

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

2008 MSPB 46

Docket No. AT-0752-07-0473-I-1

**Anthony J. Adams,
Appellant,**

v.

**United States Postal Service,
Agency.**

March 5, 2008

Anthony J. Adams, West Palm Beach, Florida, pro se.

Beverly R. Brooks, Esquire, Memphis, Tennessee, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman
Barbara J. Sapin, Member
Member Sapin issues a separate dissenting opinion.

OPINION AND ORDER

¶1 The agency has petitioned for review of an initial decision (ID) finding that the appellant's resignation was involuntary due to mental incapacity. For the reasons set forth below, we GRANT the petition for review (PFR), VACATE the ID, and DISMISS the appeal for lack of jurisdiction.

BACKGROUND

¶2 The appellant, a preference-eligible veteran, was employed by the agency as a rural carrier. Initial Appeal File (IAF), Tab 6, Subtab 4E. On March 7, 2006, postal inspectors observed the appellant discarding mail. When confronted

about his actions, the appellant stated that he had discarded the mail because there was too much for him to handle. *See id.*, Subtab 4H. The agency placed the appellant in an off-duty status without pay, effective March 7, 2006, pending further investigation into his actions that day. *Id.*, Subtab 4J.

¶3 On March 31, 2006, the appellant submitted a PS Form 2574, Resignation from the Postal Service. *Id.*, Subtab 4G. On that form, the appellant wrote that he was resigning for personal reasons. *Id.* The appellant's resignation was effective March 31, 2006, and the PS Form 50 indicated that he had resigned for personal reasons while charges were pending against him. *Id.*, Subtab 4E.

¶4 Shortly after resigning, the appellant was diagnosed with a benign brain tumor. IAF, Tab 9, Exhibit 1. In a Consultation Report dated April 20, 2006, the appellant's neurosurgeon, Philip Levitt, M.D., noted that the appellant presented with "irritability and confusion." IAF, Tab 9, Exhibit 1. He indicated that the appellant's girlfriend had reported "slowing of [the appellant's] mentation over several weeks." *Id.* Dr. Levitt noted in the same report, however, that the appellant was able to understand the surgery that he was about to undergo and that he asked appropriate questions. *Id.* Also on April 20, 2006, the appellant submitted a written request to rescind his resignation. IAF, Tab 6, Subtab 4F. The appellant's tumor was surgically removed on April 24, 2006. IAF, Tab 9, Exhibit 1. The appellant contacted the agency's equal employment opportunity (EEO) office on April 25, 2006. *See* IAF, Tab 6, Subtab 4P, Counselor's Report.

¶5 Dr. Levitt prepared a letter dated May 3, 2006, that described the appellant's treatment and condition. IAF, Tab 9, Exhibit 5. Dr. Levitt indicated that the appellant had requested a letter stating that his tumor caused him to discard the mail. *Id.* Dr. Levitt stated that he did not think that the appellant would do something like that again. He also stated that the location of the tumor supported his belief that the tumor caused the appellant's misconduct. *Id.* Dr. Levitt prepared another letter, also dated May 3, 2006. IAF, Tab 6, Subtab 4C. In that letter, Dr. Levitt stated that the appellant's "bizarre behavior

... was due exclusively to the brain tumor.” *Id.* Dr. Levitt also indicated that behavior such as throwing out mail is “typical” for people with tumors in the same location as the appellant’s. *Id.*

¶6 On June 13, 2006, the appellant filed a formal EEO complaint alleging that the agency had discriminated against him on the basis of his race, age, and mental disability by forcing him to resign. IAF, Tab 6, Subtab 4P, Formal Complaint. He requested a hearing before an administrative judge (AJ) at the Equal Employment Opportunity Commission (EEOC) on September 30, 2006. IAF, Tab 6, Subtab 4P. On December 27, 2006, the EEOC AJ dismissed the appellant’s hearing request because there is no right to a hearing before an EEOC AJ in a mixed case. *Id.* The AJ ordered the agency to issue a Final Agency Decision (FAD) on the appellant’s complaint within 45 days, and notified the appellant of his right to file a Board appeal if he was dissatisfied with the FAD. *Id.* The agency issued a FAD finding no discrimination on February 5, 2007. *Id.* The appellant filed a timely Board appeal. IAF, Tab 1. He did not request a hearing. *Id.*

¶7 After giving both parties an opportunity to submit evidence and argument on the issue of jurisdiction, the AJ issued an ID finding that the appellant’s resignation was involuntary. IAF, Tab 14. The AJ found that the appellant had proven by preponderant evidence that his brain tumor “seriously impaired” his ability to make a rational decision to resign. *Id.* at 4. The AJ also found that the appellant failed to prove his affirmative defenses. *Id.* at 4-5. He ordered the agency to cancel the appellant’s constructive removal and restore him effective May 22, 2004. *Id.* at 5.

¶8 The agency has filed a timely PFR of the ID. PFR File, Tab 1. On PFR, the agency argues that the AJ erred in finding that the appellant lacked the capacity to make a rational decision to resign. *Id.* at 4-8. The agency also argues that the effective date established by the AJ for the appellant’s restoration was incorrect. *Id.* at 8. The appellant has not responded to the PFR.

ANALYSIS

¶9 An employee-initiated action, such as a resignation, is generally presumed to be voluntary. *Talley v. Department of the Army*, 50 M.S.P.R. 261, 263 (1991). An involuntary resignation is tantamount to a removal, however, over which the Board has jurisdiction. *Spiegel v. Department of the Army*, 2 M.S.P.R. 140, 141 (1980). When an appellant claims that his resignation was involuntary due to mental incapacity, the proper test is whether, at the time he submitted his resignation, the appellant was capable of making a rational decision to resign.* *Brown v. National Science Foundation*, 47 M.S.P.R. 159, 162 (1991). We find that the appellant failed to meet that burden.

¶10 In finding that the appellant lacked the mental capacity to validly resign, the AJ relied primarily upon Dr. Levitt's letters and notes. IAF, Tab 14 at 2-4. But none of the documents authored by Dr. Levitt actually address the critical question in this appeal, i.e., whether the appellant was capable of making a rational decision to resign on March 31, 2006. The evidence from Dr. Levitt supports the conclusion that the appellant's brain tumor caused him to discard mail on March 7, 2006. *See* IAF, Tab 9, Exhibit 5; IAF, Tab 6, Subtab 4C. The fact that the appellant's tumor may have caused the misconduct for which he was being investigated, however, does not necessarily mean that he was unable to rationally consider the consequences of resigning. None of the evidence from Dr. Levitt explains how the appellant's tumor could have affected his ability to make a rational decision to resign, and so that evidence is not particularly persuasive. *See Brown*, 47 M.S.P.R. at 163 (discounting medical evidence that did not address the appellant's mental state at the time she resigned).

* Although the AJ did not inform the appellant of this standard in the acknowledgment order, *see* IAF, Tab 2, his order dated May 24, 2007, included the legal standard for mental incapacity, IAF, Tab 9 at 4; *see Burgess v. Merit Systems Protection Board*, 758 F.2d 641, 643-44 (Fed. Cir. 1985) (an appellant must receive explicit information on what is required to establish an appealable jurisdictional issue).

¶11 The agency submitted a sworn declaration from Bruce N. Butler, M.D., M.P.H., an agency employee. IAF, Tab 11, Exhibit N. Dr. Butler reviewed the appellant's medical documentation and the agency's files relating to this appeal. *Id.* at 1-2. Based on that review, Dr. Butler concluded "with a reasonable degree of medical certainty, that [the appellant] was rational, emotionally sound, and able to exercise free will when he threw away the mail on March 7, 2006, and when he resigned from [the agency] on March 31, 2006." *Id.* at 2. Dr. Butler did not dispute the existence of the appellant's tumor, but he stated that the tumor did not prevent the appellant from thinking rationally. *Id.*

¶12 Attached to Dr. Butler's declaration were several pages of notes analyzing the evidence and explaining the basis for his conclusion. IAF, Tab 11, Exhibit N2. In those notes, Dr. Butler reasoned that the appellant's act of discarding only advertising mail, as opposed to first class or other mail, was an indication that he was thinking rationally at that time because the absence of such mail would be less likely to be reported by customers. *Id.* at 4. Dr. Butler also reviewed the documentation relating to the appellant's March 30, 2006 investigative interview, and concluded that there was no indication that the appellant's thinking or decision making was impaired at that time. *Id.* at 4-5. With respect to the appellant's resignation on March 31, 2006, Dr. Butler noted that the appellant came to the post office voluntarily and without assistance, engaged in "a lucid conversation" with his supervisor, and listed a reason for his resignation that would not provoke suspicion from potential future employers. *Id.* at 5. Dr. Butler therefore concluded that the appellant demonstrated "alertness, high cognitive functioning, . . . free will[,] and rational thought" at the time of his resignation. *Id.* Dr. Butler also noted that the appellant was permitted to sign a surgical consent form before undergoing surgery on April 24, 2006, without Dr. Levitt or anyone else questioning his mental capacity. *Id.* at 7.

¶13 In assessing the probative weight of competing medical opinions, the Board considers the following factors:

whether the opinion was based on a medical examination, whether the opinion provided a reasoned explanation for its findings as distinct from mere conclusory assertions, the qualifications of the expert rendering the opinion, and the extent and duration of the expert's familiarity with the treatment of the appellant.

Lassiter v. Department of Justice, 60 M.S.P.R. 138, 142 (1993).

¶14 The AJ gave Dr. Butler's opinion less weight than that of Dr. Levitt because Dr. Butler never met the appellant and had no first-hand knowledge of his circumstances. IAF, Tab 14 at 3-4. Dr. Levitt did not begin treating the appellant until several weeks after his resignation, however. *See* IAF, Tab 9, Exhibit 1. Neither Dr. Levitt nor Dr. Butler was able to observe the appellant at the time he submitted his resignation, and therefore neither doctor had direct knowledge of the appellant's mental state at that time. As the appellant's treating neurosurgeon, Dr. Levitt would certainly have greater insight into the appellant's diagnosis and treatment than Dr. Butler, who is not a neurologist, *see* IAF, Tab 11, Exhibit N1, and merely reviewed the appellant's file. However, Dr. Butler does not dispute the appellant's diagnosis or treatment. Dr. Butler also does not dispute the general proposition that tumors such as the one the appellant had can cause behavioral changes. The only matter on which the doctors appear to disagree is whether the appellant's tumor actually rendered him mentally incompetent at the time of his resignation. Dr. Levitt's opinion with respect to that matter is conclusory and lacks any explanation for why he believes the appellant was mentally incompetent at the time of his resignation. Dr. Butler, on the other hand, analyzed the available evidence and provided reasoned explanations for his conclusion that the appellant was able to make a rational decision to resign.

¶15 Having considered all of the factors enumerated in *Lassiter*, we find that Dr. Butler's opinion is entitled to greater weight than that of Dr. Levitt. We therefore find that the appellant was mentally competent at the time of his resignation. There is no other basis in the record for concluding that the

appellant's resignation was involuntary. Although he faced a possible removal for discarding mail, the fact that an employee is faced with the unpleasant choice of either resigning or opposing a potential removal action does not rebut the presumed voluntariness of his ultimate choice of resignation. *Schultz v. U.S. Navy*, 810 F.2d 1133, 1136-37 (Fed. Cir. 1987).

¶16 Because the appellant failed to establish Board jurisdiction over his appeal by proving that his resignation was involuntary, we dismiss the appeal for lack of jurisdiction.

ORDER

¶17 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, <http://www.mspb.gov>. Additional information is available at the court's website, <http://fedcir.gov/contents.html>. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

William D. Spencer
Clerk of the Board
Washington, D.C.

DISSENTING OPINION OF BARBARA J. SAPIN

in

Anthony J. Adams v. United States Postal Service

MSPB Docket No. AT-0752-07-0473-I-1

¶1 My colleagues, in disagreement with the administrative judge, conclude that the appellant was mentally competent at the date of his resignation and that therefore his resignation was voluntary. For the reasons set forth below, I respectfully dissent from the majority.

¶2 The appellant was a rural carrier who resigned from his position, apparently rather than face charges for discarding third-class mail. Within 3 weeks, Dr. Philip Levitt, a neurosurgeon, diagnosed the appellant with a brain tumor. Dr. Levitt noted that the appellant presented with “irritability and confusion.” Dr. Levitt immediately removed the tumor and indicated that he believed that the tumor caused the appellant’s misconduct. Dr. Levitt characterized the appellant’s behavior as bizarre, although he did not specify that the appellant’s bizarre behavior caused him to involuntarily resign.

¶3 The appellant filed a petition for appeal. During the proceedings before the Board, the agency had an associate medical director, Dr. Bruce Butler, who had been employed by the postal service for less than three months, review the appellant’s medical documentation. Dr. Butler concluded that the brain tumor did not cause the appellant to throw away the third-class mail or to resign. The administrative judge gave more weight to Dr. Levitt’s statements than to Dr. Butler’s and based on Dr. Levitt’s statements found that “the size, location and reported effects of the tumor removed from the appellant’s brain demonstrate by preponderant evidence that, on March 31, 2006, the appellant’s ability to make a rational decision regarding his resignation was seriously impaired.” Initial Appeal File (IAF), Tab 14 (ID at 4).

¶4 The Board majority reverses the initial decision. The Opinion and Order gives more weight to Dr. Butler's statement than to that of Dr. Levitt. The majority bases its decision on the finding that Dr. Butler analyzed the available evidence and provided a reasoned explanation for his conclusion that the appellant was able to make a rational decision to resign, while Dr. Levitt's opinion appeared conclusory and lacked any explanation for why he believed that the appellant was mentally incompetent at the time of his resignation. I believe, however, that the administrative judge correctly gave more weight to Dr. Levitt's opinion under the four-prong test of *Lassiter v. Department of Justice*, 60 M.S.P.R. 138, 143 (1993). Dr. Levitt's opinion must be weighed heavily based on three of the four prongs. It was based on a medical examination, was made by a neurosurgeon with particular expertise in the effects of a brain tumor, and was made by a physician who was fully familiar with the appellant's treatment from diagnosis to cure. As the majority notes, Dr. Levitt would have greater insight into the appellant's diagnosis and treatment than Dr. Butler. While Dr. Butler's opinion may have contained a fuller explanation for his findings, I would find that it is entitled to less weight than that of Dr. Levitt under the circumstances. Dr. Butler did not examine the appellant, is not a neurosurgeon, has no expertise in the effects of a brain tumor, and was not fully familiar with the appellant's treatment from diagnosis to cure. Further, unlike Dr. Levitt, Dr. Butler's opinion was prepared for his employer in response to the well defined issues in this appeal.

¶5 The appellant's first irrational act of record was to throw away third-class mail, as Dr. Levitt stated. His irrational behavior continued through his resignation until Dr. Levitt removed the tumor. Dr. Levitt's opinion that the appellant was irrational is entitled to more weight than Dr. Butler's opposite opinion. I would deny the agency's petition for review by final order.

Barbara J. Sapin
Member