

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

BETTY REBECCA BOYD,
Appellant,

DOCKET NUMBER
DC-3443-11-0581-I-1

v.

UNITED STATES POSTAL SERVICE,
Agency.

DATE: August 17, 2012

THIS FINAL ORDER IS NONPRECEDENTIAL¹

Betty Rebecca Boyd, Montgomery Village, Maryland, pro se.

Stephen W. Furgeson, Esquire, Landover, Maryland, 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 administrative judge's initial decision dismissing her appeal for

¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

lack of jurisdiction. We AFFIRM the initial decision as modified by this Order and DISMISS the appeal for lack of jurisdiction.

As the administrative judge correctly found, to the extent that the appellant is appealing the arbitration award, the Board does not have jurisdiction over such a claim because [5 U.S.C. § 7121](#) does not apply to the Postal Service and, therefore, Postal Service employees do not have a right of Board review of an arbitration decision. *See, e.g., Anderson v. U.S. Postal Service*, [109 M.S.P.R. 558](#), ¶ 4 (2008). The appellant also asserted, however, that the agency denied her restoration rights during the 1982-85 period of time and did not inform her of the right to appeal to the Board. The administrative judge found that the appellant's restoration claims were subsumed by the arbitration award. With regard to restoration appeals, however, Postal Service employees have the right to file both a grievance and a Board appeal concerning the same agency action. *See Latham v. U.S. Postal Service*, [117 M.S.P.R. 400](#), ¶ 29 (2012); *Hall v. U.S. Postal Service*, [26 M.S.P.R. 233](#), 236 (1985). Thus, we find that the administrative judge erred by finding that such a claim was subsumed by the 1985 arbitration decision and by failing to inform the appellant of the requirements of establishing jurisdiction over a restoration appeal. On review, the Clerk of the Board issued a Show Cause Order notifying the appellant of the requirements for establishing jurisdiction over a restoration claim and giving the parties an opportunity to submit evidence and argument.

After reviewing the additional arguments and evidence submitted on review, we find that the appellant has failed to make a nonfrivolous allegation of jurisdiction over her restoration appeal as a partially recovered individual; thus she is not entitled to a jurisdictional hearing. *See Bledsoe v. Merit Systems Protection Board*, [659 F.3d 1097](#), 1102, 1106 (Fed. Cir. 2011). Although she nonfrivolously alleged that she partially recovered from a compensable injury, that she requested restoration, and that the agency's delay in restoring her could constitute a denial of restoration, she has not made a nonfrivolous allegation that

the agency acted arbitrarily and capriciously in failing to restore her during the 1982-1985 timeframe. The agency removed the appellant in 1982 for absence without permission from July 3-13, 1982. Initial Appeal File (IAF), Tab 1 at 59-61, 66. The appellant grieved her removal, and a May 1983 arbitration decision found that there was just cause for the notice of removal. *Id.* at 87. The arbitrator also found that, in the event that the Office of Workers' Compensation Programs (OWCP) determined that her absences were because of a compensable injury, the agency would be ordered to withdraw the notice of removal. *Id.* In a September 18, 1985 letter, OWCP stated that the appellant received compensation benefits "for the intermittent period February 5, 1982 through September 9, 1982." *Id.* at 33. On October 30, 1985, the arbitrator found that the appellant's absences from July 3-13, 1982, were determined to be related to the job injury of December 19, 1981. *Id.* at 87. The agency restored the appellant in November 1985. *Id.* at 18.

Based on the unique circumstances of this case, we find that the appellant has not made a nonfrivolous allegation that the agency's failure to restore her prior to November 1985 was an arbitrary and capricious denial of restoration. The agency's obligation to restore the appellant depended upon OWCP's determination regarding whether her absences during the time period for which she was removed were due to her compensable injury. *See Bynum v. U.S. Postal Service*, [112 M.S.P.R. 403](#), ¶ 10 (2009) (a compensable injury is defined as one that is accepted by OWCP as job-related and for which medical monetary benefits are payable from the Employees' Compensation Fund), 382 F. App'x 934 (Fed. Cir. 2010); *see also Payton v. Department of Homeland Security*, [113 M.S.P.R. 463](#), ¶ 8 (an employee who has been removed for cause, other than for a compensable injury, is not entitled to restoration), *aff'd*, 403 F. App'x 496 (Fed. Cir. 2010), *cert. denied*, 131 S. Ct. 956 (2011). The agency promptly restored the appellant after the issue of whether OWCP determined her absences to be related to her compensable injury was resolved, and the appellant has not made a

nonfrivolous allegation that the agency acted arbitrarily and capriciously at any time prior to her restoration.² Cf. *Hardy v. U.S. Postal Service*, [104 M.S.P.R. 387](#), ¶ 21, *aff'd*, 250 F. App'x 332 (Fed. Cir. 2007); *Tisdale v. Department of the Treasury*, [44 M.S.P.R. 390](#), 395-96 (1990). Thus, we find that she has failed to make a nonfrivolous allegation of jurisdiction that would entitle her to a hearing.

The appellant alleges that the agency did not enter her on its reemployment priority list following the termination of OWCP compensation. To the extent that she is making a claim that the agency violated her restoration rights as a fully recovered individual, she does not allege that OWCP terminated her compensation payments on the basis that she was able to perform all the duties of the position she left or an equivalent one or that she was medically capable of performing all of the duties of her former position. See *Steinmetz v. U.S. Postal Service*, [106 M.S.P.R. 277](#), ¶ 8 (2007), *aff'd*, 283 F. App'x 805 (Fed. Cir. 2008); *Hall v. Department of the Navy*, [94 M.S.P.R. 262](#), ¶¶ 19-20 (2003); [5 C.F.R. § 353.102\(e\)](#) (1982). In fact, all of the evidence in the record indicates that the appellant continued to suffer injuries and was not able to perform all of the duties of her former position or an equivalent one. Thus, we find that the appellant failed to allege that she was entitled to the restoration and appeal rights of a fully recovered individual. See *Hall*, [94 M.S.P.R. 262](#), ¶ 20. Further, to the extent that

² It is unclear when OWCP determined the July 3-13, 1982 dates to be related to the appellant's compensable injury. Although the appellant alleged that OWCP made such a determination in 1984, IAF, Tab 1 at 9, the earliest document reflecting a clear OWCP decision with respect to the July dates is dated September 18, 1985, IAF, Tab 1 at 33; see Petition for Review File, Tab 5 at 14, 17, 22-23 (indicating a dispute over the interpretation of OWCP's decision, which did not specifically reference the July dates); see also IAF, Tab 1 at 33, 49, 50, 55 (indicating that a decision was issued on August 15, 1984, but containing no clear determination regarding whether the July dates were covered). Any lack of clarity or dispute over which dates were covered by OWCP was resolved by the October 1985 arbitration decision, after which the agency promptly restored the appellant. The appellant has not made a nonfrivolous allegation that the agency acted arbitrarily or capriciously throughout the OWCP or arbitration processes necessary to resolve the question of whether the July dates were related to her compensable injury.

she is arguing that she fully recovered after 1 year from the date of her compensable injury, she has not alleged that the agency violated her reemployment priority rights, i.e., that she was denied restoration because of the employment of another person. *Payton*, [113 M.S.P.R. 463](#), ¶ 6; *Whitfield v. U.S. Postal Service*, [5 M.S.P.R. 239](#), 240-41 (1981).³

Therefore, we find that the appellant has failed to demonstrate that any error by the administrative judge in addressing her restoration claims affected the outcome of this appeal. The appellant has not made a nonfrivolous allegation of Board jurisdiction over her restoration claims for the reasons explained above, and she has not shown any other error in the administrative judge's jurisdictional analysis. Accordingly, we AFFIRM the initial decision as modified by this Order and DISMISS the appeal for lack of jurisdiction.

**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

³ In light of our disposition, we do not reach the issue of the timeliness of the appeal. See *Dean v. U.S. Postal Service*, [115 M.S.P.R. 56](#), ¶ 13 n.5 (2010).

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.