

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

ROBERT HOLMES, JR.,  
Appellant,

DOCKET NUMBER  
DA-4324-11-0661-I-1

v.

DEPARTMENT OF JUSTICE,  
Agency.

DATE: July 25, 2012

**THIS FINAL ORDER IS NONPRECEDENTIAL\***

Robert Holmes, Jr., Buena Vista, Georgia, pro se.

Michael A. Markiewicz, Phoenix, Arizona, 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 that was not available for consideration earlier or when the administrative judge

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\* A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

The appellant asserted in this appeal that the agency violated his rights under the Uniformed Services Employment and Reemployment Rights Act of 1994 (codified at [38 U.S.C. §§ 4301-4333](#)) (USERRA) when it denied him 45 days of continuation of pay (COP) and advised the Office of Workers' Compensation Programs (OWCP) that he did not incur his claimed injury on-the-job, and that the injury was instead "related to incident(s) that occurred in another country while [the appellant] served in the Army." Initial Appeal File (IAF), Tab 1; Tab 8 at 6. The appellant did not request a hearing and the administrative judge dismissed the appeal on the written record for lack of jurisdiction because the appellant failed to allege that the agency's COP decision and its recommendation that OWCP deny his claim were based on his status as a veteran or the mere fact of his military service. IAF, Tab 10, Initial Decision (ID) at 4-5.

Two types of cases arise under USERRA: (1) reemployment cases, in which the appellant claims that an agency has not met its obligations under [38 U.S.C. §§ 4312-4318](#) following the appellant's absence from civilian employment to perform uniformed service; and (2) discrimination cases, in which the appellant claims that an agency has taken an action prohibited by [38 U.S.C. §§ 4311\(a\)](#) or (b). *Clavin v. U.S. Postal Service*, [99 M.S.P.R. 619](#), ¶ 5 (2005). This case is of the latter variety. In pertinent part, an employer is considered to have engaged in action prohibited by [38 U.S.C. § 4311\(a\)](#) if the person's membership, application for membership, service, application for service, or obligation for service in the uniformed services is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such membership, application for membership, service, application for service, or obligation for service. [38 U.S.C. § 4311\(c\)\(1\)](#). Under [38 U.S.C. § 4311](#), military service is a motivating factor for an employment

action if the employer “relied on, took into account, considered, or conditioned its decision” on the employee’s military–related absence or obligation. *Erickson v. U.S. Postal Service*, [571 F.3d 1364](#), 1368 (Fed. Cir. 2009). In USERRA actions, there must be an initial showing by the employee, by preponderant evidence, that the employee’s military status was at least a motivating or substantial factor in the agency action, upon which the agency must prove, also by preponderant evidence, that the action would have been taken for a valid reason despite the protected status. *Sheehan v. Department of the Navy*, 240 F.3d 1009, 1013 (Fed. Cir. 2001).

In his timely-filed petition for review, the appellant argues that the agency’s assertion, in the advisory opinion that it provided to the OWCP, that his injury occurred while he served overseas in the Army, is sufficient to establish jurisdiction over his USERRA claim. Petition for Review File (PFR File), Tab 1 at 2. Nevertheless, as the administrative judge correctly found, the fact that the appellant’s injury occurred during his military service does not transform his allegations into a USERRA claim. ID at 4-5; *see, e.g., Daniels v. U.S. Postal Service*, [88 M.S.P.R. 630](#), ¶ 8 (appellant’s assertion that the agency took its action as a result of something that happened during his military service, as opposed to the fact of that service, failed to raise a claim under USERRA and his appeal was therefore properly dismissed for lack of jurisdiction), *aff’d*, 25 F. App’x 970 (Fed. Cir. 2001). Indeed, the fact that the appellant’s claimed injury developed while he served on active military duty is irrelevant to his USERRA claim. *See McBride v. U.S. Postal Service*, [78 M.S.P.R. 411](#), 414-16 (1998) (USERRA proscribes the agency taking an action based on a veteran’s performance of military duty, as opposed to an action based on an injury arising out of the performance of that duty; this interpretation is consistent with the statute’s purpose, which mentions “service,” and not injuries or disabilities arising from that service).

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](http://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:

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William D. Spencer  
Clerk of the Board

Washington, D.C.