



IN THE MATTER OF:

MARY MADISON,

COMPLAINANT,

v.

KENCO LOGISTICS,

RESPONDENT.

ARB CASE NO. 18-018

ALJ CASE NO. 2016-FDA-004

DATE: FEB 15 2018

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Jordan TraVaille Hoffman, Esq.; Aurora, Illinois

For the Respondent:

Jody Wilner Moran, Esq. and Julia P. Argentieri, Esq.; Jackson Lewis P.C.,
Chicago, Illinois

Before: Joanne Royce, *Administrative Appeals Judge*, and Leonard Howie III,
Administrative Appeals Judge

FINAL DECISION AND ORDER DISMISSING APPEAL

On December 17, 2017, Complainant Mary Madison, filed a Petition requesting the Administrative Review Board to review a Department of Labor Administrative Law Judge's Decision and Order Granting Respondent's Motion for Summary Decision on Reconsideration, Cancelling Hearing, and Dismissing Claim (D. & O.), issued on November 22, 2017, in this case arising under the whistleblower protection provisions of the FDA Food Safety Modernization Act, 21 U.S.C.A. § 399d (Thomas Reuters 2013) (FDA). The Secretary of Labor has delegated authority to issue final agency decisions under the FDA to the Administrative Review Board.¹ A

¹ Secretary's Order No. 2-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,378 (Nov. 16, 2012).

party must file a petition for review within fourteen days of the date of the ALJ's decision.² The date of the postmark, facsimile transmittal, or electronic communication transmittal will be considered to be the date of filing; if the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon the date the petition is received.³

Madison filed her petition for review more than fourteen days after the ALJ issued his Order. Nevertheless, "the Board's authority includes the discretionary authority to review interlocutory rulings in **exceptional** circumstances"⁴ The period for filing a petition for review with the ARB is not jurisdictional and therefore is subject to equitable modification.⁵ In determining whether the Board should toll a statute of limitations, we have recognized four principal situations in which equitable modification may apply: (1) when the defendant has actively misled the plaintiff regarding the cause of action; (2) when the plaintiff has in some extraordinary way been prevented from filing his action; (3) when the plaintiff has raised the precise statutory claim in issue but has done so in the wrong forum, and (4) where the defendant's own acts or omissions have lulled the plaintiff into foregoing prompt attempts to vindicate his rights.⁶ But the Board has not found these situations to be exclusive, and an inability to satisfy one is not necessarily fatal to Madison's claim.⁷ Nevertheless, we hold that Madison has failed to demonstrate entitlement to equitable tolling here.

Madison bears the burden of justifying the application of equitable tolling principles.⁸ Accordingly, we ordered Madison to show cause, why the petition should not be dismissed as untimely. In response, Madison avers that the ALJ originally served his decision on Madison's counsel at an incorrect address. When the ALJ became aware of the error, on December 1, 2017, the ALJ re-served the decision addressed correctly. Madison claims that her petition for review was timely because it was filed on December 17, 2017, within fourteen days of the date when her counsel **received** the decision at the correct address on December 6, 2017.

In reply to Madison's response, Respondent Kenco Logistics avers that Madison knew that the ALJ had issued the D. & O. as early as December 1, five days before the due date for the petition for review, but failed to act diligently by either requesting an extension of time to file her

² 29 C.F.R. § 1987.110(a)(2017).

³ *Id.*

⁴ Secretary's Order No. 2-2012 at 77 Fed Reg. 69,379 at ¶ 5(c)(66) (emphasis added).

⁵ *Accord Hillis v. Knochel Bros.*, ARB Nos. 03-136, 04-081, 04-148; ALJ No. 2002-STA-050, slip op. at 3 (ARB Oct. 19, 2004); *Overall v. Tennessee Valley Auth.*, ARB No. 98-011, ALJ No. 1997-ERA-053, slip op. at 40-43 (ARB Apr. 30, 2001).

⁶ *Selig v. Aurora Flight Sciences*, ARB No.10-072, ALJ No. 2010-AIR-010, slip op. at 3 (ARB Jan. 28, 2011).

⁷ *Id.* at 4.

⁸ *Accord Wilson v. Sec'y, Dep't of Veterans Affairs*, 65 F.3d 402, 404 (5th Cir. 1995) (complaining party in Title VII case bears burden of establishing entitlement to equitable tolling).

petition or timely filing the petition in the remaining five days. Further Kenco argues that even if the time for filing was tolled until the ALJ served the second copy of the decision, Madison's petition for review was untimely because it was not filed within 14 days of the date on which the decision was served.

The Board has consistently held that "equitable tolling is generally not appropriate when a complainant is represented by counsel because counsel is "presumptively aware of whatever legal recourse may be available to [his or her] client.""⁹ Thus, attorney error does not constitute an extraordinary factor because "[u]ltimately, clients are accountable for the acts and omissions of their attorneys."¹⁰

Furthermore, "extraordinary circumstances" is a very high standard that is satisfied only in cases in which even the exercise of diligence would not have resulted in timely filing.¹¹ Madison's counsel was informed no later than December 1, 2017, that the ALJ had issued his decision. He had five days of the original fourteen in which to act and two legitimate choices—he could either file the petition for review or he could file a motion for an enlargement of time to file the petition for review—he did neither. Instead, he unilaterally decided, without consulting the Board, that (1) Madison was entitled to toll the due date for filing because the original decision was sent to the wrong address, and (2) that he had fourteen days from the date he received the decision, rather than fourteen days from the date the ALJ issued it, to file the petition.¹² Counsel was incorrect on both counts. Had Madison's counsel contacted the Board and explained the reasons for requiring an enlargement of time, it is likely that the Board would have granted the request, but he failed to ask for such an enlargement and thereby has failed to establish due diligence.

⁹ *Nevarez v. Werner Enters.*, ARB No. 18-005, ALJ No. 2013-STA-012, slip. op. at 2-3 (ARB Dec. 14, 2017) (quoting *Brown v. Synovus Fin. Corp.*, ARB No. 17-037, ALJ No. 2015-SOX-018, slip op. at 3 (ARB May 17, 2017)). See also *Sysko v. PPL Corp.*, ARB No. 06-138, ALJ No. 2006-ERA-023, slip op. at 5 (ARB May 27, 2008)(quoting *Mitchell v. EG&G*, No. 1987-ERA-022, slip op. at 8 (Sec'y July 22, 1993)).

¹⁰ *Id.* (quoting *Higgins v. Glen Raven Mills, Inc.*, ARB No 05-143, ALJ No. 2005-SDW-007, slip op. at 9 (ARB Sept. 29, 2006)).

¹¹ *Romero v. The Coca Cola Co.*, ARB No. 10-095, ALJ No. 2010-SOX-021, slip op. at 5 (ARB Sept. 30, 2010). *Accord Stoll v. Runyon*, 165 F.3d 1238, 1242 (9th Cir. 1999)("complete psychiatric disability" during the entirety of the limitations period); *Alvarez-Machain v. United States*, 107 F.3d 696 (9th Cir. 1996) (incarceration in a foreign country for the entirety of the limitations period).

¹² *Accord Bohanon v. Grand Trunk W. R.R.*, ARB No. 16-048, ALJ No. 2014-FRS-003, slip op. at 3 (ARB Apr. 27, 2016)(Attorney who erroneously filed petition for review within 14 days of receipt, rather than 14 days of issuance of the ALJ's decision, demonstrated at most garden variety mistake, rather than the required extraordinary circumstances.).

CONCLUSION

Accordingly, because Madison failed to timely file her petition for review and has not established grounds for equitable tolling, we **DISMISS** her appeal.

SO ORDERED.



JOANNE ROYCE
Administrative Appeals Judge



LEONARD J. HOWIE III
Administrative Appeals Judge