

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

MIGUEL ANGEL SEDA CUPRILL,
Appellant,

DOCKET NUMBER
NY-0752-11-0271-I-1

v.

DEPARTMENT OF VETERANS
AFFAIRS,
Agency.

DATE: August 17, 2012

THIS FINAL ORDER IS NONPRECEDENTIAL¹

Leda Norana Sanchez Alvarado, Esquire, Cabo Rojo, Puerto Rico, for the appellant.

Joy C. Vilardi-Rizzuto, Esquire, San Juan, Puerto Rico, 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

¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

On review, the appellant disagrees with the administrative judge's finding that he failed to prove his affirmative defenses of disability discrimination based on a failure to accommodate and reprisal for whistleblowing.² Petition for Review (PFR) File, Tab 1. Among other things, he reasserts that the agency knew of his disability, that he requested a reasonable accommodation, and that the proposing official knew of his protected disclosure. *Id.* at 6-11. However, he has not shown any error by the administrative judge. To the extent that the appellant disputes the administrative judge's decision to credit the sworn statement of Deciding Official Marlan Waldrop that she was unaware of the

² Neither party disputes the administrative judge's decision to merge the charges of inappropriate conduct and "damage to government lease [sic] property," or her finding that the agency proved the merged charge and that a nexus exists between the proven misconduct and the efficiency of the service. Thus, we need not further address these findings on review.

We note that the appellant challenges the administrative judge's finding that a medical report drafted by Dr. Socorro Figueroa on or about March 23, 2011, is irrelevant to the issues before her. Petition for Review File, Tab 1 at 8; Initial Decision (ID) at 9. While we agree with the appellant that the medical report is relevant, the error does not prejudice his substantive rights because the administrative judge did consider the medical report in analyzing the appellant's disability discrimination claim and, as set forth below, we consider the report in assessing the reasonableness of the penalty. *See Panter v. Department of the Air Force*, [22 M.S.P.R. 281](#), 282 (1984); ID at 14-16.

The appellant appears to allege that the agency discriminated against him by delaying submission of his disability retirement paperwork to the Office of Personnel Management. PFR File, Tab 1 at 10. However, this argument is immaterial to his claim of alleged disability discrimination based on a failure to accommodate. To the extent that the appellant is raising a new discrimination claim, we decline to consider it on the ground that he makes the allegation for the first time on review without showing that it was based on previously unavailable evidence. *See Vazquez v. U.S. Postal Service*, [114 M.S.P.R. 264](#), ¶ 8 (2010).

appellant's whistleblowing, *id.* at 12-13; Initial Decision (ID) at 22-23, the Board will not overturn an administrative judge's findings of fact and credibility determinations absent persuasive evidence of error, which is not present here. *See Madison v. Defense Logistics Agency*, [48 M.S.P.R. 234](#), 238 (1991).

The record evidence and the applicable law support the administrative judge's explained findings that: (1) the appellant failed to prove that he is a qualified individual with a disability under [42 U.S.C. § 12111](#)(8), and therefore, the agency was not obligated to provide him with an accommodation; and (2) the appellant failed to prove that his protected disclosure was a contributing factor in the agency's decision to remove him. *See* ID at 8-24; Initial Appeal File (IAF), Tab 15 at 4, Tab 39, part I, Tab 44 at 4. Thus, we discern no reason to disturb the administrative judge's findings that the appellant failed to prove his affirmative defenses of disability discrimination based on a failure to accommodate him and reprisal for his whistleblowing. *See Crosby v. U.S. Postal Service*, [74 M.S.P.R. 98](#), 106 (1997) (finding no reason to disturb the administrative judge's findings where the administrative judge considered the evidence as a whole, drew appropriate inferences, and made reasoned conclusions); *Broughton v. Department of Health & Human Services*, [33 M.S.P.R. 357](#), 359 (1987) (same).

On review, the appellant alleges that his mental impairment at the time of the January 28, 2011 incident is a mitigating factor that the deciding official should have considered in her penalty analysis. PFR File, Tab 1 at 5-6, 10. However, Deciding Official Waldrop averred that there was no evidence of the appellant's disability before her when she made her penalty determination, and nothing in the record evidence refutes her sworn statement. *See* IAF, Tab 39, part I at 7-9. Although Dr. Socorro Figueroa drafted a medical report on or after March 23, 2011, opining that the appellant suffered from a mental impairment on January 28, 2011, the appellant has not alleged and the record does not reflect that he provided this medical report to the agency prior to filing his prehearing submissions. *See* IAF, Tab 15 at 4. Thus, we find that the deciding official

considered the relevant *Douglas* factors based on the information before her. *Woebcke v. Department of Homeland Security*, [114 M.S.P.R. 100](#), ¶ 7 (2010).

Nonetheless, our reviewing court has held that “when mental impairment or illness is reasonably substantiated, and is shown to be related to the ground of removal, this must be taken into account when taking an adverse action against the employee.” *Malloy v. U.S. Postal Service*, [578 F.3d 1351](#), 1356 (Fed. Cir. 2009); *see Norris v. Securities & Exchange Commission*, [675 F.3d 1349](#), 1357 (Fed. Cir. 2012). Thus, the Board is obligated to consider new evidence affecting the penalty determination in weighing the *Douglas* factors, even if the appellant failed to bring the mitigating factor to the agency’s attention. *See Norris*, 675 F.3d at 1356; *Bryant v. General Services Administration*, [23 M.S.P.R. 425](#), 427 (1984). Under *Malloy*, the administrative judge should have found that Dr. Figueroa’s medical report substantiates that the appellant was suffering from a mental impairment at the time of the January 28, 2011 incident and should have re-weighed the factors under *Douglas v. Veterans Administration*, [5 M.S.P.R. 280](#), 305-06 (1981), considering the appellant’s mental impairment as a mitigating factor. *See Malloy*, 578 F.3d at 1354-57; IAF, Tab 15 at 4. Instead, the administrative judge deferred to Deciding Official Waldrop’s penalty analysis. ID at 26-28. Based on the foregoing, we VACATE the administrative judge’s penalty analysis.

Evidence that an employee's medical condition or mental impairment played a part in the charged misconduct is ordinarily entitled to considerable weight as a mitigating factor. *Woebcke*, [114 M.S.P.R. 100](#), ¶ 15. However, the Board has found that a medical or mental impairment is not a significant mitigating factor in the absence of evidence that the impairment can be remedied or controlled, i.e., when the potential for rehabilitation is poor. *Id.*

Here, Dr. Figueroa opined that the appellant was suffering from recurrent major depression at the time of the January 28, 2011 incident. IAF, Tab 15 at 4. However, there is no medical evidence in the record showing that the appellant

has a likely potential for rehabilitation. To the contrary, Dr. Figueroa found that: (1) the appellant's response to medical treatment was poor; (2) he had a poor capacity to judge reality and anticipate the consequences of his actions; (3) he suffered from "violent behavior, poor impulse control, persecutory delusions and inability to take [sic] decisions for his own benefit;" (4) he was unable to work; and (5) his violent behavior and poor impulse control posed a safety risk to others. *Id.* at 4-5. These medical findings demonstrate the appellant's inability to understand the seriousness of his misconduct and the unlikelihood that his impairment can be remedied or controlled. Based on the appellant's unlikely potential for rehabilitation, we do not afford significant weight to the appellant's mental impairment as a mitigating factor.

The seriousness of the appellant's misconduct and his unlikely potential for rehabilitation outweigh the mitigating factors and support the agency-selected penalty of removal. The appellant's misconduct on January 28, 2011, placed employees in an unsafe situation, evidenced by the pending complaint with the Occupational Safety and Health Administration against the agency regarding hazardous working conditions and pending Federal Employees' Compensation Act claims filed by agency employees, some of whom were absent for a couple of weeks based on the January 28, 2011 incident. *See* IAF, Tab 39, part I at 7-8. Further, the appellant has demonstrated a pattern of violent behavior, which started with a verbal threat to a co-worker in March 2009, and escalated to throwing a fire extinguisher repeatedly at a glass wall in an office building in the presence of co-workers in January 2011. *See* IAF, Tab 12 at 38, Tab 39, part I at 6, 11. Based on the foregoing, the agency has shown that the appellant's misconduct would have justified the discipline imposed, regardless of any disability. *See Laniewicz v. Department of Veterans Affairs*, [83 M.S.P.R. 477](#), ¶ 5 (1999) (neither the Rehabilitation Act of 1973 nor the Americans with Disabilities Act of 1990 immunizes disabled employees from discipline for misconduct in the workplace, provided the agency would impose the same

discipline on an employee without a disability). Thus, the agency selected penalty of removal falls within the tolerable limits of reasonableness. We therefore AFFIRM the removal action.

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 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. 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.