UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2009 MSPB 147

Docket No. CH-0752-09-0091-I-1

Grimaldi M. Gonzalez, Jr.,
Appellant,
v.
Department of Veterans Affairs,
Agency.

July 30, 2009

Joe Dolan, Warren, Michigan, for the appellant.

Kathy K. Christian, Esquire, Detroit, Michigan, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman

OPINION AND ORDER

¶1 The appellant has filed a petition for review (PFR) of a March 3, 2009 initial decision (ID) that affirmed his removal. For the reasons set forth below, we DISMISS the PFR as untimely filed by 8 days with no showing of good cause for the delay.

BACKGROUND

¶2 Effective October 3, 2008, the agency removed the appellant from his position as a Health Technician. Initial Appeal File (IAF), Tab 1 at 1-2, 7; Tab 4, Subtab 4 at 1. The appellant filed a timely appeal. IAF, Tab 1.

¶3 Because the appellant failed to attend his requested hearing, the administrative judge (AJ) decided the case on the written record, after keeping the record open for an additional 15 days to allow the appellant the opportunity to submit documents and sworn statements from his previously approved witnesses. IAF, Tab 10, ID at 1-2 & n.1; IAF, Tab 8 at 1-2. The appellant did not make any submissions before the record closed. ID at 2, n.1.

¶4 On March 3, 2009, the AJ issued an ID that affirmed the agency's decision and found that the appellant failed to prove his affirmative defense of disability discrimination. ID at 2-5. The AJ informed the parties that the ID would become final on April 7, 2009, unless either party filed a PFR. ID at 6. On April 15, 2009, the pro se appellant filed a PFR with a motion to accept his late filed PFR, signed under the penalty of perjury. Petition for Review File (PFRF), Tab 1 at 12. In his motion, the appellant indicated that his PFR was untimely because of delays caused by his disability. *Id.* The agency has responded in opposition to the appellant's PFR, asserting that the PFR is untimely with no good cause shown and fails to meet the Board's review criteria. PFRF, Tab 3.

¶5 The Clerk of the Board issued an order advising the appellant of the type of evidence and argument needed to support his claim that the untimely filing was the result of illness and providing the opportunity for the appellant to submit additional evidence and argument on the timeliness issue. PFRF, Tab 4. The appellant has not responded to the Clerk's order.

ANALYSIS

¶6 A PFR must be filed within 35 days after the date the ID was issued, or, if the appellant shows that he received the ID more than 5 days after it was issued, within 30 days after the date that he received the initial decision. *Williams v. Office of Personnel Management*, 109 M.S.P.R. 237, ¶ 7 (2008); 5 C.F.R. § 1201.114(d). If the appellant is represented, the 30-day period begins to run upon receipt of the ID by either the representative or the appellant, whichever

comes first. 5 C.F.R. § 1201.114(d). Here, the last day the appellant could timely file his PFR was April 7, 2009.* ID at 6. As noted above, however, he did not file his PFR until April 15, 2009. PFRF, Tab 1. Thus, his PFR was untimely filed by 8 days.

¶7 The Board will waive the filing deadline only upon a showing of good cause for the delay in filing. *Williams*, 109 M.S.P.R. 237, ¶ 7; 5 C.F.R. § 1201.114(f). To establish good cause for an untimely filing, a party must show that he 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). To determine whether an appellant has shown good cause, the Board will consider the length of the delay, the reasonableness of his excuse and his showing of due diligence, whether he is proceeding pro se, and whether he has presented evidence of the existence of circumstances beyond his control that affected his ability to comply with the time limits, or of unavoidable casualty or misfortune which similarly shows a causal relationship to his inability to timely file his petition. *Moorman v. Department of the Army*, 68 M.S.P.R. 60, 62-63 (1995), *aff'd*, 79 F.3d 1167 (Fed. Cir. 1996) (Table).

¶8 The Board will find good cause for an untimely filing when a party demonstrates that he was unable to file his petition on time due to illness, or mental or physical incapacity. *See Stribling v. Department of Education*, 107 M.S.P.R. 166, ¶ 8 (2007). To establish that an untimely filing was the result of an illness, the party must: (1) Identify the time period during which he suffered from the illness; (2) submit medical evidence showing that he suffered from the alleged illness during that time period; and (3) explain how the illness prevented him from timely filing his petition or a request for an extension of time. *Id.*; *Lacy v. Department of the Navy*, 78 M.S.P.R. 434, 437 (1998).

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* The appellant has not alleged that he received the ID more than 5 days after it was issued. *See* 5 C.F.R. § 1201.114(d).

¶9 On PFR, the appellant submitted a motion in which he asked the Board to waive the filing deadline because "[his] disability has caused [him] delays in handling [his] case. Anywhere from lack of sleep, stress, headaches, [and] mental fatigue." PFRF, Tab 1 at 12. He also submitted the following: (1) A copy of a Family and Medical Leave Act of 1993 (FMLA) healthcare provider certification form executed in 2008; (2) January 2009 affidavits from two of his former supervisors and an agency human resource specialist swearing that he never requested or submitted a request for FMLA leave; (3) notes from his physician's office excusing him from work at various times in 2007 and 2008 for various ailments allegedly caused by his post-traumatic brain injury; and (4) a narrative written by the appellant explaining his failure to appear at his appeal hearing. *Id.* at 13-30. Absent from the record, however, is any medical documentation that directly addresses the period of delay in this case, i.e., between the issuance of the ID on March 3, 2009, and the filing of the PFR on April 15, 2009. ID at 1, 6; PFRF, Tab 1.

¶10 Moreover, even if we were to assume that the appellant's condition in April 2009 was the same as it was when his physician's office excused him from work in 2007 and 2008 for stress, insomnia, and severe headaches, the evidence does not establish that his medical conditions impaired his ability to file a timely PFR or request an extension of time to file. PFRF, Tab 1 at 24-30; *see Stribling*, 107 M.S.P.R. 166, ¶ 11. Further, although the Clerk issued an order providing the appellant with explicit information regarding the legal standard to show good cause for waiver of the Board's filing time limit based on illness under *Lacy*, 78 M.S.P.R. at 437, and gave him the opportunity to submit additional evidence and argument on the timeliness issue, PFRF, Tab 4, the appellant failed to respond. Thus, we find that the appellant has failed to establish good cause for his untimely filing based upon his asserted medical conditions.

¶11 We note that, although the 8-day delay in this case is not especially lengthy, it is not minimal. *See Harris v. Department of Defense*, 101 M.S.P.R.

123, ¶ 10 (2006). In any event, we have consistently denied a waiver of our filing deadline if a good reason for the delay is not shown, even where the delay is minimal and the appellant is pro se. *See Schuringa v. Department of the Treasury*, 106 M.S.P.R. 1, ¶¶ 9, 14 & n.* (2007) (declining to excuse a 4-day delay in filing an appeal where the pro se appellant's submissions did not support a finding that she was medically prevented from timely filing her appeal or from requesting an extension of time); *Lockhart v. Office of Personnel Management*, 94 M.S.P.R. 396, ¶¶ 7-8 (2003) (declining to excuse a 5-day delay in filing a PFR where the pro se appellant failed to show good cause for the delay); *Gaddy v. Department of the Army*, 92 M.S.P.R. 315, ¶¶ 3, 6-7 (2002) (declining to excuse a pro se appellant's 8-day delay in filing an PFR where the appellant failed to show good cause for the delay), *review dismissed*, 55 F. App'x 566 (Fed. Cir. 2003).

ORDER

¶12 Accordingly, we dismiss the PFR as untimely filed with no good cause shown for the delay. This is the final decision of the Merit Systems Protection Board concerning the timeliness of the appellant's PFR. The initial decision remains the final decision of the Board concerning the merits of the 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:

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