UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 194

Docket No. AT-0831-10-0061-I-1

Leroy Hudson,

Appellant,

v.

Office of Personnel Management,

Agency.

September 23, 2010

Leroy Hudson, Conyers, Georgia, 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 petitions for review of the administrative judge's initial decision dismissing his appeal as untimely filed without a showing of good cause for the delay. For the reasons set forth below, we DENY the appellant's petition for review, REOPEN the appeal on the Board's own motion under 5 C.F.R. § 1201.118, VACATE the initial decision, and DISMISS the appeal for lack of jurisdiction.

BACKGROUND

¶2 The appellant retired from federal service under the Civil Service Retirement System (CSRS) on October 3, 2006, and began receiving a retirement annuity. Initial Appeal File (IAF), Tab 1. Also in October 2006, the appellant moved from New York to Georgia, where the premium rate for his federal health insurance benefits was $198.56 less per month. IAF, Tab 1, Attachment; Tab 4 at 1. On February 27, 2008, the Office of Personnel Management (OPM) adjusted the appellant's premium rate, effective February 1, 2008, and refunded to the appellant the premium difference for February 2008. IAF, Tab 1, Attachment. The appellant, however, sought a full refund from OPM for the higher premiums that he was charged from October 2006 through January 2008. IAF, Tab 1; Tab 3, Subtab 2d.

¶3 On July 22, 2008, OPM issued a reconsideration decision, denying the appellant's request for a retroactive adjustment of his health insurance premiums. IAF, Tab 3, Subtab 2a. OPM notified the appellant that he had "the right to appeal this decision to the appropriate Federal district court or the U.S. Court of Federal Claims within thirty (30) calendar days," relying upon *Miller v. Office of Personnel Management*, 449 F.3d 1374 (Fed. Cir. 2006). *Id*. The appellant stated that on August 18, 2008, he appealed to the U.S. Court of Appeals for the Federal Circuit, and the court returned his pleadings. IAF, Tab 1, Tab 4 at 1.

¶4 On September 18, 2009, the appellant appealed to the Board, noting that if his filing was late, it was because he was initially directed by OPM to file his appeal to the wrong entity. IAF, Tab 1. In its response, OPM essentially moved to dismiss the appeal as untimely filed without a showing of good cause for the delay. IAF, Tab 3. In the initial decision, the administrative judge dismissed the appeal as untimely. IAF, Tab 5. He also noted that it appeared OPM was correct in its assessment that the Board lacked jurisdiction over the appeal, but that he need not address that issue in light of his timeliness finding. *Id*. at 3 n.1.

¶5 The appellant has filed a timely petition for review. Petition for Review File (PFR File), Tab 1. OPM has filed a response and moves to dismiss the appeal for lack of jurisdiction based on its assertion that proper jurisdiction over this matter rests with the U.S. District Courts and the U.S. Court of Federal Claims. PFR File, Tab 4.

ANALYSIS

¶6 The Board will grant a petition for review only when significant new evidence is presented or the administrative judge made an error interpreting a law or regulation. *Lopez v. Department of the Navy*, 108 M.S.P.R. 384, ¶ 16 (2008); 5 C.F.R. § 1201.115. Mere disagreement with the administrative judge's factual findings or legal conclusions does not show legal error. *Cirella v. Department of the Treasury*, 108 M.S.P.R. 474, ¶ 15, *aff'd*, 296 F. App'x 63 (Fed. Cir. 2008). On petition for review, the appellant has presented neither new evidence nor any argument showing error in the administrative judge's decision in any respect. Therefore, we deny his petition for review. We reopen the appeal on our own motion under 5 C.F.R. § 1201.118, however, solely to address the issue of the Board's jurisdiction over this appeal. *See Scott v. Department of the Air Force*, 113 M.S.P.R. 434, ¶ 5 (2010) (the issue of Board jurisdiction may be raised at any time during a proceeding by the parties or *sua sponte* by the Board).

¶7 Here, the administrative judge dismissed the appeal as untimely, without addressing whether the Board has jurisdiction over this matter. IAF, Tab 5. An administrative judge may, in certain circumstances, assume Board jurisdiction *arguendo* and dispose of an appeal on timeliness grounds; however, where the issues of jurisdiction and timeliness are interrelated, the administrative judge must address the issue of jurisdiction first. *See generally Smart v. Department of Justice*, 113 M.S.P.R. 393, ¶ 11 (2010). Here, the issues of timeliness and jurisdiction are interrelated.

¶8 An agency must provide an appellant with notice of his Board appeal rights whenever it subjects an appellant to an action that is appealable to the Board. 5 C.F.R. § 1201.21. For this reason, an appellant who is not provided the required notice of his Board appeal rights by the agency is not required to show that he exercised due diligence in attempting to discover his appeal rights to show good cause for his late filing; he must instead show that he was diligent in filing a Board appeal after he learned he could do so. *See Smart*, 113 M.S.P.R. 393, ¶ 8. Here, OPM never provided the appellant notice of any possible Board appeal rights. IAF, Tab 3, Subtab 2a. Therefore, the question of whether the appellant can establish due diligence to excuse his untimely appeal is related to whether OPM had an obligation to notify the appellant of his Board appeal rights, which depends upon whether the Board would have jurisdiction over his appeal. *See* 5 C.F.R. § 1201.21; *see also Smart*, 113 M.S.P.R. 393, ¶ 10. Thus, the administrative judge erred in failing to analyze whether the Board has jurisdiction over this appeal.

¶9 The Board's jurisdiction is not plenary; it is limited to those matters over which it has been given jurisdiction by law, rule or regulation. *Maddox v. Merit Systems Protection Board*, 759 F.2d 9, 10 (Fed. Cir. 1985). Here, the record is sufficiently complete that the Board can properly assess jurisdiction.

¶10 The appellant’s only claim is that he is entitled to a refund for the overpayment of insurance premiums for his federal employee health benefits resulting from his move from New York to Georgia. PFR File, Tab 1. But it is well-established that the Board does not have jurisdiction to consider claims concerning federal employee health insurance benefits. *See Chamblin v. Office of Personnel Management*, 112 M.S.P.R. 266, ¶ 7 (2009); *Crawford v. Office of Personnel Management*, 100 M.S.P.R. 102, ¶ 5 (2005); *Oppenheim v. Office of Personnel Management*, 51 M.S.P.R. 255, 257 (1991). Thus, the Board cannot consider the merits of the underlying insurance dispute that gave rise to the

appellant's claim. *See generally Miller*, 449 F.3d at 1377-79 (claims of this type must be brought in the U.S. District Court or U.S. Court of Federal Claims).

¶11 We note that the appellant never received notice on how to properly establish the Board's jurisdiction over his appeal. *See Burgess v. Merit Systems Protection Board*, 758 F.2d 641, 643-44 (Fed. Cir. 1985) (an appellant must receive explicit information on what is required to establish an appealable jurisdictional issue). This omission is harmless in this case, however, because the record clearly shows that the Board lacks jurisdiction over the appeal. *See Richards v. Office of Personnel Management*, 97 M.S.P.R. 291, ¶ 7 (2004); *Johnson v. U.S. Postal Service*, 67 M.S.P.R. 573, 578, *review dismissed*, 65 F.3d 186 (Fed. Cir. 1995) (Table).

¶12 Therefore, OPM correctly notified the appellant that his appeal must be brought before the U.S. District Court or the U.S. Court of Federal Claims rather than the Board. Under the circumstances, the appellant's appeal must be dismissed for lack of jurisdiction.

ORDER

¶13 This is the final decision of the Merit Systems Protection Board in this appeal. 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 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:

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