

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

2013 MSPB 8

Docket No. CH-0752-11-0318-I-1

**Jill Braxton,
Appellant,**

v.

**Department of the Treasury,
Agency.**

January 30, 2013

Peter H. Noone, Esquire, Belmont, Massachusetts, for the appellant.

Jill B. Lubetsky, Esquire, Chicago, 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 her appeal as untimely filed. For the reasons set forth below, we GRANT the petition, VACATE the initial decision, and REMAND the appeal to the Central Regional Office for a timeliness hearing.¹

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.

BACKGROUND

¶2 Effective October 17, 2010, the agency removed the appellant from her GS-5 Information Technology Position for failure to follow managerial directives, engaging in inappropriate, unprofessional, and/or disrespectful conduct, and failure to comply with security procedures. Initial Appeal File (IAF), Tab 18, Subtabs 4a, 4c, 4d. The decision effecting the appellant's removal informed her that she could file an appeal with the Board no later than 30 days after the effective date of the action or 30 days after the date of receipt of the decision, whichever was later. *Id.*, Subtab 4c at 1. The decision also informed the appellant of the address of the Central Regional Office. *Id.* The agency sent the decision letter by regular mail, certified mail, and commercial delivery service (United Parcel Service (UPS)). IAF, Tab 19, Ex. 2. The copy of the decision letter sent by certified mail was returned as unclaimed. *Id.* at 4. However, UPS records show that it delivered the decision to the appellant's front door on October 15, 2010, *id.* at 6, and there is no evidence that the copy of the decision letter sent by regular mail was returned as undeliverable.

¶3 The appellant filed the instant appeal on February 8, 2011. IAF, Tab 1. She requested a hearing. *Id.* at 4. The administrative judge informed the parties that there was a question whether the appeal was timely, and she ordered the appellant to file evidence and argument showing that her appeal was timely filed or that good cause existed for the filing delay. IAF, Tab 3. In her response, the appellant offered the history of her mental illness, schizoaffective disorder, which was first diagnosed in April 2006. IAF, Tab 16. Notably, she was hospitalized for her psychiatric condition from November 29 through December 16, 2010. *Id.* at 121.

¶4 The administrative judge found that the appellant had submitted insufficient medical documentation to show good cause for the untimely filing of her appeal. IAF, Tab 22 at 6. The administrative judge noted the appellant's evidence of her hospitalization but found that there was no medical documentation indicating that

the appellant was medically unable to file her appeal prior to the deadline. *Id.* She further found that the appellant was released from the hospital without restrictions on December 16, 2010, yet the appellant did not file her appeal until February 8, 2011. *Id.* The administrative judge found that the appellant's failure to follow the straightforward instructions in the decision letter effecting her removal constituted failure to exercise due diligence or ordinary prudence. *Id.*

¶5 The appellant has petitioned for review. Petition for Review (PFR) File, Tab 4. The agency has responded in opposition to the petition. PFR File, Tab 6.

ANALYSIS

¶6 Generally, an appeal must be filed with the Board no later than 30 days after the effective date of the agency's action, or 30 days after the date of the appellant's receipt of the agency's decision, whichever is later. [5 C.F.R. § 1201.22\(b\)\(1\)](#) (Jan. 1, 2012).² The agency presented evidence that the decision letter was delivered to the appellant's home address on October 15, 2010, 2 days before the effective date of her removal. IAF, Tab 19, Ex. 2 at 6. In her affidavit addressing the timeliness issue, the appellant alleges that, due to her mental condition, she tore up everything the agency sent her during that time period. IAF, Tab 16 at 18. However, she does not dispute that she received the decision letter. *See id.* We therefore agree with the administrative judge that the appellant received the decision letter on October 15, 2010, and that the filing deadline for her appeal was therefore 30 days after the effective date of the removal, i.e.,

² Section 1201.22 was amended in the rulemaking that became effective November 13, 2012, while the appellant's petition for review was pending. Merit Systems Protection Board Practices and Procedures, 77 Fed. Reg. 62350, 62364 (Oct. 12, 2012). The Board added a new provision at [5 C.F.R. § 1201.22\(b\)\(3\)](#) (Nov. 13, 2012), which states the Board's general rule concerning constructive receipt of decisions and provides several illustrative examples of the rule's application. We apply the prior version of the regulation in this appeal because it was the regulation in effect at the time the appeal was filed. However, because we find that the appellant actually received the agency's decision letter, the outcome in this appeal would be the same whether we applied the Board's prior regulations or the November 2012 revisions.

November 16, 2010. See [5 C.F.R. § 1201.22](#)(b)(1) (Jan. 1, 2012). Accordingly, the appellant's February 8, 2011 initial appeal was filed 84 days after the filing deadline.

¶7 The Board may waive its regulatory filing time limit for good cause shown. [5 C.F.R. § 1201.22](#)(c). To establish good cause for the untimely filing of her appeal, an appellant must show that she exercised due diligence or ordinary prudence under the particular circumstances of the case. *Alonzo v. Department of the Air Force*, [4 M.S.P.R. 180](#), 184 (1980). The Board will find good cause for a waiver of its filing time limits where a party shows that she suffered from an illness that affected her ability to file on time. *Lacy v. Department of the Navy*, [78 M.S.P.R. 434](#), 437 (1998). To establish that an untimely filing was the result of an illness, the party must: (1) Identify the time period during which she suffered from the illness; (2) submit medical or other corroborating evidence showing that she suffered from the alleged illness during that time period; and (3) explain how the illness prevented her from timely filing her appeal or a request for an extension of time. *Id.* at 437 & n.*. The party need not prove incapacitation during the filing period. *Id.* at 437 n.*.

¶8 In response to the acknowledgment order, the appellant alleged that her mental illness, schizoaffective disorder, caused her to be unaware of the agency's removal action against her and was the cause of her untimely filing. IAF, Tab 16 at 9-14. The appellant has submitted medical evidence showing, inter alia, that she had been diagnosed with schizoaffective disorder, was admitted for treatment, and was prescribed antipsychotic medications in 2006. IAF, Tab 16 at 45. She ceased receiving treatment in 2008. *Id.* at 51. Subsequently, slightly more than a month after the effective date of the appellant's removal, on November 29, 2010, she was again admitted for psychiatric treatment and again prescribed antipsychotic medications. *Id.* at 109-120. She was discharged on December 16, 2010, with the recommendation that she continue treatment with an outpatient mental health provider. *Id.* at 122. Upon discharge, she had no

restriction on the activities of daily living, including work. *Id.* The discharge note states that the appellant agreed to cooperate with the discharge plan. *Id.*

¶9 We cannot determine from the medical evidence submitted, however, whether the appellant's mental condition affected her ability to timely file her appeal by November 16, 2010, because, while the medical evidence indicates that she may have been mentally ill near the filing period, it does not establish that her medical condition affected her ability to meet the filing deadline. We also cannot determine whether the appellant exercised due diligence in filing this appeal after she first became aware of her right to do so because the record does not establish the date when the appellant first became aware of that right. *See Alonzo*, 4 M.S.P.R. at 184.

¶10 According to the appellant's assertions, she was unaware that she had been removed until after she sent agency personnel a letter dated December 31, 2010, stating that she was inquiring about her date of return to work. IAF, Tab 16 at 130. She asserts that, in July 2010, her health regressed and she subsequently engaged in a number of acts as a result of her serious mental condition, including tearing up, without reading, everything the agency sent her. *Id.* at 18. We note that, in a January 13, 2011 letter, the agency indicated that it was sending the appellant copies of the proposal and decision letters that had previously been sent to the appellant by certified mail. *Id.* at 132. The letter also indicates that the appellant had stated during a January 11, 2011 telephone conversation with agency personnel that she was aware that she had been removed and that she had received letters regarding such removal. *Id.* However, in a letter dated January 17, 2011, the appellant replied to the agency, thanking it for copies of the documentation but stating that she did not indicate that she was aware of her removal, noting that she had signed none of the papers. *Id.* at 133.

¶11 If an appellant can establish a factual dispute as to whether there is good cause for her untimely filing, and she requested a hearing, she is entitled to a timeliness hearing. *Hamilton v. U.S. Postal Service*, [79 M.S.P.R. 354](#), 356-357

(1998); *see Stout v. Merit Systems Protection Board*, [389 F.3d 1233](#), 1241-42 (Fed. Cir. 2004). As noted, the appellant requested a hearing. IAF, Tab 1 at 4. Further, we find that the appellant's submissions establish a factual dispute as to whether she established good cause for her untimely filing due to her serious mental illness.

ORDER

¶12 Accordingly, we remand this appeal to the regional office to afford the appellant a hearing on the timeliness issue. If the administrative judge finds that good cause exists for the untimely filing, she shall adjudicate the appeal on its merits.

FOR THE BOARD:

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