



In the Matter of:

LARONDA PHOX,

ARB CASE NO. 2021-0057

COMPLAINANT,

ALJ CASE NO. 2019-FDA-00014

v.

DATE: January 6, 2022

THE SAVOY AT 21C,

RESPONDENT.

Appearances:

For the Complainant:

LaRonda Phox; *pro se*; Kansas City, Missouri

For the Respondent:

Emily N. K. Monroe, Esq. and Sara E. Welch, Esq.; *STINSON LLP*;
Kansas City, Missouri

Before: James D. McGinley, *Chief Administrative Appeals Judge*; Thomas
H. Burrell, *Administrative Appeals Judge*.

ORDER DISMISSING PETITION FOR REVIEW

PER CURIAM. LaRonda Phox (Complainant) filed a complaint under the Food Safety Modernization Act¹ (FSMA), and its implementing regulations at 29 C.F.R. § 1987, alleging that her former employer, The Savoy at 21c (Respondent), had violated the FSMA's employee protection provisions. On May 25, 2021, an Administrative Law Judge (ALJ) issued a Decision and Order Denying Complaint (D. & O.), finding that Complainant did not successfully prove Respondent violated the FSMA. On June 9, 2021, Complainant filed a "Motion to Stay and Motion to

¹ 21 U.S.C. § 399d (2016).

Reconsider or Motion for Extension of Time.” On July 14, 2021, the ALJ denied the motions.

On July 28, 2021, Complainant filed a Petition for Review with the Administrative Review Board (Board). The petition included Complainant’s issues on appeal and arguments supporting her request to reverse the ALJ’s May 25 decision. On August 11, 2021, the Board issued a Notice of Appeal and Order Establishing Briefing Schedule, requiring Complainant to file an opening brief within 28 days of the order and Respondent to file a response to the opening brief within 28 days of receipt of the brief.² The briefing order did not address the issues on appeal and stated only that “Complainant filed a petition for review of [the ALJ’s order] issued July 14, 2021.” On September 30, 2021, Complainant filed a motion requesting the Board to accept the Petition for Review as the opening brief.

On October 28, 2021, Respondent filed a Response to Complainant’s Petition for Review, requesting the Board to deny the petition. In the response, Respondent argues that Complainant did not timely appeal the May 25 decision and that the Petition for Review does not address the ALJ’s July 14 order, which Respondent contends is the sole issue identified by the Board for review in the briefing order.

Complainant’s Petition for Review only addresses issues with the May 25 decision and presents no arguments regarding the ALJ’s July 14, 2021 denial of the motion for reconsideration. We therefore interpret Complainant’s petition as an appeal of the ALJ’s May 25, 2021 decision only. A party desiring review of an ALJ’s decision on an FSMA claim must file a petition with the Board within 14 days of the date of the decision.³ Under the Federal Rules of Appellate Procedure,⁴ the filing of a timely motion for reconsideration tolls the start of the appeal period until the

² The order permitted Complainant to file a reply brief within 14 days of receipt of the response brief.

³ 29 C.F.R. § 1987.110(a).

⁴ The Board has adopted the principles employed by federal courts under the Federal Rules of Appellate Procedure. *Henin v. Soo Line R.R. Co.*, ARB No. 2019-0028, ALJ No. 2017-FRS-00011, slip op. at 2 (ARB Mar. 22, 2019).

entry of the order granting or denying the motion.⁵ However, an untimely motion for reconsideration does not delay the start of the appeal period.⁶

The ALJ denied Complainant’s motion for reconsideration because it was untimely.⁷ Motions for reconsideration of an ALJ’s decision must be filed within 10 days of service of the decision.⁸ Complainant filed her motion on June 9, 2021, more than 10 days after the ALJ’s decision. Therefore, the appeal period began when the ALJ issued her May 25, 2021, decision, and Complainant’s Petition for Review of the decision, filed July 28, 2021, is therefore untimely. As a result, we **DISMISS** the Complainant’s Petition for Review.^{9,10}

SO ORDERED.

⁵ FED. R. APP. P. 4(a)(4)(A); *see also United States v. Ibarra*, 502 U.S. 1, 4 n.2 (1991) (“[T]he 30-day limitation period runs from the denial of a timely petition ... rather than from the date of the order itself.”); 16A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3950.4 (5th ed. 2021).

⁶ *Sanders v. Clemco Indus.*, 862 F.2d 161, 168-71 (8th Cir. 1988); FEDERAL PRACTICE AND PROCEDURE, *supra* note 5, at § 3950.4 (“The introductory language of Rule 4(a)(4)(A) says that its tolling provisions apply only if a party makes one of the specified motions ‘within the time allowed by’ the Civil Rules. An untimely motion does not affect the time for appeal.”). The appeal period is not delayed even if the judge addresses and denies the untimely motion on the merits. *See Banks v. Chicago Bd. of Educ.*, 750 F.3d 663, 666-67 (7th Cir. 2014).

⁷ The ALJ further concluded that Complainant did not present any grounds for reconsideration.

⁸ 29 C.F.R. § 18.93.

⁹ In her reply brief, Complainant seemingly addresses Respondent’s timeliness argument by contending that she made an effort to comply with the procedural rules while acting pro se. While the Board does provide a degree of latitude to pro se complainants, we also “must be able to impose appropriate sanctions . . . when they fail to comply with the . . . procedures in the administrative process,” for a “pro se party may not be allowed ‘to avoid the risks of failure that attend his decision to forgo expert assistance.’” *Canterbury v. Adm’r, Wage & Hour Div., USDOL*, ARB No. 2003-0135, ALJ No. 2002-SCA-00011, slip op. at 3-4 (ARB Dec. 29, 2004); *see also Santamaria v. U.S. EPA*, ARB No. 2005-0023, ALJ No. 2004-ERA-00025, slip op. at 2, 5 (ARB Mar. 31, 2005).

¹⁰ In any appeal of this Decision and Order that may be filed with the Courts of Appeals, we note that the appropriately named party is the Secretary, Department of Labor (not the Administrative Review Board (ARB)).