

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

2008 MSPB 150

Docket No. CH-0752-06-0580-I-1

**George Bruton,
Appellant,**

v.

**Department of Veterans Affairs,
Agency.**

July 3, 2008

George Bruton, Chicago, Illinois, pro se.

Paul E. Piwinski, Esquire, Hines, Illinois, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman

OPINION AND ORDER

¶1 The appellant has petitioned for review of an initial decision that affirmed his removal from federal service based on charges of absence without leave (AWOL). For the reasons set forth below, we GRANT the petition for review under 5 C.F.R. § 1201.115, REVERSE the initial decision, and DO NOT SUSTAIN the appellant's removal.

BACKGROUND

¶2 The appellant was formerly a Housekeeping Aid, WG-3566-02, at the agency's Edward Hines, Jr. Hospital. Initial Appeal File (IAF), Tab 6, Subtab 4a. On April 16, 2002, he suffered an injury to his knee; he began receiving benefits

under the Office of Workers' Compensation Programs (OWCP). *Id.*, Subtab 4e at 17. Thereafter, he worked in various light duty assignments on a work schedule limited to four hours per day. *Id.* On January 18, 2005, the appellant's physician, Dr. Samuel Chmell, further restricted the appellant to working three hours per day. *Id.* OWCP directed the appellant to attend a "second opinion medical examination" with Dr. Edward S. Forman, who concluded that the appellant was able to work eight hours per day with certain restrictions. *Id.* OWCP then directed the appellant to attend a "referee medical examination" with Dr. John J. Dwyer in order to resolve the conflicting medical opinions concerning the appellant's abilities. *Id.* Dr. Dwyer concluded that the appellant was able to work an eight hour day with certain physical restrictions. *Id.*

¶3 On August 3, 2005, the agency offered the appellant a permanent light duty position consistent with the medical restrictions imposed by Dr. Dwyer. IAF, Tab 6, Subtab 4q at 3. OWCP determined that the offered position was suitable and informed the appellant that, if he declined the position without justification, his OWCP benefits would be terminated. *Id.* at 2. The appellant declined the position, and OWCP terminated his benefits effective December 9, 2005. IAF, Tab 6, Subtab 4e at 14, 18-19.

¶4 The agency then directed the appellant to report for duty beginning on December 27, 2005, for a tour of eight hours, from 6:00 a.m. to 2:30 p.m. Monday through Friday, or to provide a request for leave substantiated by appropriate medical documentation. IAF, Tab 6, Subtab 4o. However, consistent with the medical restrictions imposed by Dr. Chmell, the appellant reported for duty every day at 6:00 a.m. and left at 9:00 a.m. *Id.*, Subtab 4p.

¶5 Thereafter, the agency proposed the appellant's removal based on a charge of AWOL in that, from December 27, 2005, through February 17, 2006, he: was absent for five hours per day; was one hour tardy on February 9, 2006; did not report at all on February 3, 2006; and did not provide acceptable medical documentation for any of his absences. *Id.*, Subtab 4g. After considering the

appellant's written reply to the proposed removal, *id.*, Subtab 4e, the agency removed the appellant effective May 12, 2006, *id.*, Subtabs 4a, 4b.

¶6 The appellant appealed the removal action, requested a hearing, and claimed that the removal constituted discrimination based on his disability. IAF, Tabs 1, 3, 10, 15. After a hearing, the administrative judge found that the agency proved its charge by preponderant evidence, the appellant did not prove his affirmative defense of disability discrimination, and the penalty of removal was within the tolerable bounds of reasonableness. Initial Decision (I.D.) at 4-8. The initial decision informed the appellant that the deadline for filing a petition for review was December 12, 2006. *Id.* at 8.

¶7 On February 27, 2008, the appellant filed an untimely petition for review upon receiving a decision from the Employees' Compensation Appeals Board (ECAB) that reversed an earlier OWCP decision and reinstated his benefits. Petition for Review (PFR) File, Tab 1. The agency moved to dismiss the petition for review as untimely filed, but did not respond to the merits of the petition for review. *Id.*, Tabs 3, 4.

ANALYSIS

¶8 A petition for review must be filed within 35 days after the date the initial decision was issued, or, if the appellant shows that he received the initial decision more than five days after it was issued, within 30 days after the date that he received the initial decision. *Lawson v. Department of Homeland Security*, 102 M.S.P.R. 185, ¶ 5 (2006); 5 C.F.R. § 1201.114(d). Here, the last day that the appellant could timely file his petition for review was December 12, 2006. I.D. at 8. As noted above, however, he did not file his petition for review until February 27, 2008, over fourteen months later. PFR File, Tab 1. Thus, it was untimely filed.

¶9 The Board will waive the filing deadline for a petition for review only upon a showing of good cause for the delay in filing. *Lawson*, 102 M.S.P.R. 185, ¶ 5;

5 C.F.R. §§ 1201.12, 1201.114(f). To establish good cause for the untimely filing of an appeal, the appellant must show that he exercised due diligence or ordinary prudence under the particular circumstances of the case. *Alonzo v. Department of the Air Force*, 4 M.S.P.R. 180, 184 (1980). The discovery of new evidence may establish good cause for the untimely filing of a petition for review “if the evidence was not readily available before the close of the record below, and if it is of sufficient weight to warrant an outcome different from that of the initial decision.” *Satterfield v. U.S. Postal Service*, 80 M.S.P.R. 132, ¶ 5 (1998) (quoting *Boyd-Casey v. Department of Veterans Affairs*, 62 M.S.P.R. 530, 532 (1994)).

¶10 The record reflects that ECAB reversed the earlier OWCP decision and reinstated the appellant’s benefits on February 6, 2008, after the initial decision had become final. PFR File, Tab 1 at 10-18. The ECAB award is therefore new. *See Brown v. National Archives and Records Administration*, 92 M.S.P.R. 95, ¶ 8 (2002); *Satterfield*, 80 M.S.P.R. 132, ¶ 6. Further, although the record does not reflect precisely when the appellant received the award, he filed his petition for review within three weeks of its issuance; thus, we find that he filed his petition for review promptly and with due diligence upon receiving the award. The agency does not assert any prejudice that would result from waiver of the time limit. PFR File, Tabs 3, 4; *see Alonzo*, 4 M.S.P.R. at 184. Therefore, under the circumstances of this case, we find that the appellant has shown good cause for the delay in filing and we waive the filing deadline for the petition for review. *See Thornton v. Office of Personnel Management*, 104 M.S.P.R. 471, ¶¶ 8-9 (2007) (the Board waived the deadline for filing a cross petition for review based on a newly-received letter from OWCP where the OWCP letter was of a sufficient weight to warrant a different outcome from that of the initial decision and the party submitting the letter established that it filed the letter with the Board promptly upon receiving it).

¶11 An adverse action based on a charge of AWOL cannot be sustained if OWCP determines that the employee was entitled to compensation benefits as a result of a work-related injury for the entire time period charged as AWOL. *Brown*, 92 M.S.P.R. 95, ¶ 6; *Satterfield*, 80 M.S.P.R. 132, ¶ 6. Here, ECAB's decision reverses an earlier OWCP decision that terminated the appellant's benefits, and it covers the entire period of the agency's AWOL charge, i.e., from December 27, 2005, through February 17, 2006. PFR File, Tab 1 at 14-18; IAF, Tab 6, Subtab 4g. Specifically, ECAB found that there was insufficient medical evidence upon which to conclude that the permanent light duty position that the agency offered the appellant on August 3, 2005, was suitable, and, therefore, the appellant did not refuse a suitable work position. PFR File, Tab 1 at 14-18. ECAB concluded that OWCP had not met its burden of proof to terminate the appellant's compensation benefits. *Id.*

¶12 Therefore, in light of the newly-issued ECAB award, the AWOL charge cannot be sustained. *See Burton v. Department of the Army*, 60 M.S.P.R. 392, 394-95 (1994); *cf. Hagan v. Department of the Army*, 99 M.S.P.R. 313, ¶ 8 (2005) (where the agency placed the appellant in an unauthorized absence status but OWCP subsequently determined that the appellant had a compensable injury for the period of his absence, he should have been in an approved leave status). Furthermore, we conclude that the appellant's new submission warrants an outcome different from that reached in the initial decision and that the appellant has shown good cause for the untimely filing of his petition for review.

¶13 Accordingly, we do not sustain the appellant's removal.

ORDER

¶14 We ORDER the agency to cancel the appellant's removal and to restore the appellant effective May 12, 2006. *See Kerr v. National Endowment for the Arts*, 726 F.2d 730 (Fed. Cir. 1984). The agency must complete this action no later than 20 days after the date of this decision.

¶15 We also ORDER the agency to pay the appellant the correct amount of back pay, interest on back pay, and other benefits under the Office of Personnel Management's regulations, no later than 60 calendar days after the date of this decision. We ORDER the appellant to cooperate in good faith in the agency's efforts to calculate the amount of back pay, interest, and benefits due, and to provide all necessary information the agency requests to help it carry out the Board's Order. If there is a dispute about the amount of back pay, interest due, and/or other benefits, we ORDER the agency to pay the appellant the undisputed amount no later than 60 calendar days after the date of this decision.

¶16 We further ORDER the agency to tell the appellant promptly in writing when it believes it has fully carried out the Board's Order and to describe the actions it took to carry out the Board's Order. The appellant, if not notified, should ask the agency about its progress. *See* 5 C.F.R. § 1201.181(b).

¶17 No later than 30 days after the agency tells the appellant that it has fully carried out the Board's Order, the appellant may file a petition for enforcement with the office that issued the initial decision in this appeal if the appellant believes that the agency did not fully carry out the Board's Order. The petition should contain specific reasons why the appellant believes that the agency has not fully carried out the Board's Order, and should include the dates and results of any communications with the agency. 5 C.F.R. § 1201.182(a).

¶18 For agencies whose payroll is administered by either the National Finance Center of the Department of Agriculture (NFC) or the Defense Finance and Accounting Service (DFAS), two lists of the information and documentation necessary to process payments and adjustments resulting from a Board decision are attached. The agency is ORDERED to timely provide DFAS or NFC with all documentation necessary to process payments and adjustments resulting from the Board's decision in accordance with the attached lists so that payment can be made within the 60-day period set forth above.

¶19 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 RIGHT TO REQUEST
ATTORNEY FEES AND COSTS

You may be entitled to be paid by the agency for your reasonable attorney fees and costs. To be paid, you must meet the requirements set out at Title 5 of the United States Code (5 U.S.C.), sections 7701(g), 1221(g), or 1214(g). The regulations may be found at 5 C.F.R. §§ 1201.201, 1201.202 and 1201.203. If you believe you meet these requirements, you must file a motion for attorney fees WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION. You must file your attorney fees motion with the office that issued the initial decision on your appeal.

NOTICE TO THE APPELLANT REGARDING
YOUR FURTHER REVIEW RIGHTS

You have the right to request further review of this final decision.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review this final decision on your discrimination claims. See Title 5 of the United States Codes, section 7702(b)(1) (5 U.S.C. § 7702(b)(1)). You must send your request to EEOC at the following address:

Equal Employment Opportunity Commission
Office of Federal Operations
P.O. Box 19848
Washington, DC 20036

You should send your request to EEOC no later than 30 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 EEOC no

later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time.

Discrimination and Other Claims: Judicial Action

If you do not request EEOC to review this final decision on your discrimination claims, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. *See* 5 U.S.C. § 7703(b)(2). You must file your civil action with the district court no later than 30 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 district court no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e5(f); 29 U.S.C. § 794a.

Other Claims: Judicial Review

If you do not want to request review of this final decision concerning your discrimination claims, but you do want to request review of the Board's decision without regard to your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review this final decision on the other issues in your appeal. 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, www.cafc.uscourts.gov. 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.



DFAS CHECKLIST

INFORMATION REQUIRED BY DFAS IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT CASES OR AS ORDERED BY THE MERIT SYSTEMS PROTECTION BOARD

AS CHECKLIST: INFORMATION REQUIRED BY IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT
CASES

CIVILIAN PERSONNEL OFFICE MUST NOTIFY CIVILIAN PAYROLL OFFICE VIA COMMAND LETTER WITH THE FOLLOWING:

1. Statement if Unemployment Benefits are to be deducted, with dollar amount, address and POC to send.
2. Statement that employee was counseled concerning Health Benefits and TSP and the election forms if necessary.
3. Statement concerning entitlement to overtime, night differential, shift premium, Sunday Premium, etc, with number of hours and dates for each entitlement.
4. If Back Pay Settlement was prior to conversion to DCPS (Defense Civilian Pay System), a statement certifying any lump sum payment with number of hours and amount paid and/or any severance pay that was paid with dollar amount.
5. Statement if interest is payable with beginning date of accrual.
6. Corrected Time and Attendance if applicable.

ATTACHMENTS TO THE LETTER SHOULD BE AS FOLLOWS:

1. Copy of Settlement Agreement and/or the MSPB Order.
2. Corrected or cancelled SF 50's.
3. Election forms for Health Benefits and/or TSP if applicable.
4. Statement certified to be accurate by the employee which includes:
 - a. Outside earnings with copies of W2's or statement from employer.
 - b. Statement that employee was ready, willing and able to work during the period.
 - c. Statement of erroneous payments employee received such as; lump sum leave, severance pay, VERA/VSIP, retirement annuity payments (if applicable) and if employee withdrew Retirement Funds.
5. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.



NATIONAL FINANCE CENTER CHECKLIST FOR BACK PAY CASES

Below is the information/documentation required by National Finance Center to process payments/adjustments agreed on in Back Pay Cases (settlements, restorations) or as ordered by the Merit Systems Protection Board, EEOC, and courts.

1. Initiate and submit AD-343 (Payroll/Action Request) with clear and concise information describing what to do in accordance with decision.
2. The following information must be included on AD-343 for Restoration:
 - a. Employee name and social security number.
 - b. Detailed explanation of request.
 - c. Valid agency accounting.
 - d. Authorized signature (Table 63)
 - e. If interest is to be included.
 - f. Check mailing address.
 - g. Indicate if case is prior to conversion. Computations must be attached.
 - h. Indicate the amount of Severance and Lump Sum Annual Leave Payment to be collected. (if applicable)

Attachments to AD-343

1. Provide pay entitlement to include Overtime, Night Differential, Shift Premium, Sunday Premium, etc. with number of hours and dates for each entitlement. (if applicable)
2. Copies of SF-50's (Personnel Actions) or list of salary adjustments/changes and amounts.
3. Outside earnings documentation statement from agency.
4. If employee received retirement annuity or unemployment, provide amount and address to return monies.
5. Provide forms for FEGLI, FEHBA, or TSP deductions. (if applicable)
6. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.
7. If employee retires at end of Restoration Period, provide hours of Lump Sum Annual Leave to be paid.

NOTE: If prior to conversion, agency must attach Computation Worksheet by Pay Period and required data in 1-7 above.

The following information must be included on AD-343 for Settlement Cases: (Lump Sum Payment, Correction to Promotion, Wage Grade Increase, FLSA, etc.)

- a. Must provide same data as in 2, a-g above.
- b. Prior to conversion computation must be provided.
- c. Lump Sum amount of Settlement, and if taxable or non-taxable.

If you have any questions or require clarification on the above, please contact NFC's Payroll/Personnel Operations at 504-255-4630.