UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2013 MSPB 1

Docket No. CH-0752-12-0280-I-1

Rogers Butler,
Appellant,
v.
Department of Veterans Affairs,
Agency.

January 2, 2013

Rogers Butler, Chicago, Illinois, pro se.

Janet M. Kyte, Esquire, Hines, Illinois, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

OPINION AND ORDER

¶1 The appellant has petitioned for review of an initial decision that dismissed his removal appeal as untimely filed. For the reasons discussed below, we REVERSE the initial decision and REMAND the case to the regional office for adjudication on the merits.

BACKGROUND

¶2 The sole issue before the Board is whether the appellant timely filed this mixed appeal under 5 C.F.R. § 1201.154(b)(1) (Jan. 1, 2012), i.e., whether he filed the appeal within 30 days of having received a copy of the Final Agency

Decision (FAD), and, if not, whether he established good cause for his delay in filing. The FAD was issued on November 23, 2011. The appeal was filed on February 17, 2012. Initial Appeal File (IAF), Tab 1. Applying the presumption of 5 C.F.R. § 1201.4(l) (Jan. 1, 2012) and related case law that a mailed document is received 5 days after mailing, the administrative judge found that the appeal was filed more than 7 weeks late and that the appellant had not established good cause for the delay in filing.

¶3 The appellant claimed that the appeal was timely filed because he did not receive the FAD until January 27, 2012, when his nephew provided him a United Parcel Service (UPS) package that had been delivered to his old address on January 25. IAF, Tab 12. The appellant claimed he had given the agency representative (Janet Kyte) his new address on November 7. *Id.*[1] He claimed that the UPS package contained both the FAD at issue in this case (relating to the "0562" equal employment opportunity (EEO) complaint) and a document relating to a different discrimination complaint concerning matters that were not appealable to the Board (the "2337" EEO complaint). *Id.* The judge rejected the appellant's claim because he had referenced a document relating to the 2337 discrimination complaint.

ANALYSIS

¶4 The timeliness of the appeal in this case is governed by 5 C.F.R. § 1201.154(b) (Jan. 1, 2012), which provided that, when an "appellant has filed a timely formal complaint of discrimination with the agency," the "appeal must be filed within 30 days after the appellant receives the agency resolution or final

[1] Although he said he provided the address to Ms. Kyte on November 7, 2012, he must have meant November 7, 2011, about 2 weeks before the issuance of the FAD at issue in this case. *Id.*

decision on the discrimination issue."[2] Both the Board and its reviewing court have held that this regulation generally requires that the Board go by the date of actual receipt, even in situations in which the appellant's receipt was delayed by his or her negligence. *See Hamilton v. Merit Systems Protection Board*, 75 F.3d 639, 646-47 (Fed. Cir. 1996); *Saddler v. Department of the Army*, 68 F.3d 1357, 1358-59 (Fed. Cir. 1995); *Cody v. Department of the Navy*, 104 M.S.P.R. 161, ¶ 13 (2006). The Federal Circuit has recognized two exceptions to the actual receipt rule of section 1201.154. First, receipt may be imputed to the appellant when the agency decision was received by a relative at the address designated by the employee for correspondence. *Saddler*, 68 F.3d at 1359. Second, receipt may be imputed to the appellant if he intentionally avoided receiving the decision. *Id.* Although there is no indication in the record that the appellant intentionally avoided receiving the agency's FAD, there is a question, discussed below, whether it was received by a relative at the address left by the appellant for receiving correspondence.

¶5 Although the principle has usually been applied to appeals governed by 5 C.F.R. § 1201.22 (Jan. 1, 2012) rather than to appeals governed by 5 C.F.R. § 1201.154 (Jan. 1, 2012), the Board has recognized a presumption that documents placed in the mail are received in 5 days. *See, e.g.*, *Cabarloc v. Department of Veterans Affairs*, 110 M.S.P.R. 695, ¶ 7 (2009); *Williamson v. U.S. Postal Service*, 106 M.S.P.R. 502, ¶ 7 (2007); *cf.* 5 C.F.R. § 1201.4(l) (Jan.

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[2] Section 1201.154 was amended in the rulemaking that became effective November 13, 2012. 77 Fed. Reg. 62731. Although revised section 1201.154 still contains the language quoted above, it also provides that the date an appellant receives the agency's decision is determined according to the standard set forth at 1201.22(b)(3), which was also revised effective November 13, 2012. *Id.* Revised section 1201.22(b)(3) provides for a finding that an appellant constructively received an agency decision in specified circumstances. *Id.* at 62364. We apply section 1201.154 as it existed prior to the November 2012 revision because that was the regulation in effect at the time the appeal was filed.

1, 2012) (providing that, when a document is mailed but the postmark is not legible, it is presumed to have been mailed 5 days prior to receipt). As discussed below, we conclude that the "actual receipt" rule of section 1201.154 applies in this case, and that, even if the 5-day presumption doctrine were otherwise applicable, it does not apply in this case because the agency failed to establish that the FAD was mailed to the appellant on the date it was issued.

The only evidence of actual receipt indicates that the appellant did not receive the FAD until January 27, 2012.

¶6 The appellant has consistently maintained that he did not receive the agency's FAD until January 27, 2012. *See* IAF, Tab 1 at 4 (item 27), Tab 9, Tab 12; Petition for Review (PFR) File, Tab 1. He related that the FAD was included in a UPS package sent by the agency's Chicago office that was delivered to his former address on January 25 and that his nephew hand-delivered to him on the morning of January 27. IAF, Tab 12; PFR File, Tab 1. This account was supported by a copy of the UPS package label, which indicated that the package was sent by the agency's Chicago office and delivered to the appellant's former address on January 25. *Id.* The agency has adduced no evidence whatever regarding the date on which the appellant actually received the FAD.[3]

[3] The packing label indicated that the package was sent from "BBEAN" at the Jesse Brown VA Medical Center in Chicago and delivered to the appellant's former address on January 25, 2012. IAF, Tab 12. The appellant supplemented this evidence on review with copies of UPS tracking slips, which indicate that the package was shipped on January 24, 2012, and delivered to the front door of the appellant's former address on January 25. PFR File, Tab 1, Subtab 1 at 22-23 of 42. He also attached a statement from his nephew attesting that the nephew hand-delivered the package to the appellant on January 27. *Id.* at 20 of 42. In its response to this pleading, the agency confirmed that a Ms. Bean works in the EEO office at the Jesse Brown VA Medical Center and stated that it "is speculative at best to presume the envelope contained any FAD, much less the FAD in this case." IAF, Tab 13 at 2. In its response to the petition for review, the agency added that this UPS package "could have contained anything, including documents regarding Case 2337, documents regarding Butler's former employment with the VA, or documents regarding his medical treatment at the facility." PFR File, Tab 3 at 5. We find the agency's statements about the contents of the UPS package to have been incomplete at best and disingenuous at worst. The agency concedes that a Ms.

¶7 The agency has relied entirely on the presumption that the appellant received the FAD 5 days after it was issued. It does not dispute, however, the appellant's contention that, prior to the issuance of the FAD, he had moved from the residence to which the FAD, and the UPS package of January 24, were addressed. The agency instead contends that the appellant did not properly notify it of a change of address. Even if the agency is correct in this regard, it does not negate the actual receipt rule of section 1201.154. Indeed, that would make this case exactly like *Saddler*, where the employee neglected to inform the agency of a change of address. The court stated that, even though "[c]ommon sense would seem to obligate an employee to inform the agency of his current address," "[n]egligence is not at issue here, there being no due diligence obligation in the regulation." *Saddler*, 68 F.3d at 1359. As in *Saddler*, the agency cannot rely on a nonexistent duty to notify it of a change of address to justify avoidance of the "actual receipt" rule.[4]

¶8 Because the appellant's version of events implies that his nephew was living at his former address both when the FAD was issued and when the UPS package was delivered to that location, evidence that the nephew actually

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Bean, an employee in its EEO office in Chicago, sent the appellant a UPS package on January 24, 2012. The agency has no need to speculate as to what that package contained. It could and should have produced a statement from Ms. Bean as to the contents of that package, as well as a copy of any associated cover letter or other attachments.

[4] If the outcome of this decision depended on whether the appellant gave the agency proper notice of a change of address, it might be necessary to remand the case for further adjudication because neither party provided evidence within their control. Although the appellant says he gave the agency representative his new address on November 7, he did not provide a copy of the letter or other document he sent the representative on that date. If the appellant merely listed a new address in that communication, without advising Ms. Kyte that this constituted a change of address, this would not be a proper notification. The agency does not deny that the appellant communicated with Ms. Kyte on November 7, but similarly has not provided a copy of the communication.

received the FAD before January 25, 2012, might suffice to avoid the requirement of actual receipt by the appellant. The record is devoid of any evidence, however, of actual receipt of the FAD by a relative close in time to the FAD's issuance on November 23, 2011, and we are unaware of any case in which either the Board or the Federal Circuit has found that an appellant can be charged with constructive receipt of an agency decision by relying on a presumption that a relative received a letter addressed to the appellant 5 days after it was mailed.

Even if it were otherwise appropriate to invoke the presumption that a document is received 5 days after mailing, it would be inappropriate to apply it in this case.

¶9 Our reviewing court has not categorically ruled out the use of the presumption of receipt in 5 days in cases governed by section 1201.154. Rather, the court stated in *Hamilton* that it rejected the judge's "double-barrelled presumption: first, that a decision is mailed on the date it was signed and, second, that it was received by the employee within 5 days," where the judge had neglected to inform the appellant of the presumption and of the dates on which the judge intended to rely in applying the presumption. *Hamilton*, 75 F.3d at 647.

¶10 As in *Hamilton*, the judge did not advise the appellant that she would rely on the presumption of receipt in 5 days; this presumption was mentioned for the first time in the initial decision.[5] More importantly, there is no evidence in the record that the FAD was in fact mailed to the appellant on November 23, 2011, as the FAD was not accompanied by a certificate of service, which would have certified that a named individual mailed the document to the appellant's address on that date. Instead, the Director of the agency's Office of Employment

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[5] For this reason, it is appropriate to consider the appellant's "new" evidence submitted with his petition for review described above in note 4. We also note that the judge's Order on Timeliness misinformed the appellant as to when the filing period commenced. She advised that the filing period began on November 23, 2011, the date on which the FAD was issued. IAF, Tab 3 at 2. If the judge intended to apply the 5-day presumption, the filing period would not have begun until November 28.

Discrimination Complaint Adjudication (OEDCA), the same official who signed the FAD, issued a "Transmittal of Final Agency Decision or Order," which contained the same date as the FAD. IAF, Tab 14, Subtab 4B. Although use of the term "transmittal" implies that the document was transmitted to the appellant on the specified date, this Transmittal does not supply the specifics of who did the transmitting and how the document was transmitted. The Board should not simply assume that these specific actions occurred in the absence of evidence that they did indeed occur.[6]

¶11 Accordingly, we find that the appellant established by preponderant evidence that he did not receive the agency's FAD until January 27, 2012, and that his appeal was therefore timely filed.

[6] That it cannot be presumed that a document was mailed on the same day that it was issued is illustrated in the record of this case. The Order of Judgment and Dismissal in the 2337 complaint issued by the Equal Employment Opportunity Commission's (EEOC's) Chicago District Office was dated October 13, 2011, but the certificate of service for that Order indicates that it was not mailed to the parties until November 7, 2011, almost 4 weeks later. IAF, Tab 5, Subtab 2. We also note that certificates of service are often signed by someone other than the official who issued the primary document. For example, the Order of Judgment and Dismissal in the 2337 complaint was signed by an EEOC administrative judge, whereas the certificate of service for that Order was signed by a Clerk. Although it is possible that the Director of the OEDCA personally mailed the FAD and the accompanying Transmittal to the parties, there is no basis for assuming that she did so.

ORDER

¶12 For the reasons discussed above, we REMAND this case to the regional office for adjudication on the merits.

FOR THE BOARD:

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