



**Pension Benefit Guaranty Corporation**

1200 K Street, N.W., Washington D.C. 20005-4026

March 30, 2022

*[Attorney]*  
*[Address]*  
*[Address]*  
*[Address]*

Re: *[Appeal]* No. 2021-*[xxxx]*; *[Participant]*; Case No. *[xxxx]*; *[Division]* Pension Plan (“Plan”)

Dear *[Attorney]*:

This Appeals Board decision constitutes PBGC’s final agency action regarding the claim of your client, *[Participant]*, for disability pension benefits under the Plan. This decision follows the *[date redacted]* Memorandum Opinion and Order (“Opinion”) from the United States District Court for the *[District]* (“District Court”).<sup>1</sup> The District Court vacated the Board’s previous April 18, 2018 decision (the “2018 Decision”) in this matter and remanded *[Participant]*’s claim for the Board to conduct further proceedings consistent with the Opinion.<sup>2</sup>

This new Appeals Board decision recites the facts that are relevant to *[Participant]’s* claim for disability pension benefits, reviews relevant Plan provisions, explains how the provisions of the Plan and Title IV of the Employee Retirement Income Security Act of 1974, as amended (“ERISA”) apply to *[Participant]’s* circumstances, and addresses the issues raised in *[Participant]’s* March 2, 2017 appeal and your correspondence dated October 5, 2021. For the reasons discussed below, this decision upholds PBGC’s determination that *[Participant]* is not entitled to a PBGC-payable disability benefit. Therefore, the Board is denying the appeal.

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<sup>1</sup> United States District Judge *[redacted]* issued the Opinion (at Enclosure 1) on *[date redacted]*, after *[Participant]* and PBGC had filed separate Summary Judgment motions in *[redacted]*. In this Board decision, we cite to the pages of the Opinion.

<sup>2</sup> An August 6, 2021 letter from the Appeals Board (at Enclosure 2) informed you that the Board had received the District Court’s remand order and would “issue a new decision.” In doing so, we have not given the April 18, 2018 decision any weight because it was based on an inapplicable provision of the Plan. We discuss this further in Section IV.D of this decision, below.

## I. Background

### A. *[Participant's] Employment, Disability Applications, and Early Retirement*

The Opinion provides the following discussion of the relevant factual background. (We have omitted the footnotes and citations to the Joint Appendix and other documents filed with the District Court.)<sup>3</sup>

In September 1976, *[Participant]* started working as a part-time packer for *[Division]*, which was then a division of a corporation called the *[Company]*. In 1985, *[Division]* reclassified *[Participant]* as a full-time grocery clerk. *[Participant]* continued to work as a grocery clerk with *[Division]* until he suffered a work-related injury to his left shoulder in August 2005. This shoulder injury required *[Participant]* to undergo surgery in December 2005, which ultimately limited his ability to serve as a grocery clerk. *[Participant]* was later released to return to “light duty” work in 2006, but *[Division]* did not have any light duty work for *[Participant]* to perform. *[Division]* eventually terminated *[Participant]* on December 1, 2006.

At the time of his 2006 termination, *[Participant]* was a participant in the Amendment and Restatement of the *[Division]* Pension Plan (the “Pension Plan”), an amended version of the pension plan that *[Company]* originally negotiated with the [Union] in 1974. The Pension Plan was administered by a Joint Board of Trustees that was mutually selected by both *[Company]* and the union.

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In 2008, *[Participant]* requested information from the Pension Plan administrators regarding his eligibility for a disability pension. On December 30, 2008, a benefits administrator named *[Plan representative]* sent *[Participant]* a letter confirming that, effective January 1, 2009, *[Participant]* would be eligible for a disability pension of \$626.84 per month. *[Plan representative]* also stated in her December 30, 2008 letter, however, that *[Participant]* “must be Social Security Disabled” to qualify for a disability benefit under the Pension Plan. *[Participant]* subsequently completed an application for a disability pension in April 2009. With his application, *[Participant]* included a signed statement from his treating physician, Dr. *[redacted]*, M.D., declaring that *[Participant]* was completely disabled. On August 17, 2009, the Pension Plan sent *[Participant]* a letter acknowledging the acceptance of his pension application, but also stating that *[Participant's]* pension eligibility was “contingent on him receiving a[n] SSA disability award letter.” On November 18, 2009, however, *[Company]* filed for bankruptcy, and on January 25,

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<sup>3</sup> Opinion, at 4 - 6. We have also omitted the District Court’s discussion of Section 5.06 of the Plan, which our 2018 Decision erroneously cited as governing *[Participant's]* claim for disability pension benefits. As discussed below, Section 5.06A of the Plan provides the Plan’s rules that apply in deciding *[Participant's]* claim for disability pension benefits. Our 2018 Decision did not address Section 5.06A, and a copy of its text was not provided to *[Participant]*. The Appeals Board apologizes for these errors.

2010, the Pension Plan was terminated without sufficient assets to cover its benefit obligations. The record does not contain any final decision made by *[Company]* regarding *[Participant's]* disability pension application prior to the company's bankruptcy.

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Following *[Company's]* bankruptcy, the PBGC became the trustee for the Pension Plan. In 2013, the PBGC began providing *[Participant]* early retirement benefits under the Pension Plan of approximately \$275 per month, payable as a Joint and 100% Survivor Annuity. But after an inquiry lodged by Plaintiff's Congressional representative in 2015, the PBGC also began to review *[Participant's]* eligibility for a disability pension under the Pension Plan. The PBGC responded in June 2015, informing *[Participant]* that he was required to provide a Social Security disability award to demonstrate his eligibility for a disability pension under the Pension Plan. Accordingly, *[Participant]* sent a letter to the PBGC in November 2016, notifying the PBGC that he had been receiving Social Security disability benefits, effective as of October 26, 2010, and requesting that the PBGC reconsider his eligibility for a disability pension under the Pension Plan.

The Appeals Board finds that the following related information is relevant and undisputed:

- Administrative Law Judge ("ALJ") *[redacted]* of the Social Security Administration ("SSA") reached the following conclusion in the October 25, 2010 decision that denied *[Participant's]* March 23, 2009 application for Social Security disability benefits:

11. The claimant *[Participant]* has not been under a disability, as defined in the Social Security Act, from August 19, 2005, through the date of this decision (20 CFR 404.1520(g)).

- ALJ *[redacted]* decision was upheld in an SSA Appeals Council order dated November 3, 2011 ("2011 SSA Denial"). The Notice of the Order advised *[Participant]* of his right to challenge the 2011 SSA Denial by filing a complaint in a United States District Court.<sup>4</sup>

- *[Participant]* has not claimed or provided the Appeals Board with any evidence that he availed himself of his right to challenge the 2011 SSA Denial. Likewise, there is no evidence that such 2011 SSA Denial was ever reversed. Accordingly, there has been no change to the SSA's determination that *[Participant]* "has not been under a disability, as defined in the Social Security Act, from August 19, 2005, through [October 25, 2010]."

The Appeals Board is aware that *[Participant]* filed a subsequent application for Social Security disability benefits on February 2, 2011. In 2012, SSA ALJ *[redacted]* found *[Participant]*

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<sup>4</sup> A copy of the 2011 SSA Denial is provided as Enclosure 3.

to be disabled under the Social Security Act “since October 26, 2010” (“2012 SSA Award”). As discussed in more detail later in this decision, the 2012 SSA Award is not material to this appeal.<sup>5</sup>

***B. PBGC is Responsible for Paying Pension Benefits under the Plan***

PBGC is the United States government agency that administers the termination insurance program for tax-qualified, defined benefit pension plans in accordance with Title IV of ERISA. If a plan’s sponsor is unable to continue supporting its insured plan, PBGC becomes the plan’s trustee and pays benefits as defined in the plan, subject to the limitations and requirements in ERISA.

*[Company]* and its affiliated companies filed for Chapter 11 bankruptcy on November 18, 2009 (the “Bankruptcy Petition Date” or “BPD”). During the bankruptcy case, the companies sold their assets and effectively ceased business operations.<sup>6</sup>

Pursuant to an agreement between PBGC and the prior Plan administrator, the Plan terminated on January 25, 2010 (the “Date of Plan Termination” or “DOPT”), and PBGC became the Plan’s statutory trustee on June 17, 2010. When PBGC becomes statutory trustee of a terminated plan, it collects participant information and copies of the plan’s governing documents from the plan administrator and audits that data. PBGC relies on the data it receives from a plan administrator unless its audit shows that the data is inaccurate or incomplete, or a participant supplies PBGC with such information.

***C. [Participant’s] PBGC-Guaranteed Benefit Must Be Determined as of [Company’s] Bankruptcy Filing Date***

PBGC guarantees the payment of a participant’s nonforfeitable pension benefit to which he or she is entitled as of the pension plan’s termination date.<sup>7</sup> For a plan, such as the Plan, that is terminated under section 4042 of ERISA, the plan’s termination date is the date established by PBGC and agreed to by the plan administrator.<sup>8</sup>

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<sup>5</sup> Briefly, the 2012 SSA Award is not material to this appeal because *[Participant’s]* October 26, 2010 disability onset date is after both November 18, 2009 (the bankruptcy petition date on which PBGC must determine his entitlement to a PBGC-guaranteed disability benefit under section 4022(a) of ERISA) and January 25, 2010 (the Plan’s termination date on which PBGC must determine his entitlement to payments for non-guaranteed benefits under section 4022(c) of ERISA). In this decision, the Appeals Board refers to sections of ERISA; e.g., section 4022 of ERISA, rather than the corresponding section of the United States Code, e.g., 29 U.S.C. § 1322.

<sup>6</sup> A copy of PBGC’s Agreement for Appointment of Trustee and Termination of Plan is provided at Enclosure 4.

<sup>7</sup> See ERISA § 4001(a)(8).

<sup>8</sup> See ERISA § 4048(a)(3).

If the plan sponsor filed a bankruptcy petition that has not been dismissed, the date of the bankruptcy petition is treated as the termination date. Specifically, Section 4022(g) of ERISA, *Bankruptcy Filing Substituted for Termination Date*, provides the following:<sup>9</sup>

If a contributing sponsor of a plan has filed or has had filed against such person a petition seeking liquidation or reorganization in a case under title 11, United States Code, or under any similar Federal law or law of a State or political subdivision, and the case has not been dismissed as of the termination date of the plan, then this section [4022] shall be applied by treating the date such petition was filed as the termination date of the plan.

Where section 4022(g) of ERISA applies, PBGC guarantees the amount of a participant's nonforfeitable benefit under a pension plan as of the bankruptcy petition date, rather than as of the plan's termination date.

If a disability benefit is claimed, PBGC first determines whether the participant is eligible for a disability pension in accordance with the terms of the plan.<sup>10</sup> PBGC's guarantee applies to "an annuity which is payable . . . under the terms of a plan on account of the total and permanent disability of a participant which is expected to last for the life of the participant."<sup>11</sup> A disability pension is nonforfeitable, and thus guaranteed, if the disability began on or before the date prescribed under 29 C.F.R. § 4022.6(a) and (d).<sup>12</sup> Accordingly, *[Participant's]* entitlement to a PBGC-guaranteed disability benefit must be determined as of BPD, i.e., November 18, 2009, because section 4022(g) of ERISA applies to the Plan.

***D. [Participant's] Non-Guaranteed Benefit Must Be Determined as of the Date of Plan Termination***

Under section 4022(c) of ERISA, PBGC pays additional benefits from recoveries that it receives on its claims against the companies that are responsible for an insured plan. If applicable, these payments are added to PBGC-guaranteed benefit payments. Participants who satisfy the

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<sup>9</sup> See also PBGC's regulations at 29 Code of Federal Regulations ("C.F.R.") § 4001.2 for the definitions of *Bankruptcy filing date* and *PPA 2006 [Pension Protection Act of 2006] bankruptcy termination*, as well as § 4022.3, *Guaranteed benefits*.

<sup>10</sup> See 29 C.F.R. § 4022.6, *Annuity payable for total disability*:

(a) Except as otherwise provided in this section, an annuity which is payable (or would be payable after a waiting period described in the plan, whether or not the participant is in receipt of other benefits during such waiting period), under the terms of a plan on account of the total and permanent disability of a participant which is expected to last for the life of the participant and which began on or before the termination date is considered to be a pension benefit.

\* \* \*

(d) *PPA 2006 bankruptcy termination*. In a PPA 2006 bankruptcy termination, "bankruptcy filing date" is substituted for "termination date" in paragraph (a) of this section.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

plan's conditions for a disability benefit after BPD but on or before DOPT are eligible to share in any such recoveries under section 4022(c).<sup>13</sup> Under section 4022(c) of ERISA, PBGC would have paid a portion of *[Participant's]* benefit that accrued and/or became payable as the result of disability between BPD and DOPT, *had [Participant's] disability commenced under the terms of the Plan between BPD and DOPT*. As we discuss in this decision, *[Participant]* did not satisfy the Plan's conditions for disability pension benefits until October 26, 2010; such date is after both BPD and DOPT.

#### ***E. PBGC's Determination***

On February 17, 2017, PBGC sent *[Participant]* a benefit determination letter, denying his request for a disability pension. PBGC's determination letter stated:

The Pension Benefit Guaranty Corporation (PBGC) has completed a review of the plan and your records, and we have determined that you did not meet the eligibility requirements for a Disability Pension.

You would have had to have been declared disabled prior to the DOPT of 1/25/2010.

#### ***F. [Participant's] Appeal, the Appeals Board's 2018 Decision, and [Participant's] Civil Action***

The Opinion provides the following discussion of the procedural background. (Once again, we have omitted footnotes and citations to the Joint Appendix and other documents filed with the District Court; the italicization, however, is from the original.)

On March 2, 2017, *[Participant]* appealed this adverse benefit determination to the PBGC's Appeals Board. In his appeal letter, *[Participant]* asserted that he had last worked for *[Division]* in 2005, and he also referenced medical records submitted to the PBGC, which demonstrated that he had been physically disabled well before the Pension Plan's January 25, 2010 termination date. On April 18, 2018, however,

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<sup>13</sup> Section D of PBGC Operating Policy 5.14-1, *Benefits in PPA 2006 Bankruptcy Plans*, dated October 30, 2008 (at Enclosure 5) provides as follows:

**3. Disability Benefits.** PBGC will not guarantee the additional value provided by a disability benefit to which a participant becomes entitled under the plan after BPD. Like early retirement benefits (see section 2 above), eligibility for entry into pay status, including with disability benefits depends on the conditions that were satisfied under the plan on or before DOPT (not BPD).

To determine the date a participant in a PPA 2006 bankruptcy plan is eligible to enter pay status with a disability retirement benefit, see section 3(a) below. . . .

a. **Eligibility to Receive Disability Benefits.** Eligibility for entry into pay status depends on the conditions that were satisfied under the plan on or before DOPT (not BPD). . . .

PBGC updated Operating Policy 5.14-1 as of March 27, 2014, but the guidance quoted above remained substantively the same.

the Appeals Board sent *[Participant]* a decision letter, concluding that there was no basis to reverse the PBGC's benefit determination that *[Participant]* was ineligible for a disability pension under the Pension Plan.

In its April 18, 2018 decision, the Appeals Board specifically observed that the original plan administrator with *[Company]* had accepted *[Participant's]* pension application, "contingent on [him] receiving a[n] SSA disability award letter." That plan administrator had also noted that "if *[Participant]* d[id] not receive a[n] SSA disability award, [he] would have to wait until . . . age 55 to receive a pension." The Appeals Board, therefore, found it "evident that the prior Plan administrator interpreted the Plan to require proof of a Social Security disability award letter as proof of a Total and Permanent Disability" under Section 5.06(d) of the Pension Plan. *[Participant]*, however, had received a Social Security disability award effective only *as of October 26, 2010*. Because this Social Security award came *after [Company's]* November 18, 2009 bankruptcy, the Appeals Board concluded that *[Participant]* had not become eligible for a disability benefit under the Pension Plan until after the plan's termination date. The Appeals Board, therefore, found that *[Participant's]* disability benefit was not guaranteed by the PBGC and upheld the agency's initial determination, denying *[Participant's]* request for a disability pension under the Pension Plan.

The 2018 Decision did not change *[Participant's]* ongoing receipt of a monthly early retirement benefit of \$275.59 in the form of a Joint and 100% Survivor Annuity.

On *[redacted]*, *[Participant]* filed a civil action, *[Participant] v. PBGC*, and that lawsuit became Civil Action No. *[redacted]* in the District Court. In his civil action, *[Participant]* disputed PBGC's denial of his claim for a disability pension benefit. He asserted that "PBGC's adverse determination violated the plain language of the Pension Plan by conditioning [his] eligibility for a disability pension on the receipt of a Social Security disability award."<sup>14</sup> The District Court agreed with *[Participant]* that the Plan provision applied by the Appeals Board in the 2018 Decision did not plainly require a Social Security disability award (emphasis in original): "[T]he basic terms of *[Participant's]* Pension Plan *did not* require a Social Security disability award as a condition for his pension eligibility."<sup>15</sup> Accordingly, the District Court vacated the 2018 Decision and remanded this matter for the Board to conduct further proceedings consistent with the Opinion.

## **II. Relevant Plan Provisions**

When *[Participant's]* employment ended, he was a participant in the Plan as amended and restated December 1, 2002 ("2002 Restatement").<sup>16</sup> The Plan's rules for disability pension benefits are detailed in Article V of the 2002 Restatement. On June 14, 2004, the Trustees of the Plan

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<sup>14</sup> Opinion, at 9 (citing *[Participant's]* Motion for Summary Judgment at 8–14).

<sup>15</sup> Opinion, at 13.

<sup>16</sup> A copy of the relevant Plan document is provided as Enclosure 6.

adopted an amendment to the 2002 Restatement (the “Fifth Amendment”) to, *inter alia*, “change the eligibility requirements for a disability pension.” The Fifth Amendment became effective March 1, 2004. Specifically, the sixth and seventh changes detailed in the Fifth Amendment created a new Section 5.06A to replace the rules in Section 5.06 of the 2002 Restatement for disability applications filed on or after August 1, 2004:<sup>17</sup>

WHEREAS, the Trustees of the [Division] Pension Plan (the “Trustees”) have the right to amend the [Division] Pension Plan, as amended and restated December 1, 2002 (the “Plan”). . . .

6. Effective August 1, 2004, Section 5.06 is amended to read as follows:

**Section 5.06. Disability Pension (Before August 1, 2004).**

(a) The Disability Pension provisions set forth in this Section shall apply to a Participant who applies for a Disability Pension before August 1, 2004.

\* \* \*

(f) The determination of the Total and Permanent Disability of any Participant and entitlement to an award of a Disability Pension under this Section shall be made by the Trustees. The Trustees shall also have full authority and responsibility for the following determinations relating to a Participant’s disability and benefits:

\* \* \*

7. Effective August 1, 2004, Section 5.06A is added to read as follows:

**Section 5.06A. Disability Pension (After August 1, 2004).**

(a) The Disability Pension provisions set forth in this Section shall apply to a Participant who applies for a Disability Pension on or after August 1, 2004.

(b) A Participant who has been credited with at least fifteen (15) years of Service under the applicable provisions of Section 3.01(b)(1) or Section 3.01(b)(2)(B) and the other applicable provisions of Article III shall be eligible for a Disability Pension if his/her Covered Employment is subsequently terminated by reason of Total and Permanent Disability incurred while in Covered Employment before he/she becomes eligible for a Normal Retirement Pension. Except as otherwise provided in paragraph (d)(2) below, such Disability Pension shall be in lieu of any other benefits payable under the Plan.

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<sup>17</sup> A copy of the Fifth Amendment to [Division] Pension Plan (As Amended and Restated December 1, 2002) is provided as Enclosure 7.



\* \* \*

- (e) The term “Total and Permanent Disability” shall mean a physical or mental condition for which a Participant receives a final award of Social Security disability benefits, but excluding any disability which: (1) originated while the Participant was not in the active service of the Employer; or (2) arose while the Participant was engaged in, or as the result of having engaged in, an illegal or criminal act or an act contrary to the best interest of the Employer or a Related Employer.

### **III. Post-Remand Proceedings Before the Appeals Board**

#### ***A. The Appeals Board’s August 6, 2021 Letter to You***

The Appeals Board, wrote to you on August 6, 2021 to provide you with a copy of the Plan’s Fifth Amendment (discussed above), as well as to invite you to raise arguments and provide additional information in support of *[Participant’s]* appeal.<sup>18</sup> The Board asked you to provide copies of any correspondence between *[Participant]* and the prior Plan administrator regarding his pension disability application, and also asked that *[Participant]* provide a copy of his 2009 settlement agreement with the *[Company]*. The stated reason for these requests was to enable the Board to issue a new decision that addressed all relevant arguments and information.

#### ***B. Your October 5, 2021 Response to the Appeals Board***

In a six-page letter dated October 5, 2021, you acknowledged the Plan’s Fifth Amendment but dismissed it as “irrelevant” “[i]n the context of this case.”<sup>19</sup> You also provided legal arguments for why the Plan’s Fifth Amendment should be disregarded. You did not, however, provide copies of any correspondence between *[Participant]* and the prior Plan administrator regarding his pension disability application, or a copy of the 2009 settlement agreement between *[Participant]* and the *[Company]*. Instead, you provided only copies of the documents that were filed with the District Court, and you argued that *[Participant’s]* claim must be decided based solely on those documents:

Your letter also stated that I am to raise all relevant argument and provide all relevant documents even if that had been previously raised or provided. For that reason, I am providing with the letter a CD containing the entire certified record that was filed with the District Court by the PBGC, along with the decision of the court and the filings in the District Court on behalf of *[Participant]* and the PBGC. I believe that this is the extent of the record that can be considered on remand in light of the decision of Judge *[redacted]*.

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<sup>18</sup> A copy of the August 6, 2021 letter is provided as Enclosure 2.

<sup>19</sup> A copy of your October 5, 2021 letter is provided as Enclosure 8.

I first will address your request regarding Section 5.06A of the Plan, added by the Fifth Amendment to the Plan, effective August 1, 2004. I acknowledge that the amendment adding Section 5.06A of the Plan requires under paragraphs (c) and (e) that the participant receive a final award of Social Security disability benefits to meet the definition of “Total and Permanent Disability.” In the context of this case, however, that is irrelevant.

On October 14, 2021, you submitted a follow-up letter which stated that you were correcting the first paragraph on page 6 of the October 5, 2021 letter:

I left out the word “not” in the sentence regarding the decision of the original Administrative Law Judge. That sentence should read, “The determination by the original Administrative Law Judge demonstrates that *[Participant]* could not return to work with *[Division]*.” I need to clarify this point so that the Appeal[s] Board has the correct information.

In this new Appeals Board decision, all references to the October 5, 2021 letter mean the October 5, 2021 letter as modified by the October 14, 2021 letter. Section IV.E of this decision, below, provides the Appeals Board’s analysis of the arguments that have been raised in support of *[Participant’s]* appeal.

#### **IV. Discussion**

##### ***A. The Plain Language of the Plan Controls the Decision in This Appeal***

The District Court framed the issue in this appeal as follows (with emphasis in the original):<sup>20</sup>

As a threshold matter, the parties do not dispute that the plain language of the Pension Plan controls in this case. In fact, the PBGC acknowledges that the question of “[w]hether and when a participant is disabled is based on the terms of the Pension Plan” itself. Def.’s Mot. at 11. And with regards to disability pensions, the PBGC’s governing regulations stipulate that “an annuity which is payable . . . *under the terms of a plan* on account of the total and permanent disability of a participant . . . is considered to be a pension benefit.” 29 C.F.R. § 4022.6(a) (emphasis added). In short, the PBGC’s benefit determination regarding *[Participant’s]* disability pension under the Pension Plan was tied to the plan’s plain language. *See Wagener v. SBC Pension Benefit Plan—Non Bargained Program*, 407 F.3d 395, 405 (D.C. Cir. 2005) (“Plan fiduciaries cannot claim deference for an interpretation of the Plan that . . . contradicts the Plan’s plain language.”); *Wright v. Metro. Life Ins. Co.*, 618 F. Supp. 2d 43, 57 (D.D.C. 2009) (“Where, as here, the plain language of a Plan’s coverage provision leaves no room for ambiguity, it is reasonable to interpret the provision as written.”) (quotation omitted and cleaned up).

To proceed in a manner that is consistent with the District Court’s Opinion, we must focus on “the plain language of the Pension Plan.” And, consistent with PBGC regulations and the Opinion, the

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<sup>20</sup> Opinion, at 15.

answer to whether and when *[Participant]* became disabled “is based on the terms of the Pension Plan itself.”

***B. Section 5.06A of the Plan Requires a Social Security Disability Award***

As we have noted above, Section 5.06(a) of the Plan as amended by the Fifth Amendment states, “The Disability Pension provisions set forth in this Section shall apply to a Participant who applies for a Disability Pension before August 1, 2004.” Section 5.06A(a) of the Plan as amended by the Fifth Amendment states, “The Disability Pension provisions set forth in this Section shall apply to a Participant who applies for a Disability Pension on or after August 1, 2004.” The District Court found that “*[Participant]* . . . completed an application for a disability pension in April 2009.” The plain meaning of the language from Sections 5.06(a) and 5.06A(a) of the Plan, as amended by the Plan’s Fifth Amendment, requires the Appeals Board to find that Section 5.06A of the Plan governs the resolution of *[Participant’s]* claim for disability pension benefits.

According to the plain meaning of the words used in Section 5.06A(e) of the Plan, quoted below, *[Participant’s]* claim for disability pension benefits must be based on a disability award from SSA (with emphasis added):

(e) The term “Total and Permanent Disability” shall mean a physical or mental condition for which a Participant receives a final award of Social Security disability benefits, but excluding any disability which: (1) originated while the Participant was not in the active service of the Employer; or (2) arose while the Participant was engaged in, or as the result of having engaged in, an illegal or criminal act or an act contrary to the best interest of the Employer or a Related Employer.

Considering the 2011 SSA Denial discussed above, the Appeals Board finds that *[Participant]* was not suffering from a “Total and Permanent Disability” as defined in Section 5.06A(e) of the Plan at any time on or before October 25, 2010.

***C. [Participant] Was Found Not to Be Disabled Under the Social Security Act On or Before the Dates on Which His PBGC-Payable Benefit Must Be Determined***

Pursuant to section 4022(g) of ERISA, PBGC must determine guaranteed benefits under the Plan, including *[Participant’s]* claim for disability pension benefits, as of November 18, 2009, the date on which *[Company]* filed for bankruptcy. In Section IV.B of this decision, above, we have recognized that *[Participant]* was found not to be disabled under the Social Security Act at any time on or before October 25, 2010. This necessarily means *[Participant]* did not become entitled to disability pension benefits under the Plan on or before BPD, the date on which his PBGC-guaranteed benefit must be determined. In other words, *[Participant]* did not satisfy the conditions of the Plan for disability pension benefits on or before BPD. Therefore, in accordance with section 4022(g) of ERISA and PBGC regulations, PBGC cannot guarantee *[Participant’s]* disability pension benefits. Furthermore, PBGC cannot pay *[Participant’s]* non-guaranteed disability pension benefits under Section 4022(c) of ERISA, because he did not satisfy the conditions of the Plan for disability pension benefits on or before DOPT.

***D. The Appeals Board Cannot Award a Disability Pension Benefit to [Participant] Under the Terms of the Plan***

Prior to the Plan's Fifth Amendment, Section 5.06 of the 2002 Restatement provided the following definition of the term "Total and Permanent Disability":<sup>21</sup>

(d) The term "Total and Permanent Disability" shall mean a physical or mental condition of a Participant resulting from a bodily injury or disease or mental disorder which, in the sole judgment of the Trustees, will render the Participant totally unable ever to discharge or resume such part of his/her duties of employment with the Employer, or such other duties with the Employer, as the Trustees may determine and as are acceptable to the Employer, regardless of type or kind, deemed to be necessary to the Participant's satisfactory continued employment with the Employer. . . .

Section 5.06(e) of the 2002 Restatement further provided, "The determination of the Total and Permanent Disability of any Participant and entitlement to an award of a Disability Pension under this Section shall be made by the Trustees."<sup>22</sup>

Under the Plan's Fifth Amendment, Section 5.06(a) of the Plan clearly stated, "The Disability Pension provisions set forth in this Section shall apply to a Participant who applies for a Disability Pension before August 1, 2004."<sup>23</sup> [Participant] did not file his claim for a Disability Pension before August 1, 2004. Therefore, the Appeals Board must find that [Participant] cannot qualify for disability pension benefits under Section 5.06 of the Plan as amended by the Fifth Amendment.

The 2018 Decision focused on whether [Participant's] claim had satisfied the requirements of Section 5.06 of the 2002 Restatement. The Appeals Board recognizes that this focus was erroneous.<sup>24</sup> Our earlier failure to identify and apply Section 5.06A of the Plan to [Participant's] claim obscured the fact that PBGC's February 17, 2017 determination correctly rested on the 2011 SSA Denial, which established that [Participant] was not under a disability on or before BPD, or between BPD and DOPT. The Board apologizes for its error in the 2018 Decision, and we have endeavored to rectify it in this new decision.

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<sup>21</sup> See Enclosure 6.

<sup>22</sup> *Id.*

<sup>23</sup> See Enclosure 7.

<sup>24</sup> Opinion, at 18 (with emphasis added):

The Appeals Board decision, however, does not explain why the prior plan administrator's interpretation was reasonable or how it comported with the plain language of the Pension Plan, which makes no reference to a required Social Security disability award.

### ***E. Your Arguments for Granting the Appeal Are Not Persuasive***

The Appeals Board is satisfied that the language in Section 5.06A of the Plan (1) was made part of the Plan in 2004, approximately one year before *[Participant]* became injured, and (2) is “language of the Plan” of the type discussed by the District Court.<sup>25</sup> Also, as we have noted in Section IV.B of this decision, above, there is a plain meaning of the language in Section 5.06A, and the plain meaning of that Plan language imposed upon *[Participant]* the requirement to provide the Plan with a Social Security disability award. Furthermore, under 29 C.F.R. § 4022.6(a) and (d), *[Participant]* was required to have received his Social Security disability award on or before the November 18, 2009 BPD.

*[Participant’s]* sole argument before the District Court was that the plain meaning of language in the 2002 Restatement established his entitlement to disability pension benefits.<sup>26</sup> Your October 5, 2021 letter acknowledged “that the amendment adding Section 5.06A of the Plan requires under paragraphs (c) and (e) that the participant receive a final award of Social Security disability benefits to meet the definition of ‘Total and Permanent Disability.’”<sup>27</sup> However, you argued that the Appeals Board cannot consider Section 5.06A of the Plan because “the District Court excluded consideration of any requirement that *[Participant]* have a Social Security disability award within the appropriate time period.”<sup>28</sup> You did not cite or quote any language from the Opinion that says as much. Indeed, as we discuss below, the case law cited in the Opinion contradicts your argument.

The District Court relied on *Wright v. Metro. Life Ins. Co.*, 618 F. Supp. 2d at 57, for the proposition that “[w]here, as here, the plain language of a Plan’s coverage provision leaves no

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<sup>25</sup> Opinion, at 15 (“In short, the PBGC’s benefit determination regarding *[Participant’s]* disability pension under the Pension Plan was tied to the plan’s plain language” (citing, *inter alia*, *Wright v. Metro. Life Ins. Co.*, 618 F. Supp. 2d 43, 57 (D.D.C. 2009)). See also 29 C.F.R. § 4022.6(a).

<sup>26</sup> Opinion, at 9:

*[Participant]* presents a single argument in support of his request to overturn the PBGC’s Appeals Board decision. According to *[Participant]*, the PBGC’s adverse determination violated the plain language of the Pension Plan by conditioning *[Participant’s]* eligibility for a disability pension on the receipt of a Social Security disability award.

<sup>27</sup> A copy of your October 5, 2021 letter is provided as Enclosure 8.

<sup>28</sup> *Id.* Your argument on remand attempted to circumvent Section 5.06A of the Plan. It has been the clear and consistent position of the prior Plan administrator and PBGC, since *[Participant]* filed his claim for disability pension benefits, that he was required to provide a Social Security disability award letter. As the District Court observed, the timing of *[Participant’s]* March 23, 2009 pursuit of a disability award from SSA seems related to the Plan requirement that he provide such an award to receive disability pension benefits:

*[Plan representative]* also stated in her December 30, 2008 letter, however, that *[Participant]* “must be Social Security Disabled” to qualify for a disability benefit under the Pension Plan. *[Participant]* subsequently completed an application for a disability pension in April 2009.

Opinion, at 5 - 6 (citation removed).

room for ambiguity, it is reasonable to interpret the provision as written.” Nowhere in the Opinion, or in any other court decision we have found, is any litigation-related limitation on what may be regarded as “language of a Plan” recognized. Rather, the Opinion is clear that the Appeals Board should apply the unambiguous meaning of the relevant language in the Plan documents.

To the extent that your argument attempts to invoke a rule of litigation to override the plain language in the Plan documents, we must once again disagree.<sup>29</sup> As we have discussed above, PBGC is to determine whether a participant is eligible for a disability pension in accordance with plan terms. Moreover, in accordance with 29 C.F.R. § 4003.59 and § 4022.6(a), the Appeals Board must apply the Plan’s terms, even if we previously erred by focusing on Plan terms that did not apply to *[Participant]*.

***F. [Participant’s] Claim is Not Entitled to Further Review by the Appeals Board***

You ended the October 5, 2021 letter by asking the Appeals Board to give *[Participant]* the chance to review and comment on any proposed adverse decision on remand:

Before a final decision of the Appeals Board is issued, I would request an explanation of a proposed decision under 29 C.F.R. § 4003.58(b) so that *[Participant]* has an opportunity to respond. *[Participant]* does have due process rights to his claim that must be vindicated. Without an explanation of a proposed decision allows him to respond, he will be deprived of those rights as the consideration of this matter by the Appeal[s] Board is beyond the level of the Initial Determination, 29 C.F.R. Part 4003, Subpart B and C. . . .

The regulation you cited in your letter, 29 C.F.R. § 4003.58(b), addresses a request for “an explanation of the initial determination being appealed.” Such a request for explanation does not apply to Appeals Board decisions, such as this one, which under 29 C.F.R. § 4003.59(c) are “in writing, specify the relief granted, if any, state the bases for the decision, including a brief statement of the facts or legal conclusions supporting the decision, and state that the appellant has exhausted his or her administrative remedies.” Moreover, the Board sent the August 6, 2021 letter to you in furtherance of a thorough review of *[Participant’s]* matter. Further proceedings before the Board are neither required nor warranted.

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<sup>29</sup> Your argument was based on the so-called “newly discovered evidence rule” under Federal Rule of Civil Procedure 60(b)(2) (“FRCP”). The District Court, however, noted that proceedings before the Appeals Board (pursuant to PBGC regulations at 29 C.F.R. Part 4003) are governed by the Administrative Procedure Act. Because the Court authorized the Appeals Board to issue a new decision, it is not precluded from providing new reasons for its decision, including the applicable amended provisions of the Plan. Furthermore, under 29 C.F.R. § 4003.59(a) (with emphasis added), “In reaching its decision, the Appeals Board will consider those portions of the file relating to the initial determination, all material submitted by the appellant and any third parties in connection with the appeal, and any additional information submitted by PBGC staff.”

## V. Decision

The Appeals Board has applied the terms of the Plan and the provisions of ERISA and PBGC regulations to the facts in this case. For the reasons explained above, the Board has found no basis for changing PBGC's February 17, 2017 determination that *[Participant]* is not entitled to a disability pension. Therefore, we must deny the appeal. This is the Agency's final decision on this matter and *[Participant]* may, if he wishes, seek review of this decision in an appropriate United States District Court.

If you or *[Participant]* have questions about his benefit, please call PBGC's Customer Contact Center at 1-800-400-7242.

Sincerely,



John R. Paliga  
Member, Appeals Board

8 Enclosures:

1. *[date redacted]* Memorandum Opinion and Order from the United States District Court for the District of *[redacted]* (20 pages)
2. August 6, 2021 letter from Appeals Board with enclosures (11 pages)
3. Social Security Administration November 3, 2011 decision (3 pages)
4. PBGC Agreement for Appointment of Trustee and Termination of Plan, signed June 2010 (3 pages)
5. PBGC Operating Policy 5.14-1 (Benefits in PPA 2006 Bankruptcy Plans) (October 30, 2008) (8 pages)
6. Excerpts of the *[Division]* Pension Plan, as amended and restated December 1, 2002 (9 pages)
7. Fifth Amendment to the *[Division]* Pension Plan, as amended and restated December 1, 2002 (8 pages)
8. October 5, 2021 letter from *[Attorney]* (6 pages)

cc: *[Participant]*  
*[Address]*  
*[Address]*