

# Disability Retirement Information

## Courtesy of Attorney Robert R. McGill

If you believe that you need to consult an attorney concerning disability retirement, please contact me at 1-800-990-7932, or email me at [DisabilityAtty@msn.com](mailto:DisabilityAtty@msn.com). My ad also appears weekly in the Federal Times. Thanks, Robert R. McGill, Esquire

### Subject: Disability Retirement and the Law Today

*"The conquering Army chose the time and place of the battle, but made it appear as if the fighting began by accident. Who wins the war is always determined by careful planning. Wars are never won by chance; they are won by choosing the right battles, at the right time, on the advantageous terrain, and by professionals who know what they are doing." - Anonymous Roman Centurion, on The Art of Warfare*

The Office of Personnel Management is constantly and aggressively attempting to change the laws concerning disability retirement, to make disability retirement laws more difficult to overcome. Such attempts at changing the law always comes in incremental steps, and may not seem like "blockbuster" cases at the time; but the reverberating effects of such cases can be far-reaching, and impact upon Federal and Postal Workers for years to come.

I am presently involved in two cases which may have a direct impact upon those who wish to file for disability retirement. This Article is meant to keep you updated on the two issues:

Issue #1: In the well-known case of Bruner v. Office of Personnel Management, 996 F. 2d 290 (Fed. Cir. 1993), the Federal Circuit Court of Appeals found that where a person is separated for "physical inability to perform his job," that the "burden of production" shifts to the government. This is well-known as the "Bruner Presumption." In laymen terms, this merely means that if a person is terminated or separated from Federal Service because of his or her "physical inability to perform the job," then it is almost a certainty that we can get disability retirement for that Federal/Postal worker. That is why it is extremely important to have an attorney involved in the separation process -- to negotiate the type of language which is acceptable. This is more the case now, because the Office of Personnel Management is appealing a recent case to the Full M.S.P.B. Board involving a case where the worker was separated for "unavailability for duty," even though the "unavailability" was clearly for medical reasons. OPM argued that, because the worker was not specifically separated for "physical inability to work," but instead, because he was "unavailable," that therefore the "Bruner Presumption" should not apply.

This is, to use a well-known legal term, "hogwash."

OPM should know better. What OPM ignores, is that the Court in Bruner went on to say that "the government's action in separating an employee for disablement produces a presumption of disability..." Furthermore, there are recent holdings which support the position that lack of precision in the language of separation should not preclude invocation of the Bruner Presumption. For instance, in Lewis v. Office of Personnel Management, 87 M.S.P.R. 275 (2000), the Board held that a charge of "inability to work" warranted application of the Bruner Presumption; and again in Bell v. Office of Personnel Management, 87 M.S.P.R. 1 (2000), the Board applied the Bruner Presumption where, although the Agency charged the appellant with failure to meet the requirements of her position, it was clear that the agency removed the appellant because it found her unable to perform her duties based on medical evidence of psychological incapacitation.

Thus, what the Office of Personnel Management is trying to do, is to narrowly limit the application of the Bruner Presumption. The Lesson here is: If termination or separation is an issue, or a potential issue, get an attorney.

Issue #2: As many of you know, I have previously discussed the important case of Bracey v. Office of Personnel Management, 236 F.3d 1336 (Fed. Cir. 2001). It is an important case which directly impacts upon the issue of accommodation.

What the Court in Bracey did, was to clarify what an Agency can and cannot do. For instance, the Court therein stated unequivocally that if the Agency wants to "accommodate" you, it must be so that you can do the job you are presently slotted for. Keeping you "officially" slotted in a given position, but in reality having you do some light-duty, "other" kind of job, is not considered an "accommodation". As the Court clearly stated, an agency cannot

stop a disability retirement application "by assigning an injured employee to an ad hoc set of light duties as long as it continues to pay the employee at the same level as before." (Page 1362 in Bracey)

More recently, however, the problem has been that the Office of Personnel Management has questioned -- no, let me go further -- they have challenged, the applicability of the Bracey decision for Postal Employees. While I have previously pointed out that the combination of 5 U.S.C. Section 8451(a)(2)(D), which states that "an employee of the United States Postal Service shall not be considered qualified for a position if such position is in a different craft or if reassignment to such position would be inconsistent with the terms of a collective-bargaining agreement covering the employee," and further, pointed out that in *Smith v. Office of Personnel Management*, Docket #AT-844E-00-0140-I-1 (March, 2001), the Merit Systems Protection Board concluded that, where the Postal Service attempted to "accommodate" a disabled Rural Carrier by assigning her to duties or positions in the Clerk craft, it did not constitute "accommodation", and therefore disability retirement was granted to the employee; nevertheless, OPM is at it again. In 2 or 3 cases all at once (and one in which I am involved in), OPM is trying to argue that (1) the Bracey decision does not apply to Postal Workers, and therefore the Postal Service can slot workers from one craft to do jobs of another craft, and (2) that the Postal Service has a duty under the collective bargaining agreement to "accommodate" Postal Employees, even if it means doing work in a different craft. If OPM wins in these arguments, what it means is that the Postal Service can potentially take an injured Letter Carrier, and have him sit in a room doing odd jobs devised by his or her supervisor.

Thus far, OPM has not been successful in their arguments. Indeed, it is important that Postal and Federal employees applying for disability retirement take great care in fighting the various arguments of OPM. Each fight which OPM wins, creates a greater obstacle to potential future disability retirement filers.

Disability retirement is a benefit which all Federal and Postal Employees should be able to have access to, if and when the need arises. However, there is a large chasm between having the right, and being able to access that right. The road between the two is often beset with legal obstacles and potholes. How to maneuver through the legal maze is the job of the Attorney.