

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

2009 MSPB 86

Docket No. DE-0845-07-0375-I-2

**Gayle F. Perry,
Appellant,**

v.

**Office of Personnel Management,
Agency.**

OPM Claim No. CSA 8 076 367

May 27, 2009

Gayle F. Perry, West Valley City, Utah, pro se.

Kristine Prentice, Washington, D.C., for the agency.

BEFORE

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

OPINION AND ORDER

¶1 We have docketed the appellant's recent submission as a petition for review (PFR) of the initial decision in this case. That decision affirmed the reconsideration decision in which the Office of Personnel Management (OPM) found that the appellant had received an annuity overpayment. For the reasons set forth below, we DISMISS the PFR as untimely filed with no showing of good cause for the delay.

BACKGROUND

¶2 On April 24, 2007, OPM issued a reconsideration decision in which it found that the appellant had been overpaid \$17,218.26 in Federal Employees' Retirement System disability benefits. Appeal File, MSPB Docket No. DE-0845-07-0375-I-1 (I-1 File), Tab 6, Subtab 2. The appellant filed a timely appeal of that decision, and on July 30, 2008, the administrative judge to whom the appeal was assigned issued an initial decision affirming OPM's reconsideration decision. *Id.*, Tab 1; Appeal File, MSPB Docket No. DE-0845-07-0375-I-2 (I-2 File), Tab 7.*

¶3 On December 29, 2008, the appellant electronically filed a document with the Board's Denver Field Office requesting reopening of the initial decision. Petition for Review File (PFRF) Tab 1. The document was forwarded to the Clerk of the Board, who notified the appellant that his filing would be considered a PFR of the initial decision. PFRF, Tab 1 at 1-2; *id.*, Tab 2 at 1. The Clerk also informed the appellant that his PFR was untimely filed, that the Board's regulations required him to file a motion to accept the submission as timely and/or to waive the time limit for good cause, and that such a motion should include a statement signed under penalty of perjury or an affidavit showing that the petition was timely filed or that there was good cause for the late filing. *Id.*, Tab 2 at 1-2. The appellant did not file any further submissions.

ANALYSIS

¶4 An initial decision becomes final 35 days after issuance when neither party files a timely PFR. [5 C.F.R. § 1201.113](#)(a). The Board treats a request to reopen an initial decision that became final under those circumstances as an untimely filed PFR. *See Valdez v. Office of Personnel Management*, [103 M.S.P.R. 88](#), ¶ 4 (2006); *Dunn v. Department of the Army*, [100 M.S.P.R. 89](#), ¶ 5 (2005); *Blair v.*

* The administrative judge dismissed the appeal without prejudice at the appellant's request, and the appellant subsequently refiled it. I-1 File, Tab 11; I-2 File, Tab 7.

Office of Personnel Management, [89 M.S.P.R. 113](#), ¶ 9 (2001), *aff'd*, 31 F. App'x 646 (Fed. Cir. 2002). Therefore, we will consider the appellant's submission as an untimely filed PFR.

¶5 The appellant bears the burden of proof, by preponderant evidence, with regard to timeliness. *McPherson v. Department of the Treasury*, [104 M.S.P.R. 547](#), ¶ 4 (2007); *see* [5 C.F.R. § 1201.56\(a\)\(2\)\(ii\)](#). To be timely, a PFR must be filed within 35 days after the initial decision was issued or, if the appellant shows that he received the initial decision more than 5 days after it was issued, within 30 days after the date it was received. *McPherson*, [104 M.S.P.R. 547](#), ¶ 4; 5 C.F.R. § 1201.114(d). Here, the initial decision was issued on July 30, 2008, and it stated that it would become final on September 3, 2008, unless a PFR was filed by that date. I-2 File, Tab 7 at 1, 8. The appellant does not allege that he received the initial decision more than 5 days after its issuance date and he did not file his PFR until December 29, 2008. PFRF, Tab 1. Thus, the PFR was filed nearly 4 months late.

¶6 The Board will waive its time limit only upon a showing of good cause for the delay in filing. [5 C.F.R. § 1201.114\(f\)](#). To establish good cause for the untimely filing of a PFR, the appellant must show that he exercised due diligence or ordinary prudence under the particular circumstances of the case. *See 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).

¶7 Although the appellant is appearing pro se in this appeal, we have rejected similar claims for shorter delays. *See, e.g., Gaines v. U.S. Postal Service*, [96 M.S.P.R. 504](#), ¶ 7 (2004) (a delay of 37 days is not minimal). Moreover, the appellant did not address the timeliness issue in his PFR, nor did he respond to the Clerk's notice regarding timeliness. Because the appellant has failed to demonstrate diligence or ordinary prudence that would excuse his late filing, we dismiss his PFR as untimely filed.

ORDER

¶8 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 with respect to the merits of 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 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:

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