to the disability retirement benefit he seeks. As discussed above, to prove his entitlement to disability retirement under FERS, the appellant must establish that: (1) he completed at least 18 months of

creditable civilian service under FERS; (2) while employed, he became disabled because of a medical condition, resulting in deficient performance, conduct or attendance, or, if there is no such deficiency, the disabling 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 of his disability retirement application; (4) the condition cannot be reasonably accommodated; and (5) he did not decline a reasonable offer of reassignment to a vacant position.

As an initial matter, I find that the appellant proved that he had at least 18 months of creditable FERS service. However, he failed to prove the remaining necessary elements for establishing his entitlement to a FERS disability annuity. While the appellant relied heavily on evidence that the DVA rated him permanently disabled, the date of onset by the DVA was **after** the appellant's resignation from his position became effective. In addition, at no time did any medical professional state that the appellant was unable to render useful and efficient service while he was still employed as a Human Resources Specialist. Further, the appellant's last performance rating and Supervisor's Statement both document fully successful performance with no deficiencies in attendance or conduct. I therefore find that the appellant failed to prove deficient performance, conduct, or attendance prior to his retirement.[4]

The appellant also failed to prove any causative link between his decision to resign and his medical conditions since he identified no treatment records indicating a rapid deterioration of his condition before his resignation, and his last known treatment records before his retirement indicate that his condition was stable and without any medical restrictions, other than that the appellant should

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[4] The record includes several messages in which the appellant requested time off because of various injuries. *See* IAF, Tab 17 at 6-18. However, the dates of these messages are sporadic and do not rise to the level of deficient attendance.

be given an ergonomic chair and desk during the work week. I further find that the appellant failed to prove that his medical conditions could not be accommodated, since his main reasons for resigning seem to be stress and an unpleasant work environment.

Even if the appellant had demonstrated that his conditions had become disabling and could not be accommodated at the time he resigned, he failed to show that any such symptoms were expected to continue to be disabling for at least one year from the date that he filed his disability application. The medical treatment records document that physical therapy resulted in significant improvement (IAF, Tab 9 at 130-132) and that the appellant discontinued therapy when he had to go out of town in August 2019. IAF, Tab 9 at 50. Further, the appellant reported that after his resignation, has been able to go for walks, sleep, and care for his dogs. IAF, Tab 10 at 96-97. These facts contradict the appellant's claim that his conditions were disabling at the time of his retirement.

The appellant asserted affirmative defenses.

The appellant alleged the agency's action was the result harmful procedural error, race discrimination, and retaliation for prior protected activity. The appellant bears the burden of proving his affirmative defenses by preponderant evidence. 5 C.F.R. § 1201.56(b)(2)(i)(C). For the following reasons, I find the appellant failed to prove his affirmative defenses by preponderant evidence.

The appellant did not show the agency committed harmful procedural error.

The Board defines harmful error as "error by the agency in the application of its procedures that is likely to have caused the agency to reach a conclusion different from one it would have reached in the absence or cure of the error." 5 C.F.R. § 1201.4(r). The Board may not assume an employee has been harmed by a procedural error in the adverse action process; rather, the appellant bears the burden of proving harm by preponderant evidence. *See Doe v. Department of Justice*, 118 M.S.P.R. 434, ¶ 31 (2012).

The appellant failed to identify an error by OPM in the application of its procedures. Even assuming a procedural violation occurred, the appellant has not shown any error had a harmful effect on the outcome of his application for disability retirement.

The appellant failed to prove his disparate treatment affirmative defenses.

The appellant contends he was subjected to disparate treatment based on his race and prior protected activity. When an appellant asserts an affirmative defense of discrimination or retaliation under 42 U.S.C. § 2000e-16, the Board first will inquire whether he has shown by preponderant evidence the prohibited consideration was a motivating factor in the contested personnel action. *See Savage v. Department of the Army*, 122 M.S.P.R. 612, ¶ 51 (2015). Such a showing is sufficient to establish the agency violated 42 U.S.C. § 2000e-16, thereby committing a prohibited personnel practice under 5 U.S.C. § 2302(b)(1). In making his initial showing, an appellant may rely on direct evidence (i.e., evidence that can be interpreted as an acknowledgment of discriminatory intent), or any of the three types of circumstantial evidence, either alone or in combination. The first kind of circumstantial evidence consists of suspicious timing, ambiguous oral or written statements, behavior toward or comments directed at other employees in the protected group, and other bits and pieces from which an inference of discriminatory intent might be drawn. The second kind is comparator evidence, consisting of evidence that similarly situated employees were treated more favorably. The third kind consists of evidence that the agency's stated reason for its action is unworthy of belief and a mere pretext for discrimination. *See Savage*, 122 M.S.P.R. 612, ¶ 42. If the appellant meets his burden, the Board then will inquire whether the agency has shown by preponderant evidence the action was not based on the prohibited personnel practice, i.e., that it still would have taken the contested action in the absence of the discriminatory motive. *Id.* In *Gardner v. Department of Veterans Affairs*,

123 M.S.P.R. 647 (2016), the Board clarified that this analysis does not require administrative judges to separate "direct" from "indirect" evidence and to proceed as if such evidence were subject to different legal standards, or require appellants to demonstrate a "convincing mosaic" of discrimination or retaliation.

The appellant stated that he was subjected to retaliation based on his race and prior protected activity. There is no evidence that the appellant's race was in any way considered in OPM's decision regarding his application for disability retirement. Though there were some issues regarding the timeliness of his request for reconsideration, the appellant failed to show that anyone at OPM was aware of or named as a responsible official in any of his prior protected activity. Further, I find that the appellant was unable to identify a similarly situated employee/individual who was treated more favorably than he was. *See Ly v. Department of the Treasury*, 118 M.S.P.R. 481, ¶ 15 (2012). The record is devoid of any facts to support the appellant's claim that the real reason for the agency's denial of his application for disability retirement was race discrimination or retaliation for prior protected activity. Therefore, these affirmative defenses fail.

In sum, after carefully reviewing all of the evidence, I find that the appellant failed to satisfy his burden of proving that his medical conditions prevented him from rendering useful and/or efficient service in his position. Moreover, even if he had satisfied that burden, he failed to show that any disabling symptoms from his conditions were expected to continue for at least a year from the date of his application, and/or that they could not be adequately controlled by medication and/or accommodated by other reasonable means. Further, his affirmative defenses failed. Therefore, OPM's reconsideration decision must be affirmed.

DECISION

The agency's reconsideration decision is AFFIRMED.

FOR THE BOARD: /S/
Chizoma O. Ihekere
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on **June 1, 2021**, unless a petition for review is filed by that date. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if you prove that you received this initial decision more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. If you are represented, the 30-day period begins to run upon either your receipt of the initial decision or its receipt by your representative, whichever comes first. You must establish the date on which you or your representative received it. The date on which the initial decision becomes final also controls when you can file a petition for review with one of the authorities discussed in the "Notice of Appeal Rights" section, below. The paragraphs that follow tell you how and when to file with the Board or one of those authorities. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review.

If the other party has already filed a timely petition for review, you may file a cross petition for review. Your petition or cross petition for review must state your objections to the initial decision, supported by references to applicable laws, regulations, and the record. You must file it with:

The Clerk of the Board
Merit Systems Protection Board
1615 M Street, NW.
Washington, DC 20419

A petition or cross petition for review may be filed by mail, facsimile (fax), personal or commercial delivery, or electronic filing. A petition submitted by electronic filing must comply with the requirements of 5 C.F.R. § 1201.14, and may only be accomplished at the Board's e-Appeal website (https://e-appeal.mspb.gov).

NOTICE OF LACK OF QUORUM

The Merit Systems Protection Board ordinarily is composed of three members, 5 U.S.C. § 1201, but currently there are no members in place. Because a majority vote of the Board is required to decide a case, *see* 5 C.F.R. § 1200.3(a), (e), the Board is unable to issue decisions on petitions for review filed with it at this time. *See* 5 U.S.C. § 1203. Thus, while parties may continue to file petitions for review during this period, no decisions will be issued until at least two members are appointed by the President and confirmed by the Senate. The lack of a quorum does not serve to extend the time limit for filing a petition or cross petition. Any party who files such a petition must comply with the time limits specified herein.

For alternative review options, please consult the section below titled "Notice of Appeal Rights," which sets forth other review options.

Criteria for Granting a Petition or Cross Petition for Review

Pursuant to 5 C.F.R. § 1201.115, the Board normally will consider only issues raised in a timely filed petition or cross petition for review. Situations in which the Board may grant a petition or cross petition for review include, but are not limited to, a showing that:

(a) The initial decision contains erroneous findings of material fact. (1) Any alleged factual error must be material, meaning of sufficient weight to

warrant an outcome different from that of the initial decision. (2) A petitioner who alleges that the judge made erroneous findings of material fact must explain why the challenged factual determination is incorrect and identify specific evidence in the record that demonstrates the error. In reviewing a claim of an erroneous finding of fact, the Board will give deference to an administrative judge's credibility determinations when they are based, explicitly or implicitly, on the observation of the demeanor of witnesses testifying at a hearing.

(b) The initial decision is based on an erroneous interpretation of statute or regulation or the erroneous application of the law to the facts of the case. The petitioner must explain how the error affected the outcome of the case.

(c) The judge's rulings during either the course of the appeal or the initial decision were not consistent with required procedures or involved an abuse of discretion, and the resulting error affected the outcome of the case.

(d) New and material evidence or legal argument is available that, despite the petitioner's due diligence, was not available when the record closed. To constitute new evidence, the information contained in the documents, not just the documents themselves, must have been unavailable despite due diligence when the record closed.

As stated in 5 C.F.R. § 1201.114(h), a petition for review, a cross petition for review, or a response to a petition for review, whether computer generated, typed, or handwritten, is limited to 30 pages or 7500 words, whichever is less. A reply to a response to a petition for review is limited to 15 pages or 3750 words, whichever is less. Computer generated and typed pleadings must use no less than 12 point typeface and 1-inch margins and must be double spaced and only use one side of a page. The length limitation is exclusive of any table of contents, table of authorities, attachments, and certificate of service. A request for leave to file a pleading that exceeds the limitations prescribed in this paragraph must be received by the Clerk of the Board at least 3 days before the filing deadline. Such requests must give the reasons for a waiver as well as the desired length of the

pleading and are granted only in exceptional circumstances. The page and word limits set forth above are maximum limits. Parties are not expected or required to submit pleadings of the maximum length. Typically, a well-written petition for review is between 5 and 10 pages long.

If you file a petition or cross petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. A petition for review must be filed with the Clerk of the Board no later than the date this initial decision becomes final, or if this initial decision is received by you or your representative more than 5 days after the date of issuance, 30 days after the date you or your representative actually received the initial decision, whichever was first. If you claim that you and your representative both received this decision more than 5 days after its issuance, you have the burden to prove to the Board the earlier date of receipt. You must also show that any delay in receiving the initial decision was not due to the deliberate evasion of receipt. You may meet your burden by filing evidence and argument, sworn or under penalty of perjury (*see* 5 C.F.R. Part 1201, Appendix 4) to support your claim. The date of filing by mail is determined by the postmark date. The date of filing by fax or by electronic filing is the date of submission. The date of filing by personal delivery is the date on which the Board receives the document. The date of filing by commercial delivery is the date the document was delivered to the commercial delivery service. Your petition may be rejected and returned to you if you fail to provide a statement of how you served your petition on the other party. *See* 5 C.F.R. § 1201.4(j). If the petition is filed electronically, the online process itself will serve the petition on other e-filers. *See* 5 C.F.R. § 1201.14(j)(1).

A cross petition for review must be filed within 25 days after the date of service of the petition for review.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

NOTICE OF APPEAL RIGHTS

You may obtain review of this initial decision only after it becomes final, as explained in the "Notice to Appellant" section above. 5 U.S.C. § 7703(a)(1). By statute, the nature of your claims determines the time limit for seeking such review and the appropriate forum with which to file. 5 U.S.C. § 7703(b). Although we offer the following summary of available appeal rights, the Merit Systems Protection Board does not provide legal advice on which option is most appropriate for your situation and the rights described below do not represent a statement of how courts will rule regarding which cases fall within their jurisdiction. If you wish to seek review of this decision when it becomes final, you should immediately review the law applicable to your claims and carefully follow all filing time limits and requirements. Failure to file within the applicable time limit may result in the dismissal of your case by your chosen forum.

Please read carefully each of the three main possible choices of review below to decide which one applies to your particular case. If you have questions about whether a particular forum is the appropriate one to review your case, you should contact that forum for more information.

(1) Judicial review in general. As a general rule, an appellant seeking judicial review of a final Board order must file a petition for review with the U.S. Court of Appeals for the Federal Circuit, which must be received by the court within **60 calendar days** of the date this decision becomes final. 5 U.S.C. § 7703(b)(1)(A).

If you submit a petition for review to the U.S. Court of Appeals for the Federal Circuit, you must submit your petition to the court at the following address:

U.S. Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Additional information about the U.S. Court of Appeals for the Federal Circuit is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, 10, and 11.

If you are interested in securing pro bono representation for an appeal to the U.S. Court of Appeals for the Federal Circuit, you may visit our website at http://www.mspb.gov/probono for information regarding pro bono representation for Merit Systems Protection Board appellants before the Federal Circuit. The Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.

(2) Judicial or EEOC review of cases involving a claim of discrimination. This option applies to you only if you have claimed that you were affected by an action that is appealable to the Board and that such action was based, in whole or in part, on unlawful discrimination. If so, you may obtain judicial review of this decision—including a disposition of your discrimination claims—by filing a civil action with an appropriate U.S. district court (*not* the U.S. Court of Appeals for the Federal Circuit), within **30 calendar days** after this decision becomes final under the rules set out in the Notice to Appellant section, above. 5 U.S.C. § 7703(b)(2); *see Perry v. Merit Systems Protection Board*, 582 U.S. ____ , 137 S. Ct. 1975 (2017). If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and

to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e-5(f) and 29 U.S.C. § 794a.

Contact information for U.S. district courts can be found at their respective websites, which can be accessed through the link below:

http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx.

Alternatively, you may request review by the Equal Employment Opportunity Commission (EEOC) of your discrimination claims only, excluding all other issues. 5 U.S.C. § 7702(b)(1). You must file any such request with the EEOC's Office of Federal Operations within **30 calendar days** after this decision becomes final as explained above. 5 U.S.C. § 7702(b)(1).

If you submit a request for review to the EEOC by regular U.S. mail, the address of the EEOC is:

Office of Federal Operations
Equal Employment Opportunity Commission
P.O. Box 77960
Washington, D.C. 20013

If you submit a request for review to the EEOC via commercial delivery or by a method requiring a signature, it must be addressed to:

Office of Federal Operations
Equal Employment Opportunity Commission
131 M Street, N.E.
Suite 5SW12G
Washington, D.C. 20507

(3) Judicial review pursuant to the Whistleblower Protection Enhancement Act of 2012. This option applies to you only if you have raised claims of reprisal for whistleblowing disclosures under 5 U.S.C. § 2302(b)(8) or other protected activities listed in 5 U.S.C. § 2302(b)(9)(A)(i), (B), (C), or (D). If so, and your judicial petition for review "raises no challenge to the Board's disposition of allegations of a prohibited personnel practice described in section 2302(b) other than practices described in section 2302(b)(8) or 2302(b)(9)(A)(i), (B), (C), or (D)," then you may file a petition for judicial review with the U.S.

Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction. The court of appeals must receive your petition for review within **60 days** of the date this decision becomes final under the rules set out in the Notice to Appellant section, above. 5 U.S.C. § 7703(b)(1)(B).

If you submit a petition for judicial review to the U.S. Court of Appeals for the Federal Circuit, you must submit your petition to the court at the following address:

U.S. Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Additional information about the U.S. Court of Appeals for the Federal Circuit is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, 10, and 11.

If you are interested in securing pro bono representation for an appeal to the U.S. Court of Appeals for the Federal Circuit, you may visit our website at http://www.mspb.gov/probono for information regarding pro bono representation for Merit Systems Protection Board appellants before the Federal Circuit. The Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.

Contact information for the courts of appeals can be found at their respective websites, which can be accessed through the link below:

http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx