



In the Matter of:

WILLIAM C. SALSBUARY,

ARB CASE NO. 05-014

COMPLAINANT,

ALJ CASE NO. 04-ERA-7

v.

DATE: July 31, 2007

**EDWARD HINES, JR. VETERANS
HOSPITAL, DEPARTMENT
OF VETERANS AFFAIRS,**

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Roy R. Brandys, Esq., *Childress Duffy Goldblatt, LTD*, Chicago, Illinois.

For the Respondent:

Tim Morgan, Esq., *Department of Veterans Affairs*, Chicago, Illinois.

FINAL DECISION AND ORDER DISMISSING COMPLAINT

William C. Salsbury filed a complaint against the Edward Hines, Jr. Veterans Hospital, Department of Veterans Affairs (VA), under the employee protection provisions of the Energy Reorganization Act (ERA), 42 U.S.C.A. § 5851 (West 2003),¹

¹ The statute provides, in pertinent part, that “[n]o employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee” notified a covered employer about an alleged violation of the ERA or the Atomic Energy Act (AEA) (42 U.S.C. § 2011 *et seq.* (2000)), refused to engage in a practice made unlawful by the ERA or AEA, testified regarding provisions or proposed provisions of the ERA or AEA, or commenced, caused to be commenced or is about to commence or cause to be commenced, or testified,

and its implementing regulations at 29 C.F.R. Part 24 (2006). The Administrative Law Judge (ALJ) granted the VA's motion to dismiss for lack of subject matter jurisdiction. Salsbury filed a petition for review with the Administrative Review Board (ARB). We affirm.

BACKGROUND

Our brief summary of the facts is based on the documents submitted by the parties in connection with the VA's motion to dismiss and in response to the ALJ's briefing order dated June 28, 2004. Salsbury worked at the VA's Lakeside Medical Center in Chicago, Illinois as a GS-13 health physicist and radiation safety officer until August 23, 2002, when he was fired for cause. Salsbury appealed his discharge to the Merit Systems Protection Board (MSPB).²

Salsbury wrote a letter on January 22, 2003, to the Nuclear Regulatory Commission (NRC) stating that the VA's nuclear materials license should be denied or rescinded. Exhibit 5. He took part in an NRC teleconference on February 25, 2003, to discuss the safety issues, particularly staffing and inspections, that he felt warranted suspension of the VA's master license to handle radiological and nuclear materials. On March 5, 2003, the NRC denied Salsbury's request, but noted that staff would review his concerns and respond in future correspondence.

In February 2003, the VA's Edward Hines Jr. Medical Center posted an opening, VAR-BA-3-1344, for a health physicist at either the GS-9 or GS-11 grade levels. The notice stated that applicants wishing to be considered for more than one grade level must submit a complete application for each level for which they wish to be considered. Salsbury applied for only the GS-11 level position. Subsequently, Lynn K. Hoffstadter, performance improvement manager at Hines, discussed the position's requirements with her selection committee and decided to hire at the lower GS-9 level, for which only one person had applied. That applicant was hired.

assisted or participated in a proceeding under the ERA or AEA to carry out the purposes of this chapter or the AEA as amended. 42 U.S.C.A. § 5851(a)(1).

² On March 7, 2003, Salsbury signed a settlement agreement with the Hines VA hospital, which put him on leave without pay status from August 23, 2002, until September 2003; accepted his resignation effective September 1, 2003; and expunged from his personnel file all disciplinary and removal actions. Salsbury agreed to waive "any and all actions, claims, complaints, grievances, appeals, and proceedings of whatever nature" related to "any conduct or act occurring prior to the execution of this Agreement, against the VA, its officers, and employees...."

Salsbury's whistleblower complaint

Salsbury filed a complaint on July 14, 2003, with the Occupational Safety and Health Administration (OSHA), stating only that he wished to “report whistle-blowing retaliation, against myself, which is based on a petition to the Nuclear Regulatory Commission. The retaliation occurred during MSPB settlement negotiations.” Salsbury explained that he and others had complained to the Director of the VA Chicago Health Care Systems that lack of staffing was endangering the radiation safety program and that management had failed to resolve safety concerns. Salsbury added that he had been harassed and blacklisted for a position in another VA hospital in retaliation for raising safety issues.

On September 29, 2003, OSHA dismissed Salsbury's complaint on the grounds that the Hines VA provided clear and convincing evidence that Salsbury was not rated for the GS-11 position for which he had applied because the VA decided to hire a lower-level GS-9 for the job.³ The letter informed Salsbury that he must file a request for a formal hearing within five (5) calendar days of receipt of OSHA's letter and must send his request by “facsimile, overnight/next day delivery mail, or telegram” to:

Chief Docket Clerk
Office of Administrative Law Judges
800 K Street, N.W., Suite 400N
Washington, D.C. 20001-8002
Fax No. (202) 565-5325

The letter added that unless the ALJ received Salsbury's request within five days, OSHA's determination would become the final decision. Salsbury requested a hearing.

The administrative law judge's decision

On June 8, 2004, the VA filed a motion to dismiss Salsbury's complaint pursuant to 29 C.F.R. § 24.4(d)(2) on the grounds that Salsbury's request for a hearing was untimely. The motion noted that the Chief Docket Clerk logged in Salsbury's request on December 16, 2003, more than 75 days after OSHA issued its determination. Respondent's Motion to Dismiss. The VA's attorney of record, Tim Morgan, stated in a June 4, 2004 affidavit that OSHA's determination was sent by certified mail and that the return receipt showed Salsbury's signature on either October 2 or October 7, 2003. An OSHA investigator stated in a June 24, 2004 letter that the OSHA determination letter was returned on October 24, 2003 as “undeliverable.” The investigator stated that he personally served Salsbury on October 30, 2003, by leaving the determination letter in his mailbox at home.

³ A copy of the letter was sent to the NRC, Salsbury, and the Office of Administrative Law Judges, which marked it received on October 3, 2003.

Salsbury responded that he received notice of a certified letter in early October, but never took delivery, and the letter apparently went back to OSHA where the green receipt card was signed – Salsbury denied that he signed the card. He stated that he did not actually receive the OSHA determination letter until some time around November 1, 2003, and mailed his request for a hearing on November 3, 2002. The request was sent by regular mail to the Chief Docket Clerk at 88 K Street, not 800, and was returned to Salsbury for “insufficient address.” In a letter dated December 12, 2003, Salsbury “resubmitted” his request for a hearing “within 2 days of receipt” of the returned letter from the postal service and requested that it be considered timely filed.

The ALJ found that Salsbury did not submit his request in accordance with the regulation’s instructions because he did not send it by facsimile, telegram, or next-day delivery service. Further, the ALJ found that Salsbury failed to address his request correctly and did not act with due diligence when he waited four days after finally receiving the notice and two days after his misdirected letter was returned. R. D. & O. at 14.

The ALJ also concluded that Salsbury was not entitled to equitable tolling of the five-day limitations period for requesting a hearing. The ALJ found that Salsbury did not have “clean hands” because he offered no reason or cause for sending his hearing request by regular mail instead of by the specified mode. Nor was there any evidence that the VA misled Salsbury as to his rights, that he was prevented from exercising his rights, or that he filed his request in the wrong forum. Finally, the ALJ determined that Salsbury’s inadvertent misaddressing of the envelope was insufficient to invoke equitable tolling. Accordingly, the ALJ granted the VA’s motion and dismissed Salsbury’s complaint. R. D. & O. at 15.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated her authority to decide this matter to the ARB. 29 C.F.R. § 24.8; *see* Secretary’s Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002). Because the VA submitted evidence outside the pleadings in support of its Motion to Dismiss, we view it as a motion for summary decision under 29 C.F.R. § 18.40 and review the ALJ’s R. D. & O. *de novo*, thereby applying the same legal standards that governed the ALJ’s decision-making process.

The standard for granting summary decision in whistleblower cases is similar to the standard for summary judgment under the analogous federal rule of civil procedure, Fed. R. Civ. P. 56(e). Summary decision is appropriate “if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision” as a matter of law. 29 C.F.R. §§ 18.40, 18.41 (2006).

In considering a motion for summary decision, the ARB reviews the evidence in the light most favorable to the non-moving party. However, the non-moving party may

not rest upon the mere allegations or denials of its pleadings, but instead must set forth specific facts which could support a finding in its favor. 29 C.F.R. § 18.40(c); *Seetharaman v. Gen. Elec. Co.*, ARB No. 03-029, ALJ No. 2002-CAA-21, slip op. 4 (ARB May 28, 2004). In addition to determining the existence of any genuine issue of material fact, the ARB must also determine whether the ALJ properly applied the applicable law.

DISCUSSION

The issue before the Board is whether the ALJ erred in summarily dismissing Miller's complaint because he did not timely file his request for a hearing with the Office of Administrative Law Judges (OALJ). The regulatory procedures for requesting a hearing before the OALJ are provided in the Code of Federal Regulations (CFR), Title 29, part 24.4(d) (2) and (3). The requirements of this section are also contained in the OSHA determination letter to Salsbury informing him of his appeal rights.

Section 24.4(d)(2) addresses the adjudication aspect and plainly identifies the action that will vest the Labor Department's OALJ with jurisdiction over an investigated complaint. Thus, the determination letter shall include notice that any party who desires review of OSHA's decision or any part thereof shall file a request for a hearing with the Chief Administrative Law Judge within five business days of receipt of the determination. If a request for a hearing is timely filed, OSHA's determination "shall be inoperative," and shall become operative only if the case is later dismissed. If a request for a hearing is not timely filed, OSHA's determination "shall become the final order of the Secretary." 29 C.F.R. § 24.4(d)(2).

Section 24.4(d)(3) sets out the requirements for filing and serving the hearing request. A complainant shall file his or her request for a hearing with the Chief Administrative Law Judge by facsimile (fax), telegram, hand delivery, or next-day delivery service. A complainant shall also send a copy of the request for a hearing to the respondent (employer) on the same day that the hearing is requested, by facsimile (fax), telegram, hand delivery, or next-day delivery service. 29 C.F.R. § 24.4(d)(3).

Salsbury's request for a hearing was untimely

We agree with the ALJ that Salsbury filed his request for a hearing out of time. The regulation is clear that a request for a hearing shall be filed within five business days of receipt of the OSHA determination letter, and that, if the request is untimely filed, the OSHA determination will become the final decision. 29 C.F.R. § 24.4(d)(2).

Construing the facts in Salsbury's favor, we find that Salsbury received the OSHA determination letter on November 1, 2003, after it had been left in his mailbox, and that he sent his request for a hearing by regular mail on November 3, 2003, within the requisite five days. We also find that Salsbury mailed his request to the wrong address on K Street, writing the number 88 instead of the correct 800 on the envelope. Further, we accept as true that when the misaddressed envelope was returned to him, Salsbury sent another request for hearing within one or two days of the return.

The regulation, however, does not state that the request shall be “sent” within five business days of receipt of the OSHA determination. It requires rather that the request shall be “filed” with the Chief Administrative Law Judge within five business days. 29 C.F.R. 24.4(d)(2). The legal meaning of filing encompasses more than just sending, by whatever means, the request for a hearing. According to BLACK’S LAW DICTIONARY, to file means to “deliver an instrument or other paper to the proper officer for the purpose of being kept on file by him in the proper place.” Thus, to file a paper on the part of a party is to place it in the official capacity of the clerk, who indorses on it the date of its reception and retains it in his office. BLACK’S LAW DICTIONARY, p. 755-56 (Rev’d 4th Ed. 1968) *cf.* 29 C.F.R. § 18.4 (“*Computation of time for delivery by mail.* (1) Documents are not deemed filed until received by the Chief Clerk at the Office of Administrative Law Judges.”)

In this case, Salsbury acknowledged November 1, 2003, as the day he received the OSHA determination letter. But the Office of the Chief Administrative Law Judge did not receive Salsbury’s request for a hearing until December 16, 2003, more than 30 days later. The fact that Salsbury “sent” his request within a day or two after November 1st is not determinative. The regulation mandates that he “file” his request within five days. Salsbury did not, and therefore, his request for a hearing was untimely. *See Degostin v. Bartlett Nuclear, Inc.*, ALJ No. 98-ERA-7, slip op. at 3 (ARB May 4, 1998) (time limit for filing a request for a hearing must be strictly construed).

Salsbury has not demonstrated entitlement to equitable tolling

Even if Salsbury’s request for a hearing was untimely, the five-day time limit for filing a hearing request and the service requirements are not jurisdictional. *Shirani v. Calvert Cliffs Nuclear Power Plant*, ARB No. 04-101, ALJ No. 04-ERA-9, slip op. at 8 (ARB Oct. 31, 2005). Thus, these regulations are subject to the principles of equitable tolling that courts have applied to cases with statutorily-mandated filing deadlines in determining whether to relax the limitations period in a particular case. *Howell v. PPL Servs., Inc.*, ARB No. 05-094, ALJ No. 05-ERA-014, slip op. at 4 (Feb. 28, 2007).

We have reiterated these principles in many of our cases. *Hemingway v. Ne. Utilis.*, ARB No. 00-074, ALJ Nos. 99-ERA-014, 015, slip op. at 4, (ARB Aug. 31, 2000). Tolling is proper “when the defendant has actively misled the plaintiff regarding the cause of action; when the plaintiff has in some extraordinary way been prevented from filing his action; and when “the plaintiff has raised the precise statutory claim in issue but has done so in the wrong forum.”⁴

⁴ *Higgins v. Glen Raven Mills, Inc.*, ARB No. 05-143, ALJ No. 05-SDW 007, slip op. at 8 (ARB Sept. 29, 2006), citing *School District of the City of Allentown v. Marshall*, 657 F.2d 16, 19-20 (3d Cir. 1981) (internal quotations omitted).

In *Rose v. Dole*, 945 F.2d 1331 (6th Cir. 1991), a case involving the ERA, the court delineated other factors to be considered in determining whether equitable tolling of a limitations period was appropriate. Those factors are whether the complainant lacked actual or constructive notice of the filing requirements, whether the complainant exercised due diligence in pursuing his rights, whether tolling would prejudice the respondent, and whether the complainant was reasonably ignorant of his rights. 945 F.2d at 1335 (citing *Wright v. State of Tenn.*, 628 F.2d 949, 953 (6th Cir. 1980)).

Salsbury bears the burden of justifying the application of these principles by alleging facts that show entitlement to equitable treatment. See *United States v. All Funds Distributed To, or on Behalf of Weiss*, 345 F.3d 49, 55 (2d Cir. 2003) (the party seeking to benefit from the doctrine [of equitable tolling] bears the burden of proving that tolling is appropriate). Further, Salsbury's inability to satisfy one of these elements is not necessarily fatal to his claim, but the courts "have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights." *Reid v. Niagara Mohawk Power Corp.*, ARB No. 03-154, ALJ No. 03-ERA-017, slip op. at 8 (ARB Oct. 19, 2004) (citations omitted).

We agree with the ALJ's conclusion that Salsbury was not entitled to equitable tolling because he failed to exercise due diligence.

Salsbury admitted that he received notice of certified mail around the beginning of October. Whether or not he signed the return receipt, he did not take delivery of the certified letter, and it was returned as "undeliverable." Salsbury also admitted that, after finding the determination letter in his mailbox, he sent his request for a hearing by regular mail, instead of following the instructions in the OSHA determination letter to file "by facsimile (fax), telegram, hand delivery, or next-day delivery service." Salsbury offered no evidence that he pursued his request for a hearing during the month of November and into December. Only when his misdirected letter was returned to him, did he take any action. And, in sending his hearing request a second time, Salsbury again used regular mail, ignoring the specific instructions for filing.

Given these circumstances, we must conclude that Salsbury did not use due diligence in seeking a hearing, and is therefore not entitled to equitable tolling. See *Baldwin County Welcome Ctr. v. Brown*, 446 U.S. 147, 151 (1990) (pro se party who was informed of due date but filed six days late was not entitled to equitable tolling because she failed to exercise due diligence). Cf. *Thissen v. Tri-Boro Constr. Supplies, Inc.*, ARB No. 04-153, ALJ No. 04-STA-035, slip op. at 5 (ARB Dec. 16, 2005) (equitable tolling was appropriate where the Complainant produced a copy of the misaddressed envelope and an affidavit from his attorney confirming that the letter of objection dated February 25 had been sent on that day but to the wrong address and Complainant diligently followed up when told that the letter had not been received).

Salsbury's arguments

Salsbury offers several arguments in support of his position that the ALJ erred in concluding that the five-day limitations period should not be tolled. First, Salsbury argues that failure to toll the limitations period would be “too harsh a result for a pro se” complainant, citing *Hibler v. Exelon Generation Co.*, ARB No. 03-106, ALJ No. 03-ERA-009, slip op. at 2 (ARB Feb. 26, 2004). Petitioner’s Brief at 10. Second, Salsbury asserts that he substantially complied with the regulation and should not be penalized for a scrivener’s error, citing *Goldstein v. Ebasco Constructors, Inc.*, ALJ No. 86-ERA-036 (Sec’y Apr. 7, 1992). *Id.* at 10-11. Third, Salsbury contends that the VA should be estopped from seeking dismissal because OSHA failed to serve the determination letter by certified mail, as required by 29 C.F.R. § 24.4(d)(1). *Id.* at 11. Fourth, Salsbury argues that he was prevented from asserting his rights due to the extraordinary circumstance of clerical error in addressing his request.⁵ *Id.* at 12. Finally, Salsbury contends that tolling the time limitation would not be prejudicial to the VA because the delay did not hamper its defense. *Id.* at 13.

These arguments are not persuasive. First, Salsbury’s reliance on *Hibler* is misplaced. In that case, the ARB denied review of Exelon’s interlocutory appeal of the ALJ’s denial of its motion to dismiss because of lack of service. *Hibler*’s request for a hearing was timely filed, and the ARB did not endorse the ALJ’s comment that dismissal of *Hibler*’s complaint would be “too harsh” a penalty for his failure to serve Exelon pursuant to 29 C.F.R. § 24.4(d)(3).

Second, Salsbury’s reliance on *Goldstein* is also misplaced because the complainant’s hearing request in that case was timely filed, albeit by telegram. A complainant who relies on alternative means for delivery of his hearing request, *e.g.*, by regular mail, assumes the risk that the hearing request may be received beyond the due date, and therefore be untimely. *See Backen v. Entergy Operations, Inc.*, ALJ No. 95-ERA-46, slip op. at 4 (Sec’y June 7, 1996) (complaint dismissed where the hearing request was sent by regular mail in violation of applicable regulations and was untimely); *Staskelunas v. Ne. Utils. Co.*, ARB No. 98-035, ALJ No. 98-ERA-007, slip op. at 2 (ARB May 4, 1998) (complaint dismissed where the hearing request was filed by certified mail in violation of the applicable regulations and was untimely); *Crosier v. Westinghouse Hanford Co.*, ALJ No. 92-CAA-003, slip op. at 10 (Sec’y Jan. 12, 1994) (request for hearing was not timely where it was filed by mailgram, rather than telegram, and received 10 days after the time limit). Thus, Salsbury was charged with the duty of ensuring that his hearing request was properly filed. His “scrivener’s error” would not have occurred had he followed the specific directions for filing a request for a hearing by

⁵ Salsbury does not argue that he filed a timely request for a hearing in the wrong forum or that the VA actively misled him. Nor does he contend that he was ignorant of his rights or lacked actual or constructive notice of those rights. Therefore, we need not address these equitable tolling principles. *Reid*, slip op. at 8.

facsimile, telegram, or next-day delivery. Having chosen to ignore the plain instructions, Salsbury must bear the consequences of his action.

Third, Salsbury's estoppel argument is factually flawed. OSHA's September 29, 2003 determination letter was sent by certified mail, and Salsbury admitted that he had received notice of a certified letter around October 1, 2003. Regardless of who signed the return receipt, the VA cannot be faulted for Salsbury's failure to take delivery of the determination letter.

Fourth, mere clerical errors do not constitute "extraordinary circumstances" for purposes of equitable tolling. *Howlett v. Ne. Utils./Ne. Nuclear Energy Corp.*, ARB No. 99-044, ALJ No. 99-ERA-001, slip op. at 2 (ARB Mar. 13, 2001). Such circumstances would ordinarily be outside the control of a complainant and the misaddressed envelope was completely within Salsbury's control. See *Wakileh v. W. Ky. Univ.*, ARB No. 04-013, ALJ No. 03-LCA-023, slip op. at 5 (ARB Oct. 20, 2004) (ARB rejected argument that a delay in receiving the determination letter constitutes an extraordinary circumstance that prevented the complainant from timely filing his request for a hearing).

Finally, Salsbury argues that since the VA has not asserted that equitable tolling would prejudice its defense, the time limit should be tolled. To the contrary, the VA did assert in responding to the ARB's show cause order that tolling of the limitations period would place the VA in the position of having to defend stale claims "many years after the fact." Reply to Complainant's Response to Show Cause Order at 5. Further, an absence of prejudice to the other party "is not an independent basis for invoking" the doctrine of equitable tolling and "sanctioning deviations from established procedures." *Baldwin County Welcome Ctr.*, 446 at 152; *Santamaria v. U.S. Envtl. Prot. Agency*, ARB No. 04-063, ALJ No. 04-ERA-6, slip op. at 4 (ARB May 31, 2006).

In any event, the VA has no burden of proof to show any prejudice to its defense in arguing against tolling. Rather, it is Salsbury's burden to demonstrate his entitlement to equitable tolling. *Herchak v. Am. W. Airlines, Inc.*, ARB No. 03-057, ALJ No. 2002-AIR-12, slip op. at 5 (ARB May 14, 2003). Because Salsbury has failed to meet his burden, equitable tolling will not lie.

The ALJ's sovereign immunity analysis

Prior to dismissing this complaint on procedural grounds, the ALJ provided a lengthy exposition of whether the VA had waived sovereign immunity. He determined that our decision in *Pastor v. Veterans Affairs Med. Cent.*, ARB No. 99-071, ALJ No. 99-ERA-011 (ARB May 30, 2003) applied "narrowly to claims in which only compensatory damages are sought." R. D. & O. at 5-6. The ALJ concluded that because Salsbury sought equitable remedies, the Administrative Procedure Act waived sovereign immunity for Salsbury's claim for reinstatement with back pay. R. D. & O. at 10.

We affirm the ALJ's dismissal of Salsbury's complaint on the untimely filing of his request for a hearing and, therefore, do not need not to determine the issue of waiver

of sovereign immunity. *See Prybys v. Seminole Tribe of Fla.*, ARB No. 96-064, ALJ No. 95-CAA-096, slip op at 3-4 n.3 (ARB Nov. 27, 1996) (upholding the ALJ's dismissal of a complaint on the basis of timeliness and declining to address the Tribe's argument that sovereign immunity applied). The OSHA determination finding no merit in Salsbury's complaint becomes the final decision of the Department of Labor.

CONCLUSION

The regulation implementing the ERA requires complainants to file a request for a hearing within five business days of their receipt of OSHA's determination letter. Salsbury did not file his request within the allotted time frame. Further, we find no basis upon which to toll the statute of limitations. Therefore, we **DISMISS** Salsbury's complaint.

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

DAVID G. DYE
Administrative Appeals Judge