

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

2009 MSPB 186

Docket No. SF-0752-07-0348-C-1

**Deborah S. Cameron,
Appellant,**

v.

**Department of the Navy,
Agency.**

September 10, 2009

Terrell F. Moose, San Diego, California, for the appellant.

Sharon L. Jackson, San Diego, California, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant filed a May 21, 2009 submission, entitled “Request for Board Review,” which we will treat as a petition for review (PFR) of the compliance initial decision (CID), *Cameron v. Department of the Navy*, MSPB Docket No. SF-0752-07-0348-C-1 (CID, Apr. 17, 2009), which denied her petition for enforcement (PFE). For the reasons set forth below, we DENY the PFR of the CID for failure to meet the review criteria.

BACKGROUND

¶2 The appellant, an Electronic Integrated Systems Mechanic, filed separate Board appeals, based on her indefinite suspension and removal. *See, e.g.,*

Cameron v. Department of the Navy, MSPB Docket No. SF-0752-07-0348-I-1 (indefinite suspension appeal), Initial Appeal File (IAF), Tab 1; *Cameron v. Department of the Navy*, MSPB Docket No. SF-0752-07-0660-I-1, slip op. at 1-2 (Initial Decision, Oct. 23, 2007) (removal appeal). We note that the indefinite suspension appeal was dismissed without prejudice and later refiled. IAF, Tab 8; *see Cameron v. Department of the Navy*, MSPB Docket No. SF-0752-07-0348-I-2 (IAF-2), Tab 1.

¶3 The record reflects that the parties entered into a Settlement Agreement that resolved both pending appeals. IAF-2, Tab 1 at 2-7. On October 23, 2007, the administrative judge issued a separate initial decision in each of the appeals, concluding that the agreement was “lawful on its face, that it was freely reached by the parties, and that the parties understand its terms,” incorporating the agreement into the record and dismissing the respective appeals as settled. IAF-2, Tab 2 at 1-2; *Cameron*, MSPB Docket No. SF-0752-07-0660-I-1, slip op. at 1-2 (Initial Decision, Oct. 23, 2007). The appellant filed a PFR of the initial decision in the indefinite suspension appeal only, which we denied by Final Order on February 29, 2008. IAF-2 Petition for Review File (IAF-2 PFRF), Tabs 1, 8.

¶4 On January 27, 2009, the appellant filed a petition for enforcement (PFE) in the indefinite suspension appeal. *Cameron*, MSPB Docket No. SF-0752-07-0348-C-1 (CF), Tab 1. The administrative judge issued an Acknowledgment Order, noting that the appellant bears the burden of showing agency noncompliance, and ordering the agency to file a written response to the PFE. CF, Tab 2 at 1-2. The appellant filed several submissions, *see* CF, Tabs 3 (entitled, “Request for Reopening”), 5 (entitled, “Reopening an Appeal Dismissed without Prejudice”), and the agency submitted a response to the Acknowledgment Order and asserted its compliance with the settlement agreement, CF, Tab 8. The administrative judge issued an Order Closing the Record, noting that “it is unclear what specific violations of the settlement agreement the appellant is alleging were committed by the agency,” and ordering her to “submit a statement

specifically identifying what actions the agency allegedly took, or failed to take, in violation of the settlement agreement.” CF, Tab 10 at 2.

¶5 In her response to this Order, the appellant explained that the settlement agreement was breached because the agency and the appellant “both could not possibly comply with Item 11, Line 10 of page 6 of the agreement,” the paragraph that stated that she was “mentally and physically fit” to understand the settlement agreement and that she freely signed the agreement. CF, Tab 11 at 1; *see* IAF-2, Tab 1 at 7 (settlement agreement). She also stated that she had been diagnosed with “severe Post Traumatic Stress Disorder (PTSD) as a result of sexual assault and sexual trauma while serving in active duty with the Navy,” that she was taking prescription medication for PTSD-associated depression and stress at the time she signed the settlement agreement, and that she was, and still is, receiving psychological counseling. CF, Tab 11 at 1. She further claimed that she “did not have the mental fortitude to freely sign, or make a free will signing of the Settlement Agreement.” *Id.* In support of her contention, the appellant submitted a March 31, 2009 letter from her counselor, Linda Maggio, Ph.D., MFT, which stated that the appellant has been in counseling with her “on and off . . . since April of 2005.” IAF, Tab 13, exhibit 1. Ms. Maggio explained that the appellant “has a history of sexual assault and harassment in the military,” that she developed PTSD as a result of these traumas, and that she also has a diagnosis of Major Depressive Disorder. *Id.* Ms. Maggio also opined:

At the time she signed[] the agreement with work (October 22, 2007), she was experiencing a severe clinical depression. She reported to me that she did not read the docu[]ment, ask questions or recognize what she was agreeing to. She was depressed, felt defeated and beyond caring. She felt[] she literally had no choice in the matter. In my clinical opinion, her severe depression was a primary determinant in her inability to use due diligence in considering the implications of the document she was signing.

Id.

¶6 The administrative judge issued an initial decision that denied the PFE. CF, Tab 14. The appellant filed a PFR and the agency filed a response. Compliance Petition for Review File (CPFRF), Tabs 1, 4.

ANALYSIS

¶7 In the CID, the administrative judge found that “the agency has submitted un rebutted evidence that it did complete the actions promised in the agreement,” he noted that the appellant’s claim regarding agency noncompliance appeared to be a claim that the settlement agreement was invalid because she was not capable of understanding what she was signing, and he advised her that “an attack on the agreement’s validity must be made through a [PFR] of the initial decision dismissing the appeal as settled,” and not through a PFE action. CF, Tab 14 at 4-5. We discern no error with his conclusions. *Carlson v. General Services Administration*, [101 M.S.P.R. 70](#), ¶ 5 (2006). The appellant’s PFR offers no new persuasive arguments or evidence. Accordingly, we deny the PFR of the CID for failure to meet the review criteria. See [5 C.F.R. § 1201.115](#)(d).

¶8 Even though the appellant’s May 21, 2009 submission bears only the compliance appeal docket number, in light of this procedural history, she may have intended her submission to be a request to reopen the indefinite suspension appeal and/or a PFR of the initial decision that dismissed as settled the removal appeal. See CPFRF, Tab 1 at 2 (“Therefore, I petition a Board Review of the agreement’s validity by a review of the initial decision dismissing the appeal as settled. And motion that the agreement should be set aside based on the appellant’s incapacity when she signed the agreement.”). We will analyze each of these possible requests accordingly.

¶9 To the extent that the appellant intended her submission to be a request to reopen her indefinite suspension appeal, *Cameron*, MSPB Docket No. SF-0752-07-0348-I-2, we deny that request. We note that, generally, a request to reopen must be filed within a reasonable period of time, measured in weeks, not years.

Brewer v. Office of Personnel Management, [75 M.S.P.R. 163](#), 169, *aff'd*, 124 F.3d 227 (Fed. Cir. 1997) (Table). The appellant has failed to demonstrate any circumstances that would warrant reopening an appeal approximately 15 months after the initial decision became final when the Board issued its Final Order denying her PFR in that matter. *See id.* The appellant had the opportunity to challenge the settlement agreement's validity on the basis of her alleged incapacity when she filed her PFR, but she failed to do so. IAF-2 PFRF, Tab 1. We therefore decline to exercise our discretion to reopen the indefinite suspension appeal.

¶10 To the extent that the appellant intended her submission to be a PFR of the initial decision that dismissed as settled her removal appeal, *Cameron*, MSPB Docket No. SF-0752-07-0660-I-1, we find such a submission would be untimely. We note that, to be timely, a PFR must be filed within 35 days after the initial decision was issued or, if the appellant shows that she received the initial decision more than 5 days after it was issued, within 30 days after the date it was received. [5 C.F.R. § 1201.114](#)(d). The Board will waive its time limit only upon a showing of good cause for the delay in filing. [5 C.F.R. § 1201.114](#)(f). To establish good cause for the untimely filing of a petition, the appellant must show that he exercised due diligence or ordinary prudence under the particular circumstances of the case. *See 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).

¶11 An analysis of the *Moorman* factors does not weigh in the appellant's favor. We note that she was represented when she filed her May 21, 2009 PFR submission, and in each of her appeals mentioned herein. The initial decision in the removal matter was issued on October 23, 2007, and it stated that it would become final on November 27, 2007, unless a PFR was filed by that date. *Cameron*, MSPB Docket No. SF-0752-07-0660-I-1, slip op. at 2 (Initial Decision, Oct. 23, 2007). Although we do not know precisely when the appellant received this initial decision, it was issued on the same date as the indefinite suspension initial decision, and she admitted in her PFR regarding that matter that she received it on October 25, 2007. IAF-2 PFRF, Tab 1 at 4. We therefore assume that she received the removal initial decision on or around that same date, and her May 21, 2009 submission is approximately 18 months late. CPFRRF, Tab 1. We have held that a 15-month delay is significant. *Smith v. Department of the Army*, [110 M.S.P.R. 50](#), ¶ 10 (2008).

¶12 Moreover, the appellant had ample notice of the timeline for filing a PFR and the need to show good cause for the delay. In addition to the clear notice in the initial decision itself, *see Cameron*, MSPB Docket No. SF-0752-07-0660-I-1, slip op. at 2-3 (Initial Decision, Oct. 23, 2007), we note that when the appellant filed her PFR in the indefinite suspension appeal, she was then informed:

Your petition for review is untimely.

The Board will consider the merits of your petition only if you establish good cause for the untimely filing. To establish good cause, you must show that you exercised due diligence or ordinary prudence under the particular circumstances of the case.

To determine whether you have shown good cause, the Board will consider the length of the delay, the reasonableness of your excuse and showing of due diligence, whether you are proceeding without a representative, and whether you have presented evidence of the existence of circumstances beyond your control that affected your ability to comply with the time limits, or of unavoidable casualty or misfortune which similarly shows a causal relationship to your inability to timely file the petition.

If you are claiming that your health has affected your ability to meet filing deadlines, you must show that you suffered from an illness or injury that affected your ability to file on time. If you are making such a claim, you must:

1. Identify the time period during which you suffered from the illness or injury[;]
2. If available, submit medical or other evidence showing that you suffered from the illness or injury during the time since the initial decision was issued; and
3. Explain how the illness [or] injury prevented you from filing your document on time or requesting an extension of time.

IAF-2 PFRF, Tab 1 at 4. The appellant obviously understood these instructions, because she explained therein, among other things, that she was no longer represented by counsel, that she was “a damaged Vet” and that she “suffer[ed] anxiety.” *Id.* at 4-5.

¶13 Here, however, her May 21, 2009 submission essentially reiterates the information that she included in her response to the Order Closing the Record, namely her PTSD diagnosis, allegations of sexual assault and trauma, use of prescription medication and participation in psychological counseling. CPFRF, Tab 1 at 1. Notably, the PFR does not offer any evidence or explanation as to why any or all of these alleged mental health issues resulted in an 18-month delay in challenging the validity of the settlement agreement. CPFRF, Tab 1. In the absence of such evidence, to the extent the appellant intended her submission to be a PFR of the initial decision that dismissed as settled her removal appeal, we dismiss it as untimely filed with no showing of good cause for the delay. *See Gaines v. U.S. Postal Service*, [96 M.S.P.R. 504](#), ¶ 11 (2004) (noting that, although the appellant’s medical evidence supported his assertion that he suffers from AIDS and depression, it did not indicate that he was hospitalized for these conditions during the relevant filing period, nor did it “explain how, or establish that, he was prevented by his AIDS, depression, or any other medical condition,

from meeting the deadline for filing a timely PFR,” and concluding that he did not show good cause for the filing delay); [5 C.F.R. § 1201.114\(f\)](#).

ORDER

¶14 This is the final decision of the Merit Systems Protection Board concerning the PFR for MSPB Docket No. SF-0752-07-0348-C-1. [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.ca9c.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.