



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

September 11, 2007

CBCA 616-RELO

In the Matter of CLARENCE J. LARSON

Clarence J. Larson, McAllen, TX, Claimant.

Kenneth L. Merritt, Project Leader, South Texas Refuge Complex, Fish and Wildlife Service, Alamo, TX, appearing for Department of the Interior.

KULLBERG, Board Judge.

Claimant, Clarence J. Larson, a former refuge law enforcement officer with the Department of the Interior's Fish and Wildlife Service (FWS), seeks review of his agency's decision to demand recovery of his relocation costs in the amount of \$19,672.35. The FWS argues that Mr. Larson is subject to an agreement that required him to remain in government service for at least twelve months following his transfer. That agreement required that he reimburse the Government for his relocation costs unless his separation from government service was for reasons beyond his control. Mr. Larson resigned from his position with the FWS effective May 18, 2006, which was within twelve months after his relocation. Subsequently, the Office of Personnel Management (OPM) retired him for disability. For the reasons stated below, the Board finds that the FWS unreasonably exercised its discretion in finding that Mr. Larson's separation from government service was not for reasons beyond his control and acceptable to the agency.

Background

In 2005, Mr. Larson was reassigned from his position at the Kauai National Wildlife Refuge to the South Texas Refuge Complex in an equivalent position as a GS-0025-09 Park

Ranger (Law Enforcement). On August 22, 2005, he executed a written agreement in connection with his reassignment that stated the following in pertinent part:

In the event that I fail to remain in the Federal Government Service for a period of 12 months following the effective date of my transfer, unless separated for reasons beyond my control and acceptable to the Service, I will repay the Service the total of any costs incurred and any excess amounts paid as a travel advance or withholding tax allowance as a result of this relocation.

Mr. Larson began work at the South Texas Refuge Complex on October 2, 2005. On January 31, 2006, he suffered an injury to his neck during a physical fitness test. He subsequently sought medical treatment on February 2, 2006, and he filed a "Federal Workmen's Compensation Form and Report of Injury" that same day. Subsequently, Mr. Larson was examined on March 7, March 16, and April 4, 2006. The handwritten note "No Combat" appeared on the report (Department of Labor (DOL) Form CA-17) of each examination. He was examined by a neurosurgeon on April 20, 2006, who recommended an "anterior dis[k]ectomy and fusion at C5-6 and C6-7." By letter dated May 9, 2006, DOL advised Mr. Larson that his surgery had been authorized, and his condition was also updated to include "Cervical Spondylosis w/o myelopathy" and "Displaced Cervical Intervertebral Disc."

Mr. Larson continued to perform his duties as a law enforcement officer after his injury until April 24, 2006, when he was directed to turn in his badge, firearms, and law enforcement credentials pending the outcome of an investigation of a complaint. He was also advised that the nature of the complaint could not be disclosed. The direction to turn in his badge and other items specific to law enforcement duties upon receipt of a complaint was the usual procedure at the FWS.

Mr. Larson performed no law enforcement duties from April 25 to May 3, 2006. He was on annual leave from May 4 to May 17, 2007. On May 12, 2006, while he was still on leave, Mr. Larson went to the refuge complex, and he met with Mr. Kenneth Merritt, the project leader for the refuge complex. During their discussion, Mr. Merritt advised Mr. Larson that the FWS' professional responsibilities unit planned to interview him regarding the complaint. After their meeting, Mr. Larson submitted his letter of resignation at a different office at the refuge complex. Mr. Larson's letter of resignation referred only to his medical condition and upcoming surgery as the reasons for his resignation, and his letter advised further that his last day of work would be May 17, 2006. In his letter, Mr. Larson stated that he had decided to undergo surgery that could alleviate some of his symptoms, but he would be, consequently, unable to perform his duties as law enforcement officer. His

letter makes no reference to either the complaint that had been made against him or the investigation of the complaint. Mr. Larson's SF-50 shows that his resignation was effective on May 18, 2006. Mr. Merritt was not aware of Mr. Larson's intent to resign until May 17, 2006.

Mr. Larson applied for disability retirement with the Office of Personnel Management (OPM) on or about May 16, 2006. On May 23, 2006, Mr. Larson underwent surgery that included a cervical (C5-C6 and C6-C7) discectomy, fusion, and bone graft. A June 5, 2006 report by Mr. Larson's neurosurgeon described his prognosis as "guarded." By letter dated October 4, 2006, OPM advised Mr. Larson that it had determined he was disabled for his position as a park ranger due to his musculoskeletal condition. Mr. Larson's disability retirement was effective retroactively as of May 18, 2006, which had been the effective date of his resignation.

On December 19, 2006, Mr. Larson received notice of the FWS' demand that he reimburse the Government for his relocation costs, which totaled \$19,672.32. In a subsequent telephone conversation with Ms. Karen Rager at the FWS regional office, Mr. Larson advised her of his disability retirement. Ms. Rager informed Mr. Larson that she was not aware of his retirement for disability and would investigate the matter further. On January 11, 2007, Mr. Larson was notified by his regional office that his request for reconsideration of his liability for repayment of his relocation costs had been denied.

After his separation from government service, Mr. Larson heard nothing from the FWS about the complaint against him. The FWS has acknowledged that there has never been a determination that the complaint against Mr. Larson was true. Mr. Larson had no knowledge of the nature of the complaint against him until the FWS filed its April 10, 2007 response to his claim.

Discussion

This case presents the question of whether Mr. Larson separated from government service for reasons that excuse him from repayment of his relocation costs. Mr. Larson cites his neck injury, impending surgery, and the likelihood that the surgery would leave him unable to work in law enforcement as the reasons for his resignation. The FWS argues that Mr. Larson's physical disability was not the reason for his resignation, but rather, it was the news of an impending investigation of a complaint that caused him to resign.

An employee must repay to the Government his or her relocation costs if that employee fails to complete twelve months of service subsequent to that move unless that

separation is “for reasons beyond his control that are acceptable to the agency concerned.” 5 U.S.C. § 5724 (i) (2000). The applicable Federal Travel Regulation (FTR) states:

Will I be penalized for violation of my service agreement?

Yes, if you violate a service agreement (other than for reasons beyond your control and which must be accepted by your agency), you will have incurred a debt due to the Government and you must reimburse all costs that your agency has paid towards your relocation expenses

41 CFR 302-2.14 (2005) (FTR 302-2.14).

Although the FWS had the discretion to determine whether Mr. Larson’s separation was for reasons beyond his control, that discretion must be exercised in a reasonable manner. The General Services Administration Board of Contract Appeals (GSBCA), which previously decided relocation appeals, recognized that

[i]t is within an agency’s discretion to determine whether, under the particular circumstances presented, a separation from service which appears to be voluntary was for a reason beyond the employee’s control and acceptable to the agency as a reason for not fulfilling the terms of a service agreement. We will not question the agency’s exercise of its discretion so long as it has a reasonable basis.

Jeanne Hehr, GSBCA 16936-RELO, 06-2 BCA ¶ 33,431, at 165,741. An agency should take “into account the relevant facts and circumstances, when [deciding] to recoup the costs of relocating an employee who does not fulfill his or her service obligation.” *Melinda K. Kitchens*, GSBCA 16639-RELO, 05-2 BCA ¶ 33,062, at 163,879.

The FWS did not reasonably exercise its discretion in demanding that Mr. Larson repay his relocation costs because he separated from government service for reasons beyond his control, which was his physical disability. It was established by the GSBCA that a physical disability that precludes an employee from performing his or her job is a circumstance beyond that employee’s control. *See Michael J. Halpin*, GSBCA 14509-RELO, 98-1 BCA ¶ 29,730. In this case, Mr. Larson’s physical disability at the time he separated from government service was demonstrated by his medical records and OPM’s subsequent determination to retire him for disability.

In order for OPM to retire Mr. Larson for disability, it had to determine that he was “unable, because of disease or injury, to render useful and efficient service” 5 U.S.C. § 8451(a)(1)(B). Additionally, OPM had to find that his disabling condition would last for more than one year and that “[a]ccommodation of the disabling medical condition in the position held must be unreasonable” 5 CFR 844.103(a)(3), (4) (2006). Furthermore, in making such a determination, “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.’” *Trevan v. Office of Personnel Management*, 69 F.3d 520, 522 (Fed. Cir. 1995) (quoting *Chavez v. Office of Personnel Management*, 6 M.S.P.B. 343, 358-359 (1981)). A retirement for disability is retroactive to “the day after the employee separates” 5 CFR 844.310.

OPM’s approval of Mr. Larson’s application for disability retirement must be accorded considerable weight in this appeal as an independent adjudication and finding with regard to the extent of his disability and the existence of that disability when he resigned. The retroactive effect of Mr. Larson’s retirement for disability means that he was disabled at the time of he resigned. Given the fact that Mr. Larson was no longer able to render useful and efficient service due to his disability when he resigned, his resignation within twelve months after his transfer was for reasons beyond his control. The FWS, therefore, abused its discretion when it determined that Mr. Larson must repay his relocation costs.

The FWS raises several arguments in support of its demand that Mr. Larson repay his relocation costs. Generally, the FWS has sought to show that Mr. Larson’s physical problems due to his neck injury did not affect his work, and he only resigned when he learned that he was to be investigated. The Board rejects those arguments.

The FWS argues that Mr. Larson still performed law enforcement duties after his accident, but that fact does not disprove the existence of Mr. Larson’s disability. After his injury, Mr. Larson’s physician wrote “No Combat” on the reports of his examinations. Clearly, the medical judgment of the physician who examined Mr. Larson deemed him not fit for the extreme physical requirements of combat that a law enforcement officer may encounter. Mr. Larson has represented that his physician was supposed to advise the FWS of his duty limitations. Although Mr. Larson may have continued to perform his law enforcement duties after his injury, it would appear that both Mr. Larson and the FWS should have been aware of those duty limitations. In any case, OPM’s determination is conclusive that Mr. Larson was, in fact, disabled in spite of any effort by him to continue performing his job.

Also, the FWS contends that Mr. Larson could have performed other work outside of his law enforcement duties. As discussed above, OPM must find that reasonable accommodation of an employee's disability is not possible. The Board has no reason to question OPM's determination that such accommodation of Mr. Larson's disability was not possible.

The FWS argues that Mr. Larson could not have known the outcome of his scheduled surgery before he resigned. Before his surgery, however, Mr. Larson was advised that the operation would likely render him unable to perform law enforcement duties. His letter of resignation stated that his upcoming surgery would relieve some of the pain related to his neck injury, but he would not be able to perform law enforcement duties. Regardless of Mr. Larson's belief about his future ability to do his job, OPM made a conclusive finding that he was disabled. The Board has no reason to conclude that Mr. Larson's decision to resign was due to reasons other than his belief that he was no longer able to perform his job.

Finally, the FWS argues that Mr. Larson resigned "suspiciously" in that he did so the same day that he was informed of an upcoming investigation of the complaint against him. The FWS, however, has shown no facts on which to base its suspicion other than that Mr. Larson resigned after his discussion with Mr. Merritt. Mr. Larson had no specific knowledge of the complaint when he resigned, and the directive that he turn in his badge and firearms was routine in that situation. Mr. Larson was not contacted by the FWS after he resigned, and no finding as to the truth of the complaint was ever established. Given those circumstances, the Board finds no basis for concluding that Mr. Larson's resignation was related to some real or perceived misconduct on his part.

Contrary to the FWS' assertion that Mr. Larson's physical condition was not the reason for his resignation, the record is clear that when Mr. Larson resigned, he had endured several months of pain and other problems due to his neck injury, and he was aware that his upcoming surgery would likely end his law enforcement career. Those reasons appear to be the ones that weighed most heavily on his decision to resign. Moreover, Mr. Larson's assessment of his unlikely future in law enforcement in his letter of resignation proved correct in that OPM granted his application for disability retirement. The Board has no reason to question the credibility of the reasons stated in Mr. Larson's letter of resignation.

Mr. Larson has also requested that this Board address his entitlement to reimbursement for a last move home. Such a benefit applies only to certain senior executive service (SES) appointees who separate or retire. FTR 302-3.307. Mr. Larson was not an SES appointee, so reimbursement for a last move home was not an available benefit for him.

Decision

On the basis of the facts of this matter, it would be an abuse of discretion for the FWS to collect from Mr. Larson his relocation costs, and the FWS shall not take any further action to collect Mr. Larson's relocation costs. As to Mr. Larson's request that this Board determine whether he is entitled to the cost of a last move home, that claim is denied in that he is not an eligible SES appointee.

H. CHUCK KULLBERG
Board Judge