

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

JAMES L. ARNDT,
Appellant,

DOCKET NUMBER
CH-0353-11-0080-I-2

v.

UNITED STATES POSTAL SERVICE,
Agency.

DATE: July 19, 2012

THIS ORDER IS NONPRECEDENTIAL *

John P. Smeekens, Clinton Township, Michigan, for the appellant.

Lana S. Johnson, Esquire, Chicago, Illinois, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

REMAND ORDER

The appellant has filed a petition for review in this case asking us to reconsider the initial decision issued by the administrative judge. We grant petitions such as this one only when significant new evidence is presented to us that was not available for consideration earlier or when the administrative judge

* A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions. In contrast, a precedential decision issued as an Opinion and Order has been identified by the Board as significantly contributing to the Board's case law. See [5 C.F.R. § 1201.117\(c\)](#).

made an error interpreting a law or regulation. The regulation that establishes this standard of review is found in Title 5 of the Code of Federal Regulations, section 1201.115 ([5 C.F.R. § 1201.115](#)). For the reasons discussed below, we REMAND the case to the regional office for further adjudication in accordance with this Order.

The compensably-injured appellant initially filed an appeal on October 28, 2010, in which he requested a hearing on his assertion that the agency had violated his restoration rights when, as part of the agency's National Reassessment Process, the agency withdrew his limited duty assignment on September 29, 2010, and instructed him not to return to work unless the agency informed him that it had identified operationally necessary work within his medical restrictions within his local commuting area. Initial Appeal File (IAF), Tab 1 at 1-12. The administrative judge issued an order to show cause on January 4, 2011, that informed the appellant of the requirements for establishing Board jurisdiction over his restoration appeal and ordered him to file evidence and argument showing that his appeal is within the Board's jurisdiction. IAF, Tab 9. The appellant's representative filed a response to the order to show cause on January 25, 2011, which noted, *inter alia*, that he would be having follow-up knee surgery on February 8, 2011, to be followed by approximately 14 to 16 weeks of physical therapy. IAF, Tab 11 at 3. However, there is no record evidence showing that the appellant requested that his appeal be dismissed without prejudice for that period of time.

The administrative judge issued an initial decision on February 9, 2011, that nonetheless dismissed the appeal based on the appellant's impending surgery and 4 months of physical therapy and noted that the agency had no objection to the dismissal without prejudice. IAF, Tab 12 at 1-2. The initial decision provided that, to be timely refiled, the appellant would have to refile his appeal no later than Friday, August 12, 2011. *Id.* at 2.

The appellant's representative sent the administrative judge a letter in regard to his initial appeal that the Board received on August 22, 2011, approximately 10 days beyond the refiling deadline. Refiled Appeal File (RAF), Tab 1. The appellant's representative acknowledged the August 12, 2011 refiling deadline and inquired, "[w]here do we stand with this appeal?" RAF, Tab 2. The administrative judge issued an order to show cause on August 24, 2011, in which she instructed the appellant to indicate whether he intended to refile his appeal. RAF, Tab 2. The administrative judge subsequently issued an order to show cause on September 26, 2011, in which she informed the appellant that, if he did not respond by October 4, 2011, and address the timeliness of any intention to refile his appeal, his appeal would be dismissed. RAF, Tab 3. However, the order did not provide the appellant with any information regarding his burden to show that his refiled appeal was either timely refiled or that there was good cause for waiving the refiling deadline. *See id.* When the appellant failed to respond, the administrative judge issued an initial decision in the refiled appeal that dismissed the appeal as untimely refiled. RAF, Tab 4. Although the initial decision contains the statement that the appellant's first appeal was dismissed at his request, there is no evidence in the record to support that statement. *Id.* at 1.

The appellant's representative has filed a petition for review in which he asserts confusion regarding the orders to show cause issued in the initially filed appeal and the refiled appeal. Petition for Review File, Tab 1. The agency has filed a response in opposition. *Id.*, Tab 3. Although we find the assertions of the appellant's representative to be unpersuasive, we nonetheless find that the circumstances in this case warrant the waiver of the refiling deadline.

An administrative judge has wide discretion to dismiss an appeal without prejudice in the interests of fairness, due process, and administrative efficiency, and the administrative judge may order such a dismissal at the request of one or both parties, or to avoid a lengthy or indefinite continuance. *Thomas v. Department of the Treasury*, [115 M.S.P.R. 224](#), ¶ 7 (2010). There is no record

evidence in this case showing that the appellant voluntarily agreed to the dismissal of his appeal or that he was informed of and understood the consequences of the dismissal of his appeal. *See Thomas*, [115 M.S.P.R. 224](#), ¶ 10. Rather, the February 9, 2011 initial decision reflects that the administrative judge dismissed the appeal for the benefit of the appellant based on the medical treatment information he noted in his January 25, 2011 jurisdictional response. IAF, Tab 11 at 2; Tab 12 at 1-2. Under such circumstances, the administrative judge should have provided for an automatic refiling date, rather than placing the refiling burden on the appellant. *See, e.g., Gingery v. Department of the Treasury*, [111 M.S.P.R. 134](#), ¶ 13 (2009). Thus, we find that a waiver of the refiling deadline is warranted in this case. *Thomas*, [115 M.S.P.R. 224](#), ¶ 11; *Jaramillo v. Department of the Air Force*, [106 M.S.P.R. 244](#), ¶ 8 (2007).

However, we hereby warn the appellant that any further failures to timely respond to the directions of the administrative judge can result in the dismissal of his appeal as a sanction for failing to comply with those instructions. [5 U.S.C. § 1204\(a\)\(2\)](#); *Ahlberg v. Department of Health & Human Services*, [804 F.2d 1238](#) (Fed. Cir. 1986); *Johnson v. Department of the Treasury*, [108 M.S.P.R. 592](#), ¶ 15 (2008); [5 C.F.R. § 1201.43\(b\)](#).

Accordingly, we REVERSE the initial decision and REMAND this case for adjudication consistent with the Board's subsequently provided guidance in *Latham v. U.S. Postal Service*, [117 M.S.P.R. 400](#) (2012).

ORDER

For the reasons discussed above, we REMAND this case to the regional office for further adjudication in accordance with this Remand Order.

FOR THE BOARD:

William D. Spencer
Clerk of the Board

Washington, D.C.