

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

JANICE P. WELLMAN,
Appellant,

v.

DEPARTMENT OF HEALTH AND
HUMAN SERVICES,
Agency.

DOCKET NUMBER
DC07529010320

DATE: APR 17 1991

John Brzostowski, American Federation of Government
Employees, Baltimore, Maryland, for the appellant.

Beverly Barber, Baltimore, Maryland, for the agency.

BEFORE

Daniel R. Levinson, Chairman
Antonio C. Amador, Vice Chairman
Jessica L. Parks, Member

OPINION AND ORDER

The appellant petitions for review of the initial decision dismissing her appeal as untimely filed. We GRANT the appellant's petition under 5 C.F.R. § 1201.115, VACATE the initial decision, and REMAND the appeal for further adjudication.

BACKGROUND

On February 2, 1990, an appeal of the agency's action removing the appellant from the GS-5 position of Claims Clerk was submitted to the Board. The appeal as initially submitted

was signed by Wayne Williams, "Union Representative," but contained neither the appellant's signature nor the signature of Dana Shield, the designated representative listed in the appeal. The regional office rejected the appeal on February 7, 1990, because it had not been signed by the appellant or by her representative as required under 5 C.F.R. § 1201.24(a)(9). The rejection notice provided that the appeal could be refiled, with an appropriate signature, within 15 days. In a submission postmarked April 9, 1990, and bearing a cover letter signed by Dana Shield, another copy of the original appeal was submitted. The cover letter inquired into the status of the case, adding that it was Mr. Shield's "recent experience" that Board appeals were generally acknowledged within 30 days of the filing of an appeal. The case was docketed at that time, and the appellant was ordered, by notice dated April 12, 1990, to submit evidence and argument showing why the appeal should not be dismissed as untimely filed and/or refiled. See 5 C.F.R. § 1201.22(c).

In response to the April order, Mr. Shield submitted a statement indicating that the original submission was filed late because Mr. Williams had been unable to contact the appellant to obtain her signature on the appeal due to her "mental condition." The submission also included a copy of the appeal now signed by the appellant, and her affidavit wherein she stated that she did not receive the February 7, 1990, rejection notice until she received the April 12, 1990, acknowledgment order.

The agency submitted its appeal file concerning the appellant, and also filed a motion to dismiss the appeal on the basis of untimeliness. Mr. Shield then submitted "a copy of the psychiatric report documenting the Appellant's condition" relating to the untimely filing of the original appeal. The agency filed an objection to the consideration of this evidence. In the meantime, the appellant submitted a designation of representative form, received by the regional office on May 9, 1990, designating John Brzostowski, of the same union as Messrs. Williams and Shield, as her representative.

On June 7, 1990, the administrative judge conducted a teleconference with the parties' representatives. He denied the appellant's request for a hearing on the issue of timeliness, indicating that "the original appeal, which was filed one day late, had been submitted by a union official acting as appellant's representative." Appeal File (AF), Tab 11 (order describing teleconference proceedings). The administrative judge ruled that the situation was governed by Board holdings that an appellant was bound by the actions and inactions of his or her representative. *Id.*; see *Sofio v. Internal Revenue Service*, 7 M.S.P.R. 667, 670 (1981). He did not specifically rule on the agency's objection to the consideration of the appellant's psychiatric report.

On June 26, 1990, the administrative judge issued his initial decision dismissing the appeal as untimely. On June 29, 1990, subsequent to the issuance of the initial

decision, the regional office received another submission from the appellant, a motion for a hearing on the issue of timeliness, which contained sworn statements from the appellant's son and from his girlfriend regarding the appellant's mental condition, and from Wayne Williams explaining how he came to file the initial appeal. AF, Tab 14. The motion was dated and postmarked June 26, 1990, the day on which the initial decision was issued.

ANALYSIS

In her petition for review, the appellant argues that the administrative judge erred in not granting a waiver of the time limit to appeal, and/or in not granting a hearing to resolve the timeliness issue. The agency asserts, in response, that the petition fails to meet the Board's criteria for review.

A petition for appeal must be filed within 20 days after the effective date of the action being appealed. 5 C.F.R. § 1201.22(b). This time limit may be waived only upon a showing of good cause for the delay in filing. 5 C.F.R. §§ 1201.12, 1201.22(c). To establish good cause for an untimely appeal, a party must show that he exercised 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). In the interest of judicial efficiency and fairness, the Board will not waive its timeliness requirements in the absence of good cause shown, regardless of how minimal

the delay. *Green v. Office of Personnel Management*, 36 M.S.P.R. 131, 132-33 (1988).

In the acknowledgment order, AF, Tab 3, the administrative judge stated that, if the appellant established the existence of a dispute as to facts that would affect his decision regarding timeliness, and if the appellant requested a hearing, she would be entitled to one. We find that the appellant has established disputes as to the facts concerning her mental condition during the time in which she could have filed a timely appeal, as to her ability to comply with subsequent Board orders in a responsible and timely fashion, as to her alleged nonreceipt of the Board's rejection notice, and as to the status of her designation(s) of representation. We find further that these disputes entitle her to the hearing she requested on the timeliness issue. See *Secaida v. United States Postal Service*, 44 M.S.P.R. 256, 258 (1990).* The administrative judge's finding that the appellant was represented when the appeal was filed constitutes a finding that cannot be made on the basis of the current record.

With regard to the appellant's mental condition, the record contains significant evidence of severe disturbance. The agency's file, AF, Tab 5(k), contains a copy of the

* Due to the unresolved factual disputes that concern the appellant's stages of representation and her mental competence and ability to prosecute her appeal, we have considered all of the documents that were submitted by the parties for purposes of this decision, regardless of whether they were available to the administrative judge at the time he issued his initial decision.

agency's preremoval, April 13, 1989, notice of referral of the appellant to counseling. The notice states, *inter alia*:

The purpose of this letter is to express my concern for your personal well-being [sic] and professional welfare, and my strong recommendation that you seek professional counseling. In recent conversations with me you have mentioned that you are troubled by personal problems. You have told me that someone is trying to kill you; that you keep hearing noises in the attic but who or what it is, is gone by the time you get there; that people are following you in different cars and trucks. On the basis of that information, as well as the serioius [sic] decline in your work performance I believe it is imperative that you contact the Personnel Counselor assigned to Division III.

There is ample evidence to suggest that your personal problems are interfering with your ability to meet your responsibilities. Your performance had deteriorated significantly during the last several months. You do not seem to be able to concentrate on your work but for a short period of time. You have dozed off ... are not alert and seem disinterested ... and have told me you are having trouble keeping up with changes. Your attendance [sic] has become very poor to non-existent. It is clear to me and should be clear to you that continuation of these types of problems will have a negative impact on your continued employment with this organization.

The psychiatric report submitted by Mr. Shield, AF, Tab 7, dated May 17, 1989, states:

Her diagnosis is Atypical Bipolar Disorder with Mania, in Remission. She had psychotic symptoms when I first saw her 4/26/89. It is reasonable to presume she could have been psychotic for the prior several weeks, as she states. She was treated with narvane, and symptoms have cleared, since 4/26/89. - She was incapable of appreciating a work setting, when I saw her, could not have worked then, and in all likelihood was unable to work in the period prior to her first office visit to me. She can return to work now.

The appellant's son, Sandy Shuman, states, *inter alia*, AF, Tab 14, "under penalty of perjury," that his mother has been living with a man who was "in and out of jail his whole life . . . , taking the mail, keeping her home from work, and feeding her cocaine (by smoking)." He adds:

[H]er state of mind between the time of October, 1989 and February 1990 was in and out of reality, she could not reasonably have been able to return any letters or answer questionnaires [sic], because she could not comprehend what she was reading if she even got a chance to read it, because like I stated earlier, half the time she didn't even get the mail. The man she is living with would throw it away. . . . She has totally abandoned everything she has stood for over the past year and a half, and if anyone should have noticed this, it should have been the people at her job.

Laurel Anne Redman, "Sandy Shuman's girlfriend," says in her statement given "under penalty of perjury," *id.*:

I have known Janice Wellman for the past six years. In December, Janice was very unstable. I would go down her house many times in the middle of the night at her request. One night she called my house and said "They're here!" and hung up the phone. I got dressed and went down to her house and she was running from room to room trying to find someone. She said that the people were living in her house, putting microphones in the wall, walking on her roof, they had made secret passages throughout her house. On one instance in January she claimed the spics were cloning everybody. Her next door neighbors weren't really themselves they were clones. Her dog wasn't really her dog. Then she claimed they were getting ready to clone her, she then showed me her Driver's license and said the picture wasn't really her and that the spics had changed the picture. Janice thought everyone was conspiring against her. Janice has a boyfriend named Mike. Sandy and I believe Mike caused some of the problems that Janice is having.

In addition, the appellant correctly asserts, in her Motion for Hearing, *id.*, that there exists a genuine dispute as to whether she was actually represented by any third party at the time the initial request for appeal was filed on February 2, 1990. She argues that she cannot be bound by those whom she has not appointed. In Mr. Williams' sworn statement, AF, Tab 14, he explains that, toward the end of January 1990, he received a telephone call from Sandy Shuman, who told him that his mother had received a termination notice and asked him if he would look at the papers. He did so and prepared the appeal, but was unable to contact the appellant in order to obtain her signature. He adds:

Since I had not talked directly with Ms. Wellman about the termination notice, I did not think that a valid representational relationship existed between us. I thought that I needed her signature to file a valid appeal on her behalf. Unable to contact Ms. Wellman, I finally signed the appeal myself and submitted it hoping that my action would protect Ms. Wellman's rights.

In her petition for review, the appellant states that, during the time for filing her appeal, she was "actively hallucinating, disoriented, and avoiding contact with others." She also asserts that her condition substantially interfered with her ability to obtain valid representation. The agency has not refuted these assertions. The appellant also asserts that she cannot be bound by the actions of one who was not designated as her representative. In addition, she has included another psychiatric report, which indicates that in

October 1989, she was seen for "excessive use of marijuana." See Report of Dr. Levin, dated June 27, 1990. She also indicates an intention to submit records of her hospitalization when they become available.

The agency maintains that several documents the appellant has submitted, and documents she plans to submit, as discussed above, should not be considered because the appellant did not show that they were unavailable, despite due diligence, when the record was closed. The appellant's diligence in light of her mental condition, however, remains to be determined following a hearing. The agency also speculates that the appellant may have received the Board's rejection notice and discarded or misplaced it. This speculation, we find, merely presents the agency's version of a pertinent fact that is in dispute. In addition, the agency maintains that if, as the appellant argues, she should not be bound by the actions or inactions of Mr. Williams relative to the filing of her initial appeal, then her appeal was not actually filed until approximately April 25, 1990, which is approximately 80 days after the due date. Again, however, the appellant's ability to obtain and effectively communicate with a representative sooner remains to be determined. The Board has found good cause to excuse a six-month filing delay where the appellant's mental incompetence caused her to irrationally and intentionally withhold the appealable decision from her representative, and the representative acted diligently upon

discovering it. See *Tuten v. Office of Personnel Management*, 30 M.S.P.R. 30, 32-33 (1986).

As the appellant states in her motion for hearing, her medical condition is not fully documented, and "a hearing will permit [her] to testify as to her condition at the time of filing." We conclude that the appellant has presented non-frivolous allegations of fact that, if proven, may establish good cause for waiver of the Board's time limit for appeal. See *Scalida*, 44 M.S.P.R. at 258.

ORDER

Accordingly, we REMAND the appeal to the regional office for issuance of a new initial decision consistent with this Opinion and Order. The administrative judge shall hold a hearing on the issue of the timeliness of the petition for appeal. If the administrative judge determines that there is good cause for the untimely filing, he shall proceed with the adjudication of the appeal.

FOR THE BOARD:

Washington, D.C.



Robert E. Taylor
Clerk of the Board