UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

95 M.S.P.R. 252

ELLA M. ALSTON,
Appellant,

v.

SOCIAL SECURITY ADMINISTRATION,
Agency.

DOCKET NUMBER
PH-0752-01-0374-I-2

DATE: December 4, 2003

Douglas R. Taylor, Esquire, Rockville, Maryland, for the appellant.

Jonathan R. Cantor, Esquire, Baltimore, Maryland, for the agency.

BEFORE

Susanne T. Marshall, Chairman
Neil A. G. McPhie, Member

OPINION AND ORDER

¶1 The agency has petitioned for review of an initial decision finding that the agency constructively suspended the appellant. For the reasons set forth below, the Board GRANTS the petition, REVERSES the initial decision, and FINDS that the agency did not suspend the appellant, as she contends it did.

BACKGROUND

¶2 The appellant, a Benefits Earning Technician, filed an August 3, 2001 appeal alleging that the agency constructively discharged her. Initial Appeal File (IAF), Tab 1. The administrative judge (AJ) clarified that the appellant was attempting to appeal an alleged constructive suspension, not a discharge. IAF,

Tabs 5 & 14. The agency filed a motion to dismiss the appeal for lack of jurisdiction. IAF, Tabs 4 & 10. The appellant submitted evidence and argument on the jurisdictional issue. IAF, Tab 8.

¶3 After holding a hearing, the AJ found that the appellant was placed on an enforced leave suspension beginning when she was escorted off agency premises on April 19, 2000, due to inappropriate behavior in the workplace, pending receipt of medical documentation from her physician. Refiled Appeal File (RAF), Tab 7, Initial Decision (ID) at 4-6. The AJ further found that the appellant did not show that working at home was a reasonable accommodation for her medical condition, or that she was subject to intolerable working conditions that compelled her to be absent from duty. ID at 6-7. The AJ also found that the appellant was not afforded due process with respect to what the AJ found was a constructive suspension of more than 14 days. ID at 2-3, 7. She therefore reversed the alleged suspension and ordered the agency to provide interim relief if a petition for review was filed. ID at 7-9.

¶4 In its petition for review, the agency argues that the appeal was untimely filed. Petition for Review File (PFRF), Tab 1. The agency also asserts that the AJ erred in finding that a period of administrative leave is a constructive suspension. The agency further asserts that any constructive suspension ended when the appellant filed an application for disability retirement. Finally, the agency argues that the appellant was not subject to intolerable working conditions that prevented her from returning to duty.

ANALYSIS

Interim relief

¶5 With its petition for review, the agency submitted evidence showing that it had returned the appellant to duty in her position effective the day the initial decision was issued. PFRF, Tab 1, Att. The appellant did not contest the agency's interim relief in her August 2, 2002 response to the petition for review.

PFRF, Tab 3. In fact, the appellant stated that, in accordance with the interim relief order, she returned to work in June 2002, and that "[s]he has been assigned a new supervisor and works in a relatively stress-free environment where she is now performing her duties without difficulty and without any adverse effects on her health." *Id.*, Tab 3 at 4. The appellant further stated that she "is presently functioning as a productive employee, free of the conditions which prevented her from going to work two years ago," and that she "is now working in an environment which is not 'hostile' and she is able to function." *Id.* at 8.

¶6 Over four months after the close of the record on review, the appellant filed a December 5, 2002 "complaint" in which she criticizes the conditions of her employment since her return to duty in June 2002. PFRF, Tabs 2, 4. The appellant claims for the first time that she has been subject to a hostile environment since her return to duty on interim relief. PFRF, Tabs 4-5. To the extent that the appellant is challenging the agency's interim relief actions, an appellant's motion to dismiss a petition for review for noncompliance with an interim relief order must be filed before the record on review closes, unless it is based on new and material evidence that was not readily available before the record closed. *Forma v. Department of Justice*, 57 M.S.P.R. 97, 102, *aff'd*, 11 F.3d 1071 (Fed. Cir. 1993) (Table). Further, if the agency submits evidence that, on its face, shows that it has met its interim relief obligations, the Board will look no further into the matter absent a timely challenge by the appellant to the sufficiency of the agency's interim relief measures. *May v. Department of Veterans Affairs*, 57 M.S.P.R. 422, 424 (1993). The appellant has not explained why she is raising these complaints at this late date, nor has she shown that they are based on new and material evidence. Thus, the Board will not consider her untimely challenge of the agency's interim relief actions. *See May*, 57 M.S.P.R. at 424; *Forma*, 57 M.S.P.R. at 102.

Alleged Constructive suspension

¶7 On June 13, 2000, Beverly Gross, the Deputy Division Director, issued a letter to the appellant advising her that, due to her inappropriate behavior in the workplace, she was placed on administrative leave on April 19, 2000, pending receipt of medical documentation from her physician. IAF, Tab 4, Subtab 4k. Gross informed the appellant that she was placed on leave without pay (LWOP) on May 18, 2000, when she failed to submit medical documentation by May 17, 2000, as she was instructed to do in an April 28, 2003 letter. *Id.* The AJ found that the appellant was placed on an enforced leave suspension beginning on April 19, 2000. ID at 4-6. However, the agency is correct that a period of paid administrative leave is not appealable to the Board. *Lohf v. U.S. Postal Service*, 71 M.S.P.R. 81, 84 (1996); *Dixon v. U.S. Postal Service*, 69 M.S.P.R. 171, 175 (1995). Thus, contrary to the initial decision, the period that the appellant was placed on administrative leave from April 19 through May 17, 2000, is not appealable to the Board.

¶8 Beginning on May 18, 2000, the agency placed the appellant on LWOP. As discussed below, the undisputed evidence shows that it was the appellant, not the agency, who initiated that period of unpaid absence. The evidence also shows that it was also the appellant, not the agency, who caused the LWOP period to continue. Thus, the agency did not take a constructive suspension beginning on May 18, 2000, as the AJ found.

¶9 The agency's April 28, 2000 letter to the appellant stated that the latest information it had from the appellant was her statement to her supervisor that she was "under a doctor's care and would be off work for an extended period of time." IAF, Tab 4, Subtab 4N. According to the letter, the appellant had informed the agency that she would not be returning to work for some time. In view of the appellant's claim that she could not return to duty, the agency said in its letter that it was "in need of clarification of [her] current health status." The April 28 letter expressly stated that the appellant must provide medical

information on her health status "no later than two weeks from the date of the receipt of the letter."

¶10 The appellant received the April 28, 2000 letter on May 3, 2000. IAF, Tab 4, Subtab 4K. Thus, as stated in the agency's June 13, 2000 letter to the appellant, the required medical information should have been received "no later than May 17, 2000." *Id.* The June 13 letter further informed the appellant: "Since this information was not received by May 17, 2000, you were placed on Leave Without Pay on May 18, 2000."

¶11 The dispositive question in determining whether a suspension took place is who initiated the absence. *Sherrod v. Department of the Navy*, 90 M.S.P.R. 347, ¶ 19 (2001) (citing cases). If the appellant initiated the leave period, the absence is not a constructive suspension. *Okleson v. U.S. Postal Service*, 90 M.S.P.R. 415, ¶ 16 (2001). Moreover, constructive suspension claims of the type made here may arise in two situations. The first occurs when an agency places an employee on enforced leave pending an inquiry into her ability to perform her job. *Hardy v. U.S. Postal Service*, 94 M.S.P.R. 539, ¶ 12 (2003). The second situation arises when an employee absent from work for medical reasons requests to return to work with altered duties, and the agency denies the request. *Id.* If the agency is obligated by policy, regulation or contract to offer available light-duty work to the appellant, her continued absence may constitute a suspension appealable to the Board if the agency fails to offer her available light-duty work. *Id.* An appellant who asserts a constructive suspension claim bears the burden of proving that her absence from the workplace was involuntary. *Baker v. U.S. Postal Service*, 71 M.S.P.R. 680, 692 (1996).

¶12 The record shows that the appellant initiated her absence by telling the agency that she would not be returning to work for an extended period of time. The record further shows that it was the appellant, not the agency, who initiated the LWOP period when she did not give the agency the requested medical report by the due date. That is to say, once the deadline for receipt of the medical

documentation passed, the agency placed the appellant on LWOP since the appellant had provided no information on her current medical condition. Thus, it was the appellant who decided that she could not return to work for an indefinite period of time, and it was the appellant who caused the LWOP period to begin by failing to provide a medical report by the required date. These facts are not materially distinguishable from those in *Perez v. Merit Systems Protection Board*, 931 F.2d 853 (Fed. Cir. 1991).

¶13 The appellant in *Perez* requested sick leave for an indefinite period of time, was placed on sick leave and was told by the agency that it needed medical documentation on his condition by a certain date. *Id.* at 854. The agency told Perez that if it did not receive the requested medical report by the due date, he would be listed as absent without leave (AWOL). *Id.* When Perez failed to supply the medical documentation, he was placed on AWOL beginning April 2, 1990, until May 7, 2000, when he returned to work. *Id.* Even though Mr. Perez submitted the requested medical documentation on April 5, 1990, which was only three days after he was placed in AWOL status, the United States Court of Appeals for the Federal Circuit found that he was never placed on enforced leave by the agency. *Id.* at 855. Rather, the court found that Perez's decision to stay off work initially and his subsequent failure to comply in a timely fashion with the request to submit medical documentation on his condition made it "his choice, not the agency's, to remain away from work." *Id.* The court held that "in a situation such as this, where an employee has voluntarily absented himself from work, placement in a non-pay or AWOL status, even for longer than 14 days, is not a constructive suspension or other agency action appealable to the [Board]." *Id.*

¶14 The *Perez* court observed that its decision was consistent with *Bucci v. Department of Education*, 36 M.S.P.R. 489 (1988). 931 F.2d at 855. As in this case and as in *Perez*, the appellant in *Bucci* was placed in a non-pay status after absenting himself from work and then failing to timely comply with the agency's

request for additional medical documentation. 36 M.S.P.R. at 491. As noted by the *Perez* court, the Board in *Bucci* found that the agency had not constructively suspended the appellant in that situation. *Id.* at 491-92; *see also Moon v. Department of the Army*, 63 M.S.P.R. 412, 419-20 (1994) (the appellant's failure to return to duty was not at the behest of the agency).

¶15 Consistent with longstanding precedent, we find that the appellant did not prove that the agency constructively suspended her. Rather, the appellant's initial absence from work was by her choice, and the agency placed her in LWOP status only after she failed to timely provide the required medical documentation by the date specified in the agency's April 28, 2001 letter. Moreover, the medical report which the appellant eventually gave to the agency did not show that she could return to work.

¶16 The appellant gave the agency a medical report from her psychiatrist, Dr. Richard L. Wright. In his report, Dr. Wright stated that the appellant "is capable of explosive outbursts and could well pose a threat to coworkers or her supervisors." IAF, Tab 4, Subtab 4Mc. Dr. Wright went on to say that the appellant has "fleeting suicidal and homicidal ideations" and "shows poor judgment and little insight." The appellant's submission to the agency on her medical condition does not show that she could return to duty.

¶17 Dr. Wright's report states that the appellant should work exclusively from home. *Id.* The appellant provided no evidence showing that the agency was obligated by any policy, regulation or contract to let her work at home every day. Indeed, the administrative judge found that "the agency has shown that due to the nature of the appellant's work, working at home is not a reasonable accommodation." ID at 7. The appellant has not filed a cross petition for review challenging that factual finding, and we discern no basis on which to find to the contrary. The appellant therefore has not met her burden of showing that the agency was obligated to allow her to work exclusively from home. Accordingly, she has failed to prove that the agency suspended her when it denied her request

to work at home. *Accord, e.g., McIver-Smith v. U.S. Postal Service*, 74 M.S.P.R. 464, 471 (1997) (agency did not constructively suspend the appellant when the appellant did not provide acceptable medical evidence showing that she could work only in daylight); *cf. Justice v. Department of the Navy*, 89 M.S.P.R. 379, ¶ 13 (2001) (the agency suspended the appellant starting October 25, 1999, which was the date that he reported to his duty station after providing the agency with a letter from his doctor stating that he was capable of returning to work).

¶18 Under all the circumstances, we find that the appellant failed to prove that the agency constructively suspended her for any of the dates in question. She therefore did not establish that the agency took any action which is appealable to the Board.

¶19 It appears that the appeal may have been filed late, given the date when the appellant alleged the suspension occurred and the date she filed her appeal. *See Dancy-Butler v. Department of the Treasury*, 80 M.S.P.R. 421, ¶ 4 (1998) (when an appellant alleges a constructive suspension, the time period for filing a Board appeal from the alleged adverse action begins to run when the appellant has been absent for more than fourteen days as a result of the asserted suspension). The AJ did not decide whether the appeal was untimely filed and, if so, whether the appellant showed good cause for the filing delay. In light of our finding that the Board does not have jurisdiction over this appeal, we need not reach the timeliness issues. *See Czarkowski v. Department of the Navy*, 93 M.S.P.R. 514, ¶ 6 n.* (2003).

ORDER

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 web site, http://www.mspb.gov.

FOR THE BOARD:

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Bentley M. Roberts, Jr.
Clerk of the Board

Washington, D.C.