UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2009 MSPB 174

Docket No. CH-3443-08-0772-I-1

Gail M. Nohr,

Appellant,

v.

United States Postal Service,

Agency.

August 31, 2009

Gail M. Nohr, Suamico, Wisconsin, pro se.

Heather L. McDermott, Esquire, Chicago, Illinois, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant petitions for review of the January 30, 2009 initial decision that dismissed her appeal for lack of jurisdiction. For the reasons set forth below, the Board DISMISSES the appellant's petition for review as untimely filed without a showing of good cause for the filing delay.

BACKGROUND

¶2 The appellant filed an appeal alleging that the agency violated her rights under the Veterans Employment Opportunities Act of 1998 by denying her the contractual right to use her seniority when bidding for a job. Initial Appeal File (IAF), Tab 1. The administrative judge dismissed the appeal for lack of

jurisdiction, finding that the appellant failed to exhaust her remedy with the Department of Labor. IAF, Tab 23.

¶3 The appellant has filed an apparently untimely petition for review. Petition for Review File (RF), Tab 5. The agency has responded in opposition to the petition. RF, Tab 6.

ANALYSIS

¶4 A petition for review must be filed within thirty-five days after the date of issuance of the initial decision. *Williams v. Office of Personnel Management*, 109 M.S.P.R. 237, ¶ 7 (2008); *Stribling v. Department of Education*, 107 M.S.P.R. 166, ¶ 7 (2007); 5 C.F.R. § 1201.114(d). Here, the initial decision issued on January 30, 2009, and to be timely, a petition for review had to be filed by March 6, 2009. IAF, Tab 23. The appellant initially contacted the Board on May 19, 2009, requesting an extension of time to file her petition for review. RF, Tab 1. The Clerk of the Board denied the appellant's request because a request for an extension of time to file a petition for review must be filed prior to the due date for filing. RF, Tab 2; 5 C.F.R. § 1201.114(c).

¶5 Subsequently, on May 21, 2009, the appellant filed a request to reopen an appeal dismissed without prejudice. RF, Tab 3. The Clerk responded with a letter of intent, noting that the initial decision in this appeal did not dismiss the appeal without prejudice and asking the appellant whether she intended her submission to be considered a petition for review. RF, Tab 4. The Clerk's letter also afforded the appellant an opportunity to submit proof that her petition was filed on time or was filed late with good cause, including that illness affected her ability to meet the filing deadlines. *Id*. On June 21, 2009, the appellant filed a petition for review, asserting that illness prevented her from timely filing. RF, Tab 5.

¶6 The Board will waive the filing deadline only upon a showing of good cause for the delay in filing. *Williams*, 109 M.S.P.R. 237, ¶ 7; *Stribling*, 107

M.S.P.R. 166, ¶ 7; 5 C.F.R. § 1201.114(f). To establish good cause for an untimely filing, 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 establish good cause for untimely filing based on illness, an appellant must: (1) Identify the time period during which she suffered from the illness; (2) submit medical evidence showing that she suffered from the alleged illness during that time period; and (3) explain how the illness prevented her from timely filing her appeal or a request for an extension of time. RF, Tab 4, *Lacy v. Department of the Navy*, 78 M.S.P.R. 434, 437 (1998).

¶7 In her petition for review, the appellant states that her illness, post traumatic stress disorder, prevented her from timely filing her petition because her illness "causes [her] to be fearful, tired, depressed, anxious, not in touch with reality, unable to concentrate or understand some written documents, unable to sleep or remember things and unable to control [her] increasing heartbeat." RF, Tab 5 at 8. The appellant named a number of mental health professionals who are treating her, but, on petition for review, she did not submit any medical evidence from the professionals that she named. Two of these professionals, Victoria Gossens, LCSW, and Robert Jones, MS, submitted statements into the record below and we have considered those statements in determining whether the appellant established that illness caused her to untimely file her petition. *See Walker v. Department of Veterans Affairs*, 109 M.S.P.R. 158, ¶ 11 (2008).

¶8 In a letter to the administrative judge dated September 11, 2008, Ms. Gossens stated that she is the appellant's psychotherapist and that recent work conflict has escalated the appellant's anxiety. IAF, Tab 22. In a letter to the administrative judge dated September 15, 2008, Mr. Jones stated that the appellant is a patient of his and that, although the appellant is able to perform her work duties, workplace conflicts have resulted in the appellant suffering from generalized anxiety syndrome that negatively affects her professional and family life. *Id*.

¶9 We find that the appellant's evidence fails to establish that her medical conditions were severe enough to have prevented her from timely filing a petition for review. Although Ms. Gossens' and Mr. Jones' letters generally state the appellant's conditions and symptoms, they do not reference any medications that the appellant is taking and indicate that the appellant is able to work. Additionally, the appellant's evidence fails to account for her filing delay by explaining how her conditions prevented her from filing her petition for review or a request for an extension of time. *See Brenner v. U.S. Postal Service*, 80 M.S.P.R. 394, ¶ 7 (1998), *aff'd*, 215 F.3d 1346 (Fed.Cir. 1999) (Table).

¶10 Further, we find no basis for reconsidering or reopening the appeal. The Board has the authority to reopen and reconsider appeals in which it has rendered a final decision. 5 U.S.C. § 7701(e)(1)(B); *Moss v. Department of the Air Force*, 82 M.S.P.R. 309, ¶ 8, *aff'd*, 230 F.3d 1372 (Fed. Cir. 1999) (Table); 5 C.F.R. § 1201.118. In deciding whether to reopen a closed appeal, the Board will balance the desirability of finality against the public interest in reaching the right result and will exercise its authority to reopen only in unusual or extraordinary circumstances. *Moss*, 82 M.S.P.R. 309, ¶ 8. Generally, a request to reopen must be filed within a reasonable period of time, measured in weeks. *Gowdy v. Department of Justice*, 104 M.S.P.R. 592, ¶ 8 (2007). Here, the appellant filed her reopening request over two months after the initial decision became final. Moreover, the appellant's petition for review is untimely for the reasons set forth above, and the Board will not normally reopen an appeal to cure an untimely petition for review. *Id*.

ORDER

¶11 This is the final decision of the Merit Systems Protection Board concerning the timeliness of the appellant's petition for review. The initial decision remains 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 (5 C.F.R. § 1201 .113).

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:

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