UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

EDWARD J. SCHOENING, Appellant, v. DEPARTMENT OF TRANSPORTATION, Agency.	DOCKET NUMBERS AT34438610094 ATO7528610216 DATE: AUG 25 1987

Edward J. Schoening, Tampa, Florida, pro se.

Keith S. May, Esquire, Atlanta, Georgia, for the agency.

BEFORE

Daniel R. Levinson, Chairman
Maria L. Johnson, Vice Chairman
Dennis M. Devaney, Member

Member Devaney concurs in part and dissents in part.

OPINION AND ORDER

This case is before the Board on appellant's petition for review of an initial decision which sustained the agency's action removing him and dismissed his appeal of an alleged suspension for lack of jurisdiction. For the reasons discussed 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 under 5 C.F.R. § 1201.117, however, and AFFIRMS the initial decision as MODIFIED in this Opinion and Order.

BACKGROUND

Appellant petitioned the Board's Atlanta Regional Office for appeal of the agency's actions in placing him on enforced leave and then removing him from his position of Electronics Technician for failure to meet the physical requirements of his position. The record reflects that on March 1, 1985, appellant gave his supervisor a letter from his physician which stated that, because he could not wear contacts or be fitted for glasses, he was medically unable to perform the duties of his job until his vision could be corrected.[1] At the time that appellant presented the physician's report to his supervisor, he requested and was granted sick leave. After appellant exhausted his sick and annual leave, he reported for duty and was advised that he would not be allowed to return to work until he brought a physician's statement certifying that his vision had been corrected. Appellant presented no further medical documentation and was carried in a Leave Without Pay (LWOP) status until he was removed on December 6, 1985, for failure to meet the physical requirements of his position. Appellant appealed the agency's action placing him in an LWOP status to the Board contending that it constituted an

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[1] Appellant was again examined by a different physician on May 22, 1985. This physician also reported that appellant was unable to see with glasses or contact lenses and that the only hope for improving his vision was through a corneal transplant. The record contains no evidence indicating that a corneal transplant was ever done.

illegal suspension. While appellant's suspension appeal was pending, the agency proposed and effected his removal.[2]

Relying, in part, on *Mosely v. Department of the Navy*, 4 M.S.P.R. 135 (1980) *aff'd*, 229 Ct. Cl. 718 (1981), the administrative judge dismissed the alleged suspension for lack of jurisdiction. She found that appellant did not prove that he was ready, willing, and able to work during the enforced leave period, that his placement in an enforced leave status was not disciplinary in nature and that he was not placed in this status pending further inquiry. The administrative judge also sustained the agency's action removing appellant, finding that the agency established that he was physically unable to perform the functions of his position and there was no indication that he could perform them in the future. Finding that the agency considered reassignment but found no vacant position which could be adapted to appellant's 20/400 vision, the administrative judge found that appellant failed to establish his claim of handicap discrimination. Appellant has now filed a timely petition for review.

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[2] Appellant's appeal of the agency's removal action was initially assigned MSPB Docket No. AT07528610212 by the Board's Atlanta Regional Office. On January 3, 1986, the administrative judge joined both actions under MSPB Docket Nos. AT07528610216 and AT34438610094 pursuant to 5 C.F.R. § 1201.36(b) because the removal and the alleged suspension actions both arose from the same facts and circumstances.

ANALYSIS

Enforced Leave Status

In his petition for review, appellant contends that the administrative judge erred in analyzing his case under *Mosely, id.* rather than the less restrictive test for establishing Board jurisdiction under *Thomas v. General Services Administration,* 756 F.2d 86 (Fed. Cir. 1985), because, like the appellant in *Thomas*, he had been placed in a temporary nonduty and nonpay status pending inquiry or a prognosis from a physician.

Subsequent to the issuance of the decisions in *Thomas*, 756 F.2d 86 and *Mosely*, 4 M.S.P.R. 135, the Board decided *Pittman v. Department of the Army*, MSPB Docket No. DA07528610063, slip op. (Mar. 13, 1987), which clarifies the criteria for determining whether an enforced absence constitutes a suspension which falls within the Board's appellate jurisdiction. In *Pittman,* MSPB Docket No DA07528610063, slip. op. at 8, 9, the Board held that the *Mosely* standards apply to all situations where a physically disabled employee is placed on enforced leave, except those cases in which the employee is placed on enforced leave pending inquiry into his ability to perform. Because there was no pending inquiry into appellant's ability to perform in this case, the administrative judge was correct in applying the *Mosely* criteria.

The agency placed appellant on enforced leave because appellant's physician certified that appellant's vision

problems rendered him unable to perform the functions of his position.[3] *See* Agency Exhibit No. 1, Initial Appeal File at Tab 7. Contrary to appellant's contention, there was no pending inquiry. The agency had medical documentation and a physician's certification indicating that appellant was unable to perform the functions of his position. Another physician's statement also indicated that, in the absence of surgery, appellant's vision problems would remain unchanged. *See* Agency Exhibit No. 3, Initial Appeal File at Tab 7. There was no indication that appellant planned to undergo surgery. Moreover, the agency advised appellant that he would be allowed to return to work only upon presentation of a medical release. No medical release was provided by appellant.[4]

The administrative judge was also correct in her *Mosely* analysis. There was no evidence that appellant's placement on enforced leave was disciplinary. Appellant was not disruptive nor was he involved in misconduct. The agency

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[3] Appellant's position required him to maintain instrument landing systems, communication equipment and radar navigational aids. Because the navigational aids were not centrally located at one airport, appellant was required to drive to different locations in order to test the equipment. Moreover, because the equipment was not shut down during testing, improper maintenance posed a danger for the person handling the equipment as well as to a pilot who might be making an instrument approach in bad weather.

[4] The agency in a September 25, 1985 letter to appellant advised him that his medical records indicated that he was unable to perform the duties of his position. It further requested that appellant provide a prognosis from his physician by October 11, 1985, as to when he could perform the full range of his duties. *See* Initial Appeal File at Subtab M.

was not contemplating taking adverse action. In fact, the agency did not have much discretion in placing appellant in an enforced leave status since it was appellant's physician who found him physically unable to perform his job. In light of this medical information, the agency would have been in violation of appellant's physician's instructions if it had allowed appellant to return to work.[5] Moreover, even if the enforced leave action had been a disciplinary action, the medical information established that appellant was not able to work due to his vision problems. Accordingly, the administrative judge was correct in finding that appellant's enforced leave status was not a suspension subject to Board jurisdiction. *See Pittman*, MSPB Docket No. DA0752861006 3, slip. op. at 10.

Allegations of Administrative Judge Error

Appellant contends that the joinder of his alleged suspension and removal appeals adversely affected his rights because it precluded him from having a full discovery period for the removal action. Appellant raised this issue at the hearing below and asserted that if he had been allowed all of the time provided for discovery under the Board's regulations, he would have moved to compel discovery on

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[5] Contrary to appellant's contention, his case is not analogous to *Thomas v. General Services Administration*, 756 F.2d 86 (Fed. Cir. 1985), because his enforced leave was not disciplinary in nature nor was the action pending any agency inquiry. In these respects, the case is identical to *Mosely*.

those questions which the agency did not answer fully. The appellant has provided no basis for setting aside the administrative judge's ruling that he failed to show that his substantive rights were affected by the joinder because the unanswered questions in his discovery request were not relevant to the issues in his appeal.[6]

Appellant also objects to the administrative judge's rulings which denied him admission of evidence regarding the source or cause of his physical inability to perform the essential functions of his position. The administrative judge was correct in finding that, in a removal for physical inability to perform, the issue is whether the employee was able to perform the functions of his position and whether the agency considered accommodation. *See Owens v. Department of the Air Force*, 8 M.S.P.R. 580, 583 (1981) (agency need only establish that there is a clear and direct relationship between the articulated grounds for an adverse personnel action and either the employee's ability to accomplish his or her duties satisfactorily or some other legitimate governmental interest promoting the efficiency of the service).

The appellant has also failed to establish the the administrative judge's denial of his prehearing motions was error. The administrative judge correctly denied

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[6] Appellant attempted to establish that the agency created the hazardous environment which caused his eye sight to deteriorate and some of his discovery questions were designed to elicit this information.

appellant's motion for summary judgment on the basis that it was not error for the proposing and deciding official to be one and the same person. *See Belanger v. Department of Transportation*, 16 M.S.P.R. 304, 309 (1983) (agency committed no harmful procedural error where the proposing and deciding official for removal action were the same person). Denial of appellant's motion to compel discovery and to postpone the hearing was not error. The discovery request, as explained above, was not relevant to the dispositive issues in the case and appellant's request to postpone the hearing was filed the day of the hearing and was not supported with a showing of good cause. *See Gordon v. Department of Agriculture*, 25 M.S.P.R. 438, 440 (1984) (request that a hearing be continued must be supported by a showing of good cause). Finally, appellant's motion for joinder of his disability retirement application pending before the Office of Personnel Management and his appeals before the Board was also correctly denied by the administrative judge. *See Ferby v. United States Postal Service*, 26 M.S.P.R. 451, 453 (1985) (cases may be consolidated for review where the appeals concern the same agency, same representative and identical issues). Joinder would not have served to expedite the processing of these cases. 5 C.F.R. § 1201.36(b)(1).

Handicap/Reprisal Claim

Appellant contends that the case has connotations of reprisal for whistleblowing because no adverse action was taken against him until he filed an Office of Workers Compensation (OWCP) claim. Appellant's assertion, by definition, would not constitute whistleblowing.[7] *See Warren v. Department of the Army*, 804 F.2d 654, 658 (Fed. Cir. 1986). Even assuming that such an assertion could be construed as a reprisal claim for seeking OWCP benefits, the claim is not supported by the record which reflects that the agency's actions were in response to appellant's physician's opinion that appellant could not return to work. Nor has appellant established a basis for setting aside the administrative judge's findings that appellant failed to establish that he could have been accommodated in his position or that the agency found there was no position to which he could have been reassigned.

Accordingly, the initial decision is AFFIRMED as MODIFIED in this Opinion and Order so that the agency's action removing appellant is SUSTAINED and appellant's appeal of the alleged suspension is DISMISSED for lack of jurisdiction. This is the final order of the Merit Systems

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[7] *See* 5 U.S.C. § 2302(b)(8) (whistleblowing is the disclosure by an employee of information which the employee reasonably believes evidences a violation of law, rule or regulation or mismanagement, gross waste of funds, an abuse of authority or a substantial and specific danger to public health or safety).

Protection Board in this appeal. *See* 5 C.F.R. § 1201.113(c).

NOTICE TO APPELLANT

You have one of several alternatives to choose from if you want further review of this decision.

Discrimination Claims

You may petition the Equal Employment Opportunity Commission (EEOC) to consider the Board's decision on your discrimination claims, and still preserve any right you may have to judicial consideration of your discrimination claims or your other claims. 5 U.S.C. § 7702(b)(1). The address of the EEOC is 5203 Leesburg Pike, Suite 900, Falls Church, Virginia 22041. The law is unsettled regarding the time limit for filing where a party is represented. Therefore, you must file a petition with the EEOC no later than thirty days after receipt of this order by you or your representative, whichever occurs first. 5 U.S.C. § 7702(b)(1).

If you do not petition the EEOC for consideration of the Board's decision on your discrimination claims, or if you do petition the EEOC and it affirms the Board's decision in your appeal, you may choose to file a civil action on both your discrimination claims and your other claims in an appropriate United States district court. 5 U.S.C. § 7703(b)(2). The law is unsettled regarding the time limit

for filing where a party is represented. Therefore, if you elect to file a civil action without first petitioning the EEOC, you must file a petition with the district court no later than thirty days after receipt of this order by you or your representative, whichever occurs first. 5 U.S.C. § 7703(b)(2). If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a handicapping condition, you may be entitled to representation by a court-appointed lawyer and to request waiver of any requirement of prepayment of fees, costs, or other security. 42 U.S.C. § 2000e5(f); 29 U.S.C. § 794a.

Other Claims

If you choose not to seek review of the Board's decision on your discrimination claims, you may petition the United States Court of Appeals for the Federal Circuit to review the decision on issues other than prohibited discrimination, if the court has jurisdiction. 5 U.S.C. § 7703(b)(1). The address of the court is 717 Madison Place, N.W., Washington, D.C. 20439. The law is unsettled regarding the time limit for filing where a party is represented. Therefore, you must file a petition with the court no later than thirty days after receipt of this order by you or your representative, whichever occurs first. 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

OPINION OF BOARD MEMBER DENNIS M. DEVANEY

CONCURRING IN PART AND DISSENTING IN PART

FROM THE OPINION AND ORDER

I concur in that part of the opinion which affirms the removal.

For the reasons set forth in my dissent in *Pittman v. Army*, MSPB No. DA07528610063 (April 1, 1987), I cannot join the majority with respect to the suspension. The agency's decision to place the appellant on enforced leave under the circumstances of this case constitutes a "suspension" within the meaning of 5 U.S.C. § 7501(2). *See Mercer v. Department of Health and Human Services*, 772 F.2d 856 (1985); *Thomas v. General Services Administration*, 756 F.2d 86 (1985).

AUG 25 1987

Date

Dennis M. Devaney
Member

Washington, D.C.