UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2012 MSPB 37

Docket No. PH-844E-11-0217-I-1

Muriel Smith,

Appellant,

v.

Office of Personnel Management,

Agency.

March 20, 2012

Ryan Killeen Morse, Esquire, Hartford, Connecticut, for the appellant.

Thomas L. Styer, Washington, D.C., for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman

OPINION AND ORDER

¶1 The appellant has filed a petition for review of the initial decision that DISMISSED her disability retirement appeal as untimely filed. For the reasons discussed below, we GRANT the appellant's petition for review and REMAND the case to the regional office for further adjudication in accordance with this Order.

BACKGROUND

¶2 On November 23, 2009, the Office of Personnel Management (OPM) issued a final decision disallowing the appellant's application for a disability retirement under the Federal Employees' Retirement System (FERS) based on multiple

medical conditions, including depression and a panic disorder. Initial Appeal File (IAF), Tab 1 at 8-10. On February 23, 2011, the appellant filed this appeal of OPM's decision. IAF, Tab 1.

¶3 The administrative judge ordered the appellant to show that her appeal was timely filed or that good cause existed for the delay, IAF, Tab 2 at 2, and OPM filed a motion to dismiss the appeal on timeliness grounds, IAF, Tab 6. The appellant submitted an affidavit in which she acknowledged receiving OPM's final decision in December 2009 but claimed that she was not represented by an attorney at that time and that she had enormous difficulty understanding the correct procedures to file an appeal due to her "mental health conditions," which she identified as "major depressive disorder, depression, agoraphobia, and panic disorder." IAF, Tab 4 at 12, 14. She provided detailed medical reports that her psychiatrist had prepared in July 2009 in support of her successful claim for disability benefits from the Social Security Administration. *Id.* at 16-37. The appellant averred that her concentration and memory continued to be severely impaired as reflected in those reports with no prognosis for substantial improvement. *Id.* at 12-13. The appellant further asserted that after OPM denied her disability retirement application she filed a formal equal employment opportunity (EEO) complaint with her agency in January 2010 seeking a disability pension as a remedy, believing "that the EEO process was the correct process to seek a disability pension after having the initial application denied." *Id.* at 14. She claimed that in a confidential settlement agreement entered into in October 2010 the agency changed the terms of her separation to "medically unable to perform." *Id.*

¶4 The administrative judge dismissed the appeal as untimely filed by more than 1 year. IAF, Tab 8, Initial Decision (ID). The administrative judge found that the appellant had failed to establish good cause for waiving the time limit because OPM had provided instructions on how and when to appeal its decision and the appellant failed to meet her burden to show that her medical conditions

impaired her ability to meet the deadline. ID at 4-5. The administrative judge concluded that, because the appellant pursued and settled her EEO complaint, there was no reason to believe she was "medically unable to file a timely appeal with the Board or, at the very least, request an extension of time to file." ID at 5. The appellant filed a timely petition for review and the agency filed a timely opposition.

ANALYSIS

¶5 The appellant bears the burden of proof with regard to timeliness, which must be established by a preponderance of the evidence. *Killian v. Office of Personnel Management*, 100 M.S.P.R. 583, ¶ 5 (2005); 5 C.F.R. § 1201.56(a)(2)(ii). A preponderance of the evidence is the degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue. 5 C.F.R. § 1201.56(c)(2). With exceptions not applicable here, "an appeal must be filed no later than 30 days after the effective date, if any, of the action being appealed, or 30 days after the date of the appellant's receipt of the agency's decision, whichever is later." 5 C.F.R. § 1201.22(b). The appellant has acknowledged receiving OPM's November 23, 2009 final decision in December 2009, IAF, Tab 4 at 14, and OPM submitted certified mail receipts showing that the decision was delivered on December 14, 2009, IAF, Tab 6 at 7, 10-11. Thus, when the appellant filed her appeal on February 23, 2011, she was more than 13 months late.[1]

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[1] OPM asserted below that it had issued a prior reconsideration decision on August 7, 2009, which was received on August 11, 2009, by the appellant's attorney representative at the time. IAF, Tab 6 at 5. OPM argued that this appeal is therefore untimely by more than 17 months. *Id.* We disagree. The appellant is specifically seeking review of OPM's November 23, 2009 decision, which is on its face an appealable final determination affecting the appellant's rights or interests under FERS. IAF, Tab 1 at 8-10; *see* 5 U.S.C. § 8461(e). The August 7, 2009 reconsideration decision does not preclude the Board from taking jurisdiction over this matter pursuant

¶6 The Board may waive the time limit for filing an appeal if the appellant has shown good cause for the delay. 5 C.F.R. § 1201.22(c). To establish good cause for the untimely filing of an appeal, 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). The Board will find good cause for a filing delay when 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.* There is no general requirement that the appellant be incapacitated, only that the appellant must show that her ability to file with the Board was "affected" or "impaired" by illness. *Washington v. Department of the Navy*, 101 M.S.P.R. 258, ¶ 13 (2006); *Lacy*, 78 M.S.P.R. at 437 & n.*.

¶7 The appellant submitted detailed medical reports that her psychiatrist, John Brenner Levine, MD, completed on July 27, 2009, in support of the appellant's claim for disability benefits from the Social Security Administration.[2] IAF, Tab 4 at 18-38. Dr. Levine stated that he had been treating the appellant since February 3, 2009, and saw the appellant every 2-4 weeks. He diagnosed the

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to OPM's subsequent November 23, 2009 final decision, which purports to be a reconsideration decision discussing the merits of the appellant's entitlement to disability retirement and which does not reference the August 7, 2009 decision. *See Powell v. Office of Personnel Management*, 114 M.S.P.R. 580, ¶ 9 n.2 (2010) *Smith v. Office of Personnel Management*, 114 M.S.P.R. 395, ¶¶ 7-8 (2010). Thus, the pertinent issue is whether the appellant has shown good cause for her delay in filing an appeal of the November 23, 2009 decision.

[2] The reports were also endorsed by Linda M. Spiegel, APRN, BC. IAF, Tab 4 at 24, 33, 37.

appellant with major depressive disorder (recurrent, severe without psychotic features) and panic disorder with agoraphobia. *Id.* at 19, 26. Dr. Levine explained that, as a result of her disorders, the appellant's attention, concentration, and immediate and recent memory were all severely impaired. *Id.* at 19. The reports described the appellant as unable to leave home alone or function independently. *Id.* at 37.

¶8 Of particular relevance are Dr. Levine's findings that the appellant's abilities to focus on tasks and to complete any work were severely impaired. *Id.* For example, he certified that the appellant exhibited marked or extreme difficulties in sustaining focused attention and concentration that would permit her to complete tasks in a timely manner or repeat sequences of actions to achieve a goal. *Id.* at 22, 30. In addition, he found that the appellant exhibited marked or extreme difficulty in planning daily activities, and initiating and participating in activities independent of supervision and direction. *Id.* at 21, 29. He rated her as unable to perform the following tasks on a regular or reliable basis: (1) understand and remember very short, simple instructions; (2) understand and remember detailed instructions; (3) carry out very short and simple instructions; (4) carry out detailed instructions; (5) perform activities within a schedule; (6) be punctual within customary tolerances; and (7) ask simple questions or request assistance. *Id.* at 34-36. Although OPM provided notice of her Board appeal rights and the time limit for filing, the appellant's medical evidence specifically explained that her medical conditions substantially impaired her ability to follow even simple instructions. Such impairments are directly related to the ability of an individual to timely follow instructions regarding the filing of an appeal with the Board or to seek an extension of time to file.

¶9 The appellant has submitted sufficient evidence to establish that it is more likely than not that the impairments described in her medical evidence continued during the period of her filing delay. There is no indication that Dr. Levine expected her conditions to improve within the relevant time period. Indeed, his

reports suggested the opposite. For instance, forms completed by Dr. Levine on July 27, 2009, contained the question "Has your patient's mental condition lasted, or can it be expected to last, at least 12 months at the severity level described above?" to which Dr. Levine checked "Yes." *Id.* at 24, 32. The appellant averred in her sworn statement that her "major depressive disorder, depression, agoraphobia, and panic disorder . . . are lifelong conditions, with no prognosis for substantial improvement." *Id.* at 12. She explained that she continues to see a therapist every 2-4 weeks, and that despite medications to control her conditions, her concentration and memory remain severely impaired, she experiences as many as three panic attacks a day, and her abilities to sleep, work, and perform simple daily routine tasks remain affected. *Id.* at 13. Her representations are all consistent with the medical evidence of record. The limited information in the record regarding the appellant's pursuit of an EEO complaint is of insufficient weight to discount the appellant's otherwise strong showing that her medical conditions affected and impaired her ability to file with the Board. *See Stout v. Merit Systems Protection Board*, 389 F.3d 1233, 1238-42 (Fed. Cir. 2004).

¶10 The administrative judge suggested that, even if the evidence demonstrated that the appellant was unable to file a timely appeal, there was no reason to believe that she could not have requested an extension of time to file. ID at 5. It is "possible that an appellant may have the capacity to file, or request assistance in filing, an extension request while lacking the capacity to file, or cooperate effectively with another in filing, the appeal itself." *Stout*, 389 F.3d at 1242. However, we find no basis for drawing such a distinction on this record. *See id.*

¶11 For all the forgoing reasons, we conclude that the preponderance of the evidence shows that the appellant's impairing medical conditions constitute good cause for waiving the time limit for filing her Board appeal.[3] *See Washington*, 101 M.S.P.R. 258, ¶¶ 14-15; *Lacy*, 78 M.S.P.R. at 437; *Calfee v. Office of*

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[3] We make no finding with respect to the appellant's eligibility for disability retirement.

Personnel Management, 64 M.S.P.R. 309, 313-14 (1994). OPM has presented no evidence or argument suggesting that it would be prejudiced by a waiver of the filing time limit. *See Killian*, 100 M.S.P.R. 583, ¶ 7. Accordingly, we waive the filing time limit for good cause shown and remand for further development of the record and adjudication on the merits. *See* 5 C.F.R. § 1201.22(c).

ORDER

¶12 For the reasons discussed above, we REMAND this case to the regional office for further adjudication in accordance with this Order.

FOR THE BOARD:

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