

Kelley v. United States, No. 01-69C (U.S. Court of Federal Claims, filed Feb. 6, 2001)

UNITED STATES COURT OF FEDERAL CLAIMS

Civil Action, File Number 01-69 C

JAMES L. KELLEY)
)
 v.)
)
 STEVEN COHEN)
 ACTING DIRECTOR)
 UNITED STATES)
 OF PERSONNEL)
 MANAGEMENT)

FILED FEB 6 2001

COMPLAINT FOR
DECLARATORY JUDGMENT

Plaintiff alleges that:

1. The Court has jurisdiction of this claim pursuant to 28 U.S.C 1491 (a)(1), (2). Plaintiff's claim arises under 5 U.S.C. 8336(d)(2), 42 U.S.C 415(a)(7)(A) and related provisions of the Social Security Act, as amended.
2. Plaintiff is a former federal employee who opted to take a voluntary "early out" retirement from the United States Nuclear Regulatory Commission on April 17, 1987, following over twenty-one years of federal service with the NRC, the Department of Energy, and the Department of Justice. Plaintiff became fifty years of age on May 30, 1985. He receives monthly pension payments for his federal service. Office of Personnel Management ("OPM") Claim No. A2969122.

3. Shortly before his sixty-fifth birthday, Plaintiff applied to the Social Security Administration (“the Administration”) for Social Security benefits earned during non-federal employment. He was advised that, pursuant to 42 U.S.C 415(a)(7)(A), the date of his *eligibility* to retire from the federal government—not the actual date of his retirement—would determine whether he was entitled to full benefits or whether his benefits would be reduced. That statute provides that Social Security benefits for a person receiving a pension for employment not covered by the Social Security Act, including federal employment, are to be reduced substantially if he or she becomes eligible to retire after December 31, 1985.

4. Information obtained from the Administration’s computerized data base at the time Plaintiff applied for Social Security benefits indicated that Plaintiff’s eligibility date to retire from federal employment fell in January 1986 and that, accordingly, his monthly benefit payments would be reduced, pursuant to 42 U.S.C.415(a)(7)(A). Reduced benefits to Plaintiff were subsequently commenced, effective February 1, 2000, and continue to the present date.

5. On information and belief, the full monthly Social Security benefits to which Plaintiff is entitled would be approximately double the reduced benefits he is currently receiving.

6. The Administration informed Plaintiff that information from its data base was sometimes incomplete and that, because that information had produced an eligibility date for him which fell only a few days after December 31, 1985, the cut-off date for receiving full benefits, he was

advised to apply to OPM for a written determination of his eligibility date.

7. Plaintiff requested OPM to determine his eligibility to retire from federal employment. By letter dated July 21, 2000, OPM advised Plaintiff, without explanation, that his eligibility date was January 22, 1986, twenty-two days after the cut-off date for full Social Security benefits under 42 U.S.C. 415(a)(7)(A). OPM reaffirmed that eligibility date by letter dated August 1, 2000.

8. By letter dated August 17, 2000, OPM “corrected” its prior correspondence and changed its position, contending that the date Plaintiff actually retired, April 17, 1987, was also his eligibility date for retirement because he “retired under a RIF situation.” Copies of the cited OPM letters are attached hereto as Attachment A. Plaintiff had taken a voluntary retirement pursuant to authority granted to the NRC pursuant to 5 U.S.C. 8336(d)(2). See Attachment B, letter of Curtis J. Smith, OPM, to James McDermott, Director of Organization and Personnel, NRC.

9. OPM has failed to determine the correct date of Plaintiff’s eligibility to retire under 42 U.S.C. 415(a)(7)(A) and, as a direct result, Plaintiff’s Social Security benefits are being wrongfully reduced. OPM’s position is wrong on the facts. Based on Plaintiff’s actual time of service as a federal employee and on his active duty in the United States Army Reserve, Plaintiff had twenty years of service creditable toward retirement on December 26, 1985, five days before the deadline for full benefits. His periods of service are summarized in Attachment C. Attachments A–C are incorporated herein by reference.

10. Beginning as a GS-11 attorney in the Civil Rights Division of the Department of Justice in 1964, subsequently serving as GS-18 Deputy General Counsel of the NRC, as a Senior Executive Service–Level 3 supervisor with the Department of Energy, and completing over 21 years of service in 1987 as an Administrative Judge of the NRC, Plaintiff is entitled to have his time of service fully credited.

11. OPM’s alternative basis for its position on Plaintiff’s eligibility date is wrong as a matter of law. The statute speaks of a person “who first become *eligible* [for a federal pension] after 1985.” Given its ordinary meaning, eligibility turns on facts and characteristics personal to the employee—such as his or her age, length of service, income, education, etc. It does not refer, as OPM appears to interpret its “early retirement” regulation (5 CFR 842.213), to actions by an employing agency or by OPM over which the employee has no control. Under that regulation, the only relevant conditions of eligibility are that the applicant for early retirement be fifty years of age and have twenty years of creditable service. Beyond that, in order to receive full Social Security benefits, the applicant must meet those two conditions before January 1, 1986, as Plaintiff does.

12. Unless Plaintiff’s eligibility date is corrected by OPM, given his present life expectancy some \$50,000 and possibly more will be unlawfully withheld from him.

13. The Administration has advised Plaintiff that if his eligibility date is determined by OPM to precede January 1, 1986, full benefits will be paid to him retroactive to February 2000.

Therefore, Plaintiff does not seek money damages.

Wherefore, Plaintiff demands a declaratory judgment against the Defendant Cohen stating that Plaintiff's eligibility for retirement under 42 U.S.C. 415(a)(1)(A) was December 26, 1985.

JS/ SUK

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