

Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

April 12, 2004

GSBCA 16328-RELO

In the Matter of KATHERN L. GASKINS

Kathern L. Gaskins, Roseville, CA, Claimant.

Stephen H. Brock, Chief, Sustainment Division, Air Force Senior Leader Management Office, Department of the Air Force, Washington, DC, appearing for Department of the Air Force.

BORWICK, Board Judge.

Claimant, a member of the Senior Executive Service (SES) with the Department of the Air Force (agency), is not entitled to a separation benefit (popularly known as the "last move home" benefit) because she moved home before her separation from federal service.

Background

Between November 2, 2002, and May 2003, claimant developed serious illnesses that prevented her from fully performing her duties. On or about May 22 and May 23, claimant's physicians recommended that claimant take disability retirement, and one physician recommended that claimant take immediate medical leave for about three weeks. On May 27, 2003,¹ claimant told the agency that her physicians concluded that, for health reasons, she would be unable to continue working and recommended that claimant discontinue work at her permanent duty station. Claimant also advised the agency of her planned retirement date of on or about January 3, 2005. Finally, claimant requested that the agency grant expedited consideration of a last move home benefit in light of her health situation and in anticipation of the eventual approval of her retirement application.

On or about June 1 or 2, claimant discussed with her superiors taking leave; the agency granted claimant permission to take substantial sick and annual leave.

¹ The relevant memorandum is dated June 27, 2003, but claimant asserts it was prepared and transmitted to agency officials on May 27, 2003.

On June 20, the deputy in the agency's Senior Leader Management Office advised claimant that the agency could not then approve her request for the last move home benefit. The agency noted that as of that date, claimant had not yet submitted an application for disability retirement. The agency stated that claimant was eligible for the last move home benefit "upon her separation." The official advised that when claimant had submitted a complete disability retirement application the agency would consider her to be "pending separation" and would authorize claimant the last move home benefit. This official advised that if claimant took optional retirement on or about her planned date of January 3, 2005, that the agency would authorize claimant's last move home at that time.

On June 25, 2003, claimant submitted to the Office of Personnel Management (OPM) an application for immediate disability retirement. Claimant stated on her application that she had been rendered disabled in May 2003. Claimant also submitted to the agency a request for personnel action and requested disability retirement. She stated that if disability retirement were not approved, she requested optional retirement effective January 3, 2005. On or about June 26, 2003, one agency official advised another in an e-mail message that "we do not have sufficient evidence to support a possible disability retirement and therefore will not issue last move home orders to her at this time." Apparently, claimant was informed of this determination by a forwarded e-mail message. On August 30, 2003, claimant grieved the agency's determination of June 26.

Between June 27 and July 3, claimant packed and moved from Los Angeles to Sacramento and incurred, according to claimant, \$5192.62 in moving and transportation expenses.

On November 3, the agency denied the grievance. The deciding official for the grievance noted that in June claimant submitted a request for use of a substantial number of hours of sick and annual leave beginning in June 2003, and that the Commanding General at claimant's permanent duty station approved the request based on the recommendation of claimant's physician that claimant take early retirement.

The deciding official stated that claimant had not submitted a disability retirement application at the time of her move and in fact had not completed the application until October 2003. The official noted that claimant used annual leave in the interim and that claimant proceeded with her move and incurred expenses while in annual leave status.

The deciding official concluded:

The phrase "upon separation" [in section C4801 of the Defense Department's Joint Travel Regulations] has the clear meaning of the date on which the employee/employer relationship is severed. You have not separated from Air Force employment, nor does the Air Force have any assurance that you will separate from employment, or, if you do separate, when your separation will occur. In the interim, you have elected to request annual leave. Air Force Instruction clearly warns against the granting of annual leave when it is known that the employee will not return to duty. Further, although you have now submitted a disability retirement application, you failed to submit required medical information from June 03 to October 03, a period of approximately three months. I have been informed that the submission of

a disability retirement application is not dispositive. A disability retirement application may be withdrawn at any time or denied by the Office of Personnel Management. Finally, although you state you intend to retire voluntarily if your disability retirement is not approved, you cannot be held to that commitment should you decide to return to your position. . . . Your requested remedy is therefore denied.

On or about December 7, 2003, claimant submitted a claim to the Board challenging the grievance determination. The Board received the claim on December 10.

On December 17, 2003, OPM approved claimant's application for disability retirement but noted that the agency had not separated her from federal service. OPM stated that it would notify the agency of its approval and ask the agency to separate claimant.

Discussion

Statute provides:

Under regulations prescribed under section 5738 of this title and when the head of the agency concerned or his designee authorizes or approves, the agency shall pay from Government funds—

. . . .

upon the separation . . . of a career appointee, as defined in section 3132(a)(4) of this title, [certain SES employees], the transportation expenses of the immediate family of such individual, and the expenses of moving . . . the household goods of such individual and personal effects not in excess of eighteen thousand pounds net weight, to the place where the individual will reside.

5 U.S.C. § 5724(a)(3) (2000). Under statute the employee must have been transferred from one permanent duty station to another as a career appointee in the SES during or after the five years preceding eligibility to receive an annuity under the Civil Service Retirement System (CSRS) or Federal Employee Retirement System (FERS) and the employee must be eligible to receive an annuity "upon such separation." 5 U.S.C. § 5724(a)(3)(A), (B).

The implementing Federal Travel Regulation (FTR) restates those criteria and also implements the language of the statute basing eligibility for the last move home benefit "upon the separation . . . of a career appointee." In this regard, the FTR provides that, to be eligible for the last move, an employee "separate from Federal Service on or after September 22, 1988," and that the employee "[is] eligible to receive an annuity upon separation." 41 CFR 302-3.307(c),(d) (2003).

The Joint Travel Regulations (JTR) supplement and implement the FTR. Armando G. Solis, GSBCA 15713-RELO, 02-2 BCA ¶ 31,870. As a civilian employee of the agency, claimant is subject to both the FTR and the JTR. John W. Catellani, GSBCA 15428-TRAV, 01-2 BCA ¶ 31,515.

The relevant JTR provision generally tracks the requirements of the FTR and specifically provides that SES career employees are eligible for the last move home benefit "upon separation from Federal Service." JTR C4801.²

Under the JTR, requests for the authorization or approval of the benefit should be made in writing at least ninety days before the anticipated date of retirement. JTR C4802. Additionally, all travel and transportation shall be accomplished within six months of the date of separation, with longer periods allowed for extenuating circumstances, but not to exceed two years from the date of separation. JTR C4806.

Statute and regulation make actual separation from the federal service a pre-condition for receiving the last move home benefit. The phrase "upon the separation" (or "upon separation") in statute and both the FTR and JTR means just what it says--that an eligible employee qualifies for the last move home benefit when he or she has separated from federal service. This conclusion is reinforced by the FTR's requirement that to receive the last move home benefit, the employee actually "separate from Federal Service on or after September 22, 1988." See Edward J. Curran, GSBCA 15447-RELO, 01-1 BCA ¶ 31,403 (re-employed annuitant who resigned not entitled to last move home benefit since resignation not considered separation from Government service for retirement).

The deciding official was incorrect in one finding. Claimant had submitted a disability retirement application just before she moved home. Nevertheless, the deciding official was correct in his central point concerning the requirement for separation from the federal service. In this instance, claimant left for home and incurred her claimed last move home expenses well before her disability or optional retirement was processed and used leave pending an uncertain retirement date. Since claimant was not separated from federal service when she moved home, claimant is not entitled to the last move home benefit.

Claimant argues that the JTR places a time restriction after separation from employment but that there is "no corollary 'not earlier than language' in the JTR." The simple reason for the lack of an early date is that there is no date before separation which would entitle claimant under statute or regulation to receive the last move home benefit. The JTR's suggestion at JTR C4802 that an employee submit a request for the last move home benefit in writing at least ninety days before the anticipated date of retirement is simply to assure a smooth transition on the date of retirement. That provision does not change the statutory or regulatory requirement of separation from federal service.

Finally, claimant maintains that agency officials tried to steer her to optional retirement by placing obstacles to the timely and efficient processing of her disability retirement application. Those complaints should be addressed to OPM, not this Board. In any event, those charges, whether valid or not, do not change the statutory or regulatory

² Until January 2002, the JTR also contained the requirement that the employee "is separated from Federal Service on or after 22 September 1988." JTR C4801-3 (Jan. 2002). In February 2002, this phrase was inexplicably eliminated from JTR C4801 and what was JTR C4801-4 in the previous version was renumbered JTR C4801-3. See JTR C4801 (Feb. 2002). Nevertheless, that requirement remains in 41 CFR 302-3.307(c).

requirement of separation before claimant is eligible to receive the last move home benefit.

The Board denies the claim.

ANTHONY S. BORWICK
Board Judge