

## DISABILITY RETIREMENT RESEARCH NOTES

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1. **Definitions of “disability”**

Disability under the Retirement Act (**FERS**) is defined as follows:

“Disabled and disability means unable or inability, because of disease or injury, to render useful and efficient service in the employee's current position ... .” **5 C.F.R. §844.102.**

“... [A]n employee shall be considered disabled only if the employee is found by the Office to be unable, because of disease or injury, to render useful and efficient service in the employee's position.” **5 U.S.C. §8451(a)(1)(B).**

Disability under the Retirement Act (**CSRS**) is defined as follows:

“Disabled and disability mean unable or inability, because of disease or injury, to render useful and efficient service in the employee's current position, or in a vacant position in the same agency at the same grade or pay level for which the individual is qualified for reassignment. ... Medical condition means a health impairment resulting from a disease or injury, including a psychiatric disease. ... Useful and efficient service means (1) acceptable performance of the critical or essential elements of the position; and (2) satisfactory conduct and attendance.” **5 CFR §831.1202.**

See also **5 USC §8337(a)**:

“Any employee shall be considered to be disabled only if the employee is found by the Office of Personnel Management to be unable, because of disease or injury, to render useful and efficient service in the employee's position and is not qualified for reassignment, under procedures prescribed by the Office, to a vacant

position which is in the agency at the same grade or level and in which the employee would be able to render useful and efficient service.”

There is no requirement in disability retirement cases that the applicant prove “total disability”. Oglesby v. OPM, 19 MSPR 112 (1984); Whitmer v. OPM, 41 MSPR 658 (1989).

“[The] definition of 'disability' in [5 USC 8331\(6\)](#) does not contemplate a condition of complete 'helplessness' or inability to perform any of the functions of the particular position. Rather, as the statute clearly states, total disability is determined by the employee's ability or inability to perform in a useful and efficient manner. We perceive no sound reason for straining the plain meaning of the statute. See Bethlehem Steel Corp v. Occupational Safety & Health Commission, 573 F.2d 157, 161 (3rd Cir. 1978); United States v. Canadian Vinyl Industries, Inc., 555 F.2d 806, 811 (C.C.P.A. 1977). Thus, in the instant case, appellant need only show that, because of her medical condition, she was unable to perform her duties usefully and efficiently.” Meighen v. OPM, 7 MSPR 164, 166 (1981).

Requirements of travel in the job must be considered when determining disability vel non under FERS. Frankunas v. OPM, 26 MSPR 591 (1985).

Disability law has long held that even if a person, by dint of special effort, is able to continue working after an injury this fact does not prove he is not disabled in a legal sense. Crittendon v. OPM, 26 MSPR 152 (1985).

Even if the employee has a pre-existing medical condition, he will be eligible for disability retirement if he becomes disabled as a result of the progression of the disease or illness. Johnson v. OPM, 57 MSPR 590 (1993).

## **2. Enforceability of EEOC settlements**

Complainant, a GS-12 employee raised a claim of hostile work environment, under Title VII and the Rehabilitation Act. The parties entered into a settlement agreement which provided for the agency to recalculate complainant's disability retirement at the GS-14, step 10 level. However, subsequent to the execution of the agreement, the Office of Personnel Management (OPM), as administrator of the Civil Service Retirement System (CSRS), advised the agency that it would not implement the provision because, *inter alia*, it appeared that the agreement had been drafted solely to provide complainant with an annuity in excess of that to which he was entitled. Complainant claimed breach of the agreement. The Commission found the provision to be unenforceable. It noted that the monetary relief available for hostile environment harassment under Title VII and the Rehabilitation Act was an award of compensatory damages, instead of a promotion for which complainant never claimed he had applied or been denied. The Commission urged the parties to renegotiate the agreement, ratify it in the absence of the provision at issue,

or continue with the processing of complainant's underlying complaints. Freeman v. Department of the Army, EEOC Request No. 05990031 (July 13, 2001).

### **3. Decisions of MSPB and EEOC re AWOL, discrimination binding on OPM (from OPM website)**

**Matter of:** [claimant]  
**Date:** June 26, 2002  
**File Number:** 02-0032  
**OPM Contact:** Melissa A. Drummond

The claimant is a former employee of the [claimant's agency], who believes he should be compensated for time spent participating in a medical examination and for being denied sick and annual leave. After our review of the claim, we find that OPM is precluded from considering the claim.

The claimant was removed from his position, effective September 21, 1996, on charges of being absent without authorization for an excessive period of time and failure to provide medical information to support his requests for leave, as ordered. The claimant filed an appeal with the Merit Systems Protection Board (MSPB) on September 23, 1996, challenging his removal and alleging, among other things, that the agency discriminated against him. The MSPB issued an initial decision on October 30, 1998, sustaining the agency action and finding no discrimination. The claimant petitioned the full MSPB to review that decision, but the MSPB denied the petition on May 24, 1999.

On August 31, 2000, the Equal Employment Opportunity Commission (EEOC) issued a decision, affirming the MSPB. In its decision of August 31, 2000, the EEOC found that the MSPB decision was supported by the record, and concurred with the MSPB findings. The EEOC found that the claimant's submission of medical documentation "was very limited and unresponsive." EEOC concluded that the agency had articulated a legitimate, nondiscriminatory reason for his removal, i.e., the claimant was absent without authorization for an excessive period, and he failed to provide medical information to support his absences.

The claimant bases his claims on the allegations that the agency acted improperly in determining that his medical evidence was not sufficient to support his absences from work, and that the agency issued "bogus" charges against him.<sup>1</sup> This is the same argument that he used before the MSPB and EEOC as the basis for his challenge to the agency's action in removing him from employment. MSPB and EEOC both rejected that argument and concluded that the claimant failed to provide medical information that was sufficient to support his absences, and that the removal action was justified.

In addition, the question of whether his medical documentation was sufficient to support his extended absences leads to, and cannot be considered apart from, the question of whether the agency's action in removing the claimant was proper. To adjudicate the claim, OPM would be required to decide whether the agency abused its discretion in requesting additional medical documentation and, ultimately, in removing him for unauthorized absence when he failed to submit that

documentation. The MSPB and EEOC already have considered and decided these questions.

With respect to the claims that the claimant makes before OPM, he clearly could have raised these claims, but did not raise them, before MSPB and EEOC during the course of proceedings challenging his removal. Thus, he had the opportunity to raise before the MSPB and EEOC the issues that he presents to OPM. Moreover, if the claimant had succeeded in his MSPB/EEOC appeal of the removal action and related allegations of discrimination, he could have received the relief that he now seeks before OPM.

In view of this, it is clear that the claimant's claim before OPM, his challenge to his removal, and his discrimination claim all revolve around, and result from, the agency's determinations that his medical evidence was not sufficient to support his prolonged absence and, therefore, he should be removed from his employment. MSPB and EEOC, agencies with authority to review such determinations, already have decided that these determinations were proper. His claims that the agency acted arbitrarily already have been adjudicated. Therefore, OPM is precluded from considering his claim. *O'Connor v. PCA Family Health Plan, Inc.*, 200 F. 3d 1349 (11th Cir. 2000); *Hasson v. United States*, 220 Ct. Cl. 615 (1979); *Ray v. United States*, 209 Ct. Cl. 761 (1976); *Clark v. United States*, 150 Ct. Cl. 470, 281 F. 2d 443 (1960); *Matter of Carl A. Macmurdo*, B-234257 and B-234257.2 (November 20, 1989); *Matter of Sanford M. Altschul*, B-192433 (October 4, 1978).

This settlement is final. No further administrative review is available within OPM. Nothing in this settlement limits the employee's right to bring an action in an appropriate United States Court.

#### **4. Decisions of OWCP or SSA as bearing on OPM decisions about disability retirement**

Where OWCP has made a determination that a job offered to applicant is "suitable" to the disability under 5 U.S.C. §8106(c), OPM may deny disability retirement benefits if it finds the job was offered on a permanent basis. OWCP's determination is not binding on OPM, however, since each agency utilizes a different definition of disability. For example, OWCP may find temporary or part-time work suitable, but such work does not qualify as an accommodation barring disability retirement.

The Board is not bound by determinations made by the Office of Workers' Compensation Programs or the Social Security Administration. [\*Wilmot v. OPM\*, 35 MSPR 238, 240 \(1987\)](#); [\*Daniel v. OPM\*, 43 MSPR 599, 603 \(1990\)](#). The Federal Circuit concurred with the Board that the receipt of Social Security disability benefits did not establish a finding of disability under FERS. [\*Trevan v. OPM\*, 69 F.3d 520 \(Fed. Cir. 1995\)](#). The court concluded, [69 F.3d at 526](#):

An employee who fully recovers within one year [after a compensable work-related injury] and seeks restoration is guaranteed the right to return to her former position or an equivalent one immediately upon cessation of compensation. [5 CFR](#)

[353.301\(a\) \(2000\)](#). 'OWCP's determination that the appellant is fully recovered from his work-related injury is considered 'final and conclusive for all purposes and with respect to all questions of law and fact.' [As'Salaam v. USPS, 85 MSPR 76, 84 \(2000\)](#) (quoting [5 USC 8128\(b\)\(1\)](#)). Restoration of fully recovered employees is obligatory only when the employee is able to perform all the duties of the position he left or an equivalent position, as the Board explained in [Drews v. USPS, 5 MSPR 344, 346-47 \(1981\)](#) (footnotes omitted):

## **5. Accommodation and disability retirement**

An employing agency's offers of limited duty assignments, temporary assignments, etc. do not constitute the type of accommodation that disqualifies an applicant for disability retirement. To be fully accommodated, the duties must comprise a duly constituted "vacant position" within the meaning of *5 C.F.R. §§844.102, 844.103*. See also: *Noyer v. OPM*, 44 MSPR 336 (1990); *Breyer v. OPM*, 53 MSPR 628 (1992); *Eshelman v. OPM*, 72 MSPR 173 (1996); *Gometz v. OPM*, 69 MSPR 115, 122 (1995); *Bracey v. OPM*, Docket No. 00-3034 (Federal Circuit, issued 01/17/01). An offer of work at a temporary limited/light-duty assignment does not bar an employee from disability retirement, even if he/she rejects the position.

Where an employee performs only some of the duties of his graded position, he has not been accommodated in a way that prevents him from retiring on disability. *Marino v. OPM*, 243 F.3d 1375 (Fed. Cir. 2001); *Brickers v. OPM*, DOCKET NUMBER DC-844E-00-0348-I-1 (June 26, 2001). In *Brickers*, the Board quoted the *Marino* holding as follows:

"As we stated in *Bracey*, "[a] 'position' in the federal employment system is required to be classified and graded in accordance with the duties, responsibilities, and qualification requirements associated with it." 236 F.3d at 1359. Therefore, any evaluation of useful and efficient service for disability purposes must be with respect to the employee's official position, not an unofficial light duty assignment."

## **6. Absences and disability retirement**

While mere absence from work without a medical justification may not be sufficient to establish disability, it merits consideration in judging disability. *Coleman v. Office of Personnel Management*, 43 M.S.P.R. 570, 574 (1990), overruled on other grounds by *Alford v. Office of Personnel Management*, 79 M.S.P.R. 114 (1998). Absences due to illness prove disability. *Arnone v. OPM*, 7 MSPR 212 (1981).

Being present at work is essential to performing useful and efficient service; disability may be shown by a deficiency in performance, conduct, or attendance. *5 U.S.C. § 8451; 5 C.F.R. § 844.103(a)*.

## 7. Removal for inability to perform duties and disability retirement

A charge of 'inability to perform job duties' or 'inability to work' is equivalent to a charge of 'medical incapacity' and creates a *prima facie* case of **disability retirement**. [Lewis v. OPM, 87 MSPR 275, 279, 283 \(2000\)](#); [Cheers v. OPM, 87 MSPR 591, 595 \(2001\)](#) (case remanded because removal as 'medically disqualified' is equivalent to a removal for medical reasons.' However, an employee who resigned from his position after his supervisor had taken steps to accommodate job stress is not entitled to a presumption of a *prima facie* case of disability. [Peterson v. OPM](#), (Fed. Cir. 2001 nonprecedential No. 00- 3261). A settlement agreement providing that the appellant was removed based on her physical inability to do her job is sufficient to trigger a rebuttable *prima facie* case of disability - [Bynum v. OPM, 89 MSPR 1, 5-6 \(2001\)](#). The Board disagreed with OPM's contention that the settlement agreement was a fabrication and applied the *Bruner* presumption. See discussion in Chapter 6 under the heading of 'Disability-Physical Impairment; OWCP Findings'; see discussion in Chapter 16 concerning 'Scope of Settlements' and the subheading 'Retirement Matters.'

## 8. Job duties to be considered

An employee's official duties *as described in the position description* may differ substantially from the actual duties of Appellant's position *as performed*. The actual duties must be considered, not just what the position description says, where the tasks performed correspond to a lower-graded position. [Bracey v. OPM](#), 236 F.3d 1356 (Fed. Cir. 2001); [Marino v. OPM](#), 243 F.3d 1375 (Fed. Cir. 2001).

In [Brickers](#), *supra*, the Board discussed the impact of recent court decisions in a case in which Appellant had been on light duty and then was RIFed:

¶9 “All that remains, then, is the question of whether, by assigning the appellant light duty, the employing agency reasonably accommodated his disability. After the ID in this case was issued, the Court of Appeals for the Federal Circuit decided [Bracey v. Office of Personnel Management](#), 236 F.3d 1356 (Fed. Cir. 2001). There, the court considered the appeal of a Department of the Navy Electronics Worker, WG-8, who, following several work-related injuries, was assigned to the light-duty shop where he performed tasks associated with the lower-graded position of Material Examiner and Identifier, WG-5, until his separation by RIF. He sought disability retirement under the Civil Service Retirement System (CSRS), but OPM denied his application on the basis that his employing agency had accommodated his medical condition by providing him with light-duty work that was within his medical restrictions and was not temporary in nature. On appeal, the AJ found that Bracey's assignment to the light-duty shop was not an accommodation that would preclude disability retirement benefits because the duties of his light-duty assignment were not those of an Electronics Worker, but rather those associated with the

lower-graded position of Material Examiner and Identifier, WG-5. The full Board reversed the ID by a 2-1 vote. The majority concluded that, despite the fact that Bracey's duties were not those of his official position, he was not eligible for disability retirement because he had retained the grade and pay of his Electronics Worker position. The court reversed the Board's decision, however, finding that Bracey's light-duty assignment did not constitute an assignment to a "vacant position" at the same grade and pay, *id.* at 1359-60, or an "accommodation" of his disability in the Electronics Worker position, *id.* at 1361-62, and that, therefore, it did not preclude Bracey from being entitled to a disability retirement annuity under CSRS.

¶10 “Following *Bracey*, the court addressed the question of whether, all other factors being equal, such a light-duty assignment would preclude an employee from being entitled to a disability retirement under FERS. *In Marino v. Office of Personnel Management*, Docket No. 00-3133, slip op. at 4 (March 27, 2001), the court found that the reasons relied upon by the court in *Bracey* applied equally in the case of an employee seeking disability retirement under FERS.

¶11 “Here, while the appellant's most recent performance evaluations purported to rate him on the critical elements of the WG-5 position, his position of record was identified as that of a WG-6 Equipment Cleaner, and he was noted as being on light duty. IAF, Tab 3, Subtab II D. He remained at all times, however, assigned to his WG-6 Equipment Cleaner position, and the record does not reflect, nor does OPM suggest that he was ever reassigned to the lower-graded position. With regard to the appellant's performance of duties associated with the WG-5 Material Examiner and Identifier position, the AJ acknowledged his uncontradicted testimony that he performed only some of the duties associated with that position and that, in the months before his separation, he performed no duties at all. ID at 5. Even if the WG-5 position were deemed a "vacant position," it was not "at the same grade or pay level" as required by 5 U.S.C. § 8451. Nor does an offer of assignment to a lower-graded position constitute an "accommodation" in a disability retirement appeal. *See, e.g., Eshelman v. Office of Personnel Management*, 72 M.S.P.R. 173, 176 (1996).

¶12 “In sum, because the appellant's light-duty assignment did not constitute an accommodation of his disability, and because it is not disputed that he met all the other requirements, we find that he has established his entitlement to a disability retirement under FERS.”

In Marino, the Court held:

“In Bracey, we held that the adjustment made to the employee's job or work environment must enable the employee to continue to perform the



duties of his or her official position. 236 F.3d at 1361. A "light-duty assignment therefore cannot be considered an 'accommodation' as that term is used in the regulations." *Id.* Here, Marino was never assigned to another position within the agency. Until his separation, he maintained his official position of Materials Handler. His assignment to light duties, therefore, was not an accommodation which allowed him to perform the duties of his official position.

“Marino also asserts that the board incorrectly weighed the evidence of his disability. We may not review the factual underpinnings of physical disability determinations. *Anthony*, 58 F.3d at 626. However, he argues that in determining his disability, the board improperly relied upon his ability to perform useful and efficient service in his unofficial light duty position, and not his official position of Materials Handler. This is an alleged error going to the heart of the administrative determination, which we may review. *See id.*

“The board found that Marino suffers from allergies and respiratory problems, but concluded that the evidence did not support a finding of disability. In so concluding, it relied on OPM's finding that Marino was "providing useful and efficient service in the accommodation position." *Marino* at 7 (emphasis added). Marino acknowledged that he was able to perform any activity in a dust-free (accommodated) environment, but could not provide useful and efficient service as a Materials Handler. Section 8451 of title 5 of the United States Code requires a finding that the employee is unable "to render useful and efficient service in the employee's position." (Emphasis added). As we stated in *Bracey*, "[a] 'position' in the federal employment system is required to be classified and graded in accordance with the duties, responsibilities, and qualification requirements associated with it." 236 F.3d at 1359. Therefore, any evaluation of useful and efficient service for disability purposes must be with respect to the employee's official position, not an unofficial light duty assignment.”

## 9. **Bruner presumption**

Where the employee is removed for physical inability to perform his duties and there was no other position that he qualified for and was physically able to do, the employee is deemed to have met his initial *prima facie* burden of proof. With this presumption of disability, the burden of production then shifts to the government to come forward with evidence sufficient to support a finding that the employee is not disabled. However, the ultimate burden of proof still rests with the employee who 'will then prevail only if he/she establishes entitlement by a preponderance of the evidence.' *Bruner v. OPM*, 996 F.2d 290, 294 (Fed. Cir. 1993). This case also holds that the Board must weigh the totality of the evidence of disability produced by both sides in such cases.



## 11. Intermittent symptoms

In *Meighen v. OPM*, 7 MSPR 164, 167 (1981), the Board found that the ability to perform during 45% of the normal work period does not constitute the performance of useful and efficient service; appellant's fainting spells were sudden, unpredictable, posed the threat of injury to herself and her coworkers, and interfered substantially with her work. An employee may be disabled although able to perform some tasks on an irregular basis. *McGhee v. OPM*, 20 MSPR 372, 374 (1984) (holding that it was error to conclude appellant was not disabled due to irregular performance of job tasks).

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