UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2013 MSPB 7

Docket No. DE-315H-12-0263-I-1

Susan M. Cunningham,

Appellant,

v.

Department of the Army,

Agency.

January 28, 2013

Janice L. Jackson, Leavenworth, Kansas, for the appellant.

Anne E. Hinkebein, Esquire, Fort Leavenworth, Kansas, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member
Vice Chairman Wagner issues a separate opinion.

OPINION AND ORDER

¶1 The appellant petitions for review of the initial decision that dismissed this appeal for lack of jurisdiction. For the reasons given below, we DENY the petition for review.[1] We are issuing a precedential Opinion and Order to explain

[1] Except as otherwise noted in this decision, we have applied the Board's regulations that became effective November 13, 2012. We note, however, that the petition for review in this case was filed before that date. Even if we considered the petition under the previous version of the Board's regulations, the outcome would be the same.

how a recent Supreme Court decision affects our practice of providing appellants with notice of their review rights in final Board decisions.

BACKGROUND

¶2 Effective June 20, 2011, the agency appointed the appellant to a GS-7 Training Instructor (Casualty Affairs) position in the competitive service, subject to the successful completion of a 1-year probationary period. Initial Appeal File (IAF), Tab 1 at 20-21. Effective March 16, 2012, the agency terminated the appellant's appointment for alleged unsatisfactory performance. *Id.* at 16-18. On appeal, the appellant alleged, among other things, that her termination was the result of disability discrimination. *Id*. at 14. The administrative judge, after notifying the parties that it appeared that the appeal was beyond the Board's jurisdiction and considering the parties' submissions on the issue, IAF, Tabs 2, 6, 7, dismissed the appeal on the ground that the appellant failed to make a non-frivolous allegation of jurisdiction. IAF, Tab 8.

¶3 The appellant has filed a timely petition for review. Petition for Review (PFR) File, Tab 1. The agency opposes the petition for review. PFR File, Tab 3.[2]

---

[2] The appellant has filed a reply to the agency's response to the petition for review. PFR File, Tab 4. Under an amendment to the Board's regulations that became effective November 13, 2012, a party may file a reply to a response to a petition for review. 5 C.F.R. § 1201.114(a)(4). However, any such reply must be filed within 10 days of the date of service of the response to the petition for review. 5 C.F.R. § 1201.114(e). The appellant's reply would be deemed untimely under the new standard, and the Board would generally not consider it absent a showing of good cause for the filing delay. Because the Board's new regulations went into effect after she filed her reply, however, the appellant was not on notice of the deadline for filing a reply or that she was required to submit a motion showing good cause for any untimeliness of her reply under 5 C.F.R. § 1201.114(g). Under the particular circumstances presented, we have considered the appellant's reply in reaching our decision in this matter. We find that the appellant's reply does not affect the outcome.

ANALYSIS

The petition for review is denied.

¶4 Generally, we grant petitions such as this one only when: The initial decision contains erroneous findings of material fact; the initial decision is based on an erroneous interpretation of statute or regulation or the erroneous application of the law to the facts of the case; the judge's rulings during either the course of the appeal or the initial decision were not consistent with required procedures or involved an abuse of discretion, and the resulting error affected the outcome of the case; or new and material evidence or legal argument is available that, despite the petitioner's due diligence, was not available when the record closed. *See* Title 5 of the Code of Federal Regulations, section 1201.115 (5 C.F.R. § 1201.115). After fully considering the filings in this appeal, and based on the following points and authorities, we conclude that the petitioner has not established any basis under section 1201.115 for granting the petition for review. Therefore, we DENY the petition for review and AFFIRM the initial decision issued by the administrative judge, which is now the Board's final decision. 5 C.F.R. § 1201.113(b).

¶5 The appellant was appointed under section 511 of the Veterans Millennium Health Care and Benefits Act, Pub L. No. 106-117, 113 Stat. 1545, 1575 (1999), *see* IAF, Tab 1 at 20, and such appointments are not exempt from the general requirement that appointees in the competitive service serve probationary periods. *See* 5 C.F.R. § 315.801(e). Where a probationary period is required by the nature of the appointment, it cannot be waived. *Phillips v. Department of Housing & Urban Development*, 44 M.S.P.R. 48, 52 (1990). Therefore, the administrative judge correctly found that the appellant was required to serve a probationary period even if the agency failed to inform her that she must do so.

¶6 The administrative judge also correctly found that the appellant had not completed her probationary period at the time of her termination and was therefore not an employee under 5 U.S.C. § 7511(a)(1)(A). Although the

appellant contends that her prior military service should count towards completion of her probationary period, it is well established that only prior civilian service can be applied towards the completion of a probationary period. *See Bell v. Department of Homeland Security*, 95 M.S.P.R. 580, ¶¶ 16-18 (2004). It is undisputed that the appellant has no prior civilian service.

¶7 The appellant asserts for the first time on review that she was terminated for pre-appointment reasons and was entitled to the procedural protections of 5 C.F.R. § 315.805. PFR File, Tab 1 at 1. Because the appellant has not shown that this argument is based on new and material evidence not previously available despite her due diligence, we need not consider it. *See Banks v. Department of the Air Force*, 4 M.S.P.R. 268, 271 (1980). Similarly, because the appellant has not shown that the documents she submits for the first time with her petition for review, PFR File, Tab 1 at 4-9, were unavailable before the record was closed despite her due diligence, we need not consider those documents. *See Avansino v. U.S. Postal Service*, 3 M.S.P.R. 211, 214 (1980).

¶8 Finally, even accepting as true the appellant's assertion that her poor performance was caused by a pre-existing medical condition, her termination was based on the effect of that condition on her performance, not on the condition itself, and was for post-appointment reasons. *See Butler v. Defense Commissary Agency*, 77 M.S.P.R. 631, 635 (1998); *Von Deneen v. Department of Transportation*, 33 M.S.P.R. 420, 423, *aff'd*, 837 F.2d 1098 (Fed. Cir. 1987) (Table). Therefore, the administrative judge correctly found that the appellant was required to make a non-frivolous allegation that the termination was based on marital status discrimination or partisan political reasons. Because the appellant failed to do so, the administrative judge correctly dismissed the appeal for lack of jurisdiction.

Notwithstanding the fact that the appellant claims that the termination of her appointment was the result of disability discrimination, we are not providing notice of mixed-case appeal rights because the appellant was not affected by an action that she may appeal to the Board.

¶9 When an individual alleges that a personnel action, which can be appealed to the Board, was taken against him because of discrimination, the dispute is referred to as a "mixed case appeal." *See* 29 C.F.R. § 1614.302(a)(2). The statute governing mixed cases provides as follows:

> (a)(1) Notwithstanding any other provision of law, and except as provided in paragraph (2) of this subsection, in the case of any employee or applicant for employment who --
>
> (A) has been affected by an action which the employee or applicant may appeal to the Merit Systems Protection Board, and
>
> (B) alleges that a basis for the action was discrimination prohibited by --
>
> (i) section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16),
>
> (ii) section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d)),
>
> (iii) section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791),
>
> (iv) sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631, 633a), or
>
> (v) any rule, regulation, or policy directive prescribed under any provision of law described in clauses (i) through (iv) of this subparagraph,
>
> the Board shall, within 120 days of the filing of the appeal, decide both the issue of discrimination and the appealable action in accordance with the Board's appellate procedures under section 7701 of this title and this section.

5 U.S.C. § 7702(a)(1). The appellant in a mixed case may seek review of the Board's final decision before the Equal Employment Opportunity Commission; he may also institute an action in federal district court, where the Board's findings and conclusions on issues other than discrimination are subject to review and the discrimination claim proceeds de novo. 5 U.S.C. §§ 7702(b)(1) & (d)(1),

7703(b)(2). By contrast, the appellant in a non-mixed case may seek review of the Board's final decision before the U.S. Court of Appeals for the Federal Circuit. 5 U.S.C. § 7703(b)(1).

¶10 In the past, the Board has provided notice of mixed-case appeal rights in its final decision only when the Board actually decided a claim of discrimination. In all other cases—including one in which a claim of discrimination was raised but not decided—the Board has provided notice of non-mixed appeal rights. *See, e.g.*, *Haffarnan v. Department of the Army*, 87 M.S.P.R. 348, ¶ 3 (2000) (the administrative judge "erred in failing to provide the appellant with notice of 'mixed case' appeal rights after she adjudicated the appellant's claim of disability discrimination"); *Thomas v. Department of the Army*, 34 M.S.P.R. 678, 682-83 (1987) (providing non-mixed appeal rights in an appeal from a removal because, under the unusual circumstances of the case, the administrative judge "properly dismissed the appellant's claim of discrimination" without deciding it).

¶11 The Supreme Court's recent decision in *Kloeckner v. Solis*, 133 S. Ct. 596, 184 L. Ed. 2d 433 (2012), requires us to reexamine the circumstances under which we provide notice of mixed-case appeal rights in our final decisions. In *Kloeckner*, the appellant appealed her removal to the Board and claimed that the action was motivated by sex and age discrimination. She sought and received a dismissal of her appeal without prejudice, but she refiled her appeal beyond the deadline for doing so. The administrative judge dismissed the appeal as untimely refiled and did not decide the appellant's discrimination claims. *Kloeckner v. Department of Labor*, MSPB Docket No. CH-0752-08-0150-I-1, Initial Decision (Feb. 27, 2008). Neither party filed a petition for review with the full Board, so the administrative judge's decision became final.

¶12 The appellant then filed an action in district court. The court dismissed the matter, reasoning that review lay in the Federal Circuit and not in district court because the final Board decision did not resolve "the merits of [the appellant's] discrimination claim[s]." *Kloeckner v. Solis*, No. 4:09CV804-DJS, 2010 U.S.

Dist. Lexis 14425 (E.D. Mo. Feb. 18, 2010). The Eighth Circuit affirmed based on the same rationale. *Kloeckner v. Solis*, 639 F.3d 834, 838 (8th Cir. 2011) (the appellant's right of review was in the Federal Circuit because "the MSPB did not reach the merits of Kloeckner's discrimination claims").

¶13 The Supreme Court reversed, holding that the district court had jurisdiction. The Court began its analysis with 5 U.S.C. § 7703(b)(2), which provides that "[c]ases of discrimination subject to the provisions of [5 U.S.C. §] 7702 shall be filed" in district court. *Kloeckner*, 133 S. Ct. at 603. The Court then explained that cases of discrimination "subject to" section 7702 are those in which the appellant "has been affected by an action which [she] may appeal to the Merit Systems Protection Board" and "alleges that a basis for the action was discrimination" prohibited by one of the listed statutes. *Id*. at 603-04 (quoting 5 U.S.C. § 7702(a)(1)(A) & (B)). The Court concluded that such cases must be filed in district court, not the Federal Circuit, even when the Board does not decide the discrimination claim. *Id*. at 604.

¶14 In light of *Kloeckner*, we shall now provide notice of mixed-case appeal rights in all cases in which the appellant was affected by an action that he or she may appeal to the Board and alleges prohibited discrimination, regardless of whether we decide the claim of discrimination. In providing such notice of the option to file a civil action in district court, we would make no representation whether the district court will determine that the appellant has met the administrative exhaustion requirements for filing a civil action before that court. In the present case, we provide notice of non-mixed appeal rights. Although the appellant alleges that the agency's decision to terminate her appointment during her probationary period was based on disability discrimination, as fully explained above she does not have the right to appeal her probationary termination to the Board.

ORDER

¶15 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 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 the date of this order. *See* 5 U.S.C. § 7703(b)(1)(A) (as rev. eff. Dec. 27, 2012). 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) (as rev. eff. Dec. 27, 2012). You may read this law, as well as other sections of the United States Code, at our website http://www.mspb.gov/appeals/uscode/htm. 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.

SEPARATE OPINION OF ANNE M. WAGNER

in

Susan M. Cunningham v. Department of the Army

MSPB Docket No. DE-315H-12-0263-I-1

¶1 While I concur with the Board's decision to affirm the dismissal of this probationary termination appeal for lack of jurisdiction, I disagree with the majority's determination to provide the appellant notice of appeal rights only to the U.S. Court of Appeals for the Federal Circuit. The majority has concluded that the Supreme Court's decision in *Kloeckner v. Solis*, 133 S. Ct. 596, 184 L. Ed. 2d 433 (2012), does not require that we provide notice to the appellant of the opportunity to file a civil action against the agency raising her discrimination and other claims in an appropriate U.S. district court. For the following reasons, I respectfully disagree.

¶2 In *Kloeckner*, the Court strongly rejected the scheme of bifurcated judicial review of Board decisions in cases involving discrimination claims based on a merits-procedure distinction. However, it did not address the more problematic question as to whether an appellant would be entitled to district court review when an appeal, such as this one, involving allegations of discrimination is dismissed for lack of jurisdiction. Under the Civil Service Reform Act (CSRA or the Act), cases "subject to" section 7702 are, by definition, only appeals within the Board's jurisdiction, *see* 5 U.S.C. § 7702(a)(1)(A). Thus, a straightforward reading of the statutory language indicates that, while district court review extends to Board cases involving allegations of discrimination that are decided on the merits or dismissed on procedural grounds, it would not extend to cases dismissed for lack of jurisdiction.

¶3 Conversely, interpreting the Act consistent with its plain language preserves a scheme of bifurcated judicial review - an outcome that would seem to be at odds with the Court's opinion in *Kloeckner*. Furthermore, it is, arguably,

more reasonable to construe the CSRA as providing for district court review of all Board cases involving allegations of discrimination in order to avoid the difficulties posed by Federal Circuit review of decisions where the jurisdictional elements are inextricably intertwined with the merits of the discrimination claims.[1] This conclusion is also bolstered by the fact that had the appellant pursued the appropriate administrative mechanism for relief, she would have ultimately been entitled to seek redress for her discrimination claims in district court. *See* 42 U.S.C. § 2000e-16(c). Similarly, as the Court noted in *Kloeckner*, section 7702(e)(1)(B) entitles an individual to file a civil action in district court under an anti-discrimination statute if 120 days have lapsed from the date of filing an appeal with the Board without a final decision. *Kloeckner*, 133 S. Ct. at 606. Thus, if the appellant had not waited for this decision, she could have filed a civil action raising her discrimination claims in district court at any time after 120 days of filing her Board appeal.

¶4 I recognize that the question as to the proper judicial forum for review of Board jurisdictional dismissals of appeals involving allegations of discrimination is not ultimately for the Board to decide. Nevertheless, its resolution is necessary in order for the Board to provide appellants with correct notice of their right to subsequent review of its decisions. Until such time as the Board is instructed otherwise,[2] I believe that the best course of action is to notify appellants who have alleged discrimination and whose appeals are dismissed for lack of

---

[1] As reflected in Fed. Cir. Rule 15(c)(1), the Federal Circuit will not entertain claims of discrimination in reviewing MSPB decisions.

[2] The Federal Circuit heard oral argument on January 10, 2013, regarding whether it has jurisdiction to decide an appeal of an involuntary retirement dismissed by the Board for lack of jurisdiction in which the appellant alleged that her retirement was coerced by the agency's age and gender discrimination, harassment, and reprisal of prior protected equal employment opportunity activity. *Conforto v. Merit Systems Protection Board*, No. 2012-3119 (Fed. Cir. filed Apr. 23, 2012). Thus, guidance from our reviewing court on this question is likely to be forthcoming in the near future.

jurisdiction that, in light of *Kloeckner*, they may also have a right to judicial review in district court.

_____

Anne M. Wagner
Vice Chairman