UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

76 M.S.P.R. 334

Docket Numbers DE-0752-95-0465-I-1, DE-0752-95-0184-I-2

ROBERT ROSEMAN, Appellant,

v.

DEPARTMENT OF THE TREASURY, Agency.

Date: August 18,1997

Mark S. Bove, Esquire, Denver, Colorado, for the appellant.

Michael L. Salyards, Esquire, Dallas, Texas, for the agency.

BEFORE

Ben L. Erdreich, Chairman
Beth S. Slavet, Vice Chair

OPINION AND ORDER

The appellant petitions for review of the initial decision, issued October 17, 1996, that sustained both his 30-day suspension and his removal from the position of GS-12 Revenue Officer. For the reasons set forth below, we GRANT the appellant's petition and AFFIRM the initial decision as MODIFIED by this Opinion and Order, still SUSTAINING the agency's 30-day suspension and removal actions.

BACKGROUND

The appellant filed timely Board appeals of the agency's actions suspending him for 30 days effective December 5, 1994, and removing him from his position effective May 10, 1995. The suspension was based upon two charges: (1) Failure to follow directions of his supervisor (2 specifications); and (2) failure to follow established leave procedures (3 specifications). Initial Appeal File I (IAF I), Vol. I, Tab 4, Subtab 4o. The removal was based on a charge of failure to follow his supervisor's directions (6 specifications). Initial Appeal File II (IAF II), Vol. I, Tab 5, Subtab 4h.1 The

---

[1] References to "Initial Appeal File I" pertain to documents filed in the appeal of the 30-day suspension. MSPB Docket No. DE-0752-95-0184-I-2. References to "Initial Appeal File II" pertain to documents filed in the appeal of the removal action. MSPB Docket No. DE-0752-95-0465-I-1.

administrative judge subsequently joined the appeals under 5 C.F.R. § 1201.36(a)(2), without objection by the parties. *See* IAF II, Tab 5.

In his appeal, the appellant admitted failing to follow specific directives, but challenged the legality and/or the propriety of each direction. He denied the charge of failure to follow established leave procedures and asserted the affirmative defenses of disability discrimination, retaliation for filing Equal Employment Opportunity (EEO) complaints, and harmful error. After a hearing, the administrative judge found that the agency had proven both specifications of the charge of failure to follow directions with regard to the 30-day suspension, but had not proven the charge of failure to follow established leave procedures. *See* IAF I, Tab 25 (Initial Decision (ID)) at 4-10. He further found that the agency had proven all 6 specifications of the failure to follow directions charge brought in the removal action. *Id.* at 10-14. Finally, the administrative judge held that the appellant had failed to establish any of the 3 affirmative defenses asserted, and that both penalties were reasonable in light of the sustained charges.

In his timely petition for review, the appellant reiterates his arguments made below against the failure to follow directions charges and claims that the administrative judge erred in finding that the agency did not commit harmful error when it failed to extend the time within which he could reply to the adverse action notices. Petition for Review (PFR) File, Tab 1. The appellant also contends that the administrative judge committed error in excluding certain exhibits from the record, and in finding that he did not prove his affirmative defense of disability discrimination. Finally, the appellant argues that the administrative judge should have mitigated the 30-day suspension in light of the fact that one of the charges on which it was based was not sustained, and that both penalties were too harsh considering the mitigating factor of the appellant's disabilities. *Id.*[2] The agency opposes the petition for review. *Id.*, Tab 3.

ANALYSIS

The administrative judge did not err in sustaining two of the three charges brought by the agency.

With regard to the 2 sustained charges of failure to follow his supervisor's directions, which comprise a total of eight specifications, the appellant stipulated to the fact that, in each of the eight instances, he did not follow the direction at issue. *See* IAF I, Vol. IV, Hearing Tape (HT) 1A (November 6, 1995). He argues, both below and on review, however, that the directions were either illegal, improper, or both, and that his failure to follow them did not negatively impact the agency's objectives. *See* PFR File, Tab 1 at 14-20; IAF I, Vol. 3, Tab 22 at 14-17.[3] The administrative judge found that the

---

[2] The appellant appears to have abandoned the retaliation defense on review.

[3] In addition, the appellant attached to his petition for review his written and oral responses to a three-day suspension, effective June 1, 1994. He claims the agency neglected to include the responses when it submitted its file below. Because the appellant has not shown that he could not have submitted the documents before the

agency's directives that the appellant must make a specified number of field visits did not violate the agency's policy prohibiting the use of goals and quotas because that prohibition pertained only to the use of such quotas in measuring performance by revenue generated. ID at 7. The agency's directive, the administrative judge found, did not fall within that category. The administrative judge further found that the agency's directives to the appellant to spend a minimum percentage of his time on direct-time activities did not violate an Equal Employment Opportunity Commission (EEOC) regulation allowing an employee a reasonable amount of official time on EEOC matters, as the amount of time the appellant spent on his EEOC complaints was not reasonable, and the agency had a right to attempt to control such time. *See id.* at 13; 29 C.F.R. § 1614.605(b). Finally, the administrative judge found that the fact that the appellant's supervisor had not given certain similar directives (to access the IDRS system and to work direct time) to other employees did not justify the appellant's failure to follow them, as none of the other referenced employees were in a position similar to that of the appellant. ID at 4-5 & 13-14.

Because we agree with the administrative judge's legal and factual findings pertaining to the charges brought in both of the agency's actions, and because the appellant has not presented new and material evidence in accordance with 5 C.F.R. § 1201.115, we deny the appellant's petition for review with regard to the charges. *Weaver v. Department of the Navy*, 2 M.S.P.R. 129, 133-34 (1980) (mere disagreement with the administrative judge's findings and credibility determinations does not warrant full review of the record by the Board), *review denied*, 669 F.2d 613 (9th Cir. 1982) (per curiam).4

Although the administrative judge erred in adjudicating the appellant's affirmative defense of disability discrimination, the error was not prejudicial since the appellant has not shown that the charged misconduct was caused by his disability.

---

record closed below, and they are not new and material, we decline to consider them on review. 5 C.F.R. § 1201.115; *Avansino v. U.S. Postal Service*, 3 M.S.P.R. 211, 214 (1980) (the Board will not consider evidence submitted for the first time with the petition for review absent a showing that it was unavailable before the record was closed despite the party's due diligence).

[4] We note that, in both the notice of proposed suspension and the notice of proposed removal, the agency indicated that the charges were based on the appellant's "on-going refusal to follow ... directions." IAF I, Vol. II, Tab 4, Subtab 4l; IAF II, Vol. I, Tab 4, Subtab 4j. Thus, it is apparent that the charges include an element of intent, and the administrative judge properly required the agency to establish that element by preponderant evidence. *See Crouse v. Department of the Treasury*, MSPB Docket No. SF-0752-94-0781-R-1, slip op. at 9-10 (May 22, 1997) ("[i]n its specifications the agency may incorporate an element of intent by claiming that the employee engaged in intentional misconduct or that the conduct was improper because of the employee's intent.").

It is undisputed that on January 11, 1991, the appellant suffered an on-the-job-injury to his back. *See* HT 2B (November 7, 1996) (Testimony of Robert Roseman). In conjunction with visits to three different doctors over several years, the appellant was diagnosed with lumbar paravertebral muscle strain, lumbar strain, mild instability of low back invertebral disc tissue at L5-S1, and myofacial pain syndrome. IAF I, Tab 18, Ex. 1. As a result of his back problems, for approximately 2 1/2 years after his injury, the appellant received varying degrees of disability compensation from the Office of Workers' Compensation Programs (OWCP). In June 1993, OWCP terminated the appellant's coverage and notified the agency that the appellant was capable of working a full-time schedule. The appellant appealed OWCP's determination and, even after the agency had returned him to a full-time work schedule, he continued to claim that his injury was restricting his ability to work full-time.

In his appeal, the appellant contended that medical evidence established that he was disabled as a result of his back injury and because of mental problems that had manifested during his dispute with the agency, and that the agency's actions were linked to his disabilities. *See* IAF I, Vol. III, Tab 22 at 9-14. The administrative judge found that the appellant had not shown that he was the subject of disability discrimination because the appellant did not meet the definition of "disabled" since he was fully capable of performing all the duties of his position without job restructuring. ID at 14-17. The administrative judge further found that even if the appellant was disabled, his ability to perform all the functions of his job without accommodation foreclosed his discrimination claim. *Id.* at 17.

In his petition for review, the appellant alleges that the administrative judge incorrectly applied the law in adjudicating his affirmative defense of disability discrimination. PFR File, Tab 1 at 3-11. We agree.

Where an appellant must rely on indirect evidence to establish his disability discrimination claim, i.e., where, as here, the agency alleges that its action was taken for a reason unrelated to the alleged disability, the legal analysis will follow the burden-shifting framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973), and *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 255-57 (1981). *See Clark v. U.S. Postal Service*, MSPB Docket No. NY-0752-95-0155-I-1, slip. op. at 5 (May 9, 1997). Once the appellant has established a prima facie case, the burden of production shifts to the employer to articulate a legitimate, nondiscriminatory reason for its action. *Id.* at 5-6. If the employer satisfies this burden of production, then the appellant must introduce evidence to show that the proffered explanation is pretextual. *Id.* at 6.

A disabled person is one who has a physical or mental impairment which substantially limits one or more of the person's major life activities, has a record of such impairment, or is regarded as having such an impairment. *See Patterson v. Department of the Air Force*, MSPB Docket No. PH-0752-95-0427-I-3, slip op. at 17 (May 21, 1997); *Miller v. United States Postal Service*, 43 M.S.P.R. 473, 477 (1990). The term "major life activity" includes, but is not limited to, sitting, standing, lifting, and reaching. *See* Appendix to 29 C.F.R. Part 1630, discussing 29 C.F.R. § 1630.2(i).

Here, in determining whether the appellant was "disabled" under the regulations, the administrative judge stated that he "must consider whether the specified impairment identified in this appeal constitutes a significant barrier to employment." ID at 14. He proceeded to discuss the appellant's medical evidence only to determine whether it showed that the appellant was unable to perform his job as a Revenue Officer with the agency, i.e., whether the appellant was impaired with regard to the major life activity of work. He concluded that no such impairment existed. In light of the medical evidence presented and the appellant's argument below, we find that the administrative judge's failure to analyze whether the appellant was substantially limited in any other major life activity as a result of his physical or mental impairments constitutes error.5

The record evidence clearly supports the appellant's contention that he was "disabled" by his back condition at the time of each of the adverse actions at issue. A July 8, 1993 OWCP form, filled out by the appellant's Orthopedist, Dr. Sidney C. Walker, indicates that the appellant was restricted to 2 hours of sitting, 3-4 hours of walking, and 1-2 hours of standing per day. IAF I, Vol. II, Tab 17, Subtab AC. In follow-up letters, dated May 5, 1994, November 3, 1994, and April 14, 1995, Dr. Walker stated that the restrictions were still in effect. *Id.*, Subtabs AD, AF, AG. In a May 1, 1995 letter, Dr. Wilmer C. Allen, another Orthopedist who treated the appellant, stated that the appellant "cannot engage in prolonged sitting or standing." *Id.*, Tab AJ. Further, the appellant testified that he was unable to sit, stand or walk for extended periods of time. HT 3A (November 7, 1995). The agency did not rebut any of the appellant's medical evidence. Accordingly, we find that the appellant was substantially limited in his ability to sit and stand, which by definition are major life activities, and was therefore disabled at all times relevant to this action. *See* Appendix to 29 C.F.R. Part 1630, discussing 29 C.F.R. § 1630.2(i).6

---

[5] We note that, since the initial decision was issued in this case, the Board has stated that in determining whether an appellant is substantially limited in a major life activity, the major life activity of working should be examined last, and only in the event that the individual is not substantially limited with respect to any other major life activity. *Clark*, slip op. at 5. If an individual is substantially limited in any other major life activity, no determination need be made regarding whether the appellant is substantially limited in working. *Id.*; *Scalese v. Widnall*, EEOC Petition No. 03960050 (July 10, 1996); *Guillory v. Dalton*, EEOC Petition No. 01945298 (Jan. 24, 1996); *Hutchinson v. West*, EEOC Petition No. 03940051 (Mar. 31, 1995).

[6] The appellant has not established, however, that he was disabled at any time as a result of his mental condition. Although he submitted a letter from a psychiatrist that indicated that he suffered from Major Depression, Generalized Anxiety Disorder, and Pain Disorder, he has not shown that any of those conditions substantially impaired a major life activity. *See* IAF I, Vol. II, Tab 4, Subtab 4l. Even assuming that the appellant was disabled by these conditions, he has not shown that they caused his misconduct. *See Ajanaku v. Department of Defense*, 44 M.S.P.R. 350, 353-55 (1990);

We further find, however, that the appellant has not established that he was the victim of disability discrimination in connection with the adverse actions that are at issue here, as he has not shown a sufficient causal connection between his disability and the charged misconduct. *See, e.g., Honeyman v. Department of the Navy*, 46 M.S.P.R. 136, 141 (1990); *Ajanaku*, 44 M.S.P.R. at 353-55; *cf. Brinkley v. Veterans Administration*, 37 M.S.P.R. 682, 684 (1988) (an appellant alleging alcohol or drug abuse must show that any disability caused his misconduct or that the misconduct was entirely a manifestation of his disability). Both of the sustained charges in the two actions involve a failure to follow directions, and a number of the specifications are substantially similar in nature. In summary, after being directed to do so, the appellant failed to access the IDRS computer system, failed to make either a minimum number of, or certain specified field calls, and failed to spend a minimum percentage of his time on "direct time" activities.7 In his petition for review, the appellant does not specify how his back condition caused the misconduct with which he was charged. A number of assertions he made below, however, can be construed as arguments in favor of such a connection.

First, the appellant stated that he did not access the IDRS system because he had trouble using it as a result of his long injury-related absence from duty, and because he required further training. The evidence, however, indicates that the appellant received training on the system when he returned to duty in 1993, and he admitted on cross-examination that he could have accessed the system if he had chosen to do so. *See* IAF I, Vol. II, Tab 5 (July 8, 1994 memorandum); HT 5B (November 7, 1995). Second, the appellant argued that he was unable to make field calls as directed because he could not drive safely as a result of side effects of some of the medications he was taking. HT 4A (November 7, 1995). The record reflects, however, that the appellant did make field calls on at least 10 occasions after his return to duty in 1993, *see* IAF I, Vol. II, Tab 18, Subtab CB at 4, that he eventually made the 4 field calls specified in one of the directives that he is charged with failing to follow, *id.*, and that he drove at least part of the way on a trip from his home to Florida during the time in question, HT 5B (November 7, 1995). Thus, the appellant has not shown that his disability left him unable to drive to the extent that he could not have followed the field call directives.

Finally, in support of a connection between his failure to work the requisite direct time and his back condition, the appellant argued that he could not work the required amount of direct time because he was forced to spend his time on EEO complaints, a pending grievance, and an unfair labor practice complaint, each of which involved his back condition in some way. IAF I, Vol. III, Tab 22 at 16-18. While the record supports the appellant's explanation that most of the administrative activities in which he was engaged instead of working direct time were *related to* his back condition, we find that such a relationship is not equivalent to a showing that his disability *caused* his

---

Miller v. Department of Health & Human Services, 23 M.S.P.R. 128, 132-34 (1984), *aff'd*, 770 F.2d 182 (Fed. Cir. 1985) (Table).

[7] Direct time is defined as time spent working on assigned cases, as opposed to administrative time, which encompasses all other time while in a duty status.

misconduct. Where, as here, the appellant is charged with failure to follow directions and asserts the defense of disability discrimination, he must demonstrate that his disability *prevented* him from at least attempting to comply with the instructions given. Here, in each instance, the appellant chose not to follow the directions of his supervisor, and he has not shown that his back condition gave him a reasonable motive for making such a choice. *See Taylor v. United States Postal Service*, 41 M.S.P.R. 374, 379 (1989) (an appellant with rheumatoid arthritis failed to establish that his refusal to follow instructions was caused by his condition).8

The agency's penalties are within the bounds of reasonableness.

As discussed above, we agree with the administrative judge's finding that the agency proved only one of the two charges related to the 30-day suspension. When not all of the agency's charges are sustained, the Board will independently and responsibly balance the relevant factors listed in *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 306 (1981), to determine a reasonable penalty. *White v. U.S. Postal Service*, 71 M.S.P.R. 521, 525-26 (1996). In his petition for review, the appellant argues that the nature and seriousness of the offense, his past disciplinary record, his past work record, and his medical and psychiatric conditions are mitigating factors in his favor in

---

[8] We also find no merit in the appellant's argument that the administrative judge erred in failing to find that the agency committed harmful error by declining to grant additional extensions of time within which the appellant could orally reply to the agency's charges. The appellant argues that, if he had been given additional time, he would have been able to submit his third doctor's opinion, which may have caused the agency to change its position, or might have resulted in the deciding official making a different decision. PFR File, Tab 1 at 20-21. The appellant has not shown that that agency failed to follow either one of its own procedures or a statute or regulation in turning down his requests for an extension. *See* 5 U.S.C. § 7513(b)(2) ("[a]n employee ... is entitled to ... a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of [his] answer ...."). Even if we assume that the agency committed procedural error, it was not harmful considering the fact that the agency did grant the appellant an initial reasonable extension to reply to both proposed actions, that the appellant had in excess of one month to respond to each action, and that the report of the third doctor, Dr. Wilmer Allen (IAF I, Tab 17, Subtab AJ), which concerned the appellant's back condition, was not significantly more precise than the first report regarding his condition. *See Baracco v. Department of Transportation*, 15 M.S.P.R. 112, 123 (1983) (reversal of an action is warranted only where procedural error, whether regulatory or statutory, likely had a harmful effect upon the outcome of the case before the agency), *aff'd*, 735 F.2d 488 (Fed. Cir.), *cert. denied*, 469 U.S. 1018 (1984). In any case, we have reviewed Dr. Allen's report in our consideration of appellant's affirmative defense of disability discrimination and find that it also failed to demonstrate that appellant's medical condition caused his misconduct.

considering appropriate penalties in both actions. PFR File, Tab 1 at 21-22. Our review of the initial decision indicates that, with regard to the sustained charge related to the 30-day suspension, the administrative judge considered all of the aforementioned factors in determining a suitable penalty except for the appellant's medical and psychiatric conditions. *See* ID at 22-23.

The Board has held that evidence that an employee's medical condition or mental impairment played a part in the charged conduct is ordinarily entitled to considerable weight as a mitigating factor. *See Walker v. Department of the Navy*, 59 M.S.P.R. 309, 324-25 (1993). Even where the condition does not rise to the level of a disability, if the agency knew about it before taking the action at issue, we may consider the condition in determining the appropriate penalty. *See Sublette v. Department of the Army*, 68 M.S.P.R. 82, 89 (1995). The appellant presented unrebutted evidence that he made the agency aware of his conditions before both of the actions at issue in his appeal. While the appellant's physical and mental conditions obviously led to the deteriorating relationship between him and his supervisor, there is no evidence that the appellant was unable to understand or follow the directions that he is charged with ignoring, and therefore his conditions cannot account for his refusal to access the IDRS system or to make the field calls as directed. We find that the evidence that the appellant willfully chose not to follow these directions, coupled with the fact that he had been issued a letter of reprimand and a three-day suspension for other failures to follow directions shortly before this action was brought, outweighs the appellant's evidence that he was suffering from a back problem and various psychiatric problems. *See Redfearn v. Department of Labor*, 58 M.S.P.R. 307, 316 (1993) (an employee's deliberate refusal to follow supervisory instructions constitutes serious misconduct that cannot properly be condoned). Accordingly, we agree with the administrative judge that a 30-day suspension was reasonable under the circumstances.

With regard to the removal action, we found that the administrative judge properly sustained all specifications of the charge. Thus, he was required to review the agency's penalty only to determine if the deciding official considered all the relevant factors and exercised management discretion within tolerable limits of reasonableness. *Douglas*, 5 M.S.P.R. at 306. The appellant does not specifically argue in his petition for review that the administrative judge erred in determining that the agency had considered all relevant factors and imposed a reasonable penalty of removal. Rather, it appears that he is reiterating the assertions he made pertaining to the 30-day suspension, that the relevant mitigating factors warrant a penalty less severe than removal. Our review of the agency's decision letter, as well as the deciding official's testimony, reveals that the deciding official considered all relevant *Douglas* factors in reaching his decision. *See* IAF II, Vol. 1, Tab 5, Subtab 4b; HT 4B. Further, we agree that the appellant's pattern of a refusal to follow the instructions of his supervisor, plus his obvious lack of remorse, show a poor potential for rehabilitation, and justify the agency's penalty of removal.[9]

---

[9] The appellant argues on review that the administrative judge erred in not accepting certain documents into evidence as exhibits at the hearing. PFR File, Tab 1 at 22. It appears that these documents consist largely of the appellant's performance appraisals

Accordingly, we sustain the agency's penalties of a 30-day suspension and removal.

ORDER

This is the final order of the Merit Systems Protection Board in these appeals. 5 C.F.R. § 1201.113(c).

NOTICE TO APPELLANT

You have the right to request further review of the Board's final decision in your appeal.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review the Board's final decision on your discrimination claims. *See* 5 U.S.C. § 7702(b)(1). You must submit your request to the EEOC at the following address:

Equal Employment Opportunity Commission
Office of Federal Operations
P.O. Box 19848
Washington, DC 20036

You should submit your request to the EEOC no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C.§ 7702(b)(1).

Discrimination and Other Claims: Judicial Action

If you do not request review of this order on your discrimination claims by the EEOC, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. *See* 5 U.S.C. § 7703(b)(2). You should file your civil action with the district court no later than 30

---

from 1993 and 1994 and a rebuttal to the 1994 appraisal, proof of performance awards, and additional medical records dating back to the 1991 back injury. *See* IAF I, Vol. II, Tab 17 (rejected exhibits). While the appellant's performance appraisals during the time in question were certainly relevant in determining the proper penalty, the appellant's unrebutted testimony concerning his performance during this period was consistent with the written appraisals, and therefore he was not prejudiced by the rejection of these exhibits. Further, the medical documentation that the administrative judge rejected did not pertain to the time frame at issue, and in any event, we have found that the medical documentation that was admitted was sufficient to establish the appellant's disability. Thus, any error committed by the administrative judge in rejecting the aforementioned evidence did not harm the appellant's substantive rights. *Karapinka v. Department of Energy*, 6 M.S.P.R. 124, 127 (1981).

calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(2). If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a handicapping condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. See 42 U.S.C. § 2000e5(f); 29 U.S.C**.** § 794a.

Other Claims: Judicial Review

If you choose not to seek review of the Board's decision on your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review the Board's final decision on other issues in your appeal if the court has jurisdiction. See 5 U.S.C. §§ 7703(b)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place,
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(1).

For the Board
Robert E. Taylor, Clerk
Washington, D.C.