

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

2010 MSPB 110

Docket No. DA-0752-09-0367-I-1

**Jeffrey Thom,
Appellant,**

v.

**Department of the Army,
Agency.**

June 15, 2010

Brook L. Beesley, Alameda, California, for the appellant.

Craig Paulson, Esquire, Texarkana, Texas, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The appellant has filed a petition for review (PFR) of an initial decision that affirmed his removal due to misconduct. For the following reasons, we GRANT the PFR, and AFFIRM the initial decision as MODIFIED, still AFFIRMING the appellant's removal.

BACKGROUND

¶2 The agency removed the appellant from his position as a Heavy Mobile Equipment Mechanic based on a single charge of absence without leave (AWOL) from September 14, 2005, through October 13, 2005. See Initial Appeal File

(IAF), Tab 3, Subtabs 4A (removal SF-50), 4B (decision letter), 4D (proposal notice). After the appellant filed a discrimination complaint, he timely submitted a Board appeal, and he alleged, as affirmative defenses, harmful error, that the agency's action was based on prohibited disability discrimination and that it was taken in reprisal for filing an equal employment opportunity complaint. *See* IAF, Tabs 1, 20 (Summary of Telephonic Status and Prehearing Conferences), 24 (discussing the appellant's disability discrimination claim). A hearing was held on September 18, 2009, and September 25, 2009. Hearing CDs (HCDs). The administrative judge issued an initial decision sustaining the AWOL charge, rejecting each of the appellant's affirmative defenses, and affirming the removal penalty. IAF, Tab 27. After the appellant requested, and was granted, an extension of time to obtain copies of the hearing tapes, he filed a PFR and the agency filed a response. Petition for Review File (PFR File), Tabs 1-3, 5.

ANALYSIS

¶3 On PFR, the appellant does not appear to challenge the administrative judge's decisions sustaining the AWOL charge and rejecting the appellant's affirmative defenses.¹ Therefore, we affirm these decisions on review. Instead, the appellant's primary argument on PFR appears to be that the agency and the administrative judge did not properly consider his medical conditions as a mitigating factor in the penalty determination. *See* PFR File, Tab 3 at 4 ("Although the AJ stated that all of the Douglas factors were considered by the deciding official (Yarber), the eleventh Douglas factor, . . . (mitigating circumstances such as 'unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others

¹ To the extent the appellant may be challenging on review the administrative judge's determination that he did not prove harmful error, *see* PFR File, Tab 3 at 3, we discern no error in the administrative judge's findings in this regard, *see* IAF, Tab 27 at 9-10.

involved in the matter’) appears to be directly relevant to [these] facts, but is not mentioned and is not shown to have been considered by the agency or AJ.”).

¶4 The appellant correctly notes that deciding official Cleophus Yarber, Jr., testified that he did not see any of the appellant’s medical documentation, nor was he even aware that the appellant had a relevant medical condition, prior to making a decision to remove the appellant. HCD (Yarber). In fact, the decision letter does not discuss the appellant’s medical documentation. See IAF, Tab 3, Subtab 4B. Although it is true that the administrative judge did not explicitly address whether the appellant’s medical conditions precluded his removal, an administrative judge’s failure to mention all of the evidence of record does not mean that he did not consider it in reaching his decision.² *Marques v. Department of Health & Human Services*, [22 M.S.P.R. 129](#), 132 (1984), *aff’d*, 776 F.2d 1062 (Fed. Cir. 1985) (Table), *cert. denied*, 476 U.S. 1141 (1986). However, since this issue was not expressly addressed by the administrative judge we grant the PFR to address the evidence of the appellant’s medical conditions. We need not remand the appeal to the administrative judge, as the appellant requests on PFR, see PFR File, Tab 3 at 5, because the record is fully developed on this issue.

¶5 An AWOL charge will not be sustained if an appellant presents administratively acceptable evidence showing that he was incapacitated for duty during the relevant time period if the employee has sufficient sick leave to cover the period of absence. *Valenzuela v. Department of the Army*, [107 M.S.P.R. 549](#), ¶ 9 (2007). The appellant’s evidence regarding his medical conditions included

² Indeed, the administrative judge discussed many of the appellant’s medical conditions in his analysis of the disability discrimination claim. See IAF, Tab 27 at 7-8 (concluding that, even if the appellant was an individual with a disability, based on his conditions, including hypertension, knee injury, dislocated shoulder, depression, anxiety and insomnia, he was not a qualified individual with a disability because he did not demonstrate that he could perform the essential tasks of the position with or without a reasonable accommodation).

his testimony, the testimony of Nurse Practitioner Paul Smith and several medical certificates.³ In particular, the appellant submitted a September 16, 2005 medical certificate from Nurse Practitioner Smith, explaining that, due to workplace issues, the appellant recently had an exacerbation of hypertension and an acute exacerbation of anxiety and insomnia, that he was being placed on medication for his blood pressure as well as his anxiety, that he will have an appointment with a psychiatrist in the next few weeks, and that he “will be reevaluated every 10-14 days for the present time.” IAF, Tab 23, Exhibit C-2. The agency argues in its response to the PFR that the Board is not required to consider the appellant’s medical conditions because he failed to provide his supervisors with medical information during the time he was AWOL and because he missed medical appointments subsequent to September 2005. PFR File, Tab 5 at 5.

¶6 Even if the appellant failed to provide the September 16, 2005 medical certificate to the agency, we may properly consider it on review. *See Wesley v. U.S. Postal Service*, [94 M.S.P.R. 277](#), ¶ 18 (2003) (“A charge of AWOL will not be sustained if the appellant presents evidence to the Board that was not previously presented to the agency showing that he was incapacitated for duty during the relevant time period.”). Significantly, however, none of the appellant’s medical documentation, including the September 16, 2005 certificate, indicated that the appellant was incapacitated for duty because of these conditions, or otherwise explained why the appellant was absent during the

³ *See* HCD (appellant) (explaining that he had hurt his right shoulder and left knee in January-February 2005, that he started having blood pressure problems, that he strained his groin muscle, that he was sick and nauseous and always had headaches and was dizzy); HCD (Smith); IAF, Tab 3, Subtabs 4G (August 16, 2005 certificate, stating that the appellant recently had episodes of heat exhaustion and exacerbation of high blood pressure and that he should not work until he is re-examined in 10 days), 4I (June 6, 2005, and June 20, 2005, certificates); IAF, Tab 19, Exhibits B (August 8, 2005 certificate, which appears to state that the appellant is being treated for heat exhaustion, and that he can return to work on Friday, August 12, 2005), B-2 (August 15, 2005 U.S. Army Occupational Health Clinic Pass).

relevant time period. Moreover, the appellant has not satisfactorily explained how his medical conditions rendered him unable to present administratively acceptable evidence to show that he was incapacitated for duty. For these reasons, the agency properly considered him to be AWOL because he failed to provide the agency with administratively acceptable evidence of his incapacitation during the relevant period, and nothing in the record indicates that his medical conditions precluded him from providing such information or caused him to miss medical appointments.⁴ We therefore conclude that the appellant's medical conditions do not warrant reversal of the charge of AWOL. *Cf. Sherlock v. General Services Administration*, [103 M.S.P.R. 352](#), ¶ 12 (2006) (noting that “the appellant has not explained how any of her alleged ailments prevented her from attending her scheduled training on the dates in question, or how any medical condition accounted for her failure to contact her supervisor in San Francisco to request leave”).

¶7 When the Board sustains all of an agency's charges, the Board may mitigate the agency's original penalty to the maximum reasonable penalty when it finds the agency's original penalty too severe. *Lachance v. Devall*, [178 F.3d 1246](#), 1260 (Fed. Cir. 1999); *see Douglas v. Veterans Administration*, [5 M.S.P.R. 280](#), 306 (1981) (the Board will review an agency-imposed penalty only to determine if the agency considered all the relevant factors and exercised management discretion within tolerable limits of reasonableness). Having considered the relevant *Douglas* factors, including the appellant's medical conditions as a mitigating factor,⁵ we conclude that removal is a reasonable penalty under the

⁴ The administrative judge found that the appellant testified that, as of September 2005, he had no available leave to cover any of his absences. IAF, Tab 27 at 4. The appellant does not challenge this finding on review.

⁵ “[E]vidence that an employee's medical condition or mental impairment played a part in the charged conduct is ordinarily entitled to considerable weight as a mitigating factor.” *Roseman v. Department of the Treasury*, [76 M.S.P.R. 334](#), 345 (1997).

circumstances. *See Foreman v. U.S. Postal Service*, [89 M.S.P.R. 328](#), ¶ 17 (2001) (being AWOL for 16 days is serious); *see also Maddux v. Department of the Air Force*, [68 M.S.P.R. 644](#), 645-46 (1995) (holding that removal is a reasonable penalty for approximately 2 weeks of AWOL, despite the fact that there were mitigating factors, including the employee's length of service and his personal problems), *review dismissed*, 91 F.3d 170 (Fed. Cir. 1996) (Table). Removal is warranted in response to the appellant's significant period of unauthorized absence from duty because of its obvious disruption to the efficiency of the service. *See Desiderio v. Department of the Navy*, [4 M.S.P.R. 84](#), 85 (1980) (“[U]nauthorized absence from duty has been held to be proper grounds for removal since by its very nature it disrupts the efficiency of the service.”). Therefore, we affirm the initial decision as modified herein.

ORDER

¶8 This is the final decision of the Merit Systems Protection Board in 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 further review of this final decision.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review this final decision on your discrimination claims. *See* Title 5 of the United States Codes, section 7702(b)(1) ([5 U.S.C. § 7702\(b\)\(1\)](#)). You must send your request to EEOC at the following address:

Equal Employment Opportunity Commission
Office of Federal Operations
P.O. Box 77960
Washington, DC 20036

You should send your request to EEOC no later than 30 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 EEOC no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time.

Discrimination and Other Claims: Judicial Action

If you do not request EEOC to review this final decision on your discrimination claims, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. *See* [5 U.S.C. § 7703](#)(b)(2). You must file your civil action with the district court no later than 30 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 district court no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e5(f); 29 U.S.C. § 794a.

Other Claims: Judicial Review

If you do not want to request review of this final decision concerning your discrimination claims, but you do want to request review of the Board's decision without regard to your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review this final decision on the other issues in your appeal. 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.