UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WASHINGTON, D.C.

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RUBY N. TURNER, Appellant, v. UNITED STATES POSTAL SERVICE, Agency.	Docket No. SF-0353-10-0329-I-1 Date: November 19, 2010

AGENCY'S RESPONSE TO PETITION FOR REVIEW

I. INTRODUCTION

The UNITED STATES POSTAL SERVICE (hereinafter the "Agency") respectfully requests that the MERIT SYSTEMS PROTECTION BOARD (hereinafter the "MSPB" or "Board") affirm the Initial Decision of the Board and deny the Petition for Review filed by Petitioner Ruby N. Turner (hereinafter "Petitioner"). In her Petition for Review (hereinafter "Petition"), Petitioner requests that the Initial Decision be reversed.

The Agency asserts that the Petition fails to state any new and material evidence, and in the absence of any allegation of judicial error, the Petition is without merit and therefore Petitioner may not prevail.

II. RELEVANT BACKGROUND

On December 14, 2009, Petitioner filed an appeal in which she challenged the Agency's November 30, 2009 notification to her that the Agency no longer had operationally necessary work available for her within her medical restrictions She requested a hearing.

On April 16, 2010, a hearing was conducted before Administrative Judge Craig A. Berg.

On September 30, 2010, Judge Berg issued an Initial Decision in which he denied the appeal. Judge Berg found that Petitioner failed to establish by preponderant evidence that the Agency acted arbitrarily and capriciously in denying her restoration and that, even if Petitioner was an individual with a disability, she failed to prove her disability discrimination claim based on disparate treatment or a failure to accommodate.

III. LAW AND ARGUMENT

A. STANDARD OF REVIEW

The review jurisdiction of the Board is extremely limited, arising only when a party can show either new and material evidence not previously discoverable, or judicial error. 5 C.F.R. § 1201.115 governs the grounds for review and provides as follows:

> (d) The Board, after providing the other parties with an opportunity to respond, may grant a petition for review when it is established that:
>
> (1) New and material evidence is available that, despite due diligence, was not available when the record closed; or
>
> (2) The decision of the judge is based on an erroneous interpretation of statute or regulation.

5 C.F.R. § 1201.115(d)

B. THE PETITION MUST BE DISMISSED BECAUSE NO NEW MATERIAL EVIDENCE HAS BEEN INTRODUCED NOR IS JUDICIAL ERROR ESTABLISHED

As noted above, the Board may only grant review when it is established that new and material evidence is available that, despite due diligence, was not available when the record was closed, or the decision of the presiding official is based on an erroneous interpretation of statute or regulation. 5 C.F.R. § 1201.115.

1. Petitioner has failed to establish that new and material evidence is available that, despite due diligence, was not available when the record was closed. Therefore, Petitioner has failed to establish any basis under the first of the two requirements which allows the Board to grant a petition for review.

2. Petitioner has also failed to establish that the Decision was based on an erroneous interpretation by the Administrative Judge of a statute or regulation. Petitioner merely asserts that the Administrative Judge erred in his application of the facts to the applicable law and disagrees with that application.

As such, her argument does not meet the criteria established in 5 C.F.R. §1201.115; Weaver v. Dept. of Navy, 2 MSPR 129 (1980); Schenarts v. Dept. of Treasury, 30 MSPR 415 (1986). Therefore, Petitioner has failed to establish any basis under the second of the two requirements which allows the Board to grant a petition for review.

IV. CONCLUSION

Petitioner has offered no new evidence nor has she demonstrated judicial error in her Petition. Therefore, the Agency respectfully requests that the Board affirm the Initial Decision and deny the Petition for Review.

Please note below the new address for the Agency.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Re: Ruby N. Turner v. United States Postal Service
Docket No. SF-0353-10-0329-I-1

This is to certify that a true and correct copy of the foregoing Agency Response was mailed by the undersigned postage prepaid by First Class Mail to the following:

MSPB

Clerk of the Board
Merit Systems Protection Board
5th Floor Mail Room
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Dated: November 19, 2010

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