

## **DISABILITY RETIREMENT BENEFITS FOR FEDERAL EMPLOYEES AND POSTAL WORKERS: AN OVERVIEW**

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By Elliott Andalman, Esq.  
and Zubaidah Haamid  
Andalman & Flynn, P.C.  
8601 Georgia Avenue, Suite 604  
Silver Spring, MD 20910  
(301) 563-6685  
(301) 563-6681 fax  
[eandalman@a-f.net](mailto:eandalman@a-f.net)  
[zhaamid@a-f.net](mailto:zhaamid@a-f.net)  
[www.andalmanflynn.com](http://www.andalmanflynn.com)

Employees of the Federal Government and the United States Postal Service have an array of retirement benefits available to them. The Office of Personell Management (OPM) manages these benefits. The two main programs for civilian federal workers who became disabled to perform federal service are the Federal Employees Retirement System (FERS) and the Civil Service Retirement System (CSRS). Under both programs the disabled federal employee must have a medical condition or medical conditions that prevent him or her from performing “useful and efficient” federal service at his or her current grade or pay. There is no requirement that the employee be totally disabled nor is it necessary that the disease or illness be caused by the employee’s job.

- A. FERS pays disability benefits to federal employees who become disabled after completing at least 18 months of creditable federal civilian service. Annuitants who apply for disability benefits under FERS must also apply for Social Security Disability (SSD) benefits or show that they are not eligible for SSD.
- B. CSRS pays disability benefits to federal employees who become disabled after completing a minimum of 5 years of federal civilian service. CSRS employees do not have to apply for SSD.

The processing of applications differs between Agencies. (i.e. National Institutes of Health (NIH) conducts an in-house medical review of the application and medical evidence before processing the application and forwarding it to OPM). In addition the State Department, Foreign Service, has a different application and requires an Independent Medical Examination.

Employees who are 62 years of age or older are no longer eligible for disability retirement. These employees are eligible for regular retirement. Federal employees covered by FERS may qualify for early retirement with reduced benefits before age 62.<sup>1</sup> In addition, Federal employees covered by CSRS may be eligible for regular retirement benefits even before age 62 as shown by this chart:

#### CSRS

age 55 with at least 30 years of service; or

age 60 with at least 20 years of service.

### **I. Disqualifications**

Removal for cause does not disqualify an employee for disability retirement benefits.

However, an employee will be disqualified for disability retirement if:

1. convicted of subversive activities or perjury in connection with such an offense;
2. they are absent from the U.S. to avoid criminal prosecution;
3. they refuse to testify in matters involving subversive activities; or
4. they falsify their employment applications concerning such matters.

5 USC 8312-8315.

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<sup>1</sup> In FERS, employees may retire at age 60 with at least 20 years of service with reduced benefits and age 55 with a minimum of 10 years of service with greatly reduced benefits. Early retirement will cause benefits to be reduced by 5% for each year you are under age 62 when you retire. There is also a gradual extension of the minimum age of 55 for retirement under FERS for employees born in 1948 and thereafter.

## **II. Calculation and Payment of Benefits**

Retirement benefits under both programs are based, at least in part on, the “high-three” years’ average salary. High-three average salary is the highest average annual pay produced by the employee’s basic pay during any three consecutive years of service, including shift rates, night shift differential and within-grade increases. It does not include payments for overtime, bonuses, etc.

A. Employees covered under FERS receive 60% of their high-three average salary for the first year of disability reduced by any SSD benefits payable. Thereafter, employees will receive 40% of their high-three average salary reduced by 60% of any SSD benefits payable for every additional year an employee collects FDR.

B. There is a minimum guaranteed disability retirement annuity for employees covered under CSRS which is based on 40% of their high-three average salary or an amount computed under a general formula based on years of actual service plus remaining years to age 60. The general formula is as follows:

-take 1.50% of your high-three average salary and multiply the result by your years of service up to 5 years;

-add 1.75% of your high-three average salary and multiply the result by all your years of service over 5 years up to 10 years; and

-add 2% of your high-three average salary multiplied by all service over ten years.

If an employee has more than 22 years of actual federal service, that employee will receive more than 40% of their high-three average salary.

If an employee has less than 22 years of creditable federal service, that employee will receive less than 40% of their high three average salary.

If an employee has 22 or more years of creditable federal service but less than 22

years of actual service, that employee will receive 40% of their high-three average salary.

- C. Upon receiving notification of approval, the effective date of payment of a federal employee's disability annuity benefit begins:
1. on the first day of the month after separation from the service; or
  2. the day after pay ceases and the disability requirements are met.

The annuity cannot start until separation from civil service position, but may be retroactive to the last day in pay status. This means that the annuity will retroactively cover any final period of leave without pay upon approval of the disability retirement.

### **III. Definition of Disability**

FERS and CSRS both use the same definition of disability as defined in 5 USC 8337. In order to be declared disabled under either program, an applicant must be disabled not only for their current position, but also for any vacant positions at the same grade or pay level.

- A. An employee is entitled to disability retirement benefits only when the information submitted with the application shows that an employee is unable to perform useful and efficient service because of disease or injury (1) in the employee's current position or (2) within a vacant position, in the same agency and commuting area at the same grade or pay level and tenure, for which the employee is qualified for reassignment. 5 USC 8337(a).
- B. Useful and efficient service means fully successful performance of the critical or essential elements of the position (or the ability to perform at that level) and satisfactory conduct and attendance. 5 CFR 831.1202 (2000).

- C. The disability must be expected to last at least one year.

#### **IV. Application Forms**

There are numerous forms that make up the application for FDR. Below is a list of the forms that normally make up the complete application packet:<sup>2</sup>

1. Applicant's Statement of Disability
2. Supervisor's Statement (although this is an agency form, you should try to assist the supervisor in completing this form, which is not always possible. Some supervisors cooperate and others do not.)
3. Physician's Statement
4. Application for Immediate Retirement
5. Spouse's Consent to Survivor Annuity
6. Agency Certification of Reassignment and Accommodation Efforts
7. Disability Retirement Application Checklist
8. Certified Summary of Federal Service
9. Agency Checklist of Immediate Retirement Procedures

#### **V. Application Process and Timelines**

A federal employee may apply for disability retirement at any time before separation from service or up to the statute of limitation of 1 year after separation.

- A. Initial Application – the application must be received by OPM before the 1 year deadline. This same time limit applies to employees receiving Federal Workers' Compensation (FWC). If you are unable to collect all of the necessary information, you should not delay submitting the Applicant's Statement of

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<sup>2</sup> There are additional forms that the claimant may be required to complete concerning elections for different benefits and deductions such as taxes, survivor annuity, health insurance and life insurance.

Disability (Standard Form 3112A) to OPM. There is an exception to this deadline for cases of mental incompetence.

If the applicant is a current employee or has been separated from their position for 31 days or less, they need to submit their application packet and associated documents to the personnel office of their agency.

If an employee has been separated from federal service for more than 31 days, then their application package should be submitted directly to OPM's Retirement Operations Center at the following address:

Office of Personnel Management  
Retirement Operations Center  
Employee Service and Records Center  
P.O. Box 45  
Boyers, PA 16017-0045

- B. Request for Reconsideration to OPM – if an application for disability retirement is denied, you may appeal to OPM by filing a request for reconsideration. The request for reconsideration must be received by OPM within 30 calendar days of the initial decision or your request for reconsideration will be dismissed as not timely filed.
- C. Appeal of OPM Final Reconsideration Decision to the Merit Systems Protection Board (MSPB) – if OPM issues an adverse final decision, you may appeal directly to the MSPB. This appeal must be filed with the appropriate regional MSPB office within 30 days after the date of the OPM final decision, or 30 days after receipt of the OPM final decision, whichever is later. You have the right to discovery and a hearing with a transcript. You must request a hearing within 10 days of the MSPB administrative judge's acknowledgment order and you must initiate discovery within 25 days of the date of the acknowledgment order.

The administrative judge will usually schedule a hearing within 65 to 90 days after the filing of the appeal. The administrative judge will usually issue a decision within 120 days of the filing of the appeal.

- D. Petition for Review to Full Board – if the Administrative Judge at the MSPB again denies the application, you may appeal by filing a petition for review (PFR) with the full Board. The PFR must be filed with the full Board in Washington, D.C. within 35 days of the date of the initial MSPB decision issued by the Administrative Judge. A final MSPB decision should be issued within 6 months to 1 year (in most cases).

Pursuant to 5 C.F.R. §1201.115(d) the Standard of Review is set forth as follows:

The Board, after providing the other parties with an opportunity to respond, may grant a petition for review when it is established that:

(1) New and material evidence is available that, despite due diligence, was not available when the record closed; or

(2) The decision of the judge is based on an erroneous interpretation of statute or regulation.

- E. Appeal to the United States Court of Appeals for the Federal Circuit – if the Full Board issues a final MSPB decision further denying the application, you may file an appeal with the U.S. Court of Appeals. This appeal must be filed with the U.S. Court of Appeals for the Federal Circuit within 60 days after receipt of the adverse final MSPB decision. The Court of Appeals will not review the merits of disability retirement appeals. There has to have been a substantial violation of important procedural rights, a misconstruction of the governing legislation, or some like error going to the heart of the administrative determination.

## **VI. Coordination with Social Security Disability and Federal Workers' Compensation Benefits**

### **A. Social Security Disability (SSD) benefits**

1. If you are a FERS employee you must apply for SSD benefits before OPM will put you into pay status. If you are approved for SSD, your FERS and SSD benefits will be coordinated as follows: for the first year of disability, your FERS annuity will be reduced by 100% of your SSD benefits awarded; for all subsequent years your FERS annuity will be reduced by 60% of SSD.
2. CSRS employees do not pay into the social security system and are therefore generally not eligible for SSD benefits. CSRS employees are not required to apply for SSD. If a CSRS employee is eligible to receive SSD, that employee will be allowed to receive both CSRS and SSD benefits without any reduction.

### **B. Federal Workers' Compensation (FWC) benefits – if an employee receives benefits from a FWC claim with the Office of Workers' Compensation (OWCP), that worker should apply for FDR benefits within one year of his date of separation. The 1-year statute of limitations still applies.**

However, an employee cannot receive both FWC benefits and FDR benefits (with one important exception noted below). At the point both benefits are awarded, the employee must elect which program to receive benefits under. The election between FDR and FWC is the applicant's choice. The exception is that an applicant can receive both an FWC Scheduled Award from OWCP and FDR benefits at the same time.

## **VII. Substantive Issues**

**A. Five Basis Issues:**

Disability Retirement is a benefit available to federal employees who meet the statutory criteria. The statute does not require that you prove total and permanent disability. As set forth above, you must prove medical inability to perform useful and efficient service in the essential elements of your job.

To qualify for a FERS disability retirement, you must establish by a preponderance of evidence that:

- (1) you completed at least 18 months of civilian service that is creditable under FERS;
- (2) while employed in a position subject to FERS, you became 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 is 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 1 year from the date the application for disability retirement was filed;
- (4) accommodation of the disabling medical condition in the position held must be unreasonable; and
- (5) you did not decline a reasonable offer of reassignment to a vacant position. 5

U.S.C. §8451(a); 5 C.F.R. §844.103

To qualify for disability retirement under CSRS, you must establish by a preponderance of evidence that:

- (1) you completed at least 5 years of creditable civilian service under CSRS;
- (2) while employed in a position subject to CSRS, you became 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 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 1 year from the date of application for disability retirement was filed;

(4) the employing agency is unable to accommodate the disabling medical condition in your former position or in an existing vacant position, and you did not decline a reasonable offer of reassignment to a vacant position; and

(5) your application was filed with the employing agency before you separated from service, or, if separated, with the former agency or OPM within 1 year after separation. 5 U.S.C. §8337(a); 5 C.F.R. §831.1203(a)

**B. Requirements for Persuasive Medical Evidence:**

After you have met the eligibility service criteria, the key to obtaining approval of your disability retirement annuity is normally the medical evidence. The Board has consistently found that medical conclusions based on a brief association or single examination is given less weight. Furthermore, the Board gives greater deference to medical opinions that are supported by reasoned explanation than it gives to mere conclusory assertions. Generally a doctor report that merely states an applicant is disabled to do their job is insufficient. Narrative reports from treating physicians that explain why the patient is unable to perform one or more of the essential elements of his job carry more weight. I find it particularly helpful to provide treating physicians with a copy of the employee's position description.

**C. How to Create a Prima Facie Case:**

A removal due to medical inability to perform essential functions of your job establishes procedural rights for the individual applying for disability retirement. Those rights were first established in 1993 in the court decision of Bruner v. Office of Personnel Management, 996 F.2d 290 (Fed.Cir. 1993). These rights are often referred to as the *Bruner Presumption*.

Federal employees applying for disability retirement have the burden of proving that they qualify for disability retirement benefits. However, when the Agency removes an employee from federal service due to medical inability to perform their job duties, a “prima facie” case of disability is established for disability retirement applications. That means the applicant is entitled to a presumption of disability, the *Bruner Presumption*, and the burden shifts to OPM to produce evidence that the applicant is not disabled. Furthermore, in more recent cases, the Merit Systems Protection Board has held the *Bruner Presumption* also applies where a federal employee is removed for excessive absences/unsatisfactory attendance, if there is sufficient documentation that those absences were due to medical reasons. McCurdy v. OPM, 69 M.S.P.R. 90 (2004); Ayers-Kavtaradze v. Office of Personnel Management, 91 M.S.P.R. 397 (2002). This means that the removal itself need not specifically state that you are being removed for medical inability to perform your job; it can remove you for other reasons such as extended absences, as long as you can establish that the absences were caused by a medical condition.

**D. Treatment Issues:**

The full Board held in Shanoff v. OPM, M.S.P.R. 549 (2006) that refusing medical treatment is a basis for denial of the disability retirement application.

Refusing treatment, not following prescribed/recommended treatment, not taking prescribed medication and failing to seek treatment by the appropriate professional can all be interpreted as a failure to prove that the claimant could not have improved and controlled disabling symptoms with reasonable medical treatment. Be aware that, to date, this is not an affirmative defense, but rather it is part of the applicant's burden of proof to establish that treatment recommendations were reasonably followed.

If an employee is unable to render useful and efficient service because that employee fails or refuses to follow or accept normal treatment, the Board has held that the employee's disability flows, not from disease or injury itself as required by the statute, but from the employee's voluntary failure or refusal to take the available corrective or ameliorative action. Baker v. Office of Personnel Management, 782 F.2d 993, 994 (Fed.Cir. 1986). However, it depends on the specific facts of the case. In general, if your client's refusal was reasonable, then the disability application can still be approved. It may be reasonable to decline diagnostic procedures or treatment strategies that are invasive, painful, or may result in further illness.

#### **X. Statutes, Regulations, Handbook and Cases**

There are statutes enacted by Congress and Code of Federal Regulations adopted by OPM that control the disability retirement process for federal employees under both programs. In addition OPM has published a CSRS and FERS Handbook of which chapters 60 and 61 address disability retirement and computation of disability retirement benefits. Finally, there is case law from the U.S. Court of Appeals for the Federal Circuit as well as MSPB case decisions reported in the MSPR.

- A. Statutes and Regulations governing FERS – the FERS disability retirement statute is 5 U.S.C. 8451 through 5 U.S.C. 8456 and the FERS disability retirement regulation is 5 C.F.R. 844.101 through 5 C.F.R. 844-404.
- B. Statutes and Regulations governing CSRS - the CSRS disability retirement statute is 5 U.S.C. 8337 and the CSRS disability retirement regulation is 5 U.S.C. 831-1201 through 5 U.S.C. 831-1213.
- C. The OPM Handbook contains substantial additional information about the administration of CSRS and FERS disability retirement programs. This Handbook can be located at <http://www.opm.gov/asd/htm/hod.htm>.
- D. Below are a few relevant holdings by the United States Court of Appeals for the Federal Circuit and the Merit Systems Protection Board which are listed alphabetically:

1. Bracey v. OPM, 236 F.3d 1356

Federal employee’s light-duty position which was not formally described, classified or graded, did not constitute a “vacant position” within meaning of statute precluding eligibility for disability retirement if employee can be reassigned to a vacant position in the agency at the same grade or level as the employee’s current position. 5 U.S.C.A. §8337(a).

Federal employee who could not perform duties of his official Electronics Worker position, and who was assigned to light duties which were those of a lower-graded job, was not rendering “useful and efficient service” in his Electronics Worker position within meaning of statute precluding eligibility for disability retirement if employee is able to render such service in his position. 5 U.S.C.A. §8337(a).

2. Bruner v. OPM, 996 F.2d 290 (Fed. Cir. 1993)

Prima Facie Case – where a federal employee was separated from federal service for physical inability to perform their duties and there was no other position that they were qualified for and were physically able to do, that employee has met the initial prima facie burden of proof for an award of disability retirement benefits. The burden then shifts to the government to come forward with evidence sufficient to support a finding that the claimant is not disabled. However, the ultimate burden of proof still rests with the claimant to establish entitlement by a preponderance of the evidence.

3. Chavez v. OPM, 6 M.S.P.R. 404, 423 (1981)

An employee appealing OPM's denial of an application for FDR benefits is entitled to an evidentiary hearing, if requested, and de novo review before the Board of all relevant evidence submitted by the parties at the hearing or transmitted as part of the administrative record. The employee has the burden of proof to establish his case by a preponderance of the evidence.

In determining eligibility for benefits, OPM considers and weighs objective clinical findings, diagnoses and expert medical opinions, and subjective evidence of pain and disability, together with all evidence relating to the effect of the employee's condition on his ability to perform in the position last occupied.

4. Conant v. OPM, 255 F.3d 1371 (Fed. Cir. 2001)

Where a settlement agreement between the parties is relevant to an administrative proceeding, directly addressing an issue in dispute and is not contrary to law, an administrative agency cannot choose to ignore the agreement. Here the IRS breached a settlement agreement stating that claimant resigned voluntarily for personal reasons, and to use its best efforts to effectuate employee's application for disability retirement.

The Board erred by including in the claimant's disability application the adverse allegations and documents submitted by the IRS in violation of the settlement agreement.

- 5, 6. Daniel v. OPM, 43 M.S.P.R. 599 (1990) and Givens v. OPM, 21 M.S.P.R. 627 (1984)

The Board is not bound by determinations made by the Office of Workers' Compensation.

7. Nebblett v. OPM, 237 F.3d 1353

Court of Appeals may only disturb a final decision of the MSPB if it determines that such decision is arbitrary, capricious, an abuse of discretion, or otherwise contrary to law.

Statutory interpretation is a question of law, which Court of Appeals may review without deference to the MSPB.

Agency's interpretation of its own statutes is entitled to careful respect from Court of Appeals.

When Court of Appeals is presented with a statutory ambiguity, the Chevron doctrine commands court's endorsement of the agency's interpretation, provided that the court can fairly conclude that the agency's

interpretation is reasonable under the circumstances. (See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843-45, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984)).

8. Treva v. OPM, 69 F.3d 520 (Fed. Cir. 1995)

Although an award of disability benefits by the Social Security Administration is not binding, OPM and the Board must consider an award of Social Security Disability benefits along with other evidence in the record.

9. Vanieken-Ryals v. OPM, 11/26/2007, U.S. Ct. of App. Fed. Cir. (2007)

The Court reversed the MSPB and OPM denial of an application for federal disability retirement based on emotional problems including major depression, generalized anxiety disorder and panic attacks. The MSPB's denial decision discounted the annuitant's medical evidence from her treating psychologist and psychiatrist as "subjective" because it relied upon what she told them and because there was no "objective medical documentation" of her disability such as "formal cognitive testing". The Court held that there is no requirement for "objective" medical evidence. The Court held that "OPM must consider all of an applicant's competent medical evidence, as an applicant may prevail based on medical evidence that, as here, consists of a medical professional's conclusive diagnosis, even if based primarily on his/her analyses of the applicant's own descriptions of symptoms and other indicia of disability." The Court also held that "it is legal error for either [OPM or MSPB] to reject . . . medical

evidence as entitled to no probative weight at all solely because it lacks so-called “objective” measures such as laboratory tests.

**XI. Text on FDR benefits**

There are many sources of information on FDR benefits. One source that I find particularly helpful is Chapter 14: Retirement and Reemployment by Edward H. Passman in the following book:

Broida, Peter. *A Guide to Merit Systems Protection Board Law and Practice.*

Arlington, Virginia: Dewey Publications, Inc., 2001.

By Elliott Andalman, Esq. – reply via email at [eandalman@a-f.net](mailto:eandalman@a-f.net)  
and Zubaidah Haamid, Paralegal

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