UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 3

Docket No. DC-0831-09-0456-I-1

David M. Treacy,

Appellant,

v.

Office of Personnel Management,

Agency.

January 7, 2010

David M. Treacy, Centreville, Virginia, pro se.

Kristine Prentice, Washington, D.C., for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The appellant has filed a petition for review (PFR) of the May 29, 2009 initial decision that dismissed his appeal for lack of jurisdiction. He has also filed a Motion to Accept Filing as Timely and/or to Ask the Board to Waive or Set Aside the Time Limit. Pursuant to 5 C.F.R. § 1201.114(f), we DENY the motion and DISMISS the PFR as untimely filed with no showing of good cause for the delay.

BACKGROUND

¶2 On April 8, 2009, the Office of Personnel Management (OPM) informed the appellant that it processed his former spouse's claim for a court awarded portion of his civil service retirement benefits. Initial Appeal File (IAF), Tab 7 at 6. The appellant filed an appeal, claiming that OPM miscalculated the allocation of these benefits. *See* IAF, Tab 1. The appellant also contacted OPM directly, asking OPM to correct its calculation of the awarded benefits. *See* IAF, Tab 7 at 4-5 (the appellant's e-mail correspondence with OPM). OPM originally moved to dismiss the appeal because it claimed it had not issued a reconsideration decision, and it argued that the Board's jurisdiction over such appeals was limited to matters where OPM had issued a final decision. IAF, Tab 4 at 2.

¶3 On May 7, 2009, the administrative judge issued an Order to Show Cause, noting that the Board only has jurisdiction over an appeal affecting an individual's retirement rights or interests if OPM has issued a final or reconsideration decision. IAF, Tab 6 at 1, *citing Parker v. Office of Personnel Management*, 74 M.S.P.R. 131, 133 (1997). The administrative judge stated that the appellant has the burden of proving jurisdiction by preponderant evidence, and he ordered the appellant "to file evidence and argument to prove that [his] appeal is within the Board's jurisdiction." IAF, Tab 6 at 1. The appellant submitted a response to this Order at IAF, Tab 7.

¶4 On May 26, 2009, OPM informed the administrative judge and the appellant that it was rescinding its April 8, 2009 decision, and "[u]pon further development and review of the facts [it] will issue a new reconsideration decision with appeal rights," and it moved to dismiss the appeal for lack of jurisdiction on this basis. *See* IAF, Tab 8 at 2. The administrative judge had a telephone conference with the appellant the following day and, during this conversation, the appellant "expressed no objection to [the administrative judge's] dismissal of this appeal on the basis stated by OPM." IAF, Tab 9 at 1-2.

¶5 On May 29, 2009, the administrative judge issued an initial decision that dismissed the appeal for lack of jurisdiction, due to OPM's rescission. *Id.* However, the administrative judge noted that the appellant "retains the right to file a new appeal to the Board from any future OPM final decision concerning his retirement benefits." *Id.* at 2. The initial decision stated that it would become final on July 3, 2009, unless a PFR was filed by that date. *Id.*

¶6 On September 18, 2009, the appellant filed a document, bearing the above docket number, and entitled, "Reopening an Appeal Dismissed Without Prejudice." Petition for Review File (PFRF), Tab 1. The Office of the Clerk of the Board (OCB) apparently treated this submission as a PFR of the May 29, 2009 initial decision and as a new appeal, *see* PFRF, Tab 2; *Treacy v. Office of Personnel Management*, MSPB Docket No. DC-0831-09-0873-I-1. However, we will only address this submission as a PFR of the May 29, 2009 initial decision because the regional office has separately docketed and adjudicated the "new" appeal. *See Treacy*, MSPB Docket No. DC-0831-09-0873-I-1 (Initial Decision, Nov. 18, 2009).

¶7 We note that OCB sent a letter to the appellant, informing him that his PFR submission was untimely filed, directing him to file a motion to accept the filing as timely and/or to waive the time limit for good cause, and advising him that this motion should include either a statement signed under penalty of perjury or an affidavit. PFRF, Tab 2 at 1. The appellant filed a Motion to Accept Filing as Timely and/or to Ask the Board to Waive or Set Aside the Time Limit. PFRF, Tab 4. The agency filed a response to the PFR. PFRF, Tab 6.

ANALYSIS

¶8 To be timely, a PFR must be filed within 35 days after the initial decision was issued or, if the appellant shows that he 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). Here, the initial decision was issued on May 29, 2009,

and it stated that it would become final on July 3, 2009, unless a PFR was filed by that date. IAF, Tab 9 at 2. The appellant does not allege that he received the initial decision more than 5 days after its issuance date, and he did not file his submission until September 18, 2009. PFRF, Tab 1. Thus, the PFR was filed over 2 months late.

¶9 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 PFR, 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).

¶10 While the appellant is *pro se*, an evaluation of the remaining *Moorman* factors does not weigh in his favor. For instance, the delay in this appeal is not minimal. *See Alvarado v. Defense Commissary Agency*, 88 M.S.P.R. 46, ¶¶ 4-5 (2001) (concluding that a 2-month delay was significant). In his motion, the appellant explains why his PFR was late:

> I waited for a reconsideration decision with the expectation that it should take no more than 60-90 days for OPM to correct the error they made in the initial determination and re-apportion my pension correctly. As of this motion[,] it has been nearly 150 days since OPM issued their rescission and the original apportionment remains in effect, contrary to OPM's rescission.

PFRF, Tab 4 at 6. The appellant further explains that he did not request an extension of time to file a PFR before the deadline because he "recognized that the agency's processes take time and that given the timing of the rescission (May 26, 2009)[,] it would not have been possible to issue a decision or restore [his] pension within the 35[-]day constraint." *Id.* at 7. While we are sympathetic toward his situation, his explanations do not provide good cause for the delay in filing his PFR.

¶11 For these reasons, we DENY the appellant's Motion to Accept Filing as Timely and/or to Ask the Board to Waive or Set Aside the Time Limit and we DISMISS the PFR as untimely filed with no showing of good cause for the delay.* *See* 5 C.F.R. § 1201.114(f).

ORDER

¶12 This is the final decision of the Merit Systems Protection Board concerning the timeliness of the PFR. The initial decision will remain the final decision of the Board with regard to 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

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* As the administrative judge properly noted in the initial decision, *see* IAF, Tab 9 at 2, the appellant retains the right to file a new appeal with the Board from any future OPM final decision concerning his retirement benefits.

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.