

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

RUTH S. LAMBERSON,
Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,
Agency.

DOCKET NUMBER
DE-0752-97-0456-I-1

DATE: JAN 20 1999

Ruth S. Lamberson, Tuscon, Arizona, pro se.

Gregory G. Ferris, Esquire, Phoenix, Arizona, for the agency.

BEFORE

Ben L. Erdreich, Chairman
Beth S. Slavet, Vice Chair
Susanne T. Marshall, Member

OPINION AND ORDER

¶1 The appellant petitions for review of an initial decision that dismissed her appeal as moot. For the reasons set forth below, we GRANT the appellant's petition for review under 5 C.F.R. § 1201.115, VACATE the initial decision, and REMAND the case to the Denver Field Office for further proceedings consistent with this Opinion and Order.

BACKGROUND

¶2 On March 24, 1997, the appellant appealed her removal from a GS-5 Licensed Practical Nurse (LPN) position, effective February 14, 1997, for physical inability to perform her duties and for failure to possess a current nursing license. Initial

Appeal File (IAF), Tab 1, Tab 3, Subtab 4d. In defense, she asserted that the removal action was discriminatory because the agency had refused to accommodate her disability (latex allergy). *Id.*, Tab 1, Petition For Appeal (PFA) at 3, Exhibit (Ex.) A at 1. Additionally, she alleged sex and age discrimination, reprisal for her equal employment opportunity (EEO), union, worker's compensation and whistleblowing activities, and that she had not been selected for certain promotions on some unspecified basis. IAF, Tab 1, PFA at 3, 5, Ex. A. As part of the requested relief, she claimed compensatory damages. IAF, Tab 1, PFA at 3.

¶3 Because prior to filing her appeal, the Office of Personnel Management (OPM) had awarded the appellant disability retirement, the agency moved to dismiss the appeal. IAF, Tab 3, Subtab 4r. The agency asserted that the appeal was moot because it had retroactively separated the appellant on disability retirement, effective February 15, 1997 and had canceled her removal and deleted all references to it from her personnel file. *Id.*, Subtabs 1, 4b, 4c.

¶4 The appellant withdrew her request for a hearing. *Id.*, Tab 4. Thereafter, the administrative judge issued an initial decision (ID), dismissing the appeal as moot. *Id.*, Tab 8, ID at 1. She reasoned that the agency's cancellation of the removal action and deletion of all references to it from the appellant's personnel file following her receipt of the disability retirement award and, moreover, the appellant's failure to raise a claim of involuntary retirement, mooted the appeal. *Id.* at 1-2.

¶5 The appellant timely petitions for review of the initial decision, asserting that the administrative judge failed to address her claims before dismissing her appeal. Petition For Review (PFR) at 3. Further, she challenges the merits of the removal action concerning the nursing license requirement and that her "termination was not voluntary on my part.". *Id.* at 3. As relief, she again requests, *inter alia*, compensatory damages. *Id.* at 5.

ANALYSIS

The appellant's removal appeal is not moot.

¶6 In dismissing the appeal as moot, the administrative judge relied on the Federal Circuit's opinion in *Cooper v. Department of the Navy*, 108 F.3d 324, 326 (Fed. Cir. 1997). In *Cooper*, the court "deem[ed] it the best course" to transfer the case back to federal district court upon finding that it (the Federal Circuit) lacked jurisdiction over three counts of the complaint that were not rendered moot by the agency's cancellation of the appellant's removal and deletion of all references to it from his personnel file following his receipt of a disability retirement award. In *Currier v. U.S. Postal Service*, MSPB Docket No. DC-0351-95-0631-B-1 (July 29, 1998) (*Currier II*), the Board noted the court's decision in *Cooper*, but nonetheless reaffirmed its holding in *Currier v. U.S. Postal Service*, 72 M.S.P.R. 191 (1996), that, under standards for mootness set out in United States Supreme Court case law, an appeal is not moot even where the agency effects a complete rescission of the action as long as there is some "possible, effectual relief" that could be granted to the appellant, for example, compensatory damages if the appellant prevails on a discrimination claim. See *Currier II*, slip op. at 8, citing *Currier I*, 72 M.S.P.R. at 197, where the Board stated that "(W)here as here, an appellant has outstanding viable claims of compensatory damages before the Board, the agency's complete rescission of the action appealed does not afford him all of the relief available before the Board, so that the mere rescission does not render the appeal moot. See *Consolidated Rail Corp. v. Davrone*, 465 U.S. 624, 630 (1984)." Moreover, in *Currier II*, the Board held that where an appellant has filed an appeal from an action that is appealable under any law, rule, or regulation, the appellant has a right, under 5 U.S.C.

§ 7702(a)(1)¹, to have the Board adjudicate any allegation of discrimination based on the record evidence. *See* slip op. at 7.

¶7 The appellant here has alleged discrimination and has claimed compensatory damages. *See* IAF, Tab 1. As we stated in *Currier II*, she has a right to introduce evidence on her allegations of discrimination and to have the Board adjudicate her discrimination claim on the merits. *See* slip op. at 4-5, 7. If the appellant should prevail on her discrimination claim, she would also be entitled to establish her claim for compensatory damages.² Thus, we find that the Board retains jurisdiction over the appellant's discrimination claim. *See id.*, slip op. at 3. Accordingly, this appeal is not rendered moot by the agency's post-appeal rescission of the removal action because there remains some possible, effectual relief that the Board could grant to the appellant. *See id.* at 8.

¹ That section states in relevant part:

Notwithstanding any other provision of law ... , in the case of any employee or applicant for employment who -

(A) has been affected by an action which the employee or applicant may appeal to the Merit Systems Protection Board, and

(B) alleges that a basis for the action was discrimination ... the Board shall, ... decide both the issue of discrimination and the appealable action in accordance with the Board's appellate procedures under section 7701 of this section.

² The United States Courts of Appeals for the Seventh and Eleventh Circuits have held that only the judiciary, not an administrative agency, has the authority to award compensatory damages following a finding of prohibited discrimination. *See Crawford v. Babbitt*, 148 F.3d 1318 (11th Cir. 1998); *Gibson v. Brown*, 137 F.3d 992 (7th Cir. 1998). The Fifth Circuit has held to the contrary. *See Fitzgerald v. Secretary, U.S. Department of Veterans Affairs*, 121 F.3d 203 (5th Cir. 1997). Because this case does not arise in any of those circuits, we need not address the apparent split in authority. *See Crosby v. U.S. Postal Service*, MSPB Docket Nos. AT-0752-95-0733-B-2, *et al.*, slip op. at 3 (June 4, 1998). Moreover, because this appeal does not arise in either the Seventh or Eleventh Circuits, we decline to address the question of whether the Board should reach a result different from the one reached by the courts in those circuits. *See id.*, slip op. at 3 n.2.

¶8 The appellant has been awarded a disability retirement. If an appeal of a removal action is not moot, "retirement status cannot be taken into account in determining the appealability of 'any case involving a removal.'" *Mays v. Department of Transportation*, 27 F.3d 1577, 1579 (Fed. Cir. 1994), quoting 5 U.S.C. § 7701(j). Thus, the appellant's retirement status does not change our determination that the Board continues to have jurisdiction over her appeal of the removal action based on her claim for relief and compensatory damages under the Rehabilitation Act of 1973, 29 U.S.C. § 791 *et seq.*, and Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-16, and her request for corrective action under the Whistleblower Protection Act (WPA). See *Alleman v. Department of the Army*, MSPB Docket No. DA-0351-97-0449-I-1, slip op. at 8 n.2 (Aug. 14, 1998). Nor does *Cooper* change the result we reach here.

¶9 In *Cooper*, the petitioner (Mr. Cooper) filed a four-count complaint in federal district court, claiming that (1) the Board should not have dismissed his appeal of the agency's removal action as moot; (2) and (3) the agency discriminated against him based on race and disability; and (4) the agency retaliated against him based on whistleblowing activity. See 108 F.3d at 325-26. The district court transferred the case to the Federal Circuit for review of the Board's decision regarding the mootness of the Board appeal. See *id.* at 326.

¶10 The Federal Circuit upheld the Board's ruling that the agency's cancellation of the removal action and expungement of all references to the removal from Cooper's official personnel file rendered the removal appeal moot. See *id.* In so ruling, however, the court did not state whether Cooper, in the Board appeal of his removal, had alleged discrimination, claimed compensatory damages, or requested corrective action under the WPA, nor did the court consider the effect of such claims on mootness. See *id.* Indeed, the court stated that the complaint before the district court sought damages "based on agency conduct extending beyond Cooper's removal" which "would be outside the jurisdiction of the Merit

Systems Protection Board even if the Board had jurisdiction over Cooper's appeal from his removal." *See id.* at 327 (emphasis supplied). Thus, the court found that it lacked jurisdiction to consider claims two through four of the complaint alleging prohibited discrimination and retaliation, and transferred the case back to the district court for further proceedings on those three claims. *See id.* at 327.

¶11 The appellant here has alleged discrimination and claimed compensatory damages. Hence, we decide this appeal keeping in mind our statutory mandate to adjudicate all allegations of discrimination in cases within our jurisdiction, *see id.*, slip op. at 4 and 7, our authority to award compensatory damages, *see Currier I*, 72 M.S.P.R. at 196, and the Supreme Court's case law on mootness, as set forth in *Currier II*, slip. op. at 8-9.

¶12 We note that if we were to injudiciously apply the result in *Cooper* to resolve this case, we would in effect force the appellant to take the same allegations of discrimination that she raised in her appeal from the agency's removal action and argue (as she appears to have done on petition for review after receiving the initial decision citing *Cooper*, *see* PFRF, Tab 1, PFR at 3) that her retirement was involuntary. *See* 108 F.3d at 326. Casting her discrimination allegations in an involuntariness context would place the jurisdictional burden on the appellant, *see Locke v. U.S. Postal Service*, 61 M.S.P.R. 283, 287-88 (1994), require the Board to consider the discrimination allegations for purposes of jurisdiction under the standard for involuntariness, *see Markon v. Department of State*, 71 M.S.P.R. 574, 578 (1996), and, only if we found jurisdiction, would we then adjudicate the discrimination claims as affirmative defenses under Title VII standards, *see id.* at 580. Because the Board initially had jurisdiction over the appeal of the agency's removal action and because the appeal is not moot given our statutory mandate to afford the appellant the relief she seeks should she prevail on her allegations of discrimination, we find that *Cooper*, which did not discuss the effect of a discrimination claim and a request for compensatory damages on what would

otherwise be a moot Board appeal, is not controlling under the circumstances here. Thus, we will not require the appellant to amend her petition for appeal to recast her discrimination allegations as assertions of involuntariness (assuming she can do so at this time). Further, the adjudication of the removal action and the disability discrimination claim will render any involuntariness claim moot. *See Scalse v. Department of the Air Force*, 68 M.S.P.R. 247, 249 (1995).

¶13 The appellant therefore is entitled to a determination on the merits of her allegations of discrimination, as those allegations relate to the removal action effected by the agency on February 14, 1997. *See id.* at 8-9. If she prevails on her discrimination claims, she is entitled to the "make whole" relief authorized by law. *See Sublette v. Department of the Army*, 68 M.S.P.R. 82, 86 (1995) (remedy for discrimination is to make victim "whole," and, therefore, after finding discrimination, the administrative judge should have reversed the adverse action completely).

¶14 The appellant also claimed that the agency removed her in reprisal for alleged protected disclosures in 1995 and 1996 to an agency Human Resource Manager and a union president concerning the agency's mishandling of employees' claims for worker's compensation. *See IAF, PFA* at 3, 5. With respect to her whistleblowing allegations, the appellant has requested corrective action in the form of return to her former position. *See id.*, Tab 1, PFA at 3. Thus, the appellant can proceed with her claim of retaliation for whistleblowing activity because she has articulated some possible, effective relief that we could grant her on that claim under 5 U.S.C. § 1221(b), which, in relevant part, gives an employee the right to seek corrective action from the Board in any case that the employee can appeal directly to us under any law, rule, or regulation. *See Walton v. Department of Agriculture*, MSPB Docket No. CH-1221-97-0756-W-1, slip op. at 3 (May 20, 1998).

The appellant's receipt of a disability retirement benefit does not estop her, as a matter of law, from attempting to prove her claim of disability discrimination.

¶15 Having determined that the agency's removal action is not moot, we must decide whether the appellant's receipt of a disability retirement award judicially estops her from asserting in this appeal that the agency failed to reasonably accommodate her condition, that is, that the agency violated the Rehabilitation Act of 1973, 29 U.S.C. § 791. In the first place, it is questionable whether judicial estoppel applies under the circumstances presented in this appeal.

¶16 Judicial estoppel is an equitable doctrine which is used by courts to "bar[] a party from adopting inconsistent positions in the same or related litigation." *United States v. 49.01 Acres of Land*, 802 F.2d 387, 390 (10th Cir. 1986). As at least one court has stated, it is inappropriate to apply judicial estoppel to statements made in the context of an application for disability benefits under the Social Security Act (SSA) because to do so would supplant the truth-seeking function of the court "by an agency administrative decision rendered without an evidentiary hearing." *Griffith v. Wal-Mart Stores, Inc.*, 135 F.3d 376, 382 (6th Cir. 1998).

¶17 In this case, there was no litigation surrounding the appellant's application for disability benefits, and thus no prior proceedings before either the Board or a court on the issue of whether she could perform her position with accommodation. Thus, applying judicial estoppel to OPM's administrative decision to award the appellant a disability benefit would, as stated above, arguably supplant the Board's function of determining, in a fully litigated appeal of the agency's removal action, whether the appellant could have been accommodated.

¶18 Nonetheless, a number of courts have applied the doctrine of judicial estoppel in deciding whether statements made by a plaintiff in an application for SSA disability benefits bar a claim under the Americans with Disabilities Act of 1990 (ADA), Pub. L. No. 101-336, 104 Stat. 327. *See, e.g., Haschmann v. Time*

Warner Entertainment Co., 151 F.3d 591, 603 (7th Cir. 1998); *Rascon v. U S West Communications, Inc.*, 143 F.3d 1324, 1332 (10th Cir. 1998); *Johnson v. Oregon*, 141 F.3d 1361, 1368-69 (9th Cir. 1998); *Swanks v. Washington Metropolitan Area Transit Authority*, 116 F.3d 582, 587 (D.C. Cir. 1997). In addition, the Ninth Circuit has observed, "prior representations on disability benefits applications may demonstrate that a claimant is playing fast and loose with the courts, seeking advantage by advancing mutually exclusive contentions before the courts and benefits providers," and in such cases, the use of judicial estoppel to bar an ADA claim would be within a tribunal's discretion. *Johnson*, 141 F.3d at 1369. Thus, as explained below, although the appellant's receipt of a disability retirement award does not automatically bar her from alleging that the agency's removal action was based on disability discrimination, the administrative judge may consider statements made by the appellant in her disability application to determine what, if any, effect those statements may have on the appellant's allegation of disability discrimination in this appeal.

¶19 With respect to a claim that an employer has violated the ADA, the Equal Employment Opportunity Commission (EEOC) has posited that because of the fundamental differences between the ADA and disability programs administered by both the Social Security Administration and private disability insurers, representations made in connection with an application for benefits under the SSA and private disability programs are relevant to, but not determinative of, whether a person is a qualified individual with a disability. Thus, according to the EEOC, such representations are not an automatic bar, via judicial estoppel, to a subsequent ADA claim. *See* EEOC Enforcement Guidance: "Effect of Representations Made in Applications for Disability Benefits on the Determination of Whether a Person Is a 'Qualified Individual with a Disability'

Under the Americans With Disabilities Act of 1990" (hereinafter Enforcement Guidance) 9, 20-21 (Feb. 12, 1997).¹

¶20 The EEOC has outlined the statutory differences between the SSA and ADA as including, among other things, the fact that: (1) The ADA has a broad remedial purpose to prohibit discrimination against individuals with disabilities who want to work and are qualified to work, whereas the SSA's disability programs provide income to individuals with disabilities who are generally unable to work; (2) the ADA mandates an individualized assessment of a particular individual's capabilities, whereas the SSA permits general presumptions about an individual's ability to work; and (3) the ADA looks at whether the individual can work with reasonable accommodation, whereas the SSA does not consider this question. Enforcement Guidance at 9, 12-15.

¶21 By contrast, the standards applicable to OPM's consideration of an applicant's entitlement to disability benefits under the Civil Service Retirement System (CSRS) and the Federal Employees Retirement System (FERS) appear more akin to the standards for proof of discrimination claims filed under the ADA or the Rehabilitation Act than are the standards applicable to SSA disability determinations. For instance, CSRS and FERS regulations require both the "individual assessment" missing from SSA analyses and a showing that the agency was unable to reasonably accommodate an employee's medical condition in her position. However, for the following reasons, we find that judicial estoppel should not be used as an automatic bar to a claim of disability discrimination where the appellant has applied for or received CSRS or FERS disability benefits.

¹ We have examined the legislative history of the ADA and found that Congress did not address this issue when enacting the ADA. *See also* Matthew Diller, *Dissonant Disability Policies: The Tensions Between The Americans With Disabilities Act and Federal Disability Benefit Programs*, 76 Tex. L. Rev. 1003, 1006-07, 1031-32 (1998).

¶22 Our examination of CSRS and FERS applications for disability retirement discloses that they do not contain any specific questions to which the applicant must respond that address the issue of reasonable accommodation. Only the "Supervisor's Statement," attesting to an employee's disability, mentions accommodation by asking what efforts, in the supervisor's knowledge, have been made to accommodate the employee. See SF-2824D ("Agency Certification of Reassignment and Accommodation Efforts in Connection With Disability Retirement Under the Civil Service Retirement System"); SF-3105D ("Agency Certification of Reassignment and Accommodation Efforts in Connection With Disability Retirement Under the Federal Employees' Retirement System"). As a consequence, an award of disability retirement from OPM is not an assurance that an agency has considered all avenues of reasonable accommodation for purposes of our assessment of whether the disability award is inconsistent with a subsequent claim of disability discrimination, nor is such an award necessarily an affirmation by the appellant that she could not be accommodated. Cf. *Overton v. Reilly*, 977 F.2d 1190, 1196 (7th Cir. 1992) (a finding of disability by the Social Security Administration should not be given preclusive effect in a Rehabilitation Act case); *Sumner v. Michelin North America, Inc.*, 966 F. Supp. 1567, 1575 (M.D. Ala. 1997) ("[A] person may be totally and permanently disabled for workers' compensation purposes and yet still be able to perform a position's essential functions with or without accommodation."). Thus, we find that it would be inappropriate to estop an appellant from asserting a disability discrimination claim merely because she either applied for or is in receipt of CSRS or FERS disability benefits. Our conclusion on this point is supported by the CSRS and FERS disability provisions and their legislative histories.

¶23 Under 5 U.S.C. § 8337(a), an employee subject to the CSRS is eligible for receipt of disability retirement if, *inter alia*, he or she is unable to render useful and efficient service in his or her position and

is not qualified for reassignment . . . 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. . . . [A]n employee of the United States Postal Service shall be considered not qualified for a reassignment . . . if the reassignment is to a position in a different craft or is inconsistent with the terms of the collective bargaining agreement covering the employee.

Under 5 U.S.C. § 8451(a)(1)(B), (a)(2)(A), an employee subject to the FERS is not eligible for disability retirement if

he can render useful and efficient service in his position; or he has declined a reasonable offer of reassignment to a vacant position in [his] agency for which [he] is qualified if the position--(i) is at the same grade (or pay level) as the employee's most recent grade (or pay level) or higher; (ii) is within the employee's commuting area; and (iii) is one in which the employee would be able to render useful and efficient service.

¶24 The CSRS provision was added as part of the Omnibus Reconciliation Act of 1980, Pub. L. No. 96-499, 94 Stat. 2599. The legislative history of this Act, which was enacted after the Rehabilitation Act of 1973, shows congressional intent that "[i]f the employee is able to perform useful and efficient service in another position and a vacancy exists, the employee must be reassigned rather than retired." H.R. Rep. No. 96-1167, at 206 (1980), *reprinted in* 1980 U.S.S.C.A.N. 5526, 5651. Thus, to foreclose a disability discrimination claim that could, if proven, reinstate an employee simply because that employee has applied for or received a federal disability benefit would thwart Congress's intent that continuation of work with accommodation is preferred over disability retirement.

¶25 We are persuaded as well by the Court of Appeals for the 11th Circuit's treatment of this issue in *Talavera v. School Board of Palm Beach County*, 129 F.3d 1214 (11th Cir. 1997). There, a secretary, who was required to stand four to five hours a day, requested reasonable accommodation for her back

problems (chronic osteoarthritis). *See id.* at 1214. While bedridden, she applied for social security disability benefits and made statements to the effect that she "had good skills," her "mind was intact, but that [her] physical appearance [was] a deterrent" because she could "no longer walk, bend, etc." *Id.* The Social Security Administration found her totally disabled and awarded her benefits. *Id.* Thereafter, she filed a disability discrimination suit in the district court on the grounds that her employer had failed to reasonably accommodate her disability. *Id.* at 1216.

¶26 The court reversed the district court's finding that because of her application for and receipt of disability benefits she was judicially estopped from claiming that she was an otherwise qualified person with a disability. *Id.* at 1217, 1220. In so holding, the court stated:

A certification of total disability on [a Social Security disability (SSD)] application does mean that the applicant cannot perform the essential functions of her job without reasonable accommodation. It does not necessarily mean that the applicant cannot perform the essential functions of her job with reasonable accommodation. Whether in any particular situation there is an inconsistency between applying for SSD benefits and bringing an ADA claim will depend upon the facts of the case, including the specific representations made in the application for disability benefits and the nature and extent of the medical evidence in the record.

Id. at 1220.

¶27 Finally, as the EEOC states (although in the context of SSA standards for disability), two significant policy goals "support the conclusion that representations made in application for disability benefits should never be an absolute bar to [an ADA claim]." *Id.* at 23. Those goals are: (1) eradicating discrimination against individuals with disabilities; and (2) not forcing individuals to choose between applying for disability benefits and vindicating their rights under the ADA. *Id.* As the Ninth Circuit Court of Appeals stated:

Some potential plaintiffs [who believe their employers committed disability discrimination] might abandon their rights under the ADA

if they could not apply for disability benefits. Faced with the financial pressures accompanying the loss of a job and the uncertainty and length of litigation, individuals might well elect immediate benefits over the pursuit of even the most meritorious ADA claim. Such a situation would not only harm the individuals the ADA seeks to protect, it would also protect the very activity the ADA seeks to eliminate: discrimination against disabled individuals. Employers who discriminate unlawfully would be shielded from liability if their victims could sue them only if they did not file for disability benefits.

Johnson, 141 F.3d at 1368 (footnote omitted). Thus, the court declined to apply judicial estoppel to bar, as a matter of law, an ADA claim made by an individual who received SSA disability benefits. *See id.*

¶28 This trend of the circuit courts to decline to apply judicial estoppel in situations such as this is reflected in several other recent decisions. *See, e.g., Haschmann*, 151 F.3d at 603 (judicial estoppel does not apply to foreclose ADA claims when the claimant has applied for SSA disability benefits; "[n]evertheless, the receipt of a Social Security benefit, while not dispositive, may be relevant to the issue whether a plaintiff under the ADA is a qualified individual with a disability"); *Johnson*, 141 F.3d at 1367 (because of the different definitions of disability under various private disability policies and because the Social Security Act does not take into account an individual's ability to work with accommodation, "neither application for nor receipt of disability benefits automatically bars a claimant from establishing that she is a qualified person with a disability under the ADA"); *Rascon v. U S West Communications, Inc.*, 143 F.3d 1324, 1332 (10th Cir. 1998) ("join[ing] the majority of circuits and hold[ing] that statements made in connection with an application for social security disability benefits cannot be an automatic bar to a disability discrimination claim under the ADA"); *Griffith v. Wal-Mart Stores, Inc.*, 135 F.3d 376, 380-83 (6th Cir. 1998) (judicial estoppel does not preclude an ADA claim based on receipt of SSA disability benefits); *Weigel v. Target Stores*, 122 F.3d 461, 468-69 (7th Cir. 1997)

(an SSA total disability determination was relevant to, but not dispositive of, the issue of the plaintiff's status as a qualified person with a disability for ADA purposes); *Eback v. Chater*, 94 F.3d 410, 412 (8th Cir. 1996) (ADA definition of qualified individual with a disability requires consideration of reasonable accommodation whereas SSA's assessment of availability of jobs for a claimant is based on a range of jobs with no consideration of the employer's obligation to provide reasonable accommodation); *Overton*, 977 F.2d at 1196 (a person can have a disability for SSA purposes and still be a "qualified individual with a disability" for Rehabilitation Act purposes because SSA "may determine that a claimant is unlikely to find a job, but that does not mean that there is no work the claimant can do").

¶29 In *Cleveland v. Policy Management Systems Corp.*, 120 F.3d 513, 518 (5th Cir. 1997), *cert granted*, 119 S. Ct. 39 (1998), the court held that the application for or the receipt of social security disability benefits creates a rebuttable presumption that the claimant or recipient of such benefits is judicially estopped from asserting that he is a 'qualified individual with a disability' for purposes of an ADA claim. However, the Supreme Court has granted certiorari on two issues arising from this case:

(1) whether the application for, or receipt of, disability insurance benefits under the SSA creates a rebuttable presumption that the applicant or recipient is judicially estopped from asserting that she is a "qualified individual with a disability" under the ADA; and

(2) If it does not create such a presumption, what weight, if any, should be given to the application for, or receipt of, disability insurance benefits when a person asserts that she is a "qualified individual with a disability" under the ADA. *Id.*

¶30 In light of the considerations discussed above, and in accord with the trend in recent decisions from the majority of circuit courts of appeal, we decline to erect

an absolute procedural bar via judicial estoppel to prevent a recipient of CSRS or FERS disability benefits from claiming disability discrimination under the Rehabilitation Act. Rather, the Board will employ a case-by-case approach in determining the effect of an appellant's application for or receipt of a disability retirement award upon a claim of disability discrimination. That approach will entail a consideration of the relevant factors which the EEOC advises a fact-finder to examine when determining whether a disability benefits award is inconsistent with a subsequent ADA claim.

¶31 For example, although this list is not exhaustive, the EEOC advises that the fact-finder should consider: (1) The manner in which disability is defined on a disability benefits application; (2) the manner in which the disability benefits application permits the applicant to describe his condition (i.e., in writing and in a narrative format or by merely checking boxes, or verbally over the telephone); (3) the applicant's representations versus relevant documents including disability reports, and doctors' reports regarding his medical condition; (4) the circumstances under which the application for disability benefits was made, including whether the applicant was denied reasonable accommodation, or applied for benefits at the employer's insistence, or on a doctor's advice; and (5) the applicant's health condition at the time of his application for disability benefits versus his condition at the time of the alleged disability discrimination. Enforcement Guidance at 9-10, 21-23; *see also Nordhoff v. Department of the Navy*, 78 M.S.P.R. 88, 91-92 (1998) (where the appellant had been awarded a disability retirement benefit and made numerous statements during the course of the Board proceedings that he could not work as of the time of his separation, the Board lacked jurisdiction over the alleged involuntary retirement).

¶32 Accordingly, on remand the administrative judge shall employ this approach to determine the effect, if any, of the appellant's receipt of disability retirement on her claim that the agency's removal action constituted disability discrimination

under the Rehabilitation Act. The administrative judge shall allow the parties an opportunity to submit argument and evidence on this issue.

The availability of appeal rights under chapter 75 depends on whether the appellant meets the definition of "employee" under that chapter.

¶33 Only an "employee," as defined under 5 U.S.C. chapter 75, subchapter II, can appeal to the Board from an adverse action such as a removal. *See* 5 U.S.C. §§ 7511(a)(1), 7512(1); *Gingrich v. U.S. Postal Service*, 67 M.S.P.R. 583, 585 (1995). This right of appeal does not accrue, however, to an employee "who holds a position within the Veterans Health Administration which has been excluded from the competitive service by or under a provision of title 38, unless such individual was appointed to such position under section 7401(3) of such title." 5 U.S.C. § 7511(b)(10); *see Falso v. Office of Personnel Management*, 116 F.3d 459, 460 (Fed. Cir. 1997). Indeed, in a prior Board case involving a DVA staff nurse who was appointed under 38 U.S.C. § 7401(1), we found that she had no chapter 75 appeal rights. *Pichon v. Department of Veterans Affairs*, 67 M.S.P.R. 325, 327 (1995); *see also Exum v. Department of Veterans Affairs*, 62 M.S.P.R. 344, 346 (1994).

¶34 The similar issue presented here is whether under the appointment authority for her nursing position, the appellant has standing to pursue a Board appeal from the agency's removal action. Aside from her assertion that she was a competitive service employee and the agency's statement that she was in the excepted service, there is no record evidence, documentary or otherwise, of the authority under which the appellant was appointed to her position. IAF, Tab 1, PFA at 2.² Unless she was appointed under 38 U.S.C. § 7401(3), she would have no chapter 75

² The appellant stated that she had worked with the agency for only six and one half months. IAF, Tab 1, PFA at 2. This appears to be an inadvertent error, as other documents in the record indicate that she began her employment with the DVA Medical Center on September 25, 1990.

adverse action appeal rights pursuant to 5 U.S.C. § 7511(b)(10), in which case the Board would have no jurisdiction over her appeal.

¶35 Accordingly, on remand, the administrative judge shall apprise the appellant of the statutory provisions governing this limitation on the right of appeal to the Board under chapter 75, and afford the parties an opportunity to submit evidence showing the appointment authority under which she was serving at the time of the removal action. Upon receipt of evidence and argument on this threshold jurisdictional matter, the administrative judge shall determine whether the appellant is a chapter 75 "employee" with adverse action appeal rights to the Board and may dismiss the appeal on this jurisdictional ground, if appropriate. *See Isabelle v. Office of Personnel Management*, 69 M.S.P.R. 176, 183 (1996).

ORDER

¶36 We REMAND this appeal, first, for a determination of the appellant's status as an employee under 5 U.S.C. § 7511(b)(10); and if that is no bar, for further proceedings on her allegations of discrimination and her claim of retaliation for whistleblowing activity.

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.