

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

JOHN FRANCIS MUNRO,  
Appellant,

DOCKET NUMBER  
DC-0432-11-0343-I-2

v.

DEPARTMENT OF  
TRANSPORTATION,  
Agency.

DATE: August 10, 2012

**THIS FINAL ORDER IS NONPRECEDENTIAL \***

Rosemary Dettling, Esquire, Washington, D.C., for the appellant.

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\* A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

### **DISCUSSION OF ARGUMENTS ON REVIEW**

In the petition for review, the appellant challenges the initial decision denying his appeal of the agency action removing him for unacceptable performance. The appellant argues, among other things, that: 1) the administrative judge committed procedural errors, abused her discretion, and was biased against him; and 2) the administrative judge erred in making credibility determinations and factual findings when she concluded that he failed to prove his affirmative defense of disability discrimination.

The appellant has not shown that the administrative judge committed procedural errors, abused her discretion, or exhibited bias against him.

The appellant asserts that the administrative judge abused her discretion in allowing the agency to submit improperly marked exhibits, and that her actions prejudiced his rights because he could not find the documents to refer to them on cross examination. Petition for Review (PFR) File, Tab 1 at 20-21. The administrative judge considered and rejected the appellant's objection to the exhibits before the hearing, Refiled Appeal File (RAF), Tab 54 at 7-9, and the agency provided an exhibit index before the hearing, *id.*, Tab 55. Further, the record does not show that the appellant filed a written objection to the administrative judge's order as required by her prehearing order, nor does the hearing transcript show that his attorney objected at the outset of the hearing. Thus, the Board does not need to consider his assertion on review. *See, e.g., Becwar v. Department of Labor*, [115 M.S.P.R. 689](#), ¶ 2 n.1 (2011), *aff'd*, 467 F. App'x 886 (Fed. Cir. 2012). Moreover, the appellant has not explained how his rights were prejudiced because he has not given specific examples of how he was

unable to cross examine witnesses based on his inability to find documents. Therefore, he has not provided a basis for Board review by showing that the administrative judge abused her authority. *See, e.g., Ryan v. Department of the Air Force*, [117 M.S.P.R. 362](#), ¶ 5 (2012).

The appellant asserts that the administrative judge abused her discretion when she delayed processing his appeal a second time over his objection and in relying almost exclusively on the hearing testimony, rather than on the written evidence, because she knew that he had cognitive disabilities that caused memory loss and there was not enough time in a 1-day hearing to present all of his exhibits. PFR File, Tab 1 at 21-22. The administrative judge explained that she suspended processing the case ultimately because of the appellant's motion to compel discovery and that he did not support his objection to the suspension. RAF, Tabs 30, 32. In any event, the appellant has not shown that the administrative judge abused her discretion because he has not specifically explained how the short delay prejudiced him. *See, e.g., Jenkins v. Environmental Protection Agency*, [118 M.S.P.R. 161](#), ¶ 26 (2012). Moreover, the hearing lasted for 2 days, and the appellant has not identified what exhibits he was prevented from presenting. Given the size of the record, the appellant has not explained how the administrative judge abused her discretion in requiring both the agency and him to refer to the documents submitted, link them to the hearing, or call her attention to them in presenting their cases. Hearing Transcript (HT) 1 at 47-51; *see, e.g., Ryan*, [117 M.S.P.R. 362](#), ¶ 5.

The appellant asserts that the administrative judge engaged in impermissible disability stereotyping that demonstrated her inherent bias. He cites her finding that his recollection of events was not as trustworthy as those of agency officials. PFR File, Tab 1 at 32-33, 69, 74. In essence, the appellant argues that the administrative judge's alleged erroneous fact findings and credibility determinations evidence her bias. However, disagreement with the administrative judge's evidentiary findings is not sufficient to show bias. *See*

*Coufal v. Department of Justice*, [98 M.S.P.R. 31](#), ¶¶ 10-11 (2004). In addition, the appellant has failed to show on review that any comment or action by the administrative judge revealed a deep-seated favoritism or antagonism against him, nor has he otherwise made a showing sufficient to overcome the presumption of honesty and integrity to be afforded the administrative judge. *See, e.g., Oliver v. Department of Transportation*, [1 M.S.P.R. 382](#), 386 (1980).

In any event, the administrative judge did not find the appellant incredible; rather, she found his testimony not reliable because it and other evidence raised a question as to his capacity for recalling events accurately. Initial Decision (ID) at 4. In doing so, she was making factual findings and credibility findings required by her position. Indeed, in responding to his attorney's question concerning whether it was hard for him to remember all the details because of his disability, he stated that "[y]es. I still have some recall issues." HT 1 at 61.

The appellant has not shown that the administrative judge committed prejudicial error in making credibility determinations and factual findings and in concluding that he failed to establish his affirmative defense of disability discrimination.

The appellant asserts that the administrative judge erred in finding that he failed to prove the reasonable accommodation element of his affirmative defense of disability discrimination. *See, e.g.,* PFR File, Tab 1 at 22-35, 39-61. In essence, he contends that she erred in making credibility determinations, evaluating the evidence, making improper medical judgments, and drawing improper conclusions. *See, e.g.,* PFR File, Tab 1 at 23-26, 28-29, 61-63, 67-68. We have reviewed the initial decision, the petition for review, the agency's response, and the relevant parts of the record and have concluded that the appellant has failed to establish that the administrative judge committed prejudicial error that would provide a basis for reversing the initial decision. *See Panter v. Department of the Air Force*, [22 M.S.P.R. 281](#), 282 (1984). Rather, the initial decision shows that the administrative judge considered the evidence as a

whole, drew appropriate inferences, and made reasoned conclusions. Under these circumstances, there is no reason to disturb her findings. *See, e.g., Crosby v. U.S. Postal Service*, [74 M.S.P.R. 98](#), 106 (1997); *Broughton v. Department of Health & Human Services*, [33 M.S.P.R. 357](#), 359 (1987).

Moreover, the Board must give deference to her credibility determinations, especially when, as here, some are based on her observation of the demeanor of witnesses testifying at the hearing. *Haebe v. Department of Justice*, [288 F.3d 1288](#), 1301 (Fed. Cir. 2002). The administrative judge set forth her reasons for finding the appellant's testimony unreliable, based both on her observations at the hearing, the appellant's and his psychiatrist's testimony concerning his inability to remember things, the record evidence, and other witnesses' testimony. ID at 4-6. The appellant has not provided a sufficiently sound reason for overturning those reasons.

To the extent that the administrative judge erred in not explicitly considering the appellant's June 1, 2011 affidavit, we find that the appellant failed to show that the error prejudiced his substantive rights. The initial decision shows that the administrative judge considered the points that the appellant raised in his affidavit in considering the evidence and testimony, even if she did not agree with all of them. *Compare* ID at 31-45, *with* RAF, Tab 13, Attachment E. Because the appellant has not demonstrated on review that the excluded testimony could have affected the outcome of the appeal, he has not shown that any failure to consider his affidavit provides a basis for reversing the initial decision. *See Panter*, 22 M.S.P.R. at 282; *cf. Reeves v. U.S. Postal Service*, [117 M.S.P.R. 201](#), ¶ 12 (2011) (stating that the Board has held that to obtain reversal of an initial decision on the ground that the administrative judge abused her discretion in excluding evidence, the petitioning party must show on review that relevant evidence, which could have affected the outcome, was disallowed).

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. 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 further review of this final decision.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review this final decision on your discrimination claims. *See* Title 5 of the United States Code, section 7702(b)(1) ([5 U.S.C. § 7702](#)(b)(1)). If you submit your request by regular U.S. mail, the address of the EEOC is:

Office of Federal Operations  
Equal Employment Opportunity Commission  
P.O. Box 77960  
Washington, DC 20013

If you submit your request via commercial delivery or by a method requiring a signature, it must be addressed to:

Office of Federal Operations  
Equal Employment Opportunity Commission  
131 M Street, NE  
Suite 5SW12G  
Washington, DC 20507

You should send your request to EEOC no later than 30 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 EEOC no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time.

### Discrimination and Other Claims: Judicial Action

If you do not request EEOC to review this final decision on your discrimination claims, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. *See* [5 U.S.C. § 7703](#)(b)(2). You must file your civil action with the district court no later than 30 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 district court no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* [42 U.S.C. § 2000e-5](#)(f) and [29 U.S.C. § 794a](#).

### Other Claims: Judicial Review

If you do not want to request review of this final decision concerning your discrimination claims, but you do want to request review of the Board's decision without regard to your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review this final decision on the other issues in your appeal. 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.