

**UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD**

**2010 MSPB 44**

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Docket No. DE-0831-09-0175-I-1

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**Emmett W. McNeel,  
Appellant,**

**v.**

**Office of Personnel Management,  
Agency.**

March 2, 2010

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Emmett W. McNeel, Prescott, Arizona, pro se.

Charlretta T. McNeill, Washington, D.C., for the agency.

**BEFORE**

Susan Tsui Grundmann, Chairman  
Anne M. Wagner, Vice Chairman  
Mary M. Rose, Member

**OPINION AND ORDER**

¶1 The appellant has filed a petition for review of an initial decision that dismissed his appeal as barred by res judicata or collateral estoppel. For the reasons discussed below, we find that the petition does not meet the criteria for review set forth at [5 C.F.R. § 1201.115](#), and we therefore DENY it. We REOPEN this case on our own motion under [5 C.F.R. § 1201.118](#), however, VACATE the initial decision, and REMAND the appeal to the Denver Field Office for further adjudication consistent with this Opinion and Order.

## BACKGROUND

¶2 This is the appellant's fifth appeal to the Board concerning his disability retirement benefits. The relevant history of his appeals may be summarized as follows. The appellant began receiving disability annuity benefits in 1994. Effective March 1, 1997, the Office of Personnel Management (OPM) discontinued his disability benefits based on information provided by Dr. Lillian Muzyka, M.D., indicating that he was physically and mentally fit to return to work in the same capacity that he had prior to being approved for disability retirement. Initial Appeal File (IAF), Tab 9, Subtab E at 120-21, 127, 141. The appellant filed an appeal challenging the discontinuation of his benefits, and the administrative judge issued an initial decision upholding OPM's decision. *McNeel v. Office of Personnel Management*, MSPB Docket No. DE-831E-97-0746-I-1, Initial Decision (Jan. 28, 1998) (*McNeel I*); IAF, Tab 9, Subtab E at 7-15, 120-121. The appellant filed a petition for review claiming that the administrative judge based his analysis and findings entirely on a letter from Dr. Muzyka, who gave him a physical examination in 1996, whereas his family physician, Dr. James F. Martin, had been treating him for over 15 years. IAF, Tab 9, Subtab E at 4. On July 16, 1998, the Board denied his petition for review and the initial decision became final. *Id.* at 1.

¶3 By letter dated November 25, 2003, OPM informed the appellant that it was reinstating his disability annuity effective June 9, 2003, apparently based on a June 9, 2003 note from Dr. Muzyka stating that the appellant's medical conditions were "ongoing." IAF, Tab 8, Subtab II-C at 1, 3. The OPM letter approving the reinstatement of the appellant's disability benefits did not provide notice of Board appeal rights. *Id.* at 1.

¶4 On May 2, 2007, the appellant filed his second appeal, this time challenging OPM's August 12, 2005 initial decision not to apply cost of living allowances (COLAs) to his annuity. *McNeel v. Office of Personnel Management*, MSPB Docket No. DE-831E-07-0341-I-1, Initial Decision (July 5, 2007) (*McNeel*

*II*); IAF, Tab 8, Subtab II-B at 81. He withdrew that appeal, however, because OPM had not yet issued a reconsideration decision on his request for COLAs. IAF, Tab 8, Subtab II-B at 81-82. On November 29, 2007, OPM issued its reconsideration decision denying his request for COLAs during the period that his annuity was stopped because he had been deemed medically recovered from his disability. IAF, Tab 10 at 20-21. The appellant challenged that decision in his third appeal, which the administrative judge dismissed as settled. *See McNeel v. Office of Personnel Management*, MSPB Docket No. DE-831E-08-0137-I-1, Initial Decision (Jan. 22, 2008) (*McNeel III*); IAF, Tab 8, Subtab II-B at 1-3.

¶5 In the January 22, 2008 initial decision, the administrative judge noted “that the appellant was not contesting OPM’s decision not to allow cost-of-living adjustments during the five-year period when his annuity payments were suspended. Rather, he was contesting OPM’s decision finding that he was medically recovered during the five-year period.” IAF, Tab 8, Subtab II-B at 2. Under the terms of the parties’ settlement, the appellant agreed to withdraw his appeal and “OPM’s representative agreed to forward the appellant’s contention that he was not medically recovered during the five-year period to the appropriate OPM officials for decision.” *Id.*

¶6 After the administrative judge dismissed that appeal, however, OPM did not issue a new decision on the issue of his medical recovery during that period. Instead, OPM issued a June 2, 2008 decision responding to the appellant’s “request to contest [OPM’s] decision [finding him] medically recovered in 1998.” IAF, Tab 8, Subtab I at 1, Subtab II-A at 1. In its decision, OPM asserted that, on September 2, 1999, it had denied the appellant’s request to reinstate his disability annuity, and it had issued a reconsideration decision on January 21, 2000, affirming its initial decision. IAF, Tab 8, Subtab II-A at 1. The January 21, 2000 reconsideration decision advised the appellant that he had 30 days after receipt of the decision to file his appeal with the Board; however, the appellant apparently did not appeal OPM’s reconsideration decision to the Board. *Id.* at 3.

¶7 In the appellant’s fourth appeal, filed on June 16, 2008, he challenged OPM’s June 2, 2008 decision denying his request for retroactive reinstatement of his disability annuity benefits. *See McNeel v. Office of Personnel Management*, MSPB Docket No. DE-831E-08-0376-I-1, Initial Decision (Dec. 11, 2008) (*McNeel IV*). The same administrative judge assigned to the instant appeal dismissed *McNeel IV* for lack of jurisdiction after OPM rescinded its June 2, 2008 decision “with the understanding” that OPM would issue a new decision. *Id.*; IAF, Tab 19 at 3.<sup>1</sup>

¶8 On February 2, 2009, the appellant filed the current appeal because OPM had not issued a new decision. IAF, Tab 1. On May 7, 2009, OPM issued a final decision labeled as a response to the appellant’s “request to contest [OPM’s] decision to find [him] medically recovered from October 1, 1998 through June 8, 2003 and OPM’s denial of cost-of-living adjustments while [his] annuity was stopped based on medical recovery during the above time period.” IAF, Tab 10 at 2. In its decision, OPM set forth the procedural history of OPM’s decisions and related Board appeals involving the appellant’s claims, and found that the parties’ January 22, 2008 settlement agreement, IAF, Tab 8, Subtab II-B at 2, was not binding because the appellant had exhausted his “administrative rights on the medical recovery issue.” IAF, Tab 10 at 2-4. OPM further found that: (1) the administrative judge in the *McNeel III* initial decision “wrongly stated [that] OPM had not issued a final decision in this matter”; (2) OPM’s final decision regarding the appellant’s medical recovery was issued on August 11, 1997, and affirmed by the Board; (3) OPM’s final decision on the issue of COLAs “while medically recovered from September 30, 1998 through June 8, 2003” was issued

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<sup>1</sup> The information about the appellant’s fourth appeal is not in this appeal file. The administrative judge apparently took judicial notice of the procedural history and details of *McNeel IV* based on his prior service as the administrative judge who issued the initial decision in that appeal. Neither party has contested this background information on review.

November 29, 2007; and (4) the appellant's request to have OPM issue new final decisions on his medical recovery and COLAs was barred by res judicata. *Id.* at 4 (emphasis omitted).

¶9 Thereafter, the administrative judge held a status conference to clarify the appellant's claims in this appeal. IAF, Tab 17. In his conference summary, the administrative judge described the appellant's claim on appeal as a challenge to "the agency's decision terminating his disability retirement annuity between 1997 and 2003 as it was based on information from Dr. Lillian Muzyka, M.D., and which the appellant contends he can now establish was flawed information." *Id.* at 2. The administrative judge also ordered the appellant "to state with as much specificity and precision as possible" the basis of his appeal, if he intended to make a claim other than the one the administrative judge identified in his summary. *Id.*

¶10 In addition, the administrative judge informed the appellant that his appeal appeared to be barred by the doctrines of res judicata and/or collateral estoppel because his claim on appeal appeared to have been previously adjudicated in *McNeel I.* *Id.* The administrative judge explained the doctrines of res judicata and collateral estoppel, and he ordered the appellant to explain why his appeal was not barred under these doctrines. *Id.* The administrative judge also informed the appellant that any objection to the conference summary had to be filed within 7 calendar days or his objection would be waived. *Id.* at 2-3.

¶11 In response to the administrative judge's order, the appellant argued the merits of his appeal and asserted, among other things, that "[t]he whole basis of denial of my disability retirement is based upon the letter from Dr. Muzyka stating she was my family doctor for years which was a falsehood." IAF, Tab 18 at 1. He also asserted that he has acquired a November 1999 letter and a note from Dr. Muzyka, in which she agreed with his other doctors' assessments of his medical conditions. *Id.* at 2. The appellant did not raise any objections to the

administrative judge's conference summary or address the doctrines of res judicata and collateral estoppel.

¶12 The administrative judge issued an initial decision that dismissed the appellant's appeal as barred by the doctrine of collateral estoppel because, in *McNeel I*, the appellant had already litigated the issue of whether the information from Dr. Muzyka was properly relied upon to terminate his disability annuity in 1997, based on his allegation that she was not his family physician, and the determination of that issue was necessary to the resulting judgment in that appeal. IAF, Tab 19, Initial Decision (ID) at 1, 5. In the alternative, the administrative judge also found that, to the extent that the appellant's claim on appeal was not actually litigated in *McNeel I* or his other appeals, it could have been, and his appeal was also barred by res judicata. ID at 5.

¶13 The appellant has filed a petition for review, and OPM has not filed a response. Petition for Review File (PFR File), Tab 1.

#### ANALYSIS

¶14 On review, the appellant asks the Board to grant him "all back medical retirement pay and [COLAs] that [he has] missed up to the present." PFR File, Tab 1 at 7. He reiterates his assertion below that Dr. Muzyka was not his family physician and asserts that, on June 9, 2003, Dr. Muzyka recanted her opinion that he was fit to return to work after she reviewed the documentation from his other physicians. *Id.* at 1, 5. He further asserts that he was unable to obtain his medical records from Dr. Muzyka to show that "no exam was given to [him] other than a standard employment physical which did not address [his] disability retirement issues," until after the administrative judge issued a subpoena, and that he received the subpoenaed documents too late for consideration on appeal.<sup>2</sup> *Id.* at 1, 4-5.

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<sup>2</sup> The appellant has not submitted any documents for the Board to review with his petition.

¶15 After fully considering the filings in this appeal, we conclude that there is no new, previously unavailable, evidence. See [5 C.F.R. § 1201.115\(d\)](#). During this appeal, the administrative judge granted the appellant's request for a subpoena ordering Dr. Muzyka to produce copies of the appellant's medical records. IAF, Tabs 11-12. The alleged new evidence from Dr. Muzyka is in the record below and was before the administrative judge at the time he rendered the initial decision; thus, it does not constitute new evidence. IAF, Tab 15; see, e.g., *Meier v. Department of the Interior*, [3 M.S.P.R. 247](#), 256 (1980). Further, the appellant has not addressed the administrative judge's reasons for dismissing his appeal. Moreover, we agree with the administrative judge's conclusion that, to the extent that the instant appeal was the appellant's attempt to relitigate the Board's decision in *McNeel I* upholding OPM's decision to discontinue his disability benefits effective March 1, 1997, this appeal was barred by the doctrine of res judicata. See *Wade v. Department of the Air Force*, [70 M.S.P.R. 396](#), 399, *aff'd*, 104 F.3d 375 (Fed. Cir. 1996) (Table); *Peartree v. U.S. Postal Service*, [66 M.S.P.R. 332](#), 337 (1995). Accordingly, we deny the appellant's petition for review. We reopen this matter, however, because the appellant's claims are not entirely barred by the doctrines of res judicata and collateral estoppel.

We deny the appellant's implicit request to reopen *McNeel I*.

¶16 To the extent the appellant's instant petition can be construed as a request, based on alleged new evidence regarding the reliability of Dr. Muzyka's opinion, to reopen his previous Board appeal of OPM's decision terminating his disability annuity effective March 1, 1997, we deny his request to reopen as well. The Board may reopen a case where new evidence has sufficient weight to warrant a different outcome, but the Board's authority to reopen a case is limited by the requirement that such authority be exercised within a reasonably short period of time, which is usually measured in weeks, not months or years. See *Arenal v. Office of Personnel Management*, [106 M.S.P.R. 272](#), ¶ 10 (2007), *aff'd*, 264 F. App'x 891 (Fed. Cir. 2008), *cert. denied*, 128 S. Ct. 2468 (2008); *Mitchell v.*

*Department of Commerce*, [100 M.S.P.R. 415](#), ¶ 9 (2005), *review dismissed*, 175 F. App'x 340 (Fed. Cir. 2006).

¶17 In deciding whether to reopen a closed appeal, the Board will balance the desirability of finality against the public interest in reaching the correct result. *Mitchell*, [100 M.S.P.R. 415](#), ¶ 9. The Board, however, will exercise its discretion to reopen only in unusual or extraordinary circumstances, such as an intervening event or the discovery of misrepresentation or fraud after the issuance of the initial decision. *Id.*

¶18 On review, the appellant alleges that he has new evidence from Dr. Muzyka that was not considered on appeal, but he has not shown that unusual or extraordinary circumstances prevented him from obtaining this information and submitting it to the Board until almost 11 years after the Board issued its final decision in *McNeel I*. PFR File, Tab 1 at 4-5; IAF, Tab 15. In these circumstances, we find that the interest in finality outweighs the limited public interest in reopening this appeal. *See Mitchell*, [100 M.S.P.R. 415](#), ¶ 11. Even assuming for the sake of argument that this evidence was previously unavailable, the evidence the appellant submitted to support his claim that, in the 1997 initial decision, the administrative judge improperly relied on the opinion of Dr. Muzyka is not of sufficient weight to warrant a different outcome in *McNeel I*. IAF, Tabs 14-15; *see Mitchell*, [100 M.S.P.R. 415](#), ¶ 12.

The appellant's claim that OPM should have reinstated his disability benefits prior to June 9, 2003, is not barred by res judicata or collateral estoppel.

¶19 In addition to challenging OPM's decision to terminate his disability annuity in 1997, the pro se appellant is also claiming implicitly that OPM should have reinstated his disability benefits prior to June 9, 2003. IAF, Tab 17 at 2; PFR File, Tab 1 at 1, 5, 7. A request to reinstate a disability retirement annuity is distinct from a challenge to the original decision to terminate the annuity. *See DeGrant v. Office of Personnel Management*, [107 M.S.P.R. 414](#), ¶¶ 8, 10, 12 (2007). The record reflects that the appellant asked OPM to reinstate his annuity

in 1999, IAF, Tab 9, Subtab D at 13, and OPM denied that request in a reconsideration decision dated January 21, 2000, *id.* at 1-2. The record also reflects that OPM granted a subsequent reinstatement request from the appellant, and reinstated his annuity effective June 9, 2003. IAF, Tab 8, Subtab II-C at 1.

¶20 The issue of whether OPM should have reinstated the appellant's annuity prior to June 9, 2003, has not been actually litigated in any of the appellant's prior Board appeals. Thus, the doctrine of collateral estoppel does not apply. *See generally McNeil v. Department of Defense*, [100 M.S.P.R. 146](#), ¶ 15 (2005) (the doctrine of collateral estoppel may apply if, among other things, the identical issue was "actually litigated" by the parties in a prior case). Further, although the Board's final decision in *McNeil I* was a judgment on the merits of the termination of the appellant's disability benefits in 1997, the issue of whether the appellant subsequently became eligible for reinstatement of his benefits is a different cause of action. *See DeGrant*, [107 M.S.P.R. 414](#), ¶¶ 8, 10, 12. Similarly, none of the appellant's other Board appeals have resulted in a judgment on the merits of the appellant's reinstatement claim. Thus, the doctrine of res judicata does not apply. *See generally Wade*, 70 M.S.P.R. at 399 ("Under the doctrine of res judicata, a valid, final judgment on the merits of an action bars a second action involving the same parties or their privies based on the same cause of action.").

¶21 OPM's May 7, 2009 decision clearly states that OPM will not be issuing any further decision on the appellant's claim that he had not medically recovered and thus was entitled to reinstatement of his disability annuity prior to June 9, 2003. IAF, Tab 10 at 4-5. Thus, the Board could rule on this claim without any further proceedings before OPM. *See DeGrant*, [107 M.S.P.R. 414](#), ¶¶ 12-13; *Luna v. Office of Personnel Management*, [89 M.S.P.R. 465](#), ¶¶ 9-10 (2001). Accordingly, we remand the appellant's reinstatement claim for further adjudication. Nonetheless, there is an obvious question regarding the timeliness of the appellant's Board appeal regarding this claim.

¶22 The appellant did not immediately appeal OPM's January 21, 2000 reconsideration decision or OPM's November 25, 2003 decision to reinstate his disability benefits effective June 9, 2003. To the extent that he is trying to do so now, his appeal may be untimely, as the record reflects that, after these decisions were issued, he did not attempt to raise any issues concerning his disability retirement until May 2, 2007, when he filed his second Board appeal. We note that, although the January 21, 2000 reconsideration decision contained notice of the appellant's Board appeal rights, the November 25, 2003 letter did not contain such notice. IAF, Tab 8, Subtab II-C at 1, Tab 9, Subtab D at 2. We decline to rule on the timeliness issue based on the existing record, because the parties had no notice of or opportunity to address the timeliness issue below. We remand the appeal to allow the administrative judge to notify the appellant of his burden of proof on the timeliness issue, consider whether his appeal of his reinstatement claim was timely filed and, if not, determine whether the appellant has shown good cause for any delay. See [5 C.F.R. § 1201.22](#). In addressing the timeliness issue, the administrative judge should consider the effect, if any, of the appellant's alleged chronic medical conditions on his ability to timely file his appeal pursuant to *Lacy v. Department of the Navy*, [78 M.S.P.R. 434](#), 437 (1998).

**ORDER**

¶23 Accordingly, we VACATE the initial decision and REMAND the appeal to the Denver Field Office for further proceedings consistent with this Opinion and Order.

FOR THE BOARD:

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William D. Spencer  
Clerk of the Board  
Washington, D.C.