

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

RICHARD B. PEW,
Appellant,

DOCKET NUMBER
DE-844E-12-0032-I-1

v.

OFFICE OF PERSONNEL
MANAGEMENT,
Agency.

DATE: July 25, 2012

THIS FINAL ORDER IS NONPRECEDENTIAL¹

Richard B. Pew, Lehi, Utah, pro se.

Matthew D. MacIsaac, Washington, D.C., for the agency.

BEFORE

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

FINAL 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

¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions.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\(c\)](#).

that was not available for consideration earlier or when the administrative judge 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](#)).

The appellant challenges the administrative judge's decision to affirm the Office of Personnel Management's (OPM) decision to deny him disability retirement benefits under the Federal Employees' Retirement System (FERS) based on his depression and sleep apnea.² In the initial decision, the administrative judge stated that there was "ample evidence" that the appellant suffers from major depressive disorder, which is "chronic," and from sleep apnea, both of which will continue for more than a year, but the record was "replete" with evidence that the appellant failed to comply with recommended treatment protocols that might enable him to control his conditions, including taking medication for depression, attending regular therapy and using a CPAP (continuous positive airway pressure) machine for his sleep apnea. Initial Appeal File (IAF), Tab 26 at 9-10. Because the appellant failed to comply with the recommended treatment protocol for his conditions, the administrative judge concluded that he failed to establish that he has a disabling medical condition that would entitle him to a FERS disability annuity. *Id.* at 10.

On review, the appellant argues that the administrative judge did not consider all of his evidence, particularly his "current subjective symptoms," and she misinterpreted the testimony of Scott W. Fidler, Psy.D. In addition, the appellant argues that he did not receive all of the information that he requested from OPM, he was not aware that he could have legitimate reasons for avoiding

² We have not considered OPM's March 14, 2012 response to the appellant's petition for review, the appellant's March 14, 2012 responses to OPM's response, or his April 8, 2012 Request for Expedition of Claim because they were not filed before the record closed on review. Petition for Review (PFR) File, Tabs 10-13; *see* PFR File, Tab 2 (indicating that a response to the petition for review had to be filed by March 13, 2012, and that the record closed on that date).

treatment, and the administrative judge did not apply the “acceptable daily routine interference principles and [the] religious exception.” *See* PFR File, Tabs 1, 3-7. He also provides documentation about Zoloft (how it works and its side effects), a February 16, 2012 letter from his wife, describing his symptoms, a request to expedite review of his claim, and documentation describing how to use and clean the CPAP machine and information about his donations to The Church of Jesus Christ of Latter-Day Saints (LDS) during the 2011 calendar year. *See id.*

Under [5 C.F.R. § 1201.115](#), the Board will not consider evidence submitted for the first time with the petition for review absent a showing that it was unavailable before the record was closed despite the party's due diligence. *Avansino v. U.S. Postal Service*, [3 M.S.P.R. 211](#), 214 (1980). The appellant has not met his burden in this regard. Although the appellant's wife's letter was dated after the close of the record, below, it is not new and material evidence, because the appellant has not shown that the information contained therein, not just the document itself, was unavailable despite due diligence when the record closed. *Grassell v. Department of Transportation*, [40 M.S.P.R. 554](#), 564 (1989). Therefore, we have not considered his supplemental documentation on review.

The Board also will not consider an argument raised for the first time in a petition for review absent a showing that it is based on new and material evidence not previously available despite the party's due diligence. *Banks v. Department of the Air Force*, [4 M.S.P.R. 268](#), 271 (1980). To support his arguments that he was unaware that he could have legitimate reasons for avoiding treatment and that the administrative judge did not apply “daily routine interference principles” and the “religious exception,” the appellant relied on the OPM Disability Retirement Handbook, *see* PFR File, Tab 1 at 6. However, the Handbook does not constitute new evidence, as it was published in 1998, it is available on the internet, and the appellant, below, demonstrated that he had been to the OPM webpage to find out information regarding his disability retirement application and to obtain a relevant pay table. *See, e.g.*, IAF, Tab 23 at 3 (providing two different OPM

websites to support his contention that his reemployment did not affect his eligibility for disability retirement). Therefore, we do not consider these arguments on review.

To the extent that the appellant complains that OPM failed to provide him with requested discovery, below, *see* PFR File, Tab 3, he should have filed a motion to compel. *See* IAF, Tab 2 (Acknowledgment Order, which discussed the parties' discovery obligations); *see also* [5 C.F.R. § 1201.73\(e\)](#) (motions to compel discovery).

With respect to his remaining arguments, the administrative judge's failure to mention all of the evidence of record does not mean that she did not consider it in reaching her decision. *Marques v. Department of Health & Human Services*, [22 M.S.P.R. 129](#), 132 (1984), *aff'd*, 776 F.2d 1062 (Fed. Cir. 1985) (Table), *cert. denied*, 476 U.S. 1141 (1986). Moreover, these arguments largely constitute mere disagreement with the administrative judge's findings and they do not warrant full review of the record by the Board. *Weaver v. Department of the Navy*, [2 M.S.P.R. 129](#), 133-34 (1980), *review denied*, [669 F.2d 613](#) (9th Cir. 1982) (*per curiam*).

After fully considering the filings in this appeal, we conclude that there is no new, previously unavailable, evidence and that the administrative judge made no error in law or regulation that affects the outcome. [5 C.F.R. § 1201.115\(d\)](#). Therefore, we DENY the petition for review. Except as modified by this Final Order, the initial decision of the administrative judge is the Board's final decision.

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

This is the Board's final decision in this matter. [5 C.F.R. § 1201.113](#). You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, [931 F.2d 1544](#) (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 ([5 U.S.C. § 7703](#)). You may read this law, as well as review the Board's regulations and other related material, at our website, <http://www.mspb.gov>. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's [Rules of Practice](#), and [Forms 5, 6, and 11](#).

FOR THE BOARD:

William D. Spencer
Clerk of the Board

Washington, D.C.