UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 20

Docket No. DC-0831-07-0325-B-1

Nancy R. Keys,

Appellant,

v.

Office of Personnel Management,

Agency.

January 27, 2010

Nancy R. Keys, Washington, D.C., pro se.

Roxann Johnson, 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 petitioned for review of the initial decision on remand that affirmed the decision of the Office of Personnel Management (OPM) denying her a former spouse survivor annuity under the Civil Service Retirement System. She has also requested that the Board reopen and reconsider the case. For the reasons set forth below, we DISMISS the appellant's petition as untimely filed without a showing of good cause for the delay in filing, and DENY her request for reopening and reconsideration.

BACKGROUND

¶2 On December 21, 2006, OPM issued a reconsideration decision denying the appellant's application for survivor benefits based on the service of her late husband, Lawrence R. Keys, Sr. The appellant filed an appeal with the Washington Regional Office, and the administrative judge initially reversed OPM's decision. *Keys v. Office of Personnel Management*, MSPB Docket No. DC-0831-07-0325-I-1 (Initial Decision, May 25, 2007). OPM petitioned for review, and the full Board granted the petition and remanded the case for further development of the record on the dispositive issue of whether the appellant's common-law marriage to Mr. Keys commenced before he retired from the Federal service. *Keys v. Office of Personnel Management*, 107 M.S.P.R. 105 (2007). On remand, the administrative judge issued a new initial decision affirming OPM's decision to deny the appellant survivor benefits. *Keys v. Office of Personnel Management*, MSPB Docket No. DC-0831-07-0325-B-1 (Initial Decision, Feb. 28, 2008). The administrative judge informed the appellant that the initial decision on remand would become final on April 3, 2008, unless she filed a petition for review by that date. *Id*.

¶3 On April 3, 2008, the appellant requested an extension of time for filing a petition for review. Petition for Review File (PFRF), Tab 1. The Clerk of the Board granted her request and extended the filing deadline to May 5, 2008. PFRF, Tab 2. However, the appellant did not file a petition for review until October 7, 2009, approximately 17 months after the revised deadline. PFRF, Tab 3. The Clerk of the Board notified the appellant that her petition was untimely filed, and that the Board's regulations require that an untimely petition for review be accompanied by a motion for waiver of the time limit, supported by an affidavit or statement, signed under the penalty of perjury, stating why there is good cause for the late filing. PFRF, Tab 4. The appellant was provided with a "Motion to Accept Filing as Timely or to Waive Limit" form, and instructed to file the motion and properly signed statement on or before October 23, 2009. *Id*.

¶4 The appellant timely returned the motion, which she signed, swearing under penalty of perjury that the statements contained therein were true and correct. PFRF, Tab 6. In the space on the form designated for an "exact and detailed description of the circumstances which caused [her] petition to be filed late," she wrote the following:

> Sickness
> Sister illness, death
> Stress

Id. at 6. The appellant further stated that she did not request another extension of the filing deadline because her sister was ill with cancer; however, she did not indicate when her sister was ill or when she died. *Id*. at 7. The appellant also attached documentation, much of it illegible, relating to her own visit to the George Washington University Hospital in October 2007. *Id*. at 2-5, 8-9. The agency has filed a response, arguing that the appellant failed to show good cause for the delay in filing. PFRF, Tab 8.

ANALYSIS

¶5 To establish good cause for the untimely filing of a petition, a party must show that she 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 her excuse and her showing of due diligence, whether she is proceeding pro se, and whether she has presented evidence of the existence of circumstances beyond her control that affected her ability to comply with the time limits or of unavoidable casualty or misfortune which similarly shows a causal relationship to her inability to timely file her 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).

¶6 The Board will find good cause for a filing delay where an appellant has demonstrated that she suffered from an illness that affected her ability to file on time. *Lacy v. Department of the Navy*, 78 M.S.P.R. 434, 437 (1998). To establish that an untimely filing was the result of an illness, the party 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. *Id*. Although the appellant received notice of the *Lacy* standard, PFRF, Tab 6 at 6 n.1, she failed to indicate the period during which she suffered from illness or explain how the illness prevented her from timely filing her petition or requesting a second extension. Her medical evidence at most establishes that she was ill at some point in October 2007, prior to the proceedings on remand. Moreover, her illness did not prevent her from participating in those proceedings, or from filing a timely request for an extension on April 3, 2008. Thus, the appellant has failed to demonstrate that she suffered from an illness that affected her ability to file a timely petition or second request for an extension.

¶7 The appellant's general reference to her sister's illness and death does not provide a basis for waiver of the filing deadline. *See Greenberg v. Department of Justice*, 91 M.S.P.R. 42, ¶ 5 (2002) (the appellant's assertion that he was taking care of a sick family member did not establish good cause for the untimely filing of the petition for review, where the appellant did not specify when he was taking care of the sick relative or how that situation or the relative's death prevented him from pursuing his appeal). Furthermore, the appellant's general and unsupported allegation that she was under stress does not establish good cause for her untimely filing. *See Robinson v. Office of Personnel Management*, 56 M.S.P.R. 325, 327, *aff'd*, 5 F.3d 1505 (Fed. Cir. 1993) (Table). Finally, notwithstanding the appellant's pro se status, a delay of 17 months is not minimal, and does not reflect due diligence and ordinary prudence. *See, e.g.*,

Pimentel v. Department of the Treasury, 107 M.S.P.R. 67, ¶ 8 (2007) (delay of 10 months), *aff'd*, 287 F. App'x 850 (Fed. Cir. 2008).

¶*8* We also find no basis for reopening and reconsidering the appeal. 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. *Turner-Thompson v. Office of Personnel Management*, 112 M.S.P.R. 418, ¶ 8 (2009). Generally, a request to reopen must be filed within a reasonable period of time, measured in weeks. *Id*. Here, the appellant filed her petition more than 17 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

¶9 This is the final decision of the Merit Systems Protection Board concerning the timeliness of the petition for review. The initial decision will remain the final decision of the Board with regard to the merits of the appeal. 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:

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