



In the Matter of:

HUMBERTO R. CASTILLO,
COMPLAINANT,

v.

BAYSIDE ENGINEERING, INC.,
RESPONDENT.

ARB CASE NO. 11-046

ALJ CASE NO. 2010-NTS-002

DATE: April 24, 2013

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Humberto R. Castillo, pro se, Miami, Florida

For the Respondent:

James R. Wiley, Esq.; Carlton Fields, PA, Tampa, Florida

Before: Paul M. Igasaki, Chief Administrative Appeals Judge and Joanne Royce, Administrative Appeals Judge

ORDER DENYING MOTION FOR RECONSIDERATION

On July 28, 2011, the Administrative Review Board issued a Final Decision and Order Dismissing Appeal in this case on the grounds that the Complainant, Humberto Castillo, failed to timely file his brief in response to the Board's briefing order and failed to proffer any explanation for his failure to do so in response to the Board's Order to

Show Cause.¹ Castillo has requested the Board to reconsider our decision. For the following reasons, we deny the Complainant's motion for reconsideration.

BACKGROUND

The Respondent, Bayside Engineering, employed Castillo as an electrical engineer from April to October 2008.² On October 27, 2008, Bayside terminated Castillo's employment, and on December 10, 2010, Castillo filed a complaint with the Department of Labor's Occupational Safety and Health Administration (OSHA) alleging retaliation under the employee protection provisions of the National Transit Systems Security Act (NTSSA).³ OSHA dismissed Castillo's complaint as untimely.

Castillo requested a hearing before a Department of Labor Administrative Law Judge (ALJ). On April 11, 2011, the ALJ issued a Decision and Order Dismissing the Complaint on the grounds that Castillo had not timely filed it.⁴ Castillo filed a timely appeal with the Administrative Review Board.⁵ In response, on April 27, 2011, the Board issued a Notice of Appeal and Order Establishing Briefing Schedule. The terms of the Board's order required the Complainant to file an opening brief, not to exceed thirty (30) double-spaced typed pages, on or before May 23, 2011.

On May 20, 2011, the United States Postal Service returned the Board's Notice of Appeal and Order Establishing Briefing to the Board with the indication that it was unclaimed and it could not be forwarded. On June 6, 2011, the Board received a fax from Castillo requesting the status of his petition for review and indicating that he had not received any documents from the Board since he submitted his petition. This fax contained no contact information. The Board's Notice of Appeal and Order Establishing Briefing was correctly addressed to the address Castillo provided on his petition for review. Castillo filed no subsequent updated contact information with the Board.

¹ *Castillo v. Bayside Eng'g, Inc.*, ARB No. 11-046, ALJ No. 2011-NTS-002 (July 28, 2011) (F. D. & O.).

² *Castillo v. Bayside Eng'g, Inc.*, 2011-NTS-002, slip op. at 1 (ALJ Apr. 15, 2011)(D. & O.).

³ 6 U.S.C.A. § 1142 (Thomson/West Supp. 2011).

⁴ On April 15, 2011, the ALJ issued an Errata Order because the initial decision cited "the incorrect service type."

⁵ The Secretary of Labor has delegated her authority to decide this matter to the ARB. See Secretary's Order No. 1-2010 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 75 Fed. Reg. 3924 (Jan. 15, 2010).

Accordingly, we ordered Castillo to show cause no later than July 19, 2011, why the Board should not dismiss his petition for review because he failed to prosecute his appeal in accordance with the Board's briefing order. The Board warned Castillo, "If the Board does not **receive** [your] response to this show cause order **on or before** July 19, 2011, the Board may dismiss the appeal without further notice." The Board further stated, "If [you intend] to continue to prosecute [your] appeal before the Board, [you] must attach a copy of [your] opening brief as described in the Board's April 27th Notice of Appeal and Briefing Order with [your] response to the Order to Show Cause."⁶

The Board received no brief from Castillo as ordered, nor any explanation for his failure to timely file his brief. Accordingly, on July 28, 2011, we issued a Final Decision and Order Dismissing Appeal because Castillo "has failed to file a timely brief in support of his petition for review and has failed to demonstrate any cause, much less good cause, for his failure to do so."⁷

On August 9, 2011, the Board received Castillo's Motion for Reconsideration. In support of the Motion, Castillo indicated that he had sent his response to the Show Cause Order to the Board on July 15, 2011. He attached a copy of a certified receipt indicating that he sent mail to the Respondent's counsel on July 15, 2011, and a receipt indicating that he sent two envelopes to Washington, D.C. to the 20210 zip code (the Board's zip code), but which neither indicated where, when, or if the envelopes were delivered. He also attached a copy of his opening brief.

On August 10, 2011, Bayside Engineering filed a Response to Complainant's Motion for Reconsideration. In support of this Motion urging the Board to deny Castillo's Motion for Reconsideration, Bayside noted that "the Board dismissed the appeal because 'Castillo failed to file a brief as ordered or to proffer any explanation for his failure to timely file his brief.'"⁸ Bayside avers that Castillo has still failed to establish that the Board **received** his response to the Show Cause Order by July 19, 2011, as the Order required and that Castillo had failed to proffer any explanation for his failure to timely file his brief as the Board had ordered him to do.

On August 11, 2011, Castillo filed a Response to Respondent's Response to Complainant's Motion for Reconsideration in which he states for the first time that he did not timely file his brief because he did not receive the Board's briefing order and that he had notified the Board that he had received no correspondence from it.

⁶ A copy of the Board's briefing order was attached to the Show Cause Order.

⁷ F. D. & O. at 3.

⁸ Response to Complainant's Motion for Reconsideration at 1.

DISCUSSION

The ARB is authorized to reconsider a decision upon the filing of a motion for reconsideration within a reasonable time of the date on which the decision was issued.⁹ Moving for reconsideration of a final administrative decision is analogous to petitioning for panel rehearing under Rule 40 of the Federal Rules of Appellate Procedure. Rule 40 expressly requires that any petition for rehearing “state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended”¹⁰ In considering a motion for reconsideration, the ARB has applied a four-part test to determine whether the movant has demonstrated:

- (i) material differences in fact or law from that presented to a court of which the moving party could not have known through reasonable diligence, (ii) new material facts that occurred after the court’s decision, (iii) a change in the law after the court’s decision, and (iv) failure to consider material facts presented to the court before its decision.^[11]

Castillo has failed to demonstrate any of the grounds upon which the Board will grant reconsideration of a final decision. The Board dismissed Castillo’s petition for review because Castillo did not timely file his opening brief, and the Board did not **receive** a response to its Show Cause Order on or before July 19, 2011, as unambiguously ordered in its Order and Castillo offered no explanation for his failure to timely file his brief as the Board’s order also required. Even accepting as fact that Castillo placed his brief in the mail on July 15, 2011, this fact is not material to our decision because it does not change the fact that we did not receive the brief as ordered.¹²

⁹ *Henrich v. Ecolab, Inc.*, ARB No. 05-030, ALJ No. 2004-SOX-051, slip op. at 11 (ARB May 30, 2007).

¹⁰ Fed. R. App. P. 40(a)(2).

¹¹ *Getman v. Southwest Secs., Inc.*, ARB No. 04-059, ALJ No. 2003-SOX-008, slip op. at 1-2 (ARB Mar. 7, 2006).

¹² Given the requirement in the Show Cause Order that the response must be received by July 19, 2011, Castillo demonstrated a lack of diligence in failing to contact the Board to determine if it had been received as ordered. Had he done so and learned that it had not, he could have sent the brief by facsimile and met the deadline. *Accord Herchak v. American West Airlines*, ARB No.05-057, ALJ No. 2002-AIR-012, slip op. at 5-6 (ARB May 14, 2003)(complainant failed to show due diligence when he failed to ascertain from the Board whether petition was received as required by the regulations).

Further, even the response that Castillo allegedly sent to the Board on July 15th did not comply with the Board's Order because it did not include the required explanation for why Castillo did not timely file his opening brief in compliance with the Board's Briefing Schedule.¹³ Thus, Castillo has failed to demonstrate new and material facts or a change in the law that the Board failed to consider before issuing its Final Decision and Order dismissing his appeal. Accordingly we **DENY** the Complainant's Motion for Reconsideration.¹⁴

SO ORDERED.

PAUL M. IGASAKI
Chief Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge

¹³ While Castillo asserts in his untimely explanation for his failure to timely file his brief that he did not receive the Board's Order Establishing Briefing, he proffers no explanation for his failure to claim the certified Briefing Order that the Postal Service attempted to deliver.

¹⁴ Given Castillo's pro se status, we note that we reviewed his untimely filed brief to determine whether affirmance of the ALJ's Decision and Order would result in a grave miscarriage of justice. But Castillo's brief identified no error of fact or law that would have compelled the Board to reverse the ALJ's determinations that Castillo failed to timely file his complaint and that he failed to demonstrate any grounds that would have supported tolling of the limitations period.