

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

WILLIAM CICCONE,
Appellant,

v.

DEPARTMENT OF THE AIR FORCE,
Agency.

DOCKET NUMBER
AT07528810034-1

DATE: APR 7 1989

John C. Ellis, American Federation of Government
Employees, Patrick Air Force Base, Florida, for
the appellant.

Captain Susan C. Felker, Patrick Air Force Base,
Florida, for the agency.

BEFORE

Daniel R. Levinson, Chairman
Maria L. Johnson, Vice Chairman
Samuel W. Bogley, Member

OPINION AND ORDER

The appellant petitions for review of the initial decision issued on November 14, 1988, that dismissed his appeal for lack of jurisdiction. For the reasons set forth below, the Board DENIES the petition for failure to meet the criteria for review under 5 C.F.R. § 1201.115. The Board REOPENS this case on its own motion, however, AFFIRMS the

initial decision as MODIFIED by this Opinion and Order, and DISMISSES the appeal for lack of jurisdiction.

BACKGROUND

The appellant resigned from the agency effective October 22, 1986, and later appealed to the Board, alleging that his resignation was involuntary. In an initial decision issued on January 29, 1988, the administrative judge found that the appellant's resignation was voluntary because he set the effective date of his resignation, was aware that he did not have to resign, and did not attempt to withdraw his resignation before it became effective. Because the appellant did not request a hearing on this appeal, the administrative judge decided the case on the parties' written submissions.

Although he had designated a representative before the initial decision was issued, the appellant filed his own petition for review, in which he referred to his representative only in the certificate of service. The Board processed the petition as a pro se petition, that is, a petition filed by an appellant who has no representative. The Board found that there were unresolved evidentiary issues and remanded the appeal to the regional office for resolution of those issues. See *Ciccone v. Department of the Air Force*, 37 M.S.P.R. 594 (1988).

Upon remand, the administrative judge issued an order, dated August 23, 1988, scheduling a hearing on the issue of jurisdiction for October 21, 1988. The administrative judge

did not include the appellant's representative on the certificate of service. During the prehearing phase of the appeal, the appellant participated without his representative, although on one occasion he included his representative on the certificate of service. Appeal File, tabs 3 and 6.

At the hearing, the appellant requested a continuance because his representative, who had not been informed of the hearing date, was unavailable to attend. The administrative judge refused the appellant's request for a continuance and proceeded with the hearing. After the hearing, the administrative judge again found that the appellant set the effective date of his resignation, citing inconsistencies between his earlier assertion that he had not filled in the reason for his resignation and his hearing testimony that he had filled in the reason. Initial Decision (I.D.) at 3-4. She also cited his hearing testimony that he had not set the effective date for his resignation and his subsequent testimony that the date could very well be in his own handwriting. *Id.* The administrative judge also found that the appellant did not try to withdraw his resignation before its effective date. I.D. at 5-6. She concluded that the appellant's resignation was voluntary and not based on misleading information, and thus that the Board lacked jurisdiction over his appeal.

The appellant has petitioned for review, alleging that the administrative judge erred by: (1) Finding that he set

the effective date of his resignation; (2) failing to notify his representative of the hearing, a violation of 5 C.F.R. § 1201.26; and (3) finding that his resignation was not coerced or based on improper advice. In addition, the appellant submitted copies of prior certificates of service and correspondence from the Board which included his representative, his original designation of representative form, and a medical report dated February 12, 1987, that discussed an orthopedic evaluation of the appellant's left knee. Only the appellant's signature appeared on the petition for review, which was filed with the Board on November 19, 1988. On November 29, 1988, the appellant filed a form designating his original representative as his representative.

The agency has responded to the petition, alleging that it does not meet the criteria for review. The agency contends that the appellant has not presented new and material evidence and that the appellant has, from the beginning of this appeal, represented himself.

ANALYSIS

The appellant has failed to establish by the preponderance of the evidence that his resignation was involuntary.

In his petition for review, the appellant cites differences between the agency's narrative response to the original petition for appeal and the hearing testimony of the agency's witnesses to support his allegations that the administrative judge erred in finding that he set the date of his resignation. In her decision on remand, the

administrative judge relied on the hearing testimony of Mr. Green and Ms. Siniscalchi, personnel officials at the agency who were involved in processing the appellant's resignation. Because the existence of inconsistencies in the agency's narrative was one of the grounds for the remand of this appeal, we find that it was not error for the administrative judge to place more reliance on the agency witnesses' hearing testimony than on the narrative. In the initial decision on remand, the administrative judge provided a reasoned explanation for her credibility determinations and therefore met the requirements established in *Hillen v. Department of the Army*, 35 M.S.P.R. 453 (1987), and *Spithaler v. Office of Personnel Management*, 1 M.S.P.R. 587 (1980). See also *Borninkhof v. Department of Justice*, 5 M.S.P.R. 77, 83, 87 (1981) (assessment of the probative value of hearsay evidence necessarily depends on the circumstances of each case).

We also note that the medical report submitted with the petition for review of the remand initial decision is not new and material evidence. See 5 C.F.R. § 1201.115; *Avansino v. United States Postal Service*, 3 M.S.P.R. 211, 214 (1980) (the Board will not consider evidence submitted for the first time with the petition for review absent a showing that it was unavailable before the record was closed despite the party's due diligence).

The administrative judge did not commit harmful adjudicatory error when she denied the appellant's request for a continuance of the hearing.

The appellant alleges that the denial of the continuance violated 5 C.F.R. § 1201.26, the Board's regulation governing service of documents on the parties to an appeal and their designated representatives. Under the circumstances of this case, we find that the appellant's former designation of representative was no longer effective because the appellant had been proceeding without obvious participation by that designated representative.

The appellant, not his representative, filed the petition for review of the first initial decision and all of his subsequent submissions.* Furthermore, the appellant has not alleged, and the record does not show, that he attempted to inform the administrative judge that he was still represented during the 2-month period between the order scheduling the hearing, which included a certificate of service conspicuously showing service only to the appellant, and the date of the hearing. The appellant has also failed to show that he was unable to communicate the date of the hearing to his representative during this 2-month period.

We find that the appellant failed to act diligently in informing the Board that he was represented after the remand. See *Bennett v. Department of the Navy*, 1 M.S.P.R.

* In this regard, we note that the appellant's copies of correspondence which show that the Board included the appellant's representative in its mailings predate the appellant's first petition for review.

683, 690 (1980) (the right of appeal is personal to the employee and responsibility for the prosecution of his appeal must remain with him). Accordingly, the administrative judge correctly denied the appellant's request for a continuance. See, e.g., *Pendergraft v. Tennessee Valley Authority*, 6 M.S.P.R. 512, 514 (1981) (the appellant's request for a continuance, made on the first day of the hearing, because his previously undesignated representative had not been informed of the hearing date, did not constitute good cause for granting the continuance).

ORDER

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. See 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

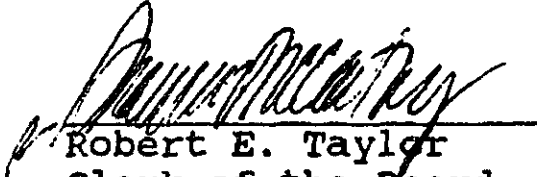
United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your

representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

Washington, D.C.



Robert E. Taylor
Clerk of the Board