UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2009 MSPB 225

Docket No. SF-0752-09-0285-I-1

Kevin M. Colleran,

Appellant,

v.

United States Postal Service,

Agency.

November 3, 2009

Kevin M. Colleran, Boise, Idaho, pro se.

Leigh K. Bonds, Esquire, Sandy, Utah, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant has filed a petition for review (PFR) of an initial decision (ID) that dismissed his appeal of various agency actions. We GRANT the PFR; AFFIRM the portion of the ID dismissing the appellant's claims of constructive suspension, furlough of 30 days or less, and exclusion from economic value added (EVA) payments; and REMAND the appeal to the Western Regional Office for further adjudication of the appellant's alleged involuntary disability retirement and restoration claims consistent with this Opinion and Order.

BACKGROUND

¶2 The appellant was a Supervisor of Maintenance Operations in the Boise Processing and Distribution Center in Boise, Idaho. Initial Appeal File (IAF), Tab 8, subtab 5 at 2, subtab 8 at 1. On June 20, 2001, the agency issued a decision notice that placed the appellant on enforced leave effective July 6, 2001.[1] *Id.*, subtab 4 at 1-2. On June 5, 2001, the appellant applied for disability retirement, which became effective on November 23, 2001. IAF, Tab 7 at 11, Tab 8, subtab 2 at 1.

¶3 On July 13, 2001, the appellant filed a Board appeal to dispute the enforced leave action, i.e., constructive suspension. IAF, Tab 8, subtab 5 at 2-3; *see id.*, subtab 8 at 1. On September 28, 2001, the parties executed a settlement agreement that fully and completely settled all of the issues related to the constructive suspension appeal. *Id.*, subtab 7 at 1-2. The appellant agreed not to pursue any other action in any other forum based on the facts arising out of that appeal, and to withdraw all appeals before the Board. *Id.* After receiving the settlement agreement, the administrative judge (AJ) issued an ID that dismissed the appeal. *Id.*, subtab 8 at 1.

¶4 On November 19, 2001, the appellant filed a second Board appeal alleging the following claims: (1) furlough of 30 days or less where the agency changed his status from sick leave to absence without leave (AWOL) in violation of the Family and Medical Leave Act of 1993 (FMLA); (2) sex discrimination; and (3) exclusion from EVA payments. IAF, Tab 8, subtab 9 at 2-6, subtab 10 at 2, subtab 11 at 1-2. On January 16, 2002, the AJ issued an ID that dismissed the appeal for lack of jurisdiction. *Id.*, subtab 11. The ID became final as neither party filed a PFR.

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[1] The agency concluded that the appellant's medical restrictions prevented him from performing the functions of his position, i.e., inability to supervise or be supervised, and there were no positions within the agency that would accommodate these restrictions. IAF, Tab 8, subtab 4 at 1-2.

¶5 On February 6, 2009, the appellant filed the present Board appeal alleging the following claims: (1) involuntary retirement; (2) reduction in pay or grade;[2] (3) furlough of 30 days or less; (4) constructive suspension in violation of the FMLA; (5) disability discrimination; (6) retaliation for his prior equal employment opportunity (EEO) activity; (7) hostile work environment; and (8) exclusion from EVA payments. IAF, Tab 1 at 4-11. He designated a representative and requested a hearing. *Id.* at 3, 12.

¶6 The AJ set forth the appellant's burdens to prove that he timely filed his appeal, and to make a nonfrivolous allegation of jurisdiction over his constructive suspension claim. IAF, Tab 2 at 2-4. In response, the appellant amended his appeal to allege the following claims: (1) failure to restore him to duty; (2) furlough of 30 days or less; (3) exclusion from EVA payments; (4) constructive suspension in violation of the FMLA; (5) sex discrimination; (6) hostile work environment; (7) harmful procedural error; (8) prohibited personnel practices; and (9) retaliation for prior EEO activity. IAF, Tab 7 at 1-8, 10. The appellant also presented evidence supporting his assertion that the Board should waive the deadline for filing his appeal due to his mental incapacity and submission of purported new evidence. *Id.* at 8-10 and subtabs 12-14. The agency responded in opposition. IAF, Tab 8.

¶7 Without holding the requested hearing, the AJ issued an ID that dismissed the appeal. ID at 1, 6. He found that the appellant waived his right to appeal the 2001 alleged constructive suspension in the September 2001 settlement agreement. ID at 4-5. Further, the AJ determined that the appellant's claims of furlough, exclusion from EVA payments, and FMLA violations were barred by the doctrine of collateral estoppel because he raised identical claims in his

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[2] Although the appellant checked the box for reduction in pay or grade on the appeal form, it appears that he was referring to reduction in pay in the context of his other claims and not as a separate action. *See* IAF, Tab 1 at 4-11, Tab 7 at 1-10. Accordingly, we have not treated it as a separate claim in this matter.

November 2001 appeal, which was dismissed for lack of jurisdiction. ID at 5-6. He acknowledged that the appellant alleged denial of restoration, but indicated that the appellant could file a new appeal on that basis. ID at 4 n.2. The appellant has timely filed a pro se PFR of this decision. Petition for Review File (PFRF), Tab 1. The agency has responded in opposition. PFRF, Tab 3.

ANALYSIS

¶8 Based on our review of the record and the ID, we discern no reason to disturb the AJ's explained findings that the appellant waived his right to appeal the 2001 alleged constructive suspension, and that the doctrine of collateral estoppel bars the appellant from re-litigating his claims of furlough of 30 days or less, and exclusion from EVA payments. *See* ID. Thus, we AFFIRM the AJ's dismissal of these claims.

The AJ failed to provide *Burgess* notice and erred in dismissing the appeal without adjudicating the appellant's alleged involuntary disability retirement and restoration claims.

¶9 On appeal and on PFR, the appellant alleged that he involuntarily retired on disability in 2001. PFRF, Tab 1 at 5; IAF, Tab 1 at 4, Tab 7 at 11. The appellant also argued on PFR and below that the Spokane, Washington District Postal Service set forth in a June 1, 2004 letter addressed to the Department of Labor, that it would re-employ him, but that an offer was never made. PFRF, Tab 1 at 5, 41; IAF, Tab 1 at 6, Tab 7 at 1, 9-10. The AJ failed to provide the appellant with explicit information on the jurisdictional requirements over his alleged involuntary disability retirement and restoration claims, and the agency's motion to dismiss did not inform the appellant of the jurisdictional requirements for these claims to cure the lack of notice. *See* IAF, Tabs 2, 8; *Burgess v. Merit Systems Protection Board*, 758 F.2d 641, 643-44 (Fed. Cir. 1985); *Elliott v. Department of the Air Force*, 102 M.S.P.R. 364, ¶ 5 (2006). Thus, the appellant never received proper notice of the jurisdictional requirements to make nonfrivolous allegations of his alleged involuntary disability retirement and restoration claims.

¶10 In the ID, the AJ failed to acknowledge that the appellant raised an involuntary disability retirement claim. *See* ID. While he acknowledged the restoration claim, stating the appellant could file a new appeal on that basis, ID at 4 n.2, the AJ did nothing further with that claim. The appellant raised both claims for the first time in this appeal, and therefore, neither claim was adjudicated in the appellant's prior Board appeals. *See* IAF, Tab 8, subtab 5 at 2-3, subtab 8, subtab 9 at 2-6, subtab 10 at 2, subtab 11. Thus, the doctrine of collateral estoppel does not apply and bar the appellant from litigating these claims. Furthermore, neither of the issues was addressed in the September 2001 settlement agreement, and the plain language of the settlement agreement does not preclude the appellant from asserting claims that were not raised in the July 2001 appeal. *See* IAF, Tab 8, subtab 7 at 1-2. We therefore find that the AJ erred in dismissing the appeal without adjudicating the appellant's alleged involuntary disability retirement and restoration claims, and that these claims must be remanded. On remand, the AJ shall give the appellant notice of the jurisdictional requirements for those claims, and allow the parties an opportunity to submit evidence and argument thereon. The AJ shall hold a hearing if appropriate. He shall also determine the timeliness of such claims, as set forth below.

The AJ failed to provide the appellant with *Lacy* notice upon the appellant's assertion that his mental incapacity prevented him from timely filing his Board appeal.

¶11 Generally, an appeal must be filed no later than 30 days after the effective date, if any, of the action being appealed, or 30 days after the date of the appellant's receipt of the agency's decision, whichever is later. 5 C.F.R. § 1201.22(b). The Board will waive this time limit only upon a showing of good cause for the filing delay. 5 C.F.R. § 1201.22(c). The appellant bears the burden of proof with regard to timeliness, which must be established by a preponderance

of the evidence. *LaGuardia v. Office of Personnel Management*, 102 M.S.P.R. 248, ¶ 6 (2006); 5 C.F.R. § 1201.56(a)(2)(ii).

¶12 To establish good cause for the untimely filing of an appeal, 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 appeal. *LaGuardia*, 102 M.S.P.R. 248, ¶ 7 (citing *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)).

¶13 Here, the appellant's disability retirement became effective on November 23, 2001. IAF, Tab 8, subtab 2. Under 5 C.F.R. § 1201.22(b), the deadline to file an alleged involuntary disability retirement appeal fell on December 23, 2001. On February 6, 2009, over 7 years later, the appellant filed his alleged involuntary disability retirement claim. IAF, Tab 1 at 4. Further, it appears that a timeliness issue exists with respect to the appellant's restoration claim. However, the appellant failed to specify the date that the agency denied his request for restoration, which we attribute to lack of *Burgess* notice. *See* PFRF, Tab 1 at 5; IAF, Tab 7 at 1, 8-10. Without additional evidence and argument, we are unable to determine the extent of the delay, if any.

¶14 The appellant alleged on appeal below that the Board should waive the filing deadline for four reasons: (1) "[his] case was subsumed by the Glover Class Action Law Suit from August 28, 2002 to April 4, 2006"; (2) he "suffered an illness of mental incapacity" that prevented him from timely filing his appeal; (3) in November 2008, he received his Department of Labor case file that

contained the June 1, 2004 letter, in which the agency stated that it would re-employ him, however, he did not notice this letter until late November 2008; and (4) he received a "[November 11, 2008] new medical report issued and given to [him] January 20, 2009." IAF, Tab 7 at 9.

¶15 The Board will find good cause for an untimely filing when a party demonstrates that he was unable to timely file his petition due to illness. *Lacy v. Department of the Navy*, 78 M.S.P.R. 434, 437 (1998). Where the appellant states that the reason for a filing delay is illness, he must receive explicit information regarding the legal standard for establishing good cause on that basis. *Id.* at 438. He must specifically be informed that he must identify the time period during which he suffered from the illness, submit medical evidence showing that he suffered from the alleged illness during that time period, and explain how the illness prevented him from timely filing the appeal or requesting an extension of time. *Id*. at 437.

¶16 Although the AJ apprised the appellant of the general requirements to prove that he timely filed his appeal, he failed to provide the appellant with *Lacy* notice after the appellant alleged that the filing deadline should be waived due to mental incapacity.[3] IAF, Tab 2 at 3-4, Tab 7 at 9. In the interest of justice and so the appellant is not "fighting a 'fog of generality,'" his appeal should not be dismissed as untimely filed before he has a fair opportunity to address the timeliness issue. *See Lacy*, 78 M.S.P.R. at 439; *McIver v. Office of Personnel Management*, 70 M.S.P.R. 103, 106 (1996).

¶17 Accordingly, we REMAND the appellant's alleged involuntary disability retirement and restoration claims to the Western Regional Office to provide the appellant with proper notice under *Lacy*, and a meaningful opportunity to file

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[3] On review, the appellant also alleges that he is filing a pro se PFR, and suffers from a mental disorder. PFRF, Tab 1 at 5. However, the timeliness of the appellant's PFR is not at issue. *See id.*; ID at 6.

evidence and argument on the timeliness issue, as well as the jurisdictional issues, as previously explained. On remand, the AJ should consider the documents the appellant has submitted below and on PFR, in addition to any documents he submits on remand, that are relevant to the remaining issues in this appeal.

ORDER

¶18 We REMAND the appellant's alleged involuntary disability retirement and restoration claims for further adjudication consistent with this Opinion and Order. After such adjudication, the AJ shall issue a new ID setting forth his decision regarding these claims, as well as his already stated findings regarding the 2001 alleged constructive suspension, furlough, and exclusion from EVA payments.

FOR THE BOARD:

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