UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 148

Docket No. DC-844E-10-0127-I-1

Deborah G. Harrison,

Appellant,

v.

Office of Personnel Management,

Agency.

July 21, 2010

Melissa Leigers, Blackstone, Virginia, for the appellant.

Evelyn K. Payne, 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 filed a petition for review of an initial decision that dismissed her appeal because it was barred by res judicata. She has also filed a motion asking the Board to accept her petition as timely or to set aside the deadline. Pursuant to 5 C.F.R. § 1201.114(f), we DENY the motion and DISMISS her petition as untimely filed with no showing of good cause for the delay.

BACKGROUND

¶2 On November 3, 2009, the appellant filed an appeal, claiming that she has "plenty of proof" that she is disabled, and she included medical records and other documentation with this submission. *See Harrison v. Office of Personnel Management*, MSPB Docket No. DC-844E-10-0127-I-1 (Initial Appeal File (IAF)), Tab 1. On November 12, 2009, the administrative judge issued an Order to Show Cause. IAF, Tab 3. In it, he noted that, based on her initial appeal paperwork, the appellant previously filed an appeal based on the Office of Personnel Management's (OPM's) reconsideration decision denying her disability retirement application, that the administrative judge issued an initial decision that affirmed OPM's decision, that the Board affirmed the initial decision by Final Order and that the United States Court of Appeals for the Federal Circuit denied the appellant's petition for review of the Board's final decision. *Id.* at 1; *see Harrison v. Office of Personnel Management*, 280 F. App'x 996 (Fed. Cir. 2008); *Harrison v. Office of Personnel Management*, MSPB Docket No. DC-844E-07-0720-I-1 (Initial Decision, Oct. 2, 2007; Final Order, Jan. 29, 2008). The administrative judge stated that the appellant's new appeal appeared to be "another attempt to seek Board review of OPM's reconsideration decision," explained the elements of res judicata,[1] noted that they appeared to be satisfied, and ordered her to address the applicability of res judicata to this appeal. IAF, Tab 3 at 2-4. The administrative judge also noted that the record on this issue would close 20 days after the date of the Show Cause Order. *Id.* at 4. The

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[1] Under the doctrine of res judicata, a valid, final judgment on the merits of an action bars a second action involving the same parties or their privies based on the same cause of action. *Peartree v. U.S. Postal Service*, 66 M.S.P.R. 332, 337 (1995). Res judicata precludes parties from relitigating issues that were, or could have been, raised in the prior action, and is applicable if: (1) the prior judgment was rendered by a forum with competent jurisdiction; (2) the prior judgment was a final judgment on the merits; and (3) the same cause of action and the same parties or their privies were involved in both cases. *Id.*

appellant responded to this Order but she did not address the res judicata issue. IAF, Tab 5.

¶3 The administrative judge issued an initial decision that dismissed her appeal because it was barred by res judicata. IAF, Tab 7. The initial decision stated that it would become final on January 13, 2010, unless a petition for review was filed by that date. *Id.* at 6. Over one month later, on February 18, 2010, the appellant filed a petition for review and a motion, asking the Board to accept her petition as timely or to set aside the deadline. Petition for Review (PFR) File, Tab 1. She also filed additional submissions. PFR File, Tabs 3-4, 6.

ANALYSIS

¶4 To be timely, a petition for review 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). Here, the initial decision was issued on December 9, 2009, and it stated that it would become final on January 13, 2010, unless a petition for review was filed by that date. IAF, Tab 7 at 6. The appellant does not allege that she received the initial decision more than 5 days after its issuance date, and she did not file her petition until February 18, 2010. PFR File, Tab 1. Thus, the petition was filed over one month late.

¶5 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 for review, the appellant must show that she 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 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 An analysis of the *Moorman* factors does not weigh in the appellant's favor. The appellant was represented below and on review. *See* IAF, Tab 4 (Designation of Representative form); PFR File, Tab 3 (letter from the appellant's representative). Moreover, the length of the delay is not minimal. *See Summerset v. Department of the Navy*, 100 M.S.P.R. 292, ¶ 7 (2005) (a filing delay of 33 days is significant). In her motion, the appellant explains why her petition for review was late:

> I do apologize for this inconvenience. I was seeking legal advice just a week before [the] deadline. A few days before the deadline I was informed by the attorney that he could not take my case. I was then referred to another attorney all the way in Virginia Beach. I was advised to ask for an extension. I believe I called on January 13th[,] the same day as my deadline. I did not know my case would already be closed.

PFR File, Tab 1 at 4.

¶7 The appellant's assertions in this regard are unclear, as it appears she had the same representative below as she does on review. In any event, these explanations do not provide good cause for the delay. *See Depierro v. U.S. Postal Service*, 54 M.S.P.R. 251, 253 (1992) ("A party's inability to obtain counsel does not establish good cause for an untimely filing."); *see also Innocent v. Office of Personnel Management*, 108 M.S.P.R. 453, ¶ 10, *aff'd*, 296 F. App'x 925 (Fed. Cir. 2008). Moreover, if the appellant was told – presumably by an employee of the Merit Systems Protection Board, although she does not identify what office she contacted or with whom she spoke – that her case was "closed," she must have called *after* the deadline for filing a petition for review had expired, and thus, she did not exercise due diligence. *See* 5 C.F.R. § 1201.114(e) (the Board will grant a motion for extension of time to file a petition for review

only upon a showing of good cause, and such motions must be filed with the Clerk of the Board before the date on which the petition is due).

¶8 For these reasons, we DENY the appellant's motion to ask the Board to accept her petition as timely or to set aside the deadline and we DISMISS the petition for review as untimely filed with no showing of good cause for the delay. *See* 5 C.F.R. § 1201.114(f).

ORDER

¶9 This is the final decision of the Merit Systems Protection Board concerning the timeliness of the petition for review. The initial decision remains the final decision of the Board with respect to the dismissal of the appeal under the doctrine of res judicata.[2] 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

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

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[2] If the appellant believes that her medical condition has worsened, she may file a new claim with OPM, and if OPM denies that claim, res judicata may not preclude an appeal of that new reconsideration decision. *See Luzi v. Office of Personnel Management*, 106 M.S.P.R. 160, ¶¶ 8-9 (2007).

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.