

U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)



Issue Date: 14 June 2016

OALJ No. 2015-AIR-00026
OSHA No. 5-2700-15-032

In the Matter of:

PHILIP TARDY,
Complainant,

v.

DELTA AIR LINES, INC.
Respondent.

Appearances:

Philip Tardy, Pro Se
Ypsilanti, Michigan
For the Complainant

Benjamin Stone, Esq.
Munger & Stone
Atlanta, Georgia

Kelly K. Giustina, Esq.
Delta Air Lines, Inc.
Atlanta, Georgia
For the Respondent

Before:

Stephen R. Henley
Chief Administrative Law Judge

DECISION AND ORDER DISMISSING THE COMPLAINT

This matter arises under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21) hereinafter the "Act." The Act includes a whistleblower protection

provision, with a Department of Labor complaint procedure.¹ Implementing regulations are at 29 CFR Part 1979, published at 68 Fed. Reg. 14,107 (Mar. 1, 2003).

Procedural History

On April 9, 2015, Philip Tardy (“Complainant”) filed a complaint with the United States Department of Labor, Occupational Safety & Health Administration (“OSHA”) alleging his August 7, 2014 suspension by Delta Airlines (“Respondent”), memorialized by an August 20, 2014 Final Corrective Action Notice (“FCAN”) was “in direct reprisal for reporting a violation of FAA regulations.” OSHA conducted an investigation, dismissing the complaint on May 12, 2015 as untimely filed. Complainant appealed to the Department of Labor, Office of Administrative Law Judges (“Office”).

On September 21, 2015, I issued a *Notice of Assignment and Conference Call* (“Notice”) scheduling a conference call and directing the parties to file a statement with their respective positions on certain issues.² On October 1, 2015, Complainant filed a *Response to Notice of Assignment and Conference Call* (“Compl. Response to Notice”). On October 26, 2015, Respondent filed its response to the Notice (“Resp. Response to Notice”). On January 6, 2016, I notified the parties that I would be holding a formal hearing on the merits on March 23, 2016 in Detroit, Michigan. On January 19, 2016, Respondent filed a *Motion for Summary Decision* (“Mot. for Summary Decision”) requesting that the matter be dismissed due to Complainant’s filing of his complaint with OSHA outside the 90-day period established by the Act. Complainant opposed Respondent’s motion, arguing that equitable tolling is appropriate in this case due to mental illness and attorney incompetence. Complainant also filed *Pro Se Motion for Unfavorable Personnel Actions*³; *Pro Se Motion for Interrogatories and Request for Production of Documents*⁴; and a second *Pro Se Motion for Interrogatories and Request for Production of Documents*.⁵ On March 23, 2016, after denying a continuance on January 29, 2016,⁶ I convened a formal preliminary hearing in Detroit limited to the issue of whether equitable tolling was warranted in this case. Both parties were in attendance. Two witnesses testified.⁷ I entered ALJ

¹ Pub. L. 106-181, tit. V, 519(a), Apr. 5, 2000, 114 Stat. 145. See 49 U.S.C. § 42121.

² The Notice requested that the parties address whether the complaint was timely filed; whether the parties were properly designated; the discrete acts of retaliation alleged; proposed hearing dates and locations; and anticipated discovery issues.

³ Filed February 10, 2016, Complainant appears to be making a new claim of retaliation, alleging that Respondent put him on a leave of absence on September 28, 2014 for requesting disability. This claim is separate from the complaint filed with OSHA on April 9, 2014 and it appears that Complainant has not filed the February 10, 2016 claim with OSHA and has not requested leave to amend the April 9, 2015 complaint. Accordingly, the February 10, 2016 claim is not properly before this Office.

⁴ Filed February 18, 2016, Complainant requested all documents and communications from Delta Airlines regarding his case since July 4, 2014.

⁵ Filed March 1, 2016, Complainant states that “Delta is hiding a crucial piece of evidence, that item is a copy of the original logbook pages from aircraft 0909 dated 2 August 2014, aircraft 7004 04 July 2014.” To the extent that the Motions for Interrogatories are pending, I find that they do not add information outside of Complainant’s possession that is relevant to the narrow issue of equitable tolling and are DENIED.

⁶ The order denying the continuance also granted an extension to Complainant to file a response to Respondent’s Motion for Summary Judgment and granted a continuance of a deposition scheduled for February 3, 2016.

⁷ I will use the following abbreviations: Tr. for the hearing transcript; ALJX for an administrative law judge’s exhibit; CX for a Complainant’s Exhibit; and RX for a Respondent’s Exhibit.

exhibits 1-4 into evidence (Tr. 22); and received and admitted Respondent's Exhibits 6, 10, 11, and 15.⁸ (Tr. 29-31.) Complainant represented himself.⁹

At the hearing and memorialized by subsequent order, Complainant was given leave to file any supplemental medical evidence or other paperwork relevant to the issue of equitable tolling within 14 days from the date of the hearing. Both parties were also given 30 days from receipt of the hearing transcript to file post-hearing briefs. On April 6, 2016, I granted a filing extension for Complainant's supplemental medical evidence to April 29, 2016. On April 21, 2016, Complainant filed *Pro Se Complaint to Quash Summary Discharge of this OSHA Case* ("Compl. Post-Hearing Brief"), with medical documents attached. Complainant filed more medical documents on April 28, 2016.¹⁰ On May 13, Respondent filed a *Second Supplemental Brief in Support of its Motion for Summary Decision* ("Resp. Post-Hearing Brief").

Positions of the Parties

Complainant

Complainant contends that he "was suffering from bipolar disorder or manic depression" and post-traumatic stress disorder (PTSD) that warrants equitable tolling from August 7, 2014 through February 4, 2015. (Compl. Post-Hearing Brief; Compl. Response to Notice.) Complainant points to a report sent by his doctor to Sedgewick CMS, the third party disability agency, as evidence of his mental incompetence. (Compl. Post-Hearing Brief.)

Respondent

Respondent asserts that Complainant's untimely filing with OSHA does not warrant equitable tolling for two reasons. First, Complainant failed to show that his mental illness prevented him from meeting the filing deadline. Complainant's participation in acquiring short and long-term disability benefits, as well as statements he made to the Delta hotline and a social worker, show that he was able to manage his affairs and would have been capable of preserving his rights under AIR 21. (Resp. Post-Hearing Brief at 5-7.) Second, Respondent asserts that Complainant was represented by counsel during the 90-day filing period, which forecloses the possibility of equitable tolling regardless of Complainant's mental status. (Resp. Post-Hearing Brief at 4.) Respondent also contends that participation by Complainant in a grievance process should not toll the statute of limitations as a matter of law. (Resp. Post-Hearing Brief at 12.)

⁸ I admitted RX-10 over Complainant's objection that the doctor's observations were incorrect. (Tr. 28-29.) I admitted RX-15 over Complainant's objection that he did not remember typing the document. (Tr. 30-31.) Respondent's exhibits also include a deposition taken from Complainant on March 1, 2016. Respondent sought to use the deposition only for impeachment. (Tr. 34-35.)

⁹ I found it appropriate to allow Complainant to represent himself after discussion with Complainant regarding the general legal issues and Complainant's ability to adequately represent himself. Further, Complainant indicated that he did not desire a continuance to seek legal counsel, but wished to proceed on his own. See Tr. 5-21.

¹⁰ Since I have received no objections from Respondents, I hereby admit both sets of medical documents into evidence. I will refer to the first set of documents as CX-1 and the second set as CX-2.

Applicable Law

The Administrative Review Board (“ARB”) has found equitable tolling appropriate in at least three circumstances¹¹: (i) “when the defendant has actively misled the plaintiff regarding the cause of action”; (ii) “when the plaintiff has in some extraordinary way been prevented from filing his action”; and (iii) “when the plaintiff has raised the precise statutory claim in issue but has done so in the wrong forum.” *Higgins v. Glen Raven Mills, Inc.*, ARB No. 05-143, ALJ No. 2005-SDW-007, pdf at 8 (ARB Sept. 29, 2006).

Mental impairment may warrant equitable tolling if it has in some extraordinary way prevented a complainant from filing his action. In order to prove those circumstances, the ARB requires the petitioner to establish that (i) he is mentally incompetent; and (ii) his mental incompetence was the cause of the failure to timely file (by preventing petitioner from being capable of managing his affairs or understanding his legal rights and acting on them). *Woods*, ARB No. 11-067 pdf at 10-11. The Sixth Circuit adds the additional requirement that the petitioner otherwise had been diligently pursuing his rights. *See Ata v. Scott*, 662 F.3d 736, 742 (6th Cir. 2011).

The petitioner must make “a particularly strong showing” to warrant equitable tolling for mental impairment. Evidence that indicates a petitioner is able to independently manage his affairs will make it difficult to make such a showing. *See Hall v. EG&G Defense Materials, Inc.*, ARB No. 98-076, ALJ No. 97-SDW-009, pdf at 3 (ARB Sept. 30, 1998) (petitioner failed to meet his burden, in large part because he signed a divorce settlement agreement; testified in a worker’s compensation proceeding; filed a complaint of disability and religious discrimination; and filed a claim for disability benefits during the statutory filing period).

Attorney incompetence does not generally warrant equitable tolling. *See, e.g., Whalen v. Randle*, 37 F. App’x. 113, 120 (6th Cir. 2002); *Patino v. Birken Mfg. Co.*, ARB No. 09-054, ALJ No. 2005-AIR-023, pdf at 4 (ARB Nov. 24, 2009). However, ineffective assistance of counsel could warrant equitable tolling under some extraordinary circumstances, such as attorney fraud, illness, or abandonment. *See Cantrell v. Knoxville Comm. Dev. Corp.*, 60 F.3d 1177, 1180-81 (6th Cir. 1995) (abandoning client due to counsel’s mental illness); *Burton v. U.S. Postal Serv.*, 612 F. Supp. 1057 (N.D. Ohio 1985) (abandoning client and skipping town).

Where a petitioner consults legal counsel and claims that petitioner’s mental illness prevented filing, the petitioner must establish that he was unable to pursue his claim as a result of his mental illness and in spite of having counsel. *See Nunnally v. MacCausland*, 996 F.2d 1, 5 (1st Cir. 1993) (stating that the plaintiff was entitled to equitable tolling if he could demonstrate that he was “unable to engage in rational thought and deliberate decision making sufficient to pursue [his] claim alone or through counsel”); *Lopez v. Citibank, N.A.*, 808 F.2d 905, 907 (1st Cir. 1987) (commenting that plaintiff would have to demonstrate why his mental illness presented a strong reason why he was unable to file suit despite the assistance of legal counsel).

¹¹ The ARB has made clear that other situations may also warrant equitable tolling. *See, e.g., Woods v. Boeing-South Carolina*, ARB No. 11-067, ALJ No. 2011-AIR-009 (ARB Dec. 10, 2012).

Evidence

Testimony

Complainant, Philip Mark Tardy (Tr. 31-53.)

I suffered from manic depression and PTSD as a result of the company's suspension and final action notice, and the discipline. (Tr. 32.) My medical records should stand on their own as far as my inability to function. (Tr. 32.) I believe Dr. Chung was inept or unable to observe my characteristics, my behavior, and yet this same Dr. Chung put me on short-term disability. (Tr. 32.) At the end of the year, I was in the hospital for a two-week stay. And if I was in the hospital I couldn't have been of right mind. (Tr. 33.)

I believe I retained an attorney, Angela Walker "within weeks or days of the initial" incident in August 2014. Ms. Walker advised me not to sign the discipline that I received from Delta. I gave Ms. Walker a \$1,500.00 retainer "for a couple of weeks only . . . because [I] could not afford beyond that \$1,500 retainer." (Tr. 34.) During the deposition I gave on March 1, 2016, I did state that I remember losing Ms. Walker as my attorney and I thought she represented me from August 2014 into sometime in early 2015. (Tr. 35-37.) I also testified at the deposition that I retained Ms. Walker to find out what my legal rights were; I wanted to know what I "could do to fight [the] punishment." (Tr. 37-40.)

In August 2014, an incident occurred with Tom Robison that was related to the discipline I received. (Tr. 41.) I thought at the time that Mr. Robison was violating the Federal Aviation Regulations and that I was being punished for communicating that. In November 2014, I called Delta Human Resources and told them that I was being retaliated against because I had blown the whistle on Mr. Robison. I do not "know why it was in April" 2015 that I went to OSHA instead of in 2014. (Tr. 42.) I would have "gone to OSHA in a New York minute," as I stated in the deposition. (Tr. 42-43.) "[P]robably when I did find out about the Internet, I filed with OSHA." I also filed with the FAA "sometime in 2015," within a month of the OSHA reporting. (Tr. 43.)

If I had been "made consciously aware" of RX-10, the psychiatric note dated August 21, 2014, I would have objected to it in the deposition. (Tr. 45.) I do not believe that the therapists and the doctors talk to each other. (Tr. 46.) I "may have agreed that the mark the psychiatrist left behind was normal," but my therapist said otherwise. (Tr. 46-47.)

RX-11 is a note from a social worker from November 2014, written a few days before my defibrillator was put in. (Tr. 47-48.) I do not remember if I told the social worker that I was attempting to file a complaint with the FAA at that time, but "since it's on paper, more than likely I did." (Tr. 48.)

At all times in 2014 and continuing, I have paid my own bills and taken care of my own finances. (Tr. 50-51.) I was and still am able to drive with the help of GPS. I went to San Francisco in September 2014 in order to take care of and spend time with my mother. (Tr. 51-52.) I did state at the deposition that I cooked, cleaned, did laundry, and shopped for her; "at the time it was truthful" testimony. However, I now repudiate that I cooked for her. (Tr. 52-53.) I do not remember a lot of the questions that were asked at the deposition, and "according to my doctor, that's lack of concentration, lack of focus, and poor memory." (Tr. 53.)

Cathy Ann Gray (Tr. 54-64.)

I have lived with Mr. Tardy “for close to nine years” and had an opportunity to observe his behavior on a daily basis. (Tr. 55.) Mr. Tardy has “not been right especially since the day of this incident He’s been suicidal, homicidal. He doesn’t remember anything. He says that he pays the bills. He did not pay the bills. “He doesn’t do all these things that he’s telling you he’s doing. He doesn’t remember. He thinks he does.” (Tr. 57.) I spoke with Mr. Tardy’s dad and sent him to California because the children and I “could not live in the house with [Mr. Tardy] any longer.” (Tr. 56.) I call Mr. Tardy’s father in San Francisco and “I tell him, ‘Dad, I can’t do this; I need help. I need a break.’ It’s a 24/7 job. And he calls him and he says he needs him to come there, and he doesn’t know.” (Tr. 57-58.) I did not go with Mr. Tardy to California. (Tr. 59.) Mr. Tardy “is homicidal, he is suicidal, and everything that we do, I do.” (Tr. 56.) “We’ve been unstable off and on He would go unstable, stable, and we would get him straightened around, and he was fine to work.” (Tr. 57.)

Mr. Tardy has had bipolar disorder the entire time that I have lived with him. (Tr. 58-59.) Mr. Tardy told me that he believed in August that he had been retaliated against, and that he reported that to Delta as well as to the social workers. (Tr. 60.) He said he also told a social worker that he was filing a complaint against Delta. (Tr. 60-61.) Mr. Tardy reads a lot of books and talks to me about them. But he reads books as “understand[ing] it in his own sense, but I don’t think it would be an understanding that maybe somebody, me or you, would understand.” (Tr. 62.)

Exhibits

ALJ Exhibits

ALJX-1 is a copy of the OSHA letter dismissing the claim, including attachments, dated May 12, 2015.

ALJX-2 is Complainant’s letter appealing the dismissal, filed with this Office on June 10, 2015.

ALJX-3 is the Notice of Hearing issued January 6, 2016.

ALJX-4 is the order issued January 29, 2016, which denied a continuance and granted the Motion to Stay the February 3, 2016 deposition.

RX-6

RX-6 is the Final Corrective Action Notice (“FCAN”) issued to Philip Tardy on August 20, 2014. The signature line notes “employee refused to sign; document was read aloud and review with Phil Tardy on 8/20/2014 1715-1800 witnessed by D. Piolrvzny 125257, J. Mazza 483013.”

RX-10

RX-10 are medical records of Complainant dated: August 6, 7, 21, 27, 29; September 24; December 1, 3, 5, 19, 2014; January 8; February 5, 11, 18; and April 16, 23, 30, 2015.

The August 21, 2014 Progress Note states “[s]uspended 2 ½ wks – got a lawyer.” Complainant’s thought processes were rated as normal. Complainant’s thought processes were also evaluated as normal on the August 29, 2014 Progress Note.

The April 23, 2015 Progress Notes state that Complainant “said he felt he might hurt self or someone else – agrees to go to Heritage [Hospital] – able to drive car home – Cathy agrees to take to ER.”

The other progress notes generally state that Complainant is upset about the incident with Delta, and that Complainant’s mood was angry, upset, or depressed.

RX-11

RX-11 is a copy of Progress Notes made by a social worker on November 17, 2014. The social worker states that the “[p]atient is currently attempting for file a complaint [*sic*] with the FAA.”

RX-15

RX-15 is a copy of the complaint Complainant filed with OSHA.

Motion for Summary Decision, Exhibit 3

Exhibit 3 is email exchanges between Kelly Giustina, counsel for Respondent, and Angela Walker, counsel for Complainant. An email dated September 4, 2014 from Ms. Walker states:

I want to confirm that I have requested an extension of the deadline for Mr. Tardy to appeal the disciplinary action he received on August 20, 2014 due to the fact that he is currently on medical leave. I have asked that he be given 30 days to appeal it from the date he is medically cleared to return to work. Please let me know whether Delta is agreeable to this.

A reply email from Ms. Giustina, sent September 8, 2014, states:

As an update to our conversation last week, I have communicated with Mr. Tardy’s Human Resources resource, Lisa Todd, as well as the Conflict Resolution Process “Gatekeeper.” Both have expressed their understanding of Mr. Tardy’s request as outlined in your email below, and both agree to support Mr. Tardy accordingly upon his return to work.¹²

¹² Complainant has not posited that the extension of the deadline to appeal his disciplinary action should toll the statutory filing period. I note that Respondent correctly asserts that the ARB has held that pending grievances seeking review of an employment decision do not toll the statute of limitations. *See* Resp. Post-Hearing Brief at 12-13; *Barrett v. Shuttle America/Republic Airways*, ARB No. 12-075, ALJ No. 2012-AIR-010 (ARB Feb. 28, 2014), pdf at 5-6.

CX-1

Apex Behavioral Health Western Wayne Psychiatric Progress Note

On January 17, 2016, Complainant faxed this Office treatment notes written by healthcare providers at Apex Behavioral Health Western Wayne. The dates of treatment are December 23, 2014 through May 1, 2015; and August 21, 2015 through December 17, 2015. The treatment notes give a diagnosis of bipolar disorder.

Sedgwick CMS Form

On April 21, 2016, Complainant filed paperwork that had been provided by his doctor to Sedgwick CMS, which administers the claims for Respondent. The form provided by Complainant states “[w]e require medical documentation that supports the employee’s inability to return to work.” The form was signed by Dr. Jajo on March 3, 2016 and indicates that Complainant’s last office visit with Dr. Jajo was on February 4, 2016. No review period was specified. Dr. Jajo selected from options on the form that (i) Complainant’s thought processes were intact; (ii) he had no hallucinations; (iii) he had paranoid delusions; (iv) he was fully oriented; (v) his judgment was impulsive; and (vi) he was not suicidal or homicidal. Dr. Jajo wrote the following:

- “Patient’s memory is deficient because of lack of registration due to lack of concentration.”
- In response to the question ‘Is the employee’s ability to concentrate impaired?’
“Impaired serial 7’s 2/5 – impaired spelling
Impaired serial 3’s 3/15”
- “Unable to maintain focus shown inability to finish task 2/5”
- “Angry, depressed, mood swing, irritable edgy and reliving traumatic events when talk about”

Dr. Jajo also indicates that the treatment plan is (1) Medications; (2) Supportive therapy; and (3) Psychotherapy (DBT). Dr. Jajo states that Complainant does not require assistance to complete activities of daily living. He indicates that the current plan is for Complainant to return to work on December 31, 2016.

CX-2

On April 28, 2016, Complainant filed additional paperwork that had been provided by his doctors to Sedgwick CMS. Mental Health Provider Statements and Psychiatric Progress Notes were provided with the following office visit dates:

August 2014: 6, 7, 8, 21, 27, 29

September 2014: 2, 3, 5, 15, 16

October 2014: 1, 9, 10, 16, 23, 24

November 2014: 7, 12, 14, 17, 30,

December 2014: 1, 2, 3, 5, 8, 17, 19, 20, 23

January 2015: 2, 8, 12, 15, 19, 23, 28

February 5, 2015

The above records indicate that Complainant has bipolar disorder. The various forms describe Complainant's thought processes as "intact" until December 23, 2014. The records also indicate that Complainant had a defibrillator implanted in November 2014 due to a heart condition.

On December 20, 2014, Dr. Tae W. Park of Apex Behavioral Health Western Wayne filled out a form letter stating that Complainant has been incapacitated since August 6, 2014, and may resume regular work duties on March 1, 2015. The diagnosis was "depression, anxiety."

On a Mental Health Provider Statement dated December 23, 2014, Dr. Park indicated that Complainant was in inpatient care in Providence Hospital from December 10, 2014 to December 16, 2014 "for manic." Dr. Park wrote "depression, anxiety, distress, manic episode" next to current symptoms/precipitating event. Dr. Park circled "flight of ideas" under thought process, paranoid delusions, and impulsive judgment. However, Dr. Park also noted that Complainant was fully oriented. The treatment plan noted was counseling and medication adjustment. To the prompt *Is the employee requiring assistance to complete activities of daily living? If so, please explain*, Dr. Park noted "under care of family." The "current return to work plan" was listed as March 1, 2015. Dr. Park diagnosed Complainant as "bipolar manic."

On January 21, 2015 a Psychiatric Evaluation from Dr. Vijaya Ramesh at the Oakwood Heritage Hospital indicates that Complainant was partially hospitalized for psychiatric reasons, "anxiety, depression, mood swings, and anger," with an admission date of January 21, 2015. The hospitalization was described as "day hospitalization to prevent inpatient hospitalization." The Psychiatric Evaluation stated that Complainant was alert and that "thought process at this time is logical." Progress Notes from the hospitalization are dated January 23, 28, and 30, 2015.

Complainant also includes a form, Attending Physician's Statement of Continued Disability, from his cardiologist, with Complainant's last office visit listed as January 6, 2015. No psychiatric issues were mentioned. It appears that Complainant visited the CardioVascular Center in Ann Arbor, Michigan on January 8 and 14, 2015. It does not appear that he was evaluated for any psychiatric issues at this time.

Essential Findings of Fact

I find the following:

- The activities that Complainant alleges are protected occurred on or about August 2, 2014. *See* ALJX-1.
- Respondent temporarily suspended Complainant on or about August 7, 2014, and issued disciplinary suspension and probation in the form of a Final Corrective Action Notice (FCAN) on or about August 20, 2014.¹³

¹³ I note that Complainant's complaint with OSHA states that Respondent issued disciplinary suspension and probation on August 8, 2014.

- The 90-day statutory filing period for Complainant's OSHA complaint began running on August 20, 2014 and ended on November 18, 2014.
- Complainant hired attorney Angela Walker not later than August 21, 2014 to assert his legal rights regarding the discipline from Respondent in response to the alleged protected activities of August 2, 2014. *See* RX-10, August 21, 2014 Progress Note. Angela Walker represented Complainant into early 2015. (Tr. 36-37).
- Respondent did not terminate Complainant's employment.
- Complainant was hospitalized in November 2014 so that a defibrillator could be implanted. This hospitalization was not related to a mental health condition. *See* CX-2. On November 17, 2014, during Complainant's hospitalization, he told a social worker that he was currently attempting to file a complaint with the FAA. *See* RX-11.
- Complainant underwent partial hospitalizations for psychiatric reasons related to bipolar disorder from December 10, 2014 to December 16, 2014 and for some period of time beginning on January 21, 2015. These were day hospitalizations, between the inpatient and outpatient levels. Complainant had paranoid delusions during the December hospitalization.
- Complainant filed his complaint with OSHA on April 9, 2015.¹⁴

I also find that Complainant has not made the particularly strong showing necessary to warrant equitable tolling. Although Complainant has established that he has had bipolar disorder for at least the last 10 years, and has suffered from it at all times relevant to these proceedings,¹⁵ he has not established that his bipolar disorder was the cause of the failure to file his complaint within the 90-day statutory filing period. Additionally, Complainant has not established that his bipolar disorder rendered him unable to pursue his claim through his retained counsel.

Complainant's testimony suggests that the untimely filing was the result of lack of knowledge of the law, rather than mental incapacity. Though Complainant has suffered from bipolar disorder for at least the last ten years, it did not prevent him from working as a mechanic for Delta Airlines. Complainant has also managed his own affairs and engaged in activities of daily living, credibly testifying that he has paid his own bills and taken care of his finances for the entire time period between the alleged protected activity and the filing of the complaint. *See* Tr. 50-52. Complainant was also able to travel to San Francisco in September 2014 to provide his father some relief in caring for his mother. (Tr. 51). Moreover, Complainant's medical records during the relevant time period, August 20, 2014 to November 18, 2014, indicate that Complainant's thought processes were normal and intact. *See* RX-10. Complainant understood in August 2014 that he should hire an attorney to learn what he could do "to fight [the]

¹⁴ Although Respondent suggests that the complaint was filed on June 14, 2015 or October 1, 2015, I find that Complainant filed on April 9, 2015, the date noted on the complaint.

¹⁵ *See* RX-10; CX-1; CX-2; Tr. 32.

punishment.” (Tr. 37-40.) The testimony of Ms. Gray tends to corroborate the evidence presented by Complainant that he suffers from bipolar disorder.¹⁶ However, Ms. Gray’s testimony also tends to establish that Complainant had the mental acuity necessary to file a complaint.¹⁷ Ms. Gray confirms that Complainant spoke to a social worker about filing a complaint against Respondent on November 17, 2014. (Tr. 60-61.) Complainant testified that he correctly stated in his deposition that he would have “gone to OSHA in a New York minute” if he had been aware of information that he learned about later on an internet blog. *See* Tr. 42-43. Additionally, Complainant’s hospitalization in November 2014 was for the placement of a defibrillator and not for psychiatric reasons.¹⁸ *See* CX-2; RX-11; Tr. 47-48. I find that Complainant has not shown that his mental illness rose to the level of mental incompetence.

Furthermore, even if Complainant had been able to establish mental incompetence, I find that he has not shown that his mental illness prevented him from filing a complaint, whether as a self-represented litigant or when represented by counsel. There is no indication that Complainant’s retained counsel provided ineffective assistance or that there were extraordinary circumstances surrounding the attorney-client relationship that would warrant equitable tolling and there is no competent evidence in the record of fraud, abandonment or illness. Rather, it appears from Complainant’s testimony that Ms. Walker advocated for Complainant’s interests until her retainer was exhausted. *See* Tr. 34-40; Mot. Summary Decision, Exhibit 3.

ORDER

Based on the foregoing, I find that Complainant has not made the “particularly strong showing” necessary to warrant equitable tolling of the applicable statute of limitations for mental impairment. Accordingly, I hereby DISMISS the April 9, 2015 complaint as untimely filed.

SO ORDERED:

STEPHEN R. HENLEY
Chief Administrative Law Judge

¹⁶ Ms. Gray testified that Complainant has been suicidal and homicidal; that he “doesn’t remember anything”; and that he cycles between stable and unstable. (Tr. 57.)

¹⁷ I note that there is insufficient evidence to credit Respondent’s assertion that Complainant’s participation in the process of acquiring disability benefits tends to support his ability to file a claim with OSHA. It is unclear from the record the degree to which Ms. Walker and Ms. Gray assisted Complainant in filing for those benefits. *See* Mot. Summary Decision, Exhibit 3; Tr. 56. I also note that Complainant has not presented any evidence to show that the standard for an employee to obtain disability leave satisfies the standard required for equitable tolling of the AIR 21 statute.

¹⁸ Complainant’s hospitalization for psychiatric reasons was in December 2014 and January 2015, after the 90-day deadline for filing with OSHA had expired.

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review (“Petition”) with the Administrative Review Board (“Board”) within ten (10) business days of the date of issuance of the administrative law judge’s decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents. Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: <https://dol-appeals.entellitrak.com>. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1979.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You waive any objections you do not raise specifically. *See* 29 C.F.R. § 1979.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210. *See* 29 C.F.R. § 1979.110(a).

If filing paper copies, you must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review. If you e-File your petition and opening brief, only one copy need be uploaded.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party’s supporting legal brief of points and authorities. The response in opposition to the petition for review must include an original

and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and may include an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies. If you e-File your responsive brief, only one copy need be uploaded.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board. If you e-File your reply brief, only one copy need be uploaded.

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1979.110. Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§ 1979.109(c) and 1979.110(a) and (b).