NOTE: This disposition is nonprecedential.

United States Court of Appeals for the Federal Circuit

CU N. DUONG,
Petitioner

v.

OFFICE OF PERSONNEL MANAGEMENT,
Respondent

2026-1418

Petition for review of the Merit Systems Protection Board in No. AT-0831-24-0297-I-1.

Decided: September 15, 2026

CU N. DUONG, Lawrenceville, GA, pro se.

REBECCA TAYLOR MITCHELL, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, for respondent. Also represented by ELIZABETH MARIE HOSFORD, PATRICIA M. MCCARTHY, BRETT SHUMATE.

Before DYK, PROST, and CUNNINGHAM, *Circuit Judges*.

PER CURIAM.

Cu N. Duong petitions for review of the final decision of the Merit Systems Protection Board ("Board") denying Mr. Duong's appeal of the Office of Personnel Management ("OPM") rejection of his application for deferred retirement annuity under the Civil Service Retirement System ("CSRS"). Because the Board's decision is supported by substantial evidence and otherwise in accordance with law, we affirm.

BACKGROUND

From February 1969 to April 1975, Mr. Duong worked for the Army as an interpreter/translator in Vietnam. S.A. 28.[1] By all accounts, Mr. Duong carried out his duties with distinction. S.A. 2, 10–11, 26–27, 39–41. Mr. Duong's work for the Army came to an end with the United States' withdrawal from Vietnam in 1975. S.A. 26. Mr. Duong contends, understandably, that paperwork related to his employment with the Army was lost during the chaos of the war. S.A. 9–10. Following the United States' withdrawal, Mr. Duong experienced significant personal upheaval and persecution. S.A. 23, 26–27.

In 2021, Mr. Duong applied to OPM for a deferred retirement annuity under the CSRS. S.A. 30–33. OPM denied this initial application, as well as Mr. Duong's request for reconsideration, because he was "not subject to the CSRS for at least 1 year out of the last 2 years before [his] separation." S.A. 25; *see also* S.A. 29 (initial OPM decision).

Mr. Duong appealed OPM's denial to the Board, and an administrative judge ("AJ") issued an initial decision affirming the denial of Mr. Duong's request for annuity.

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[1] "S.A." refers to the supplemental appendix included with the government's informal brief.

S.A. 8–11. The AJ found that Mr. Duong had not proven that his role as an interpreter/translator was a covered position under the CSRS due to: (1) a lack of any evidence showing that he made CSRS contributions during his service; and (2) testimonial evidence from Mr. Duong's supervisor that Mr. Duong was paid from a "bag of cash flown in by plane," which, in the AJ's view, rendered it "highly unlikely that the Army would have withheld CSRS retirement contributions." S.A. 9–10. Mr. Duong petitioned the Board for review of the AJ's initial decision, and the Board affirmed, rendering the AJ's initial decision the Board's final decision. S.A. 1–7.

Mr. Duong timely petitioned this court for review. We have jurisdiction under 28 U.S.C. § 1295(a)(9).

DISCUSSION

Our review of the Board's decision is limited by statute. We must affirm the Board unless its decision is: "(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence." 5 U.S.C. § 7703(c). "We review the Board's legal decisions de novo and its findings of fact for substantial evidence." *McIntosh v. DOD*, 53 F.4th 630, 638 (Fed. Cir. 2022). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Higgins v. Dep't of Veterans Affs.*, 955 F.3d 1347, 1353 (Fed. Cir. 2020) (cleaned up).

Under 5 U.S.C. § 8333(a)–(b), "to qualify for a CSRS retirement annuity, an employee must have performed at least five years of creditable civilian service, and must have served at least one of his last two years of federal service in a covered position—i.e., service that is subject to the Civil Service Retirement Act." *Lledo v. OPM*, 886 F.3d 1211, 1213 (Fed. Cir. 2018). As we have explained, "[w]hile

nearly all federal service is creditable service, covered service is a narrower subset of federal service." *Id.*; *see also* 5 C.F.R. § 831.201(a) (enumerating groups of employees excluded from covered service). Specifically, "[c]overed service only includes an appointment that is subject to the [Civil Service Retirement Act] and for which an employee must deposit part of his or her pay into the Civil Service Retirement and Disability Fund." *Rosete v. OPM*, 48 F.3d 514, 516 (Fed. Cir. 1995).

The only issue on appeal concerns whether Mr. Duong "served at least one of his last two years of federal service in a covered position." *See Lledo*, 886 F.3d at 1213. Mr. Duong bears the burden to show, by a preponderance of the evidence, that he served in a covered position. *Rosete*, 48 F.3d at 516 ("The petitioner has the burden of proof of demonstrating entitlement to retirement benefits."); 5 C.F.R. § 1201.56(b)(2)(ii) (requiring proof of entitlement "by a preponderance of the evidence").

Mr. Duong contends that the Board erred primarily because it: (1) failed to consider "whether the nature of the employment relationships met statutory criteria for CSRS coverage"; and (2) "treat[ed] the absence of payroll deductions as dispositive of whether [his] position was 'subject to CSRS.'" Pet'r's Informal Br. 2.[2] For the following reasons, we affirm the Board's decision.

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[2] Before the Board, Mr. Duong asked that the CSRS annuity determination "tak[e] into account the human [aspect] and circumstance[s] . . . beyond mere paperwork," including his "dedication and sacrifice" in support of the United States. S.A. 23 (describing persecution faced after the United States' withdrawal from Vietnam); *see also* S.A. 26–27 (same). While Mr. Duong's service and substantial sacrifices are certainly commendable, the Board was correct to refuse to consider those aspects in assessing

The Board can only assess the information before it. In this case, Mr. Duong provided no evidence corroborating his assertion that his role as an interpreter/translator for the Army was a covered position under the CSRS or that he otherwise made any CSRS contributions. S.A. 9–10.[3] In lieu of documentation, Mr. Duong provided the testimony of his former supervisor, Robert Schwab. S.A. 10, 27. Mr. Schwab was deposed by OPM, but he was unable to answer what type of appointment Mr. Duong served under or otherwise support Mr. Duong's claim regarding CSRS contributions. S.A. 39–41. Instead, Mr. Schwab described that Mr. Duong was paid biweekly from a "cash bag" flown in via courier planes. S.A. 40. Based on the lack of any supporting evidence and this method of payment, the Board concluded that it was "more likely than not that the Army did not deduct CSRS contributions from

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Mr. Duong's entitlement to CSRS retirement annuity. S.A. 2, 11. The Board is not permitted to use equitable considerations to alter the statutory requisites for compensation set by Congress. U.S. CONST. art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . . ."); *see OPM v. Richmond*, 496 U.S. 414, 426 (1990) ("[J]udicial use of [an equitable doctrine] cannot grant respondent a money remedy that Congress has not authorized.").

[3] In his memorandum in lieu of oral argument, Mr. Duong acknowledges that "the existing record contains no direct evidence" regarding "whether CSRS deductions were withheld from [his] pay." Pet'r's Memorandum in Lieu of Oral Argument 3. In the same memorandum, Mr. Duong identifies his initial notice from OPM titled "You May Be Eligible For Deferred Retirement" in support of his claim, *id.*, but the notice merely stated that Mr. Duong "may be eligible for a deferred annuity" and invited him to apply, S.A. 30. The notice itself is not evidence of covered service.

[Mr. Duong]'s pay." S.A. 10. Accordingly, the Board determined that it was "more likely than not that [Mr. Duong]'s position as a translator was not 'subject to CSRS.'" S.A. 10. On this record, we see no basis to disturb the Board's determination.

While Mr. Duong contends that the Board improperly "treat[ed] the absence of payroll deductions as dispositive of whether [his] position was 'subject to CSRS,'" Pet'r's Informal Br. 2, that assertion misapprehends the Board's decision. The Board found that the apparent lack of CSRS deductions was an indication that Mr. Duong was not serving in a covered position. S.A. 10. Based on this indication, and the lack of any evidence corroborating Mr. Duong's contrary assertions, the Board concluded that Mr. Duong had failed to prove service in a covered position. S.A. 10. There is nothing improper in such reasoning. *See Quiocson v. OPM*, 490 F.3d 1358, 1360 (Fed. Cir. 2007) ("The absence of deductions is an indication that an employee was not serving in a covered position.").

Even if we set aside the Board's finding that there likely were no CSRS deductions, we still see no fault with the Board's conclusion that Mr. Duong failed to show entitlement to a CSRS annuity. While it is true that Mr. Duong provided employment records showing that he worked for the Army as a civilian interpreter/translator, S.A. 28, that only sufficed to show *creditable* service—not *covered* service. *See Lledo*, 886 F.3d at 1213 ("While nearly all federal service is creditable service, covered service is a narrower subset of federal service."). Where, as here, the record contains no evidence whatsoever corroborating a petitioner's assertion of employment in a covered position, the Board was entitled to conclude that the petitioner did not establish that he served in a covered position. *See* 5 C.F.R. § 1201.56(b)(2)(ii) ("[T]he appellant has the burden of proving, by a preponderance of the evidence . . . , entitlement to the benefits."). Thus, the Board did not err in concluding

that Mr. Duong had failed to prove his eligibility for an annuity under the statute.

CONCLUSION

We have considered Mr. Duong's remaining arguments but find them unpersuasive. For the foregoing reasons, we affirm.

AFFIRMED

COSTS

No costs.