

NOTE: This order is nonprecedential.

**United States Court of Appeals
for the Federal Circuit**

GERALD MITCHELL,
Petitioner

v.

MERIT SYSTEMS PROTECTION BOARD,
Respondent

2023-2152

Petition for review of the Merit Systems Protection Board in Nos. AT-0831-19-0078-I-1 and AT-844E-13-3694-I-1.

Before DYK, WALLACH, and CUNNINGHAM, *Circuit Judges*.

PER CURIAM.

ORDER

In response to the court's December 8, 2023 order to show cause, the Merit Systems Protection Board urges transfer of Gerald Mitchell's petition for review with respect to MSPB Docket No. AT-844E-13-3694-I-1 and dismissal with respect to No. AT-0831-19-0078-I-1. Mr. Mitchell opposes dismissal and moves for various relief.

In No. AT-844E-13-3694-I-1, Mr. Mitchell challenged the Office of Personnel Management's decision denying

him disability retirement benefits, alleging discrimination on the basis of his disability. In 2013, the administrative judge dismissed the appeal for lack of jurisdiction when OPM rescinded the challenged decision.

In 2018, Mr. Mitchell filed No. AT-0831-19-0078-I-1 to challenge OPM's alleged discriminatory and retaliatory failure to respond to his requests for information and documents related to his disability retirement benefits. In April 2019, the Board's administrative judge dismissed the appeal for lack of jurisdiction. Mr. Mitchell then filed separate petitions for Board review in both cases.

On May 1, 2023, the Board joined the two petitions for administrative convenience, dismissed the petition as to No. AT-844E-13-3694-I-1 as untimely, and denied the petition as to No. AT-0831-19-0078-I-1, affirming the dismissal in that case. On July 10, 2023, this court received Mr. Mitchell's petition seeking judicial review of the Board's May 1, 2023 decision. Mr. Mitchell's filings here state that he wishes to pursue judicial review of his discrimination claims.

As to No. AT-844E-13-3694-I-1, we agree with the Board that we lack jurisdiction. Federal district courts, not this court, have jurisdiction over “[c]ases of discrimination subject to the provisions of [5 U.S.C.] § 7702,” i.e., “mixed cases” involving adverse personnel actions appealable to the Board and allegations of covered discrimination. 5 U.S.C. § 7703(b)(2); *Perry v. Merit Sys. Prot. Bd.*, 582 U.S. 420, 432 (2017); *Ash v. Off. of Pers. Mgmt.*, 25 F.4th 1009, 1011 (Fed. Cir. 2022).

Given Mr. Mitchell's ongoing pursuit of discrimination claims in No. AT-844E-13-3694-I-1, that case is outside our jurisdiction. We conclude that transfer to the United States District Court for the District of Columbia is appropriate under 28 U.S.C. § 1631. *See* 42 U.S.C. § 2000e-5(f)(3) (providing that discrimination cases brought pursuant to 5

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U.S.C. § 7702 “may be brought within the judicial district in which the respondent has his principal office.”).

As to No. AT-0831-19-0078-I-1, we dismiss. Under current precedent, the filing deadline is mandatory and jurisdictional. *See Fedora v. Merit Sys. Prot. Bd.*, 848 F.3d 1013, 1016 (Fed. Cir. 2017). Here, Mr. Mitchell’s petition was received outside of that deadline. Even assuming equitable tolling is available, Mr. Mitchell has shown no basis for tolling here based only on a vague recollection of “some technical issue(s) with his computer system and/or printer and scanner and/or internet,” or “something of that nature” and “difficulty figuring out how to make thing[s] happen using the FedEx Office Store equipment.” ECF No. 20 at 1.

Accordingly,

IT IS ORDERED THAT:

- (1) MSPB Docket No. AT-844E-13-3694-I-1 is transferred to the United States District Court for the District of Columbia pursuant to 28 U.S.C. § 1631.
- (2) This matter is dismissed as to MSPB Docket No. AT-0831-19-0078-I-1.
- (3) All pending motions are denied.

FOR THE COURT



Jarrett B. Perlow
Clerk of Court

March 26, 2024
Date