

U.S. Department of Labor

Administrative Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001



IN THE MATTER OF:

RUSSELL CARBON,

ARB CASE NO. 2018-0064

COMPLAINANT,

ALJ CASE NO. 2018-SOX-00009

v.

DATE: May 5, 2020

SHIRE PHARMACEUTICALS,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Jeanne Bynum Hipes, Esq.; *Hipes Law LLC*; Alpharetta, Georgia

For the Respondent:

Michael Johnston, Esq.; *King & Spalding, LLP*; Atlanta, Georgia

Before: Thomas H. Burrell, *Acting Chief Administrative Appeals Judge*, and Heather C. Leslie and James D. McGinley, *Administrative Appeals Judges*

ORDER DISMISSING COMPLAINANT'S PETITION AS UNTIMELY

PER CURIAM. On August 17, 2018, Complainant filed a petition for review of a Department of Labor Administrative Law Judge's (ALJ) Decision and Order Denying Complainant's Motion for Reconsideration. On August 24, 2018, the Clerk of the Appellate Boards, on behalf of the Administrative Review Board, issued a notice of appeal, constituting the Board's acceptance of the petition for review.

This case arises under the whistleblower protection provisions of Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act, 18 U.S.C. § 1514A (2010) (SOX) and its implementing regulations, 29 C.F.R. Part 1980 (2018). Pursuant to 29 C.F.R. § 1982.110(a), “[a] petition must be filed within 14 days of the date of the decision of the ALJ.” In addition, as the Board has previously noted, in the absence of its own rule, the Board has adopted principles employed by federal courts under the Federal Rules of Appellate Procedure.¹ Consequently, under the 14-day time period within which a petition for review of an ALJ’s decision must be filed, a petition for review was due on or before August 16, 2018. Complainant filed the petition for review in this case on August 17, 2018. His petition for review was not timely filed. In addition, 29 C.F.R. § 1982.110(b) provides, “[i]f no timely petition for review is filed, . . . the decision of the ALJ will become the final order of the Secretary” and “the resulting final order is not subject to judicial review.”

Complainant makes several arguments regarding the untimeliness of the appeal. Complainant first argues that the appeal was due on August 19, 2018, as according to 18.32(c),² three days should be added to the appeal time. However, 29 C.F.R. § 1978.110(a) provides that to be effective the petition must be filed within “14 days of the date of the decision of the ALJ,” not within 14 days of the date upon which the decision was served upon “said party.” *Butler v. Neier, Inc.*, ARB No. 2016-0086, ALJ Case No. 2014-STA-00068 (ARB Nov. 21, 2016). Pursuant to *Butler*, 29 C.F.R. § 18.32(c), by its terms is not applicable. Moreover, the ARB has consistently held that that appeals must be filed within 14 days of the date of the order. See *Sparre v. Norfolk S. Ry. Co.*, ARB No. 2018-0022, ALJ Case No. 2016-FRS-00038 (ARB May 31, 2018); *Brown v. Synovus Fin. Corp.*, ARB No. 2017-0037, ALJ No. 2015-SOX-00018 (ARB May 17, 2017).

Complainant also argues that due to “unforeseen technical difficulties” with the ARB’s online filing system, counsel was unable to timely file the appeal until August 17, 2018. In support of this argument, Complainant submits several emails,

¹ See *OFCCP v. Fla. Hosp. of Orlando*, ARB No. 11-011, ALJ No. 2009-OFC-002, slip op. at 4 (ARB July 22, 2013).

² 29 C.F.R. §18.32(c) provides: “When a party may or must act within a specified time after service and service is made under 29 C.F.R. § 18.30(a)(2)(ii)(C) or (D), 3 days are added after the period would otherwise expire under paragraph (a) of this section”

beginning in the early morning of August 17, 2018. For this reason, Complainant argues the Respondent should be equitably estopped from asserting a statute of limitations defense. We will treat these arguments as Complainant's request for equitable tolling of the filing deadline, bearing in mind Complainant bears the burden of justifying the application of equitable tolling principles. The Board has recognized four principal situations in which equitable tolling may apply: (1) when the opposing party has actively misled the movant about the cause of action; (2) when the movant has in some extraordinary way been prevented from filing his or her appeal before the Board; (3) when the movant has raised the precise statutory claim in issue but has done so in the wrong forum; and (4) when the opposing party's own acts or omissions have lulled the movant into forgoing prompt attempts to vindicate his rights. *Brown, supra*.

Complainant does not argue that Respondent misled him or that he has raised the precise statutory claim in issue but has done so in the wrong forum. Nor does Complainant argue that Respondent's acts or omissions have lulled him into forgoing prompt attempts to vindicate his rights. Complainant instead argues that the online filing system was not working properly on August 16, 2018, and therefore equitable tolling applies. In argument, complainant's counsel states that starting at 11:30 am on August 16, 2018, she attempted to file Complainant's appeal without success. She waited until 1:21 am on August 17, 2018, to contact the ARB help desk.³ We are not persuaded by this argument. It seems incredible that after having problems with an online filing system, counsel waited until the early morning of August 17, 2018, to inform the ARB help desk of technical problems. It was incumbent upon counsel to familiarize herself with the various ways an appeal could be filed, including via fax, before the appeal time had expired. A party represented by counsel is not entitled to equitable tolling⁴ because counsel is "presumptively aware of whatever legal recourse may be available to [his or her] client."⁵ An attorney practicing before the Board is expected to familiarize himself

³ Later emails submitted by the Complainant seem to indicate that it was not system error which caused the difficulties, but user error.

⁴ *Brown*, ARB No. 2017-0037, slip op. at 3.

⁵ *Sysko v. PPL Corp.*, ARB No. 2006-0138, ALJ No. 2006-ERA-00023, 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)).

or herself with the applicable regulations.⁶ Stated another way, Counsel's failure to familiarize herself with the online filing system, or in the alternative the ability to fax an appeal, does not constitute as an extraordinary factor necessary to apply equitable tolling measures.

Complainant makes several other arguments that were addressed in the Decision and Order Denying Reconsideration. We point Complainant and counsel to that order. While we have determined that the petition for review was untimely and deny it on these grounds, we have reviewed the file and the ALJ's Order Denying Reconsideration and find it to be supported by the substantial evidence in the record and in accordance with the law.

Accordingly, Complainant's petition for review is **DENIED** as untimely filed.

SO ORDERED.

⁶ *Bohanon v. Grand Trunk W. R.R. Co.*, ARB No. 2016-0048, ALJ No. 2014-FRS-00003, slip op. at 3 (ARB Apr. 27, 2016).