

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

2010 MSPB 224

Docket Nos. AT-0752-10-0054-I-2
AT-0752-10-0054-I-1

Byron R. Thomas,

Appellant,

v.

Department of the Treasury,

Agency.

November 12, 2010

Byron R. Thomas, Cedartown, Georgia, pro se.

Andrew M. Greene, Esquire, Atlanta, Georgia, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant petitions for review of the initial decision in MSPB Docket No. AT-0752-10-0054-I-2 dismissing as premature his refiled appeal in MSPB Docket No. AT-0752-10-0054-I-1. For the reasons set forth below, we GRANT the appellant's petition for review in MSPB Docket No. AT-0752-10-0054-I-2, VACATE the initial decision in MSPB Docket No. AT-0752-10-0054-I-2, REOPEN the prior appeal in MSPB Docket No. AT-0752-10-0054-I-1 on the Board's own motion under [5 C.F.R. § 1201.118](#), VACATE that initial decision dismissing the appellant's appeal without prejudice, and REMAND the

appellant's appeal to the regional office for further proceedings consistent with this Opinion and Order.

BACKGROUND

¶2 The appellant was employed by the agency as a Tax Examining Technician at the agency's Chamblee, Georgia facility. Initial Appeal File (IAF) 1 (MSPB Docket No. AT-0752-10-0054-I-1), Tab 1. On August 14, 2009, the agency proposed the appellant's removal for inappropriate conduct, failure to follow a management directive, and creating a disruption in the workplace. IAF 1, Tab 4, Subtab 4c. The deciding official sustained the charges and removed the appellant, effective September 19, 2009. IAF 1, Tab 4, Subtab 4b.

¶3 The appellant filed a timely appeal to the Board. IAF 1, Tab 1. The administrative judge issued a hearing order, setting December 2, 2009, as the date for the prehearing conference. IAF 1, Tab 5. Both sides provided prehearing submissions. IAF 1, Tabs 6, 7, 8. On December 3, 2009, the administrative judge issued an initial decision dismissing the appellant's appeal without prejudice. IAF 1, Tab 9. The administrative judge noted that, at the prehearing conference, "the appellant stated that he was interested in filing a disability retirement application based on his removal for various conduct deficiencies that appear to be related to a medical condition." *Id.* at 1. The administrative judge also indicated that the agency "may have some obligation to assist the appellant" under [5 C.F.R. § 844.202](#). *Id.* at 1-2. The administrative judge ordered that the appellant could "refile the appeal no later than 30 days after receipt of a final decision by the Merit Systems Protection Board disallowing her [sic] application for disability retirement." *Id.* at 2. The administrative judge emphasized that the appellant could only refile his appeal if his application for disability retirement benefits was denied. *Id.* at 2 n.2.

¶4 On January 3, 2010, the appellant filed with the Clerk of the Board (Clerk) a request for "board review of case number AT-0752-10-0054-I-1." IAF 2,

(MSPB Docket No. AT-0752-10-0054-I-2), Tab 1, Attachment. The Clerk construed the appellant's petition as the refiling of his appeal and forwarded it to the regional office for docketing. IAF 2, Tab 1. The administrative judge issued an order to show cause directing the appellant to explain why this appeal should not be dismissed as premature and/or contrary to the instructions for refiling set forth in the initial decision in his previous appeal. IAF 2, Tab 5. The appellant responded and argued that the agency was not being diligent in helping him to file a disability retirement application and that the result in the previous initial decision would prevent him from ever being heard on the merits of his removal appeal; he indicated that he wished to proceed on the merits of his removal appeal. IAF 2, Tab 6 at 1-2.

¶5 On February 16, 2010, the administrative judge held a telephone conference with the parties to discuss the status of the appellant's application for disability retirement, and the agency stated that it was finalizing the application package for transmittal to the Office of Personnel Management (OPM). IAF 2, Tab 9. The same day, the administrative judge issued an initial decision that dismissed the refiled appeal as premature based upon the initial decision in his previous appeal. IAF 2, Tab 8.

¶6 The appellant has filed a timely petition for review. Petition for Review File (PFR File), Tab 1. The agency has filed a response in opposition to the petition. PFR File, Tabs 3, 4.

ANALYSIS

¶7 An administrative judge has wide discretion to dismiss an appeal without prejudice in the interests of fairness, due process, and administrative efficiency, and the administrative judge may order such a dismissal at the request of one or both parties, or to avoid a lengthy or indefinite continuance. *See Gingery v. Department of the Treasury*, [111 M.S.P.R. 134](#), ¶ 9 (2009). The administrative judge, however, must exercise her discretion in a manner consistent with Board

policy, including the Board's policy that cases be adjudicated expeditiously. *See Schulte v. Department of the Air Force*, [100 M.S.P.R. 141](#), ¶ 5 (2005). Therefore, when an administrative judge dismisses a case without prejudice, she must set a date certain for refiling, rather than leaving the refiling date open or ambiguous. *See Dey v. Nuclear Regulatory Commission*, [106 M.S.P.R. 167](#), ¶ 8 (2007); *see also Selig v. Department of the Army*, [102 M.S.P.R. 189](#), ¶ 7 (2006) (the refiling date should not be set as the date the appellant's application for benefits with a third-party agency is denied at some unidentified point in the future).

¶8 An employing agency is required to file a disability retirement application on an employee's behalf where the employee meets the service requirements for disability retirement and five conditions are met: (1) The agency issued a decision to remove the employee; (2) the agency concludes after reviewing the medical documentation that the cause of the employee's misconduct is disease or injury; (3) the employee is institutionalized or the agency concludes (based upon medical and other information) that the employee is incapable of making the decision to file an application for disability retirement; (4) the employee has no personal representative or guardian; and (5) the employee has no immediate family member who is willing to file the application on his behalf. *Galwey v. U.S. Postal Service*, [104 M.S.P.R. 574](#), ¶ 5 (2007); *see also 5 C.F.R. § 844.202(a)*. If all five conditions are not met, but the agency concludes that the employee's removal is based upon reasons caused by a medical condition, the agency need only notify the employee of his possible eligibility for disability retirement and the relevant time limit for filing the application. *See 5 C.F.R. § 844.202(b)*. When [5 C.F.R. § 844.202\(a\)](#) is triggered, the Board is to oversee a cooperative process in conjunction with the agency and OPM that assures that the mentally-impaired employee will not lose his rights to disability retirement benefits based upon his incapacity. *See Dixon v. U.S. Postal Service*, [89 M.S.P.R. 148](#), ¶ 4 (2001); *see also Harris v. Department of Veterans Affairs*, [142 F.3d 1463](#), 1471-72 (Fed. Cir. 1998). The administrative judge is required to

monitor the progress of the application, set reasonable deadlines as appropriate, and ensure that the agency and OPM process the application expeditiously and in good faith. *See Nowell v. Department of the Army*, [91 M.S.P.R. 296](#), ¶ 5 (2002).

¶9 As indicated in the initial decision of the appellant's first appeal, the administrative judge concluded from the prehearing conference: (1) That the appellant agreed to dismiss his removal appeal without prejudice to pursue a disability retirement application; (2) that the appellant potentially suffered from a mental illness that could warrant the award of disability retirement benefits; (3) that the appellant's potential mental illness may have resulted in his removal; and (4) that the appellant's potential mental illness and other circumstances may have triggered the agency's responsibilities under [5 C.F.R. § 844.202](#)(a). IAF 1, Tab 9 at 1-2. The administrative judge, however, did not document the results of the prehearing conference for the record.

¶10 A dismissal of the appeal without prejudice is error in this case because the record is not clear that the appellant intended to apply for a disability retirement or requested that his appeal be dismissed without prejudice. *See generally McCarty v. Environmental Protection Agency*, [108 M.S.P.R. 45](#), ¶ 15 (2008) (the administrative judge's failure to document the results of the prehearing conference meant none of his rulings were matters of record in the appeal). Moreover, the absence of a documented record of the matters discussed at the prehearing conference, in particular the appellant's purported agreement to dismiss his appeal, deprived the appellant of any opportunity to object to the administrative judge's conclusions from the prehearing conference. *Id.* Because the initial decision in the appellant's refiled appeal was based entirely on the initial decision in the first appeal, neither of the decisions is supported by the record.

¶11 Further, there is a question as to whether the appellant voluntarily agreed to the dismissal of his case. Shortly after the administrative judge issued the initial decision in the first appeal, the appellant filed a purported petition for

review challenging it. IAF 2, Tab 1. Thereafter, in his response to the show cause order in the refiled appeal, he argued that the initial decision in his first appeal deprived him of his right to a hearing on the merits of his removal, and he expressed his desire to proceed with his case. IAF 2, Tab 6. These filings suggest two possibilities that the administrative judge did not consider in her initial decision in the refiled appeal – that the appellant did not actually voluntarily agree to dismiss his case or that he did not understand (or was not informed of) the consequences of agreeing to dismiss his case. Dismissing his case under such circumstances is contrary to the requirements of due process. *See Gingery*, [111 M.S.P.R. 134](#), ¶ 9. The Board has held that a dismissal without prejudice should not become a trap to deny an appellant the opportunity to have his case decided on the merits. *Jaramillo v. Department of the Air Force*, [106 M.S.P.R. 244](#), ¶ 6 (2007).*

¶12 The administrative judge also did not properly apply the requirements of [5 C.F.R. § 844.202](#). Specifically, the administrative judge appears to have imposed an obligation on the agency to assist the appellant with preparing a disability retirement application without making any findings on whether the appellant's situation met the conditions in [5 C.F.R. § 844.202\(a\)](#). Furthermore, if the administrative judge believed the requirements of 5 C.F.R. § 844.202(a) were triggered, the administrative judge was required to monitor the application process, not leave matters solely to the agency and OPM by dismissing the case. *See Nowell*, [91 M.S.P.R. 296](#), ¶ 5.

* Further, even if dismissing the case without prejudice was appropriate, the administrative judge erred in ordering that the appellant could only refile his appeal if his application for retirement benefits was denied. IAF 1, Tab 9 at 2. A date certain should have been set for refiling the appeal. *See Dey*, [106 M.S.P.R. 167](#), ¶ 8. We also note that the administrative judge erroneously identified the “Merit Systems Protection Board” as the entity that would review the appellant's application for disability retirement benefits. IAF 1, Tab 9 at 2. The correct entity is OPM, and the administrative judge acknowledged this in the initial decision in the refiled appeal. IAF 2, Tab 8 at 4 n.4.

¶13 Because the record is insufficiently developed on the relevant issues, we must remand the appeal to the regional office for further proceedings. *McCarty*, [108 M.S.P.R. 45](#), ¶ 16; *Galwey*, [104 M.S.P.R. 574](#), ¶¶ 13-14.

ORDER

¶14 We vacate the administrative judge's decisions in MSPB Docket Nos. AT-0752-10-0054-I-1 and AT-0752-10-0054-I-2, and we remand the appeal to the regional office for further proceedings consistent with this Opinion and Order.

FOR THE BOARD:

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