

U.S. Department of Labor

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



IN THE MATTER OF:

ROBERT KREB,

ARB CASE NO. 2023-0056

COMPLAINANT,

**ALJ CASE NO. 2023-AIR-00008
ALJ SCOTT R. MORRIS**

v.

DATE: November 20, 2023

**INTEGRA AVIATION, LLC
D/B/A APOLLO MEDFLIGHT LLC,**

RESPONDENT.

**Before HARTHILL, Chief Administrative Appeals Judge and PUST,
Administrative Appeals Judge**

ORDER DENYING PETITION FOR INTERLOCUTORY REVIEW

PUST, Administrative Appeals Judge:

This case arises under the employee protection provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21).¹ On October 5, 2023,² Complainant Robert Krebs (Complainant) filed a petition seeking an interlocutory appeal of the Administrative Law Judge's (ALJ) August 25, 2023 Order Denying Complainant's Motion to Reconsider Order Denying Motion to

¹ 49 U.S.C. § 42121. AIR 21's implementing regulations are found at 29 C.F.R. Part 1979 (2023).

² On September 22, 2023, the Administrative Review Board (ARB or Board) received from Respondent via U.S. Mail a Response to Complainant Robert Krebs's Petition for Interlocutory Review (Response). In the Response, Respondent stated that it was responding to Complainant's "Petition for Interlocutory Review." The Board had not received a copy of any Petition for Interlocutory Review or other filing from Complainant at that time. On September 29, 2023, the Board issued an "Order to File Petition for Interlocutory Review" requiring Complainant to file his petition, which he subsequently did on October 5, 2023.

Disqualify Judge and to Certify the Order to the Administrative Review Board for Interlocutory Review (Order Denying Reconsideration). In the Order Denying Reconsideration, the ALJ denied Complainant's motion for reconsideration of the ALJ's August 1, 2023 Order Denying Complainant's Motion for Disqualification of the ALJ (Initial Order).

In his petition for interlocutory review, Complainant attempts to identify several problems with his case. He argues that the case is erroneously assigned to the ALJ, the ALJ is biased, the ALJ has made several errors in issued rulings, and there are constitutional problems with the ALJ's appointment. In the Order Denying Reconsideration, the ALJ found that Complainant made substantially the same arguments he had made in his initial motion and that Complainant failed to include supporting evidence.³ The ALJ denied Complainant's request to certify the issue for interlocutory review.⁴

After a thorough review of Complainant's filings, the ALJ's Initial Order, the Order Denying Reconsideration, and the briefs filed by the parties, we deny Complainant's Petition for Interlocutory Review because he has failed to meet the requirements for collateral review.

The Board's delegated authority includes the discretionary consideration and disposition of interlocutory appeals "in exceptional circumstances, provided such review is not prohibited by statute."⁵ Interlocutory appeals are generally disfavored given the strong policy against piecemeal appeals.⁶ When a party seeks interlocutory review of an ALJ's non-final order, the Board has elected to look to the interlocutory review procedures used by federal courts, including providing for certification of issues involving a controlling question of law as set forth in 28

³ *Kreb v. Integra Aviation, LLC*, ALJ No. 2023-AIR-00008, slip op. at 2-3 (ALJ Aug. 25, 2023) (Order Denying Reconsideration).

⁴ *Id.* at 3.

⁵ Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 85 Fed. Reg. 13186 (Mar. 6, 2020).

⁶ *Gunther v. Deltek, Inc.*, ARB Nos. 2012-0097, -0099, ALJ No. 2010-SOX-00049, slip op. at 2 (ARB Sept. 11, 2012) (Order Dismissing Interlocutory Appeals) (citing *Carter v. B & W Nuclear Techs., Inc.*, ALJ No. 1994-ERA-00013 (Sec'y Sept. 28, 1994) (other citations omitted)).

U.S.C. Section 1292(b).⁷ In this case, the ALJ denied certification under 28 U.S.C. Section 1292(b).

Even when a party has failed to obtain interlocutory certification under 28 U.S.C. Section 1292(b), the ARB may consider interlocutory appeals if the requirements of the “collateral order” exception are met.⁸ To fall within the collateral order exception, the appealed order must: (1) conclusively determine the disputed question; (2) resolve an important issue completely separate from the merits of the action; and (3) be effectively unreviewable on appeal from a final judgment.⁹ This exception is “strictly construe[d]” to avoid “unnecessarily protract[ed] litigation.”¹⁰ If the ALJ’s Order Denying Reconsideration “fails to satisfy any one of these requirements, it is not appealable”¹¹

Here, regardless of the results of an examination of the first two prongs of the test, we deny the appeal because the issues Complainant raises can be effectively reviewed on appeal from a final judgment. Complainant has not demonstrated that the Order Denying Reconsideration’s denial of Complainant’s motion to recuse or the ALJ’s allegedly invalid appointment would be “effectively unreviewable on appeal” of a final judgment.¹² Courts have routinely denied interlocutory appeals

⁷ *Fagan v. Dep’t of Navy*, ARB No. 2023-0006, ALJ No. 2021-CER-00001, slip op. at 5 (ARB Apr. 6, 2023) (Order Granting Interlocutory Review) (citation omitted); *Powers v. Pinnacle Airlines, Inc.*, ARB No. 2005-0138, ALJ No. 2005-SOX-00065, slip op. at 5-6 (ARB Oct. 31, 2005) (Final Decision and Order Dismissing Interlocutory Appeal).

⁸ *Adm’r, Wage & Hour Div., U.S. Dep’t of Lab. v. Goldstar Amusements Inc.*, ARB No. 2022-0027, ALJ Nos. 2021-TNE-00027, -00028, slip op. at 4-5 (ARB Sept. 30, 2022) (Decision and Order Denying Interlocutory Appeal) (quoting *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949)); see, e.g., *Jordan v. Sprint Nextel Corp.*, ARB No. 2006-0105, ALJ No. 2006-SOX-00041, slip op. at 3-4 (ARB June 19, 2008) (Order Granting Petition for Interlocutory Review) (discussing the *Cohen* collateral order exception).

⁹ *Johnson v. Siemens Bldg. Techs., Inc.*, ARB No. 2007-0010, ALJ No. 2005-SOX-00015, slip op. at 5 (ARB Jan. 19, 2007) (Final Decision and Order Denying Interlocutory Appeal) (citing *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)).

¹⁰ *Id.* (quoting *Corrugated Container Antitrust Litig. Steering Comm. v. Mead Corp.*, 614 F.2d 958, 961 (5th Cir. 1980) (internal quotation omitted)).

¹¹ *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 276 (1988); see *Kossen v. Empire Airlines*, ARB No. 2021-0017, ALJ No. 2019-AIR-00022, slip op. at 2 (ARB Feb. 25, 2021) (Order Denying Interlocutory Appeal) (“The appeal must meet all of [the collateral order exception] criteria”).

¹² *Priddle v. United Airlines, Inc.*, ARB No. 2021-0064, ALJ No. 2020-AIR-00013, slip op. at 8 (ARB Jan. 26, 2022) (“To be effectively unreviewable, the right sought to be

regarding motions to recuse because they are “fully reviewable on appeal from final judgment.”¹³ Claims related to alleged Appointments Clause defects similarly are not reviewable under the collateral order exception because they are effectively reviewable on appeal.¹⁴ Accordingly, Complainant’s interlocutory appeal does not meet the collateral order exception.

For these reasons, Complainant’s petition for interlocutory review is **DENIED**.

SO ORDERED.



SUSAN HARTHILL
Chief Administrative Appeals Judge



TAMMY L. PUST
Administrative Appeals Judge

protected by the interlocutory appeal must be, for all practical and legal purposes, destroyed if it were not vindicated prior to final judgment.”) (internal quotations omitted).

¹³ *Corrugated Container Antitrust Litig.*, 614 F.2d at 960-61; *see also Nobby Lobby, Inc. v. City of Dallas*, 970 F.2d 82, 86 n.3 (5th Cir. 1992) (a party “must await final judgment to appeal the judge’s refusal to recuse himself”) (internal citation omitted).

¹⁴ *In re Koerner*, 800 F.2d 1358, 1360-61 (5th Cir. 1986) (order finding that bankruptcy judge was constitutionally appointed was not a collateral order because it was effectively reviewable on appeal); *see also In re Benny*, 791 F.2d 712, 719 (9th Cir. 1986) (finding the same).