



In the Matter of:

ARVIND GUPTA,

PROSECUTING PARTY,

v.

HEADSTRONG, INC.,

RESPONDENT.

**ARB CASE NOS. 11-065
11-008**

ALJ CASE NO. 2011-LCA-038

DATE: June 29, 2012

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Prosecuting Party:

Arvind Gupta, *pro se*, Mumbai, India

Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*; Joanne Royce, *Administrative Appeals Judge*; and Luis A. Corchado, *Administrative Appeals Judge*

FINAL DECISION AND ORDER

The appeals in this case arise under the Immigration and Nationality Act, as amended (INA or the Act).¹ Arvind Gupta filed complaints in May 2008 and in 2010 with the United States Department of Labor's Wage and Hour Division (Wage and Hour) alleging that his former employer, Headstrong, Inc., violated the terms of the INA.

¹ 8 U.S.C.A. §§ 1101-1537 (West 1999 & Thompson Reuters Supp. 2011). The INA's implementing regulations are found at 20 C.F.R. Part 655, Subparts H and I (2011).

Following dismissal by Wage and Hour, a Department of Labor Administrative Law Judge (ALJ) dismissed Gupta's requests for hearing for lack of jurisdiction. We affirm the ALJ's decision to dismiss.

BACKGROUND

The administrative record shows the following: The federal government authorized Headstrong to employ Gupta under the H-1B non-immigrant worker visa program from April 24, 2006, to November 8, 2007. Immigration and Naturalization Service Notice of Action on a Petition for a Non-Immigrant Worker, dated April 24, 2006. Gupta worked for Headstrong from April 2006 to November 2006 when Headstrong discharged him. By letter dated November 14, 2006, Headstrong informed Gupta that it terminated his employment effective November 27, 2006.² By December 4, 2006, Gupta had signed a separation agreement with Headstrong, accepting a "severance payment" of \$8,076.92. On January 15, 2007, Headstrong informed the United States Department of Homeland Security (DHS) Customs and Immigration Services (USCIS), that it no longer employed Gupta. In February 2007, Headstrong provided Gupta with airplane tickets to return to India. USCIS revoked its approval of Headstrong's Petition for a Non-Immigrant Worker on March 30, 2007.

Gupta then hired an attorney in an attempt to settle claims made under the INA's H-1B program, including a claim for back wages through November 8, 2007, cost of return transportation to India aside from the airplane tickets Headstrong provided, unpaid benefits, and accrued interest. Gupta's attorney made these claims in a letter to Headstrong dated April 1, 2008, in which he also detailed the actions Headstrong took in 2006 and 2007 to terminate Gupta's employment. Letter from Kenneth A. Goldberg of Goldberg & Fliegel LLP to Sandeep Sahai of Headstrong (April 1, 2008).³

Some eight weeks later, Gupta filed a complaint with Wage and Hour on or about May 28, 2008, alleging that Headstrong had violated the terms of the INA by, among other things, failing to pay him his wages through November 8, 2007.⁴ On June 6, 2008, Lou Greer, Assistant District Director, for the Administrator, Wage and Hour Division, informed Gupta, "Upon review, we have determined that there is no reasonable cause to

² The administrative record contains a Headstrong pay stub for Gupta for the period ending November 30, 2006.

³ Attached to counsel's letter is a copy of a check from Headstrong to counsel's firm dated May 9, 2008. The check contains no reference to Gupta or his claims.

⁴ Gupta's complaint is undated. Gupta asserted to the ALJ that he filed his written complaint with DOL "on or around May 28, 2008," having first contacted DOL by telephone that January. Complainant's Response to Order to Show Cause and Motion for Order Setting Forth Discovery and Briefing Schedule, dated August 23, 2010.

conduct an investigation because you have failed to provide sufficient information to indicate that there is a violation within the 12 months preceding your complaint.” Gupta claims that he then provided additional information to DOL over the two years between June 2008 and June 2010.

On June 8, 2010, Greer informed Gupta, “We have reviewed your complaint and determined that it is not timely. Please call me if you have any questions or wish to discuss.” On June 10, 2010, Greer wrote, “Upon review, we have determined that there is no reasonable cause to conduct an investigation because you have failed to provide sufficient information to indicate that there was a violation within the 12 months preceding your complaint.” Two days later, Gupta requested a hearing before an ALJ. Gupta requested that the ALJ determine the timeliness of his complaint to Wage and Hour, the applicability of equitable tolling principles, and the authority of the Administrator, Wage and Hour Division, to investigate complaints. Gupta asserted that his May 2008 complaint was timely filed within 12 months of Headstrong’s failure to pay his wages through November 8, 2007, that he is alternatively entitled to tolling of the 12-month statute of limitations in which complaints must be filed, and that the Administrator should have conducted an investigation of his complaint under 20 C.F.R. §§ 655.800(b), 655.806(a)(5).

In support of his tolling argument, Gupta asserted that Headstrong “*actively mislead him respecting his rights to file a complaint* by not providing him with a copy of his certified [Labor Condition Application] and informing him orally in November 2006 that the employer will not withdraw his H-1B petition.” Letter from Gupta to Chief ALJ requesting hearing (June 12, 2010)(emphasis in original). Gupta also stated that he had “in some extraordinary way been prevented from asserting his rights because [Headstrong] coerced him into signing a severance agreement in December 2006 and thereby restrained his legal options.” *Id.*

Proceedings Before the ALJ

By Order dated August 2, 2010, the ALJ directed Gupta to show cause why the matter should not be dismissed for lack of jurisdiction. The ALJ found that “the governing regulation” at 20 C.F.R. § 655.806(a)(2) provides that no hearing or appeal is available where “the Administrator determines that an investigation on a complaint is not warranted.” The ALJ also cited *Watson v. Electronic Data Sys. Corp.*, ARB Nos. 04-023, -029, -050; ALJ Nos. 2003-LCA-030, 2004-LCA-009, -023 (ARB May 31, 2005)(Wage and Hour finds no reasonable cause to investigate four complaints, and no administrative recourse to challenge Wage and Hour’s findings).

Gupta responded to the ALJ’s order. He sought to distinguish *Watson* where Wage and Hour’s decisions not to investigate the complaints were based on substantive issues and not on a procedural issue such as the timeliness issue in this case. Gupta cited *Ndiaye v. CVS Store No. 6081*, ARB No. 05-024, ALJ No. 2004-LCA-036 (ARB Nov. 29, 2006), affirmed on reconsideration (May 9, 2007)(Wage and Hour initially

investigated complaint before stopping investigation on the grounds of untimeliness; ALJ could properly review timeliness issue). Gupta also reiterated his assertion that he was entitled to equitable tolling of the statute of limitations. Complainant's Response to Order to Show Cause and Motion for Order Setting Forth Discovery and Briefing Schedule (Aug. 23, 2010). Headstrong urged the ALJ to dismiss the hearing request. Respondent's Reply to Complainant's Response to Order to Show Cause and Opposition to Motion for Order Setting Forth Discovery and Briefing Schedule (Sept. 30, 2010).

In her Order of Dismissal dated October 12, 2010, the ALJ found that Wage and Hour did not investigate any complaint Gupta filed and distinguished *Ndiaye* on the basis that that complaint was initially investigated. The ALJ determined that under 20 C.F.R. § 655.806(a)(2), there was no hearing available. The ALJ also found that Wage and Hour did not render any determination subsequent to investigation, which determination is a prerequisite to requesting a hearing under 20 C.F.R. § 655.820(b)(1). The ALJ found no jurisdictional basis for a hearing and dismissed Gupta's hearing request.

Gupta filed a petition for review with the Administrative Review Board (ARB) on October 17, 2010 (ARB No. 11-008). While that petition was pending, Gupta filed a second complaint in 2011. Wage and Hour declined to investigate on the basis that the alleged violations occurred more than 12 months before Gupta filed the complaint and there was "no reasonable cause to conduct an investigation." See ALJ's Order Denying Complainant's Motion for a More Definite Statement; and Dismissing Case Based on Lack of Jurisdiction (July 19, 2011). The same ALJ issued a May 13, 2011 order to show cause why the matter should not be dismissed for lack of jurisdiction. *Id.* at 1. Wage and Hour urged dismissal, asserting that the ALJ lacked jurisdiction and that Gupta was trying to relitigate matters previously adjudicated and pending disposition by the ARB in ARB No. 11-008. *Id.* at 2.

In her July 19, 2011 Order Denying Complainant's Motion for a More Definite Statement; and Dismissing Case Based on Lack of Jurisdiction, the ALJ dismissed the matter for lack of jurisdiction based on the same reasons she dismissed the matter pending in ARB No. 11-008, namely for lack of jurisdiction.

Gupta filed a petition for review (ARB No. 11-065), and the ARB subsequently consolidated these appeals. The ARB accepted for review the following issue:

The INA's H-1B regulations provide, "No hearing or appeal pursuant to this subpart shall be available where the Administrator [Wage and Hour Division] determines that an investigation on a complaint is not warranted." 20 C.F.R. § 655.806(a)(2) (2010). Did the ALJ properly dismiss Arvind Gupta's request for a hearing on the grounds that the Administrator determined that an investigation of his complaint was not warranted because Gupta had not timely filed his complaint[?]

ARB's Notice of Intent to Review, Order of Consolidation, and Order to Show Cause, dated August 16, 2011.

While this appeal was pending, Gupta submitted a "Notice of New Material Facts; Due Process Violations; And, Motion for Remand." Gupta attaches an "Extract of 'H-1B Narrative'" prepared by Wage and Hour's investigator in *Gupta v. Compunnel Software Group, Inc.*, ALJ No. 2011-LCA-045. Gupta's appeal from Administrative Law Judge Romano's decision is pending (ARB No. 12-049). Gupta asserts that Judge Romano's affirmance of Wage and Hour's Determination in *Compunnel* abrogated his right to due process *in this case* where Wage and Hour did not reach the merits of his complaint and determine what wages are due and Gupta has not had a hearing. Gupta argues that the ALJ's finding that his complaint is untimely is moot and urges the ARB to remand the case for a "hearing on the merits or issue any other just Order." Motion at 2.

The investigator's narrative was not before the ALJ when she ruled. We treat Gupta's submission and motion to remand as, in effect, a motion to reopen the evidentiary record pursuant to 29 C.F.R. § 18.54(c). Under 29 C.F.R. § 18.54(c), once the ALJ closes the record, "no additional evidence shall be accepted into the record except upon a showing that new and material evidence has become available which was not readily available prior to the closing of the record." We "ordinarily rel[y] upon this standard in determining whether to consider new evidence, i.e., any evidence that is submitted after the ALJ has closed the record." *Nixon v. Stewart & Stevenson Servs., Inc.*, ARB No. 05-066, ALJ No. 2005-SOX-001, slip op. at 12 (ARB Sept. 28, 2007). Absent a showing that the proffered evidence is "new and material evidence [that] has become available which was not readily available prior to the close of the record," the Board will not remand to the ALJ to consider the new evidence. *Id.*

We do not consider this new evidence. Gupta has not shown that the investigator's narrative in *Compunnel* is material to the issue here, namely whether the ALJ properly dismissed Gupta's request for a hearing because Wage and Hour determined that an investigation was not warranted where Gupta had not timely filed his complaint. Accordingly, we deny Gupta's motion to remand the case.

JURISDICTION AND STANDARD OF REVIEW

The Administrative Review Board has jurisdiction to review the ALJ's decision.⁵ Under the Administrative Procedure Act, the ARB, as the Secretary of Labor's designee, acts with "all the powers [the Secretary] would have in making the initial decision"⁶

⁵ 8 U.S.C.A. § 1182(n)(2); 20 C.F.R. § 655.845. See Secretary's Order No. 1-2010, 75 Fed. Reg. 3,924-25 (Jan. 15, 2010) (delegating to the ARB the Secretary's authority to review cases arising under, inter alia, the INA).

Where an ALJ dismisses a case as a matter of law, as in this case, there is no question that the ARB has plenary power to review an ALJ's legal conclusions de novo.⁷

DISCUSSION

1. Statutory and Regulatory Scheme

The H-1B non-immigrant worker program is a component of the INA that permits the temporary employment of non-immigrants to fill specialized jobs in the United States. *See* 8 U.S.C.A. §§ 1101(a)(15)(H)(i)(b), 1182(n); 20 C.F.R. Part 655, subparts H and I. An employer who seeks to hire a non-immigrant in a specialty occupation must submit a Labor Condition Application (LCA) to the Department of Labor. If the Labor Department certifies the LCA, the employer files a Petition for a Non-Immigrant Worker with the Department of Homeland Security's United States Citizenship and Immigration Services (USCIS). If USCIS approves the H-1B petition, the non-immigrant worker may obtain a visa from the Department of State, allowing him to enter the country and work for a temporary period. *See* 8 U.S.C.A. § 1184(g)(4); 8 C.F.R. §§ 214.2(h)(2)(i)(D), (9)(iii)(A)(1), (13)(iii)(A), (15)(ii)(B).

The Secretary of Labor has established a system of enforcement proceedings and sanctions for employers who fail to meet a condition specified in the LCA or misrepresent a material fact when completing the LCA. The system provides for the filing of complaints, investigations by Wage and Hour, hearings before an ALJ, and appellate review by the Administrative Review Board. 8 U.S.C.A. § 1182(n)(2)(A); 20 C.F.R. § 655.700, 800.

Section 20 C.F.R. § 655.805(a) sets forth what violations Wage and Hour may investigate. When there is an allegation that an H-1B employer has violated any of the provisions of 20 C.F.R. § 655.805(a), the Administrator, Wage and Hour, is afforded broad authority to investigate and determine whether the employer has violated any of those provisions. The provisions of 20 C.F.R. § 655.806(a) govern the filing of a complaint with the Administrator in which a complainant alleges a violation of 20 C.F.R. § 655.805(a).⁸ The regulation at 20 C.F.R. § 655.806(a)(2) reads:

⁶ 5 U.S.C.A. § 557(b) (West 1996).

⁷ *Yano Enters., Inc. v. Administrator*, ARB No. 01-050, ALJ No. 2001-LCA-001, slip op. at 3 (ARB Sept. 26, 2001); *Administrator v. Jackson*, ARB No. 00-068, ALJ No. 1999-LCA-004, slip op. at 3 (ARB Apr. 30, 2001).

⁸ *See also* 8 U.S.C.A. § 1182(n)(2)(A).

The complaint shall set forth sufficient facts for the Administrator to determine whether there is reasonable cause to believe that a violation as described in 20 C.F.R. § 655.805 has been committed and therefore that an investigation is warranted. This determination shall be made within 10 days of the date that the complaint is received by a Wage and Hour Division official. If the Administrator determines that the complaint fails to present reasonable cause for an investigation, the Administrator shall so notify the complainant, who may submit a new complaint, with such additional information as may be necessary. No hearing or appeal pursuant to this subpart shall be available where the Administrator determines that an investigation on a complaint is not warranted.

Any interested party may request a hearing before an ALJ to review an Administrator's determination after investigation.⁹ A hearing may be requested "where the Administrator determines after investigation, that there is no basis for finding that an employer has committed violation(s)," or "where the Administrator determines, after investigation, that the employer has committed violation(s)."¹⁰

The INA and its implementing regulations, however, do not provide that a complainant, such as Gupta, may request a hearing before an ALJ where the Administrator determines, as she did in this case, that there is "no reasonable cause to conduct an investigation because you have failed to provide sufficient information to indicate that there was a violation within the 12 months preceding your complaint."

2. No Right to a Hearing Without an Investigation

Gupta, who appears pro se, argues that the ALJ's decisions are inconsistent with applicable law.¹¹ We disagree. The ALJ properly held in each case that Gupta's request for a hearing did not comply with the regulatory requirement at 20 C.F.R. § 655.820(b) for requesting a hearing, which is that the Administrator, Wage and Hour, has made a determination on the complaint after investigating it. As the ARB held in *Watson*, the employee's complaint must be investigated by the Administrator as a precondition to ALJ

⁹ See 20 C.F.R. § 655.820(b).

¹⁰ 20 C.F.R. § 655.820(b)(1), (2).

¹¹ In September 2011, Gupta filed a Citation of Supplemental Authorities. In March 2012, Gupta filed a Notice of New Material Facts; Due Process Violations; and Motion for Remand and attached new evidence. These filings are not germane to the sole issue before us on appeal.

review. The ARB construed the regulation at 20 C.F.R. § 655.820(b) to mean that “unless the Administrator finds that the facts presented in a complaint establish a reasonable cause for WHD to investigate, there will be no investigation and, therefore, no determination will issue.”¹² Simply put, “the prerequisite for requesting a hearing is that the WHD Administrator has conducted an investigation and made a determination” on the complaint.¹³ In this regard, the ALJ further noted that under 20 C.F.R. § 655.835(a), ALJs conduct proceedings “[u]pon receipt of a timely request for a hearing filed pursuant to and in accordance with § 655.820,” and Gupta’s hearing requests do not comply with that regulation.

The ALJ also properly determined that under 20 C.F.R. § 655.806(a)(2), no hearing or appeal is available where the Administrator determines that an investigation is not warranted. The record before us contains no evidence that there was an investigation and determination by Wage and Hour in any complaint filed by Gupta. Consequently, the ALJ properly determined that she lacked jurisdiction to entertain Gupta’s requests for a hearing. Because Gupta is not entitled to a hearing, we have no jurisdiction to rule upon or discuss his argument that the Administrator should have found he was entitled to equitable tolling.¹⁴ The Administrator’s decision represents the final agency action in this matter.

CONCLUSION

For the reasons stated, we hold that the ALJ lacks jurisdiction under 20 C.F.R. § 655.820 to entertain Gupta’s requests for a hearing. Accordingly, we **AFFIRM** the

¹² *Watson*, ARB Nos. 04-023, -029, -050, slip op. at 5.

¹³ *Id.*

¹⁴ We recognize that limitations periods are customarily subject to equitable tolling, unless tolling would be inconsistent with the text of the relevant statute. *Young v. U.S.*, 535 U.S. 43, 49 (2002). *See also Hart v. J.T. Baker Chem. Co.*, 598 F.2d 829, 831 (3d Cir. 1979)(180-day limitations for Title VII discrimination claims could be tolled); *Moreno-Gutierrez v. Napolitano*, 794 F. Supp. 2d 1207, 1210-12 (2011)(immigration case where two-year statute of limitations could be tolled). We also appreciate that the INA does not refer to the 12-month limitation as a jurisdictional limitation, and the Department used the term “jurisdictional” bar in the regulation codified at 20 CFR § 655.806(a)(5), to refer to the statute’s time limitation only and not to impose a “jurisdictional” limitation. *See* 59 Fed. Reg. 65657 (Dec. 20, 1994)(Department refers to statutory provision as a “time bar,” “12-month time bar,” and “12-month limitation.” Nevertheless, because no further hearing within the Department is permitted, this is a matter that complainants must take up while the matter is pending with the Administrator or in another forum if the Administrator refuses to investigate the complaint.

ALJ's October 12, 2010 Order of Dismissal as well as her July 19, 2011 Order Denying Complainant's Motion for a More Definite Statement; and Dismissing Case Based on Lack of Jurisdiction.

SO ORDERED.

LUIS A. CORCHADO
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge