

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

DOUGLAS SCOTT MARSHALL,
Appellant,

DOCKET NUMBER
NY-0353-11-0257-I-1

v.

UNITED STATES POSTAL SERVICE,
Agency.

DATE: August 10, 2012

THIS FINAL ORDER IS NONPRECEDENTIAL¹

Douglas Scott Marshall, Guayanilla, Puerto Rico, pro se.

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¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

The appellant filed the instant appeal in order to challenge the agency's November 10, 2010 job offer for a modified Part-Time Flexible City Carrier assignment with approximately 5 hours per day of work. Initial Appeal File (IAF), Tab 1 at 4, 6, Tab 4, Tab 8. The appellant argues that the job offer was inadequate because it does not provide equivalent pay to the job that he held prior to his compensable injury. He argues that, based on this standard, he is entitled to a full-time job. *Id.*

We understand the appellant's arguments. However, the Board lacks jurisdiction to decide the matter because the November 10, 2010 job offer is not an action that is appealable to the Board. Specifically, that job offer would have actually *increased* the appellant's working hours from 2 to 5 hours per day. As relevant here, the Board only has jurisdiction over cases where an employee has been denied restoration. [5 C.F.R. § 353.304\(c\)](#). Although the Board has found that a decrease in working hours may constitute a denial of restoration, *see Kinglee v. U.S. Postal Service*, [114 M.S.P.R. 473](#), ¶ 13 (2010), it has never found that an increase in working hours, such as the one at issue here, may constitute a denial of restoration.

The Board recognizes that the appellant used to work full time before his injury, and that he twice suffered reductions in his working hours that have put him in his present position of working less than full time: On October 5, 2005, the agency reduced the appellant's work hours from full time to part time, consistent with the Part-Time Flexible position that the appellant voluntarily accepted; on November 30, 2009, the agency reduced the appellant's working hours again – this time to zero – pursuant to its National Reassessment Process. Because both of these actions involved actual reductions in the appellant's

working hours, they may have been appealable to the Board. However, the appellant has already litigated both of these matters to their conclusions. He litigated the October 5, 2005 reduction before the Equal Employment Opportunity Commission (EEOC), *Marshall v. U.S. Postal Service*, EEOC Doc. 0120071990, 2007 WL 2026907 (June 29, 2007), and before the U.S. District Court for the District of Puerto Rico, *Marshall v. Potter*, Civil No. 07-1625(JAG), 2009 WL 3200046 (D. P.R. 2009). Although the appellant might be dissatisfied with the outcome of these cases, we find that he is precluded from establishing in a Board appeal that the agency's action was arbitrary and capricious because both the EEOC and the district court found that the reduction in working hours was due to the appellant's voluntary actions. See *Killeen v. Office of Personnel Management*, [558 F.3d 1318](#), 1323 (Fed. Cir. 2009) (collateral estoppel, or issue preclusion, bars litigation of an issue if the identical issue was actually litigated and necessarily decided in a prior case where the interests of the party to be precluded were fully represented). The appellant litigated the November 30, 2009 reduction before the Board and ultimately before the U.S. Court of Appeals for the Federal Circuit. *Marshall v. U.S. Postal Service*, MSPB Docket No. NY-0353-10-0042-I-1, Initial Decision (Mar. 18, 2010), *aff'd*, 402 F. App'x 521 (Fed. Cir. 2010). Although the appellant might be dissatisfied with the outcome of this previous appeal, he is precluded from relitigating his claim before the Board. See *Carson v. Department of Energy*, [398 F.3d 1369](#), 1375 (Fed. Cir. 2005) (under the doctrine of res judicata, a valid, final judgment on the merits of an action bars a second action involving the same parties based on the same cause of action); *Peartree v. U.S. Postal Service*, [66 M.S.P.R. 332](#), 337 (1995) (same).

We disagree with the reasoning in the initial decision to the extent that the administrative judge found that the appellant's claim pertained to a reduction in his working hours that constituted a dispute over the details and circumstances of his restoration. As explained above, the November 5, 2010 job offer would have actually constituted an increase in the appellant's working hours. Nevertheless,

we agree with the administrative judge's ultimate conclusion that the Board lacks jurisdiction over the instant appeal because the appellant failed to make a nonfrivolous allegation that the agency's action constituted a denial of restoration.² See *Bledsoe v. Merit Systems Protection Board*, [659 F.3d 1097](#), 1104 (Fed. Cir. 2011) (in order to establish Board jurisdiction over a restoration appeal as a partially recovered individual, an appellant must establish, among other things, that the agency denied his request for restoration). Because we are dismissing the appeal for lack of jurisdiction on the basis that it does not concern a denial of restoration, we agree with the administrative judge that the Board lacks jurisdiction to address the appellant's disability discrimination claim. See *Wren v. Department of the Army*, [2 M.S.P.R. 1](#), 2 (1980), *aff'd*, [681 F.2d 867](#), 871-73 (D.C. Cir. 1982).

**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

² Because the Board lacks jurisdiction over this appeal, it is unnecessary to address the timeliness issue.

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.