UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2009 MSPB 144

Docket No. SF-0353-08-0318-I-1

Othel L. Bradshaw,

Appellant,

v.

Department of Veterans Affairs,

Agency.

July 27, 2009

Othel L. Bradshaw, Los Angeles, California, pro se.

Lisa Holliday, Esquire, Los Angeles, California, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant filed a petition for review of an August 15, 2008 initial decision that dismissed his appeal for lack of jurisdiction. For the reasons set forth below, we DISMISS the petition for review as untimely filed without a showing of good cause for the delayed filing and DENY the appellant's request to reopen this appeal. 5 C.F.R. § 1201.114(d).

BACKGROUND

¶2 The appellant was a WG-2/5 Housekeeping Aide with the agency's Greater Los Angeles Health Care System in Los Angeles, California, from July 25, 1993, to June 3, 2007. Initial Appeal File (IAF), Tab 1 at 4, Tab 6, Subtab 4a. The

record reflects that, as a result of a July 2001 injury, in December 2001 the agency afforded the appellant a light-duty position in the linen room and he was assigned the duties of folding hand towels, gowns, and sheets. IAF, Tab 6, Subtabs 4a, 4f. The appellant was permitted to perform those duties in a sitting position in keeping with his physical limitation restrictions. *Id.*, Subtab 4a. The agency proposed to remove the appellant on May 24, 2006, based on charges of: Inappropriate Conduct, with eight specifications in support thereof; Violation of Transit Benefit Program Policy; Absence Without Leave, with five specifications in support thereof; and Failure to Follow Leave Request Procedures, with four specifications in support thereof. *Id.*, Subtab 4h. The proposal notice informed the appellant of his right to respond orally and in writing. *Id.* The appellant filed a written response to the proposal notice. *Id.*, Subtab 4g. The agency issued a removal decision letter on May 25, 2007, removing the appellant effective June 3, 2007. *Id.*, Subtab 4d.

¶3 The appellant filed a March 1, 2008 appeal in which he asserted that the agency had constructively suspended him from April 17, 2006, through the date of his appeal, that it engaged in disability discrimination, and that it denied him his right to restoration to duty as a partially recovered individual. IAF, Tab 1 at 11-16. The administrative judge (AJ) issued an acknowledgment order that informed the appellant of the scope of the Board's jurisdiction over a claim of a denial of restoration rights by a partially recovered individual and he ordered the appellant to submit evidence and argument showing that the Board has jurisdiction over his appeal. IAF, Tab 2 at 2. The AJ also informed the appellant of his burden to show that his appeal was timely filed and he ordered him to file evidence and argument showing that his appeal was either timely filed or that there was good cause for his delayed filing such that his appeal should not be dismissed as untimely filed. *Id.* at 2-5. The appellant and the agency filed responses addressing the timeliness and jurisdictional issues. IAF, Tabs 6, 8-12.

¶4 In the initial decision based on the record evidence, the AJ found that the appellant had asserted in his appeal that the agency had improperly failed to restore him to duty as a partially recovered individual since April 17, 2006 (and, thus, he had been constructively suspended and the agency was engaging in disability discrimination). IAF, Tab 13, Initial Decision (ID) at 2-3. The AJ found that the appellant had failed to allege nonfrivolous allegations of the Board's restoration rights jurisdiction, because he had failed to allege facts showing that he was out of work as a result of a compensable injury, as required to be entitled to restoration as a partially recovered individual under 5 C.F.R. § 353.301(d). ID at 2-4. Moreover, the AJ noted that, in any event, the appellant no longer has restoration rights because he had been removed for cause, not due to a compensable injury. ID at 4. Accordingly, the AJ dismissed the appeal for lack of jurisdiction. ID at 1, 4. The initial decision informed the appellant that it would become the final decision of the Board if a petition for review was not filed by September 19, 2008. ID at 5.

¶5 The appellant filed an apparently untimely May 13, 2009 petition for review. Petition for Review File (PFRF), Tab 1. The Clerk of the Board informed the appellant that his petition for review appeared to be untimely, because it should have been filed on or before September 19, 2008, and that the Board's regulations required untimely filed petitions to be accompanied by a motion to accept the petition as timely filed and/or to waive the filing time limit for good cause, as well as an affidavit or sworn statement setting forth good cause for the untimely filing. PFRF, Tab 2. The Clerk enclosed a copy of the Board's "Motion to Accept Filing as Timely and/or to Ask the Board to Waive or Set Aside the Time Limit," and ordered the appellant to file his motion and an affidavit or sworn statement setting forth good cause for the untimely filing on or before June 10, 2009. *Id.* The agency filed a response in opposition to the appellant's petition for review. PFRF, Tab 3. The appellant filed a motion to waive the filing time limit on June 10, 2009. PFRF, Tab 4.

ANALYSIS

¶6 A petition for review must generally be filed within 35 days after the date of the issuance of the initial decision, or, if the appellant shows that the initial decision was received more than 5 days after the initial decision was issued, within 30 days after the date the appellant received the initial decision. 5 C.F.R. § 1201.114(d). The Board will waive this time limit only upon a showing of good cause for the delay in filing. 5 C.F.R. §§ 1201.12, 1201.114(f). To establish good cause for the untimely filing of a petition, a party 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). To determine whether an appellant has shown good cause, the Board will consider the length of the delay, the reasonableness of his excuse and his showing of due diligence, whether he is proceeding pro se, and whether he has presented evidence of the existence of circumstances beyond his control that affected his ability to comply with the time limits or of unavoidable casualty or misfortune which similarly shows a causal relationship to his inability to timely file his petition. *Moorman v. Department of the Army*, 68 M.S.P.R. 60, 62-63 (1995), *aff'd*, 79 F.3d 1167 (Fed. Cir. 1996) (Table).

¶7 The appellant has not alleged that he received the initial decision more than 5 days after it was issued. Thus, the appellant's petition for review should have been filed on or before September 19, 2008, as he was correctly informed in the initial decision, and his petition was untimely filed by more than 7 months. 5 C.F.R. § 1201.114(d). The Board has declined to find good cause for a waiver of the filing time limit where, as here, the initial decision clearly notified the appellant of the correct time limit for filing a petition for review. *See Valdez v. Office of Personnel Management*, 103 M.S.P.R. 88, ¶ 7 (2006). Further, notwithstanding the appellant's pro se status, a delay of 7 months is not minimal. *See, e.g., Dean v. U.S. Postal Service*, 100 M.S.P.R. 556, ¶ 5 (2005) (a delay of 6

months is not minimal); *Gaines v. U.S. Postal Service*, 96 M.S.P.R. 504, ¶ 7 (2004) (a delay of 37 days is not minimal).

¶8 The appellant offers no explanation for his failure to file his petition for review until more than 7 months after the date the initial decision became the final decision of the Board. Accordingly, we DISMISS the appellant's petition for review as untimely filed without a showing of good cause for the untimely filing. *See Valdez,* 103 M.S.P.R. 88, ¶ 7.

¶9 The appellant has requested that the Board reopen this appeal to address what he alleges is a constitutional violation regarding his June 3, 2007 removal from his position. The appellant asserts that the agency failed to afford him constitutional due process in the form of a pre-removal or post-removal hearing and in failing to provide him with the removal decision notice. PFRF, Tab 4 at 1-5. We treat the appellant's request to reopen this appeal as a challenge to the AJ's finding that the appellant is no longer entitled to restoration because he was removed for cause, not as a result of a compensable injury, effective June 3, 2007. ID at 4.

¶10 The agency asserts in its response that, following the appellant's June 3, 2007 removal, the appellant filed an August 20, 2007 appeal based on his separation from his position, but the Board returned that appeal to the appellant as deficient under the Board's regulations and afforded him 10 days in which to correct the deficiency and to refile his appeal. PFRF, Tab 3 at 1. The appellant did not refile his appeal or any other pleading until he filed the instant appeal on March 1, 2008. *Id.* The agency's assertions are supported by the appellant's assertions in his appeal below. The appellant asserted that he had exercised due diligence in bringing his appeal because the agency had failed to notify him of his appeal rights in taking its adverse action. IAF, Tab 1 at 1. The appellant asserted that he had timely filed his appeal within 30 days "of learning that the agency had separated him from duty through a letter forwarded to him from the Thrift Savings Plan[]," and, further, that the agency's violations of his constitutional

rights had "impeded the petitioner['s] efforts to timely bring this appeal." *Id.* at 1-2. The appellant had submitted below a copy of a July 5, 2007 letter from the "Thrift Savings Plan" (TSP) stating that it "has been informed that you have been separated from Federal service," and it provided him with information regarding his options for the money he had in his TSP account. IAF, Tab 11, Subtab S. The appellant acknowledged that the Board had returned his 2007 separation appeal. IAF, Tab 1 at 2. Thus, the record indicates that the appellant has been aware of the facts supporting his request to reopen this appeal even prior to filing this appeal below.

¶11 The Board's authority to reopen a case is limited by the requirement that such authority be exercised within a reasonably short period of time. *See Mitchell v. Department of Commerce*, 100 M.S.P.R. 415, ¶ 9 (2005), *review dismissed*, 175 F. App'x 340 (Fed. Cir. 2006); *Bagunas v. U.S. Postal Service*, 100 M.S.P.R. 328, ¶ 5 (2005). That period of time is usually measured in weeks, not months or years. *See Mitchell*, 100 M.S.P.R. 415, ¶ 9. We find that the appellant's request to reopen this appeal is untimely made. Accordingly, we DENY the appellant's request to reopen this appeal.

ORDER

¶12 This is the final decision of the Merit Systems Protection Board regarding the timeliness of the petition for review. The initial decision will remain the final decision of the Board concerning the dismissal of the appeal for lack of jurisdiction. 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, 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:

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