UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

AMADO D. CRUZ,
Appellant,

v.

OFFICE OF PERSONNEL MANAGEMENT,
Agency.

DOCKET NUMBER
SF-0831-12-0028-I-1

DATE: August 8, 2012

THIS FINAL ORDER IS NONPRECEDENTIAL[1]

Rufus F. Nobles, I, Zambales, Philippines, for the appellant.

Karla W. Yeakle, 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

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[1] A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

In 2003, the appellant applied for a Civil Service Retirement System (CSRS) annuity, covering the period of November 18, 1966, through June 8, 1990, the Office of Personnel Management (OPM) denied his application in initial and reconsideration decisions, and the administrative judge issued an initial decision affirming OPM's reconsideration decision. *Cruz v. Office of Personnel Management*, MSPB Docket No. SF-0831-05-0649-I-1, Initial Decision (Sept. 20, 2005) (*Cruz I*). The Board affirmed the initial decision by Final Order, *see Cruz v. Office of Personnel Management*, 101 M.S.P.R. 131 (2006) (Table), and the Federal Circuit affirmed the Board's decision, *see* 204 F. App'x 894 (Fed. Cir. 2006).

In 2008, the appellant sought to make a deposit for service, covering the period of November 18, 1966, through June 8, 1990, which OPM denied in initial and reconsideration decisions. *See* Initial Appeal File (IAF), Tab 4, Subtabs 2A (reconsideration decision, explaining that he was not entitled to make a deposit because he was not currently employed in a position subject to federal retirement deductions and he was not entitled to a retirement annuity), 2C (initial decision). The appellant filed a timely Board appeal. IAF, Tab 1. In his initial appeal paperwork, he stated that he was "rescinding" his prior request to make a deposit, and, instead, he informed the Board that he only wanted to make a deposit for his service, covering the period of November 18, 1966, through September 30, 1982. *Id.* at 1.

The administrative judge issued an Order Closing the Record, which informed the appellant of the doctrines of res judicata and collateral estoppel and the requirements of each doctrine, and he ordered the appellant to show cause why the appeal should not be dismissed on the basis of res judicata or decided by

collateral estoppel. IAF, Tab 5. The appellant filed a response to this Order. IAF, Tab 6. The administrative judge issued an initial decision, describing the procedural history of *Cruz I* and noting that the parties did not dispute that: the Board had jurisdiction to decide the prior appeal; the judgment in the prior appeal was issued on the merits and became final; the same parties are involved in the prior appeal and the instant appeal; and the same cause of action, *i.e.*, the appellant's entitlement to CSRS benefits, is at issue. IAF, Tab 7 at 3-4. The administrative judge found that, although the appellant's request to make a CSRS deposit was not previously litigated in *Cruz I*, he failed to explain why he did not raise it in the prior appeal. *Id.* at 4. Thus, because the appellant's request to make a CSRS deposit for his prior federal service could have been raised in *Cruz I* and was not raised, this appeal was barred by res judicata. *Id.* at 4-5. The appellant filed a timely petition for review and the agency filed a response. *See* Petition for Review (PFR) File, Tabs 1, 4.

On review, the appellant does not contend that he was denied any procedures, nor does he claim that he had any documents or evidence that he did not file before the record closed below. *See* PFR File, Tab 1 at 2-3. Although somewhat unclear, it appears that the appellant is claiming that the administrative judge was wrong to decide this appeal based on the doctrine of res judicata, instead of adjudicating it on the merits, especially since OPM did not raise the issue of res judicata below. *See id.* at 3.

Under the doctrine of res judicata, a valid, final judgment on the merits of an action bars a second action involving the same parties or their privies based on the same cause of action. *Peartree v. U.S. Postal Service*, 66 M.S.P.R. 332, 337 (1995). Res judicata precludes parties from relitigating issues that were, or could have been, raised in the prior action, and is applicable if: (1) the prior judgment was rendered by a forum with competent jurisdiction; (2) the prior judgment was a final judgment on the merits; and (3) the same cause of action and the same parties or their privies were involved in both cases. *Id.*

The administrative judge gave the appellant proper notice of the elements of res judicata below. *See* IAF, Tab 5. For the reasons described in the initial decision, we agree that the elements of res judicata are satisfied.[2] Since the appellant could have raised his entitlement to make a CSRS deposit in *Cruz I*, but did not, we agree with the administrative judge that the instant appeal is barred by res judicata. *See, e.g.*, *Encarnado v. Office of Personnel Management*, 116 M.S.P.R. 301, ¶¶ 10-12 (2011).

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

[2] The fact that the appellant, in his initial appeal paperwork in this appeal, stated that he only wished to make a deposit to cover his service through September 30, 1982, instead of through June 8, 1990, does not change our analysis.

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:

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William D. Spencer
Clerk of the Board

Washington, D.C.