FILED
United States Court of Appeals
Tenth Circuit

September 10, 2019

Elisabeth A. Shumaker
Clerk of Court

1UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

GUILLERMO MARQUEZ-GUTIERREZ,

Petitioner,

v.

WILLIAM P. BARR, Attorney General of the United States,

Respondent.

No. 18-9591
(Petition for Review)

ORDER AND JUDGMENT*

Before **EID**, **KELLY**, and **CARSON**, Circuit Judges.

Guillermo Marquez-Gutierrez (Marquez) petitions for review of an order of the Board of Immigration Appeals (Board) denying his motion to reissue an order denying his motion to reopen his immigration case. Exercising jurisdiction under 8 U.S.C. § 1252(a)(1), we deny the petition.

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* After examining the briefs and appellate record, this panel has determined unanimously to honor the parties' request for a decision on the briefs without oral argument. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

I. **Background**

Marquez, a native and citizen of Mexico, was admitted to the United States as a lawful permanent resident in 1990. In 2006, he was convicted of several marijuana offenses, including conspiracy to distribute marijuana, in violation of Wyoming law. Based on those convictions, in 2008 Marquez was charged with being removable as an alien who has been convicted of an aggravated felony as defined in 8 U.S.C. § 1101(a)(43)(B) ("illicit trafficking in a controlled substance . . . including a drug trafficking crime"). At a hearing before an immigration judge (IJ) in Colorado, Marquez admitted the factual allegations and conceded removability. He did not seek relief from removal. The IJ ordered him removed to Mexico, and Marquez waived administrative appeal of the IJ's decision.

Marquez was removed to Mexico, but he later reentered the United States. After a series of arrests, he was charged in a federal district court in California with illegal reentry after removal. In March 2017, that district court granted his motion to dismiss the indictment because, as the government conceded, the Wyoming statutes of conviction that led to the initial removal order were categorically broader than the definition of "aggravated felony" in § 1101(a)(43)(B), and therefore Marquez's removal order was "fundamentally unfair." Admin. R. at 208.

The same day, the government served Marquez with a new notice to appear, charging him with inadmissibility as "[a]n alien present in the United States without being admitted or paroled," 8 U.S.C. § 1182(a)(6)(A)(i). That notice was filed in an

immigration court in California. The agency issued a final order of removal in March 2019, and it is currently under review in the Ninth Circuit.[1]

Meanwhile, in May 2017, Marquez filed in the Colorado immigration court a motion to reopen or reconsider the 2008 removal order. He asserted that under intervening Supreme Court authority, *Moncrieffe v. Holder*, 569 U.S. 184 (2013), his Wyoming convictions no longer qualified as aggravated felonies, and therefore he was not removable under the original charge of removability. In the alternative, Marquez contended that even if he were removable under the original charge, he should be allowed to apply for cancellation of removal for lawful permanent residents. He asserted his motion to reopen was timely because he had no grounds to seek reopening until the federal court dismissed the indictment in his illegal-entry case. He also asked the IJ to reopen the matter sua sponte.

The IJ denied the motion to reopen or reconsider, concluding that it was untimely and that equitable tolling of the filing deadlines for such a motion was unwarranted.[2] The IJ also declined to reopen the matter sua sponte.

Marquez appealed the IJ's order denying reopening or reconsideration. On March 7, 2018, the Board denied Marquez's appeal. The Board mailed its decision to

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[1] On August 28, 2019, the Ninth Circuit denied Marquez's motion for stay of removal.

[2] *See* 8 U.S.C. §§ 1229a(c)(6)(B) (motion for reconsideration "must be filed within 30 days of the date of entry of a final administrative order"); 1229a(c)(7)(C)(i) (motion to reopen must "be filed within 90 days of the date of entry of a final administrative order of removal," subject to limited statutory exceptions inapplicable here).

Marquez's counsel. The Board also sent a "courtesy copy" to Marquez at the immigration center where he was detained. Admin. R. at 25. The detention center's address was listed on Marquez's notice of appeal to the Board and his attorney's entry of appearance for that appeal. Marquez did not file a petition for review.

In August 2018, Marquez, through new counsel, moved the Board to reissue the March 2018 decision so that the thirty-day time limit for filing a petition for review of it would restart.[3] Marquez explained that he did not discover the BIA had upheld the denial of his motion to reopen until May 10, 2018, when a new attorney informed him that his prior attorney had not filed an appeal. He claimed that his prior attorney had not forwarded the Board's decision to him, and that she had not "fully explain[ed] the time to appeal" to Marquez's family, who was paying the attorney's bills. *Id.* at 17. Therefore, he concluded, his family was unaware of the thirty-day deadline for filing a petition for review, and they did not inform Marquez of the Board's decision until more than thirty days after it was issued.

Marquez also asserted that his prior attorney, who was in California, had told his family to find another attorney to handle his appeal because she was not admitted to practice before the Tenth Circuit and in any event she was going on maternity leave in four days. He specified no date when his prior attorney informed his family

[3] *See Infanzon v. Ashcroft*, 386 F.3d 1359, 1361 (10th Cir. 2004) (recognizing Board's ruling on motion to reopen is separate, reviewable order); *Desta v. Ashcroft*, 329 F.3d 1179, 1183 (10th Cir. 2003) (same regarding Board ruling on motion for reconsideration); *see also* 8 U.S.C. § 1252(b)(1) (establishing thirty-day time period for filing petition for review).

of these things, but he admits in his brief on appeal that it occurred "via email on March 12, 2018, five days after the [Board's] decision." Pet'r's Opening Br. at 9.[4]

On October 29, 2018, the Board denied the motion, stating:

> We conclude that reissuance is unwarranted in this case. The Board has on occasion reissued its decisions, but generally only due to Board error or administrative problems involving the service. Here, the respondent concedes that his former counsel and a family member received copies of the decision. In addition, our docketing records indicate that the Board mailed this decision to both the respondent and the respondent's former counsel at their current addresses. Finally, the respondent has not meaningfully articulated the grounds for a petition for review.

Admin. R. at 3 (citation omitted). Marquez now seeks review of the Board's order denying reissuance.

II. **Discussion**

We review for abuse of discretion the Board's denial of a request to reissue a decision, which is treated like a motion to reopen. *Lujan-Jimenez v. Lynch*, 643 F. App'x 737, 739-40 & n.2 (10th Cir. 2016)[5] (citing, *inter alia*, *Hernandez-Velasquez v. Holder*, 611 F.3d 1073, 1077 (9th Cir. 2010), *Chen v. U.S. Att'y Gen.*, 502 F.3d 73, 75 (2d Cir. 2007) (per curiam), *and Tobeth-Tangang v. Gonzales*, 440 F.3d 537, 539 & n.2 (1st Cir. 2006)). "The BIA abuses its discretion

[4] Although not part of the Certified Administrative Record in this case, Marquez attached a copy of the March 12 email to an emergency motion to stay removal that he filed in this case. Because the email clearly informs Marquez's family member who received it that he only had until April 6, 2018, to file a petition for review, we consider his failure to provide it to the agency with his motion to reissue disingenuous.

[5] We cite to unpublished cases for their persuasive value consistent with 10th Cir. R. 32.1.

when its decision provides no rational explanation, inexplicably departs from established policies, is devoid of any reasoning, or contains only summary or conclusory statements." *Galvez Piñeda v. Gonzales*, 427 F.3d 833, 838 (10th Cir. 2005) (internal quotation marks omitted). "[T]here is no abuse of discretion when . . . [the Board's] rationale is clear, there is no departure from established policies, and its statements are a correct interpretation of the law." *Id.* (internal quotation marks omitted).

The Board is required to serve its final decision on an "alien" or the "party affected." 8 C.F.R. § 1003.1(f). But where, as here, an alien is represented by counsel before the Board, the Board is required to serve its final decision on counsel. *Id.* §§ 292.5(a), 1292.5(a).[6] Marquez concedes that his former attorney received a copy of the Board decision upholding the denial of his motion to reopen or reconsider and that she informed his family about it twenty-five days before the deadline for filing a petition for review. Furthermore, the Board sent a courtesy copy to Marquez's address of record (the detention center), and although he claims he never received it, that does not render the denial of reissuance an abuse of discretion. *Cf. Zhang v. Lynch*, 633 F. App'x 701, 703 (10th Cir. 2016) (upholding denial of reissuance where Board mailed copy of its decision to alien's address of record even

[6] In relevant part, these identical regulations provide: "Representative capacity. Whenever a person is required by any of the provisions of this chapter. . . to . . . be served with any paper other than a warrant of arrest or a subpoena[,] . . . such . . . service . . . shall be . . . served . . . upon . . . the attorney or representative of record, or the person himself if unrepresented."

though he never received it). We therefore see no abuse of discretion in the Board's refusal to reissue its decision based on Marquez's failure to receive a copy of it until after the expiration of the deadline to file a petition for review.

We also see no abuse of discretion in the Board's observation that Marquez failed to "meaningfully articulate[] the grounds for a petition for review." Admin. R. at 3. We understand this to mean Marquez failed to show prejudice resulting from his prior attorney's actions and his allegedly resultant failure to receive a copy of the Board's decision upholding the denial of his motion to reopen or reconsider until after the time for filing a petition for review had lapsed. We have noted that reissuance might be in order where an alien "'proves that retained counsel was ineffective and, as a result, the petitioner was denied a fundamentally fair proceeding.'" *Lujan-Jimenez*, 643 F. App'x at 741 (quoting *Osei v. INS*, 305 F.3d 1205, 1208 (10th Cir. 2002)). To show such prejudice, "the alien [must] demonstrate a reasonable likelihood that, but for the errors complained of, he would not have been deported." *United States v. Aguirre-Tello*, 353 F.3d 1199, 1208 (10th Cir. 2004) (en banc) (internal quotation marks omitted).

Marquez has failed to make this showing of prejudice. He offers no argument regarding whether a petition for review of the denial of the motion to reopen or reconsider might have been successful. Instead, he focuses on whether his attorney's actions violated the California Rules of Professional Responsibility. The answer to that question does not resolve the prejudice question—whether a timely-filed petition

for review of the denial of reopening or reconsideration would have resulted in Marquez not being removed.

III. **Conclusion**

The petition for review is denied. We grant Marquez's Motion For Leave To Proceed In Forma Pauperis. Because the relevant statute, 28 U.S.C. § 1915(a)(1), excuses only "prepayment of fees," Marquez remains responsible for paying the full docketing and filing fee to the clerk of this court.

Entered for the Court

Allison H. Eid
Circuit Judge