

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

SHARON A. STEWART,
Appellant,

DOCKET NUMBER
SF-0353-11-0710-I-1

v.

UNITED STATES POSTAL SERVICE,
Agency.

DATE: July 31, 2012

THIS FINAL ORDER IS NONPRECEDENTIAL*

Zepuor Parsanian, Tujunga, California, for the appellant.

Catherine V. Meek, Esquire, Long Beach, California, 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

* A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions.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 argues that this is a timely mixed-case appeal because she first filed an equal employment opportunity (EEO) complaint with the agency. Petition for Review (PFR) File, Tab 1 at 3-4. She includes with her petition an August 31, 2011 order for the agency to issue a final decision in the EEO complaint. *Id.* at 9-15. She claims that she proactively filed her Board appeal after learning of her rights, even though no final agency decision had been issued. *Id.* at 4-5. She also argues that the administrative judge failed to address the timeliness of her Board appeal. *Id.* at 3.

Because the administrative judge decided the appeal based on jurisdiction, she did not need to address whether it was timely. *See Jafri v. Department of the Treasury*, [68 M.S.P.R. 216](#), 221 (1995), *aff'd*, 78 F.3d 604 (Fed. Cir. 1996) (Table). To the extent that the appellant's arguments are material, she did not raise them below, or otherwise contend that she was filing a mixed-case appeal. *See* Initial Appeal File (IAF), Tabs 1, 8. The Board thus will not give them further consideration. *See Banks v. Department of the Air Force*, [4 M.S.P.R. 268](#), 271 (1980). The additional materials she submitted with her petition for review do not meet the Board's definition of new and material evidence. *See Avansino v. U.S. Postal Service*, [3 M.S.P.R. 211](#), 214 (1980); PFR File, Tab 1 at 7-8.

Citing *Ferdon v. U.S. Postal Service*, [60 M.S.P.R. 325](#), 329 (1994), the appellant argues that the administrative judge improperly credited the agency's documentary evidence showing that her absence from work was both for compensable injuries and non-industrial conditions. PFR File, Tab 1 at 4. Even under *Ferdon*, however, the Board may consider undisputed documentary evidence to determine whether an appellant has made *nonfrivolous* allegations. *Ferdon*, 60 M.S.P.R. at 329. Nothing in the record would contradict the medical reports identifying the appellant's degenerative conditions or outlining the

resultant medical restrictions. Her assertion that her separation was for a compensable injury is nothing more than a pro forma allegation. *See Pariseau v. Department of the Air Force*, [113 M.S.P.R. 370](#), ¶ 14 (2010). Additionally, the appellant cannot “demonstrate that no cause aside from [her] compensable injury precipitated [her] removal.” *New v. Department of Veterans Affairs*, [142 F.3d 1259](#), 1264 (Fed. Cir. 1998). The agency separated her because she had been in LWOP status for over a year. IAF, Tab 7 at 21-23. Her residual *non*-industrial injuries prevented her from resuming full duties after she recovered from a compensable injury, and she did not qualify for permanent light duty. *Id.* at 21.

Finally, the appellant contends that no record evidence supports the administrative judge’s conclusion that the Office of Workers’ Compensation (OWCP) terminated benefits for her second claim. PFR File, Tab 1 at 2. She argues that Dr. Shields’ September 27, 2010 letter establishes that her claim remains open. *Id.*; *see* IAF, Tab 7 at 111-13. However, the cessation of periodic *support* payments, and not the termination of medical benefits, triggers an employee’s restoration rights. *Nixon v. Department of the Treasury*, [104 M.S.P.R. 189](#), ¶ 6 (2006). The appellant’s support payments ended on October 16, 2009. IAF, Tab 6 at 44. Even a fully recovered employee may receive periodic payments for medical expenses related to the compensable injury. *See, e.g., Nixon*, [104 M.S.P.R. 189](#), ¶ 5. Dr. Shields’ letter clearly states that the appellant’s injury had resolved, though she “should be entitled to yearly visits for followup.” IAF, Tab 7 at 112.

The appellant also argues that she received no official notice that her support payments had been terminated and no notice of her restoration rights. PFR File, Tab 1 at 3, 5. Although the record contains no formal termination notice for the second claim, as it does for the first claim, *see* IAF, Tab 7 at 114-19, the September 29, 2009 letter clearly informed her that the OWCP no longer considered her medically eligible for wage loss compensation, IAF, Tab 6 at 42-43. Further, because the appellant had received notice of her restoration

rights when OWCP terminated her first claim, *see* IAF, Tab 7 at 114, she cannot reasonably argue that she was unaware of those rights, *see also id.* at 110.

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.