

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

CHARLES G. JOHNSON,
Appellant,

DOCKET NUMBER
DE-0353-10-0501-M-1

v.

UNITED STATES POSTAL SERVICE,
Agency.

DATE: August 17, 2012

THIS ORDER IS NONPRECEDENTIAL¹

Charles G. Johnson, Omaha, Nebraska, pro se.

David P. Larson, Esquire, Sandy, Utah, for the agency.

BEFORE

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

REMAND ORDER

This appeal is before the Board on remand for further proceedings from the United States Court of Appeals for the Federal Circuit. *Johnson v. Merit Systems Protection Board*, 455 F. App'x 984 (Fed. Cir. 2012).

¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

The appellant accepted an early retirement offer from the U.S. Postal Service in 1992. Initial Appeal File (IAF), Tab 1 at 18. Prior to his retirement, he suffered an injury in 1990 and sought benefits from the Office of Workers' Compensation Programs (OWCP). *Id.* at 46. On December 20, 1993, OWCP accepted the appellant's claim for mild binaural hearing loss and found that he was entitled to medical benefits for the effects of his injury, but it did not grant him wage-loss compensation or a scheduled award of compensation. *Id.*

On March 22, 2010, the appellant filed a request for restoration to employment with the agency, IAF, Tab 1 at 17, but the agency denied his request on the ground that he had voluntarily retired and had not separated from his position as a result of a compensable injury, *id.* at 12. When the appellant appealed the agency's decision to the Board, the administrative judge dismissed his appeal for lack of jurisdiction, finding it barred by claim preclusion and issue preclusion. IAF, Tab 10 at 5.

On the appellant's petition for review, the Board vacated the initial decision and dismissed the appeal for lack of jurisdiction on other grounds. *Johnson v. U.S. Postal Service*, [116 M.S.P.R. 355](#) (2011) (Table). The Board found, in pertinent part, that the appellant failed to make a nonfrivolous allegation of jurisdiction because it is only the cessation of periodic support or wage loss compensation, not the termination of payment of scheduled compensation awards or medical benefits, that triggers an individual's entitlement to reemployment rights under 5 C.F.R. part 353. *Johnson v. U.S. Postal Service*, MSPB Docket No. DE-0353-10-0501-I-1, Final Order at 3 (Apr. 28, 2011).

The appellant then sought judicial review of the Board's decision in the Federal Circuit. On review of the briefs, the court perceived inconsistencies between the grounds of the Board's decision and certain of its previous decisions. *Johnson*, 455 F. App'x at 985 (“*See Bartol v. U.S. Postal Serv.*, [69 M.S.P.R. 106](#), 108-09 (1995) (holding that ‘the payment of medical expenses . . . is sufficient to make the injury a compensable injury within the meaning of [5 U.S.C. § 8151](#) and

would entitle the appellant to restoration rights’); *Mobley v. U.S. Postal Serv.*, [86 M.S.P.R. 161](#), 164 (2000); *Tat v. U.S. Postal Serv.*, [109 M.S.P.R. 562](#), 566-67 (2008); *Young v. U.S. Postal Serv.*, [115 M.S.P.R. 424](#), 430 (2010).”). The court asked the Board to address those inconsistencies.

In response, the Board acknowledged that it had erred in applying its precedent and concluded “that [the appellant] had a ‘compensable injury’ for the purposes of [5 C.F.R. § 353.301](#) because he had a ‘medical condition accepted by the OWCP to be job-related and for which medical or monetary benefits are payable from the Employees’ Compensation Fund.’” *Johnson*, 455 F. App’x at 985-86. At the Board’s request, the court vacated the Board’s order and remanded the case for further proceedings as to two issues, specifically, whether the appellant has shown that his separation was substantially related to his compensable injury and, if so, whether he has fully or partially recovered from his injury. *Johnson*, 455 F. App’x at 986. The court reasoned that resolution of one or both of these issues would enable the Board to determine whether the appellant is entitled to restoration rights under [5 U.S.C. § 8151](#) and the implementing regulations. *Id.*

Because the record is not sufficiently developed for the Board to resolve these issues on review, we remand this appeal to the administrative judge to determine whether the appellant is entitled to restoration rights. On remand, the administrative judge shall fully apprise the appellant of the applicable burdens of proof on the two issues referenced by the court and afford the parties the opportunity to submit additional evidence and argument before issuing a new initial decision making explained findings of fact and conclusions of law on these issues.²

² The administrative judge should, as appropriate, consider the timeliness of the appellant’s appeal. See *Cranston v. U.S. Postal Service*, [106 M.S.P.R. 290](#), ¶¶ 9-14 (2007).

ORDER

For the reasons discussed above, we REMAND this case to the regional office for further adjudication in accordance with this Remand Order.

FOR THE BOARD:

William D. Spencer
Clerk of the Board

Washington, D.C.