



IN THE MATTER OF:

JASON FARRAR,

ARB CASE NO. 2022-0051

COMPLAINANT,

ALJ CASE NO. 2022-CAA-00001

ALJ PATRICK M. ROSENOW

v.

DATE: August 25, 2023

**STRAITLINE WELL
SERVICES, LLC,**

RESPONDENT.

Appearances:

For the Complainant:

Jason Farrar; *pro se*; San Antonio, Texas

For the Respondent:

Patrick S. Richter, Esq.; *Jackson Lewis P.C.*; Austin, Texas

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

DECISION AND ORDER

WARREN, Administrative Appeals Judge:

This case arises under the whistleblower protection provisions of the Clean Air Act (CAA) and its implementing regulations.¹ On March 25, 2020, Complainant Jason Farrar (Complainant or Farrar) filed a complaint with the Occupational Safety and Health Administration (OSHA) alleging that his former employer, Respondent Straitline Well Services, LLC (Respondent), terminated his

¹ 42 U.S.C. § 7622; 29 C.F.R. Part 24 (2023).

employment in retaliation for engaging in activities protected by the CAA. OSHA investigated Farrar's claims and dismissed his complaint on June 4, 2021. Under the rules governing appeals of CAA complaints, Farrar was required to request a hearing with the Office of Administrative Law Judges (OALJ) within 30 days of receipt of the OSHA determination.²

On October 26, 2021, Farrar contacted the OALJ by electronic mail to request a hearing. The case was assigned to an Administrative Law Judge (ALJ) who conducted a conference call with Farrar and counsel for Respondent. Counsel for Respondent stated that she intended to file a motion to dismiss the complaint as untimely. The ALJ directed Farrar to submit a Bill of Particulars describing "all the facts relevant to the filing of his request for hearing and why it was outside of the 30-day deadline."³

After the call, Farrar submitted a Bill of Particulars that, in addition to describing safety violations, indicated that he had difficulty obtaining legal counsel.⁴ Respondent submitted a Motion to Dismiss, arguing that Farrar (1) was not entitled to equitable tolling of the deadline for filing his objection to the OSHA ruling, and (2) could not establish that it discharged him in violation of the CAA.⁵

Farrar filed a Response to the Motion to Dismiss. He described his concerns about Respondent's burning of trash that included tires, used motor oil, railroad ties, and other substances.⁶ He also listed several reasons for missing the filing deadline:

Mental anguish brought on by multiple circumstances such as the Covid-19 pandemic, the loss of my job at the very beginning of the pandemic along with denial of assistance (unemployment) due to company actions, the loss of several family members due to pandemic, the stress of having to go to night school to learn a new trade, having to travel out-

² 29 C.F.R. § 24.106(a).

³ Order on Respondent's Motion for Summary Decision (Order) at 2.

⁴ Bill of Particulars at 1.

⁵ Motion to Dismiss at 2, 4-5.

⁶ Complainant's Response to the Motion to Dismiss (Comp. Resp.) at 1-3.

of-state to attend daughter's high school graduation and simultaneously having to take a weekly progress examination while on the road, all of which has exacerbated my Attention Deficit Hyperactivity Disorder (ADHD) diagnosed around age 5 and manageable into my late 20's, has now become a serious issue since early 2020.⁷

On June 23, 2022, the ALJ issued an Order on Respondent's Motion for Summary Decision (Order).⁸ He concluded that Farrar failed to describe any circumstances justifying equitable tolling of the filing deadline and denied his request for a hearing. Farrar appealed the ALJ's ruling to the Board.

JURISDICTION & STANDARD OF REVIEW

The Secretary of Labor has delegated to the Board the authority to review ALJ decisions under the CAA.⁹ We review the ALJ's decision to dismiss Farrar's complaint as untimely de novo.¹⁰

DISCUSSION

1. Governing Law

A complainant pursuing a whistleblower retaliation claim under the CAA must meet certain deadlines.¹¹ These deadlines apply whether the complainant is

⁷ *Id.* at 4.

⁸ Although the ALJ captioned the decision as a ruling on summary decision, we note that Respondent filed its motion under 29 C.F.R. § 18.70(c), the regulation governing motions to dismiss.

⁹ Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board (Secretary's discretionary review of ARB decisions)), 85 Fed. Reg. 13186 (Mar. 6, 2020).

¹⁰ *Martin v. Paragon Foods*, ARB No. 2022-0058, ALJ No. 2021-FDA-00001, slip op. at 5 (ARB June 8, 2023) (citing *Johnson v. The Wellpoint Cos., Inc.*, ARB No. 2011-0035, ALJ No. 2010-SOX-00038, slip op. at 5 (ARB Feb. 25, 2013) (citations omitted); *Boyd v. EPA*, ARB No. 2010-0082, ALJ No. 2009-SDW-00005, slip op. at 2-3 (ARB Dec. 21, 2011) (citations omitted)).

¹¹ 42 U.S.C. § 7622; 29 C.F.R. § 24.106(a).

represented by counsel or is proceeding pro se.¹² Potential complainants are responsible for determining which statutes and regulations, and which deadlines, apply to their cases and for meeting those deadlines: “[I]gnorance of the law is no excuse” for missing a filing deadline.¹³

Under the regulations governing the CAA, a complainant who wishes to object to OSHA’s findings and receive a hearing on a complaint “must file any objections and/or a request for a hearing on the record within 30 days of receipt of the findings and order”¹⁴ There is no dispute that Farrar failed to contact the OALJ within that period. Farrar asks, however, for his appeal to be accepted because of his circumstances and argues that the deadline for appeal should be equitably tolled.

The ARB and courts may apply equitable tolling to modify a filing deadline.¹⁵ Equitable tolling refers to a set of circumstances excusing a complainant’s inability to meet a deadline. The doctrine focuses on “plaintiff’s excusable ignorance of the employer’s discriminatory act.”¹⁶ Equitable tolling is rare and “an extraordinary measure that applies only when plaintiff is prevented from filing despite exercising that level of diligence which could reasonably be expected in the circumstances.”¹⁷

In determining whether the Board should toll a statute of limitations, we have recognized several principal situations in which tolling may be warranted. These include when the moving party: (1) has raised the precise statutory claim in issue but has done so in the wrong forum;¹⁸ (2) has in some extraordinary way been prevented from filing;¹⁹ and (3) was excusably ignorant of the respondent’s

¹² *Martin*, ARB No. 2022-0058, slip op. at 6 (citations omitted).

¹³ *Id.* (citation omitted).

¹⁴ 29 C.F.R. § 24.106(a).

¹⁵ *Martin*, ARB No. 2022-0058, slip op. at 7-8 (citations omitted). Farrar does not allege Respondent misled him or otherwise contend that equitable estoppel applies to his case, and so, the Board does not specifically address that doctrine with respect to the record in this matter. *Cf. id.* at 8-9.

¹⁶ *Id.* at 9 (citation omitted).

¹⁷ *Id.* (citation omitted).

¹⁸ *Id.* (citation omitted).

¹⁹ *Id.*; see also *Salsbury v. Edward Hines, Jr. Veterans Hosp., Dep’t of Veterans Affs.*, ARB No. 2005-0014, ALJ No. 2004-ERA-00007, slip op. at 6 (ARB July 31, 2007) (citation omitted); *Woods v. Boeing-South Carolina*, ARB No. 2011-0067, ALJ No. 2011-AIR-00009,

discriminatory act.²⁰ A complainant bears the burden of justifying the application of equitable tolling.²¹ Complainants must also generally show that they diligently pursued their claim.²²

None of Farrar’s arguments demonstrate that he is entitled to equitable tolling. Of the three circumstances the Board has recognized for granting equitable tolling, only one warrants extended discussion in this case. Farrar has not said or suggested he raised the precise statutory claim in issue in the wrong forum. Farrar in fact raised his claim in the correct forum; he just did so too late. Farrar also does not claim he did not know about the purported retaliation, either. He in fact filed with OSHA on time—his appeal to OALJ is where he filed too late. Farrar’s arguments instead focus on his personal circumstances, which he argues, in combination, prevented him from timely requesting a hearing. To be entitled to equitable tolling because of his personal circumstances, Farrar must show that those circumstances were “extraordinary” and that he exercised appropriate diligence pursuing his claim.²³

Farrar listed, in total, eight reasons for his failure to timely request a hearing. On appeal, Farrar reiterates several of the reasons he detailed in front of the ALJ, and states that he was under duress due to the retaliation he experienced. He states he had difficulty securing counsel and that, once obtained, his counsel did not adequately communicate the steps necessary in proceeding with an appeal.²⁴ Farrar also indicated that he suffered from ADHD and mental anguish from the loss of family members to the COVID-19 pandemic.²⁵ He listed several other obligations that kept him very busy, including trying to obtain employment, denial

slip op. at 8, 11 (ARB Dec. 10, 2012) (citing *Hall v. E.G.&G. Def. Materials, Inc.*, ARB No. 1998-0076, ALJ No. 1997-SDW-00009, slip op. at 2 (ARB Sept. 30, 1998)) (noting mental incapacity as an example of an extraordinary circumstance which the Board has recognized could qualify for tolling if there is a particularly strong showing and in fact the party was prevented from managing his affairs and thus from understanding his legal rights and acting upon them).

²⁰ *Martin*, ARB No. 2022-0058, slip op. at 9 (citation omitted).

²¹ *Id.* at 10 (citation omitted); see also *Salsbury*, ARB No. 2005-0014, slip op. at 6 (citation omitted).

²² *Katz v. U.S. Dep’t of Lab.*, 857 F. App’x 859, 863 (7th Cir. 2021).

²³ *Id.*

²⁴ Bill of Particulars at 1.

²⁵ Comp. Resp. at 4.

of unemployment compensation, attending night classes, and going to his daughter's out-of-state high school graduation "at the same time he had to take a weekly progress examination."²⁶

Farrar's argument that extraordinary circumstances prevented his timely filing falls short. Some of Farrar's arguments for tolling have been addressed specifically by this Board before. Failure to secure counsel to pursue a claim is an insufficient reason to toll the limitations period.²⁷ The Board has recognized that a medical condition that prevents a complainant from timely pursuing his legal rights may be an "extraordinary" circumstance justifying equitable tolling.²⁸ For example, the Board has held that "mental illness tolls the limitations period only if the illness in fact prevents the petitioning party from managing his affairs and thus from understanding his legal rights and acting upon them."²⁹ Additionally, several federal courts have held that the impact of the COVID-19 pandemic may constitute extraordinary circumstances for the purposes of equitable tolling under certain circumstances.³⁰ However, a petitioner seeking equitable tolling must still demonstrate fact-specific circumstances related to the pandemic that hindered their ability to file.³¹ For example, the COVID-19 pandemic does not justify an otherwise

²⁶ *Id.*

²⁷ *See, e.g., Rose v. Dole*, 945 F.2d 1331, 1335-36 (6th Cir. 1991) (stating that failure to retain counsel within the statutory filing time frame, in and of itself, is not enough to warrant equitable tolling).

²⁸ *Reid v. The Boeing Co.*, ARB No 2010-0110, ALJ No. 2009-SOX-00027, slip op. at 4 (ARB Mar. 30, 2012) (citation omitted); *cf. Martin*, ARB 2022-0058, slip op. at 13.

²⁹ *Woods*, slip op. at 11 (ARB Dec. 10, 2012) (citation omitted); *cf. Martin*, ARB 2022-0058, slip op. at 13 (rejecting argument that "cancerphobia and medical depression" warranted equitable tolling where complainant "failed to present any evidence that these illnesses made it impossible for him to manage his day-to-day activities").

³⁰ *See Hager v. Warden, Ross Corr. Inst.*, No. 2:21-CV-2472, 2021 WL 2291319, at *3 (S.D. Ohio June 4, 2021) ("The COVID-19 pandemic may qualify as an extraordinary circumstance justifying equitable tolling of the statute of limitations"), *adopted and aff'd*, No. 2:21-CV-2472, 2021 WL 2670622 (S.D. Ohio June 29, 2021); *Taylor v. Valentine*, No. 5:20-CV-00139-TBR, 2021 WL 864145, at *2 (W.D. Ky. Mar. 8, 2021) ("[T]he COVID-19 pandemic may very well qualify as an 'extraordinary' circumstance that warrants equitable tolling."), *mot. for relief from j. denied*, No. 5:20-CV-00139-TBR, 2021 WL 2043974 (W.D. Ky. May 21, 2021), *certificate of appealability denied*, No. 21-5616, 2021 WL 6201605 (6th Cir. Dec. 28, 2021), *cert. denied*, 142 S. Ct. 1400 (2022).

³¹ *See Lewis v. Postmaster Gen. of the U.S.*, No. 21-2958, 2022 WL 109007, at *2 (3d Cir. Jan. 12, 2022) (affirming the District Court's determination that the appellant's claims of age and disability-based discrimination were time barred because the appellant failed to connect the pandemic to his specific situation); *Katz*, 857 F. App'x at 864 (7th Cir. 2021)

untimely filing where the facts indicate that the petitioner had filed other documents electronically without incident during the pandemic.³²

Here, Farrar says he has ADHD and experienced mental anguish, but fails to provide evidence that these conditions in fact prevented him from timely requesting a hearing or otherwise prevented him from understanding and acting upon his legal rights. Additionally, Farrar argues that the COVID-19 pandemic placed a heavy burden on him, but again fails to articulate how it prevented him from timely requesting a hearing. In fact, his filing does not explain how his circumstances prevented him from filing on time. While job loss, retraining, and family obligations can be serious and time-consuming, there is nothing in the record indicating that Farrar’s personal circumstances stood in the way of his requesting a hearing. In order to prevail, Farrar needed to explain both his circumstances and why they prevented him from filing. He has not done so.

“[E]quitable tolling requires a party to pass with reasonable diligence through the period it seeks to have tolled.”³³ Here, we find that Farrar failed to act with reasonable diligence. The ALJ concluded that “while he established a genuine issue of material fact that he may have been busy and stressed,” Farrar failed to show “that he was prevented from filing the very short and simple email he

(finding that the petitioner did not show extraordinary circumstances warranting equitable tolling because he did not explain why the pandemic prevented him from filing a timely appeal); *Rush v. Sec’y, Fla. Dep’t of Corr.*, No. 21-10218-C, 2021 WL 3134763, at *1 (11th Cir. June 22, 2021) (finding petitioner “could not show extraordinary circumstances, as his circumstances were not different than any other prisoner attempting to access legal resources, as they all were subject to COVID-19 protocols”); *United States v. Henry*, No. 2:17-CR-00180, 2020 WL 7332657, at *4 (W.D. Pa. Dec. 14, 2020) (“[T]he COVID-19 pandemic does not automatically warrant equitable tolling for any petitioner who seeks it on that basis. The petitioner must establish that he was pursuing his rights diligently *and* that the COVID-19 pandemic specifically prevented him from filing his motion.”), *certificate of appealability denied*, No. 21-1285, 2021 WL 3669374 (3d Cir. June 3, 2021); *Dragasits v. Covello*, No. 3:21-CV-1459-CAB-MDD, 2022 WL 207730, at *7 (S.D. Cal. Jan. 24, 2022) (stating that a petitioner seeking tolling based on the COVID-19 pandemic must still demonstrate fact-specific circumstances related to the pandemic that hindered his ability to timely file a petition).

³² *Katz*, 857 F. App’x at 864.

³³ *United States v. All Funds Distributed To, or o/b/o Weiss*, 345 F.3d 49, 55 (2d Cir. 2003) (quoting *Johnson v. Nyack Hosp.*, 86 F.3d 8, 12 (2d Cir. 1996)); see also *Menominee Indian Tribe of Wis. v. United States*, 577 U.S. 250, 255 (2016).

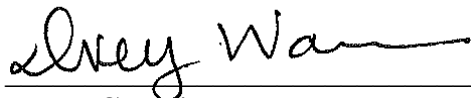
eventually sent months after the deadline.”³⁴ We agree with the ALJ’s conclusion. Farrar allowed months to go by before he sent his e-mail, and he fails to offer evidence that he was otherwise attempting to diligently pursue his case.

For all of the reasons cited, we conclude that Farrar filed an untimely request for a hearing and failed to establish that his circumstances warrant an extension of the filing deadline.

CONCLUSION³⁵

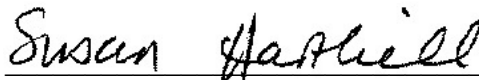
Accordingly, we **AFFIRM** the ALJ’s Decision and Order dismissing the complaint as untimely filed.

SO ORDERED.



IVEY S. WARREN

Administrative Appeals Judge



SUSAN HARTHILL

Chief Administrative Appeals Judge

³⁴ Order at 5.

³⁵ In any appeal of this Decision and Order that may be filed, we note that the appropriately named party is the Secretary, Department of Labor, not the Administrative Review Board.