

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

2010 MSPB 225

Docket No. SF-0752-10-0222-I-1

**Guillermo Mojarro,
Appellant,**

v.

**United States Postal Service,
Agency.**

November 12, 2010

Guillermo Mojarro, Upland, California, pro se.

Afshin Miraly, Esquire, Long Beach, California, 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 of the initial decision that dismissed his appeal of his alleged involuntary retirement without prejudice to refiling. We DENY the petition for review because it does not meet the criteria for review set forth at [5 C.F.R. § 1201.115](#). We REOPEN this appeal on our own motion under [5 C.F.R. § 1201.118](#), however, AFFIRM the initial decision as MODIFIED by this Opinion and Order, and FORWARD the appellant's request for reinstatement of his appeal to the Western Regional Office for docketing as a refiled appeal.

BACKGROUND

¶2 The appellant, a preference eligible Mail Processing Clerk at the agency's Upland Post Office, in Upland, California, applied for and was granted a voluntary early retirement under the Federal Employees' Retirement System (FERS). Initial Appeal File (IAF), Tab 14 at 5, 13. His last day in a pay status was October 31, 2009. *Id.* On December 10, 2009, the appellant filed this appeal alleging that his retirement was involuntary as a result of intolerable working conditions, and that the agency had violated the Americans with Disabilities Act and Rehabilitation Act. IAF, Tab 3 at 6.

¶3 The administrative judge issued an acknowledgement order that informed the appellant that the Board may not have jurisdiction over his alleged involuntary retirement appeal and of his burden and the elements of proof for establishing jurisdiction over his appeal. IAF, Tab 4. The appellant responded to the show cause order, IAF, Tabs 10, 12, and the agency filed a motion to dismiss the alleged involuntary retirement appeal for lack of jurisdiction. IAF, Tab 14.

¶4 After holding a prehearing conference call with the parties, the administrative judge issued an initial decision that dismissed the appeal without prejudice to refiling. IAF, Tab 32, Initial Decision (ID) at 1, 3. The administrative judge found that the parties agreed that: (1) the appellant would file with the Office of Personnel Management (OPM) an application for disability retirement benefits within one year of his separation date; (2) the appellant would refile his alleged involuntary retirement appeal only if his application for disability retirement benefits is ultimately unsuccessful before OPM and his subsequent appeal of OPM's final decision on his disability retirement application is ultimately unsuccessful before the Board; and (3) in that event, he may refile his alleged involuntary retirement appeal within thirty days of his receipt of notification of that ultimate unsuccessful outcome. ID at 1-2.

¶5 The appellant filed a petition for review of the initial decision requesting that the Board affirm his right to pursue his alleged involuntary retirement

complaint with the Equal Employment Opportunity Commission. Petition for Review (PFR) File, Tab 2 at 4. The agency did not respond to the appellant's petition for review. After the record closed on review, the appellant submitted a filing asserting that his physician of record will not provide him with documentation supporting an application for disability retirement, so he will not be applying for disability retirement from OPM. PFR File, Tab 5 at 5, Tab 9 at 4-5. The appellant therefore requested reinstatement of his appeal.¹ *Id.*, Tab 9 at 4-5.

ANALYSIS

¶6 An administrative judge has wide discretion to control the proceedings before him and the dismissal of an appeal without prejudice to refiling is a procedural option committed to his sound discretion. *Argabright v. Department of Defense*, [113 M.S.P.R. 152](#), ¶ 6 (2010); *Selig v. Department of the Army*, [102 M.S.P.R. 189](#), ¶ 6 (2006). Nevertheless, an administrative judge must exercise his discretion in a manner consistent with the policies set forth by the Board. *Argabright*, [113 M.S.P.R. 152](#), ¶ 6. The Board disfavors dismissals without prejudice that do not contain a specific refiling date, especially where it is

¹ After the record closed on review, the appellant requested to withdraw his petition for review in this appeal. PFR File, Tabs 5-6. The April 18, 2010 withdrawal request was apparently based on the appellant's belief that, by withdrawing his petition for review, he could refile his involuntary retirement appeal and join it with his constructive suspension appeal, *Mojarro v. U.S. Postal Service*, MSPB Docket No. SF-0752-09-0163-B-1, which was pending at the time before the administrative judge. *Id.* The administrative judge, however, issued a June 9, 2010 initial decision in that constructive suspension appeal while the appellant's petition for review in this involuntary retirement appeal was still pending before the Board. *See Mojarro*, MSPB Docket No. SF-0752-09-0163-B-1 (Initial Decision, June 9, 2010). The administrative judge did not address the appellant's involuntary retirement claim in the June 9, 2010 initial decision. *See id.* On June 21, 2010, the appellant submitted a request to "reinstate" his petition for review in this appeal. PFR File, Tab 7. Because we did not take any action to dismiss the appellant's petition for review as withdrawn, we need not address his request to "reinstate" his petition for review.

unclear when the matter underlying the dismissal will be resolved. *Id.*, ¶ 8. Given the Congressional mandate that Board cases be expeditiously adjudicated, a case may not go on indefinitely. *Id.*

¶7 Here, the administrative judge did not set a date certain for refiling the appeal, but, rather, made the refiling date solely contingent on a final decision from the Board that would affirm an OPM decision to deny the appellant disability retirement benefits. ID at 2. Thus, the administrative judge abused his discretion by dismissing this appeal without prejudice without setting a date certain for refiling the appeal. *See Argabright*, [113 M.S.P.R. 152](#), ¶ 8; *Selig*, [102 M.S.P.R. 189](#), ¶¶ 6-7; *see, e.g., Whitfield v. Department of the Air Force*, [79 M.S.P.R. 651](#), ¶¶ 4-7 (1998) (finding that the administrative judge, who dismissed the appellant's removal appeal without prejudice to refiling pending the outcome of her application for disability retirement, could have established an alternative refiling date in the event that the appellant did not file an application or OPM did not issue a reconsideration decision within a reasonable time).

¶8 When an administrative judge has abused his discretion by failing to set a date certain for refiling an appeal, the Board has modified the initial decision by setting a date certain for an appellant to refile his appeal. *See, e.g., Selig*, [102 M.S.P.R. 189](#), ¶ 8 (modifying the initial decision to allow the appellant to refile his appeal within 120 days of the date of the Opinion and Order or within 30 days of the date of issuance of the final decisions regarding his application for benefits, whichever date occurs earlier). We find, however, that setting a date certain for refiling is not necessary in this case. The appellant asserted on review that he will not file an application for disability retirement with OPM in light of his physician's refusal to provide him with a medical certificate to support a disability retirement application, and, therefore, he requests "reinstatement" of his alleged involuntary retirement appeal. PFR File, Tab 5 at 5, Tab 9 at 4-5. Because the dismissal of this appeal without prejudice was premised on the appellant's ability to pursue disability retirement, and the appellant has asserted

that the absence of supporting medical certification precludes him from any likelihood of succeeding in his application, it would be futile for the appellant to pursue a disability retirement application with OPM and, subsequently, with the Board if OPM denies his application for a disability retirement.² *See, e.g., Whitfield*, [79 M.S.P.R. 651](#), ¶¶ 4-7 (the appellant timely refiled her removal appeal that was dismissed without prejudice pending the outcome of her application for disability retirement when the appellant, who never actually filed an application for disability retirement, refiled her appeal one year later).

¶9 Thus, because the appellant has indicated that he cannot pursue his application for a FERS disability retirement, we find that the appellant's August 4, 2010 request to reinstate his appeal constitutes a timely refiled appeal.³

ORDER

¶10 This is the final decision of the Merit Systems Protection Board with respect to the initial decision that dismissed the appeal without prejudice to refile. Title 5 of the Code of Federal Regulations, section 1201.113(c) ([5 C.F.R. § 1201.113\(c\)](#)). We FORWARD the appellant's August 4, 2010 request

² To be eligible for a FERS disability retirement annuity, an employee must show, inter alia, that he is unable, because of disease or injury, to render useful and efficient service in his position, that his disabling medical condition is expected to continue for at least one year from the date the application is filed, and that accommodation of the condition in the appellant's position is unreasonable. [5 U.S.C. § 8451\(a\)\(1\)\(B\)](#); *Wilkey-Marzin v. Office of Personnel Management*, [82 M.S.P.R. 200](#), ¶ 4 (1999); [5 C.F.R. § 844.103\(a\)\(2\)](#). A determination regarding entitlement to disability retirement benefits must consider, inter alia, objective clinical findings and diagnoses and medical opinions. *Dunn v. Office of Personnel Management*, [60 M.S.P.R. 426](#), 432 (1994).

³ On petition for review, the appellant has requested that the Board join the instant appeal with several of his other pending appeals. PFR File, Tab 14 at 5. The Board may join cases if doing so would expedite the processing of the cases and would not adversely affect the interests of the parties. [5 C.F.R. § 1201.36\(2\)](#). It does not appear that joinder would expedite the processing of the cases at issue. Therefore, we DENY the appellant's request.

to reinstate his alleged involuntary retirement appeal to the Western Regional Office for docketing as a timely refiled appeal.

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.ca9.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.