

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

ALINDA D. FAVORS,
Appellant,

DOCKET NUMBER
AT-0353-12-0018-I-1

v.

UNITED STATES POSTAL SERVICE,
Agency.

DATE: August 20, 2012

THIS FINAL ORDER IS NONPRECEDENTIAL¹

Alinda D. Favors, Riverdale, Georgia, pro se.

James M. Allen, Esquire, Memphis, Tennessee, 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¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions.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). We AFFIRM the initial decision AS MODIFIED in this Final Order.

The appellant has a lengthy history before the Board.² In the instant appeal, the appellant made a general claim that the agency had violated her restoration rights when, upon her return to work, the agency allegedly failed to provide her with health care benefits and did not pay her for the actual hours she worked. Initial Appeal File (IAF), Tab 1 at 2-3. Although the administrative judge informed the appellant of what she would have to allege to establish the Board's restoration rights jurisdiction, the appellant did not provide any response to the administrative judge's order to provide evidence and argument that could establish jurisdiction over her appeal and, thus, the administrative judge dismissed the appeal for lack of jurisdiction. IAF, Tab 2 at 2; Tab 5 at 2. On

² *Favors v. U.S. Postal Service*, MSPB Docket No. AT-0752-03-0464-I-1 (Constructive Suspension appeal was dismissed for lack of jurisdiction, petition for review was denied on September 22, 2004); *Favors v. U.S. Postal Service*, MSPB Docket Nos. AT-0752-09-0606-I-1 & AT-0752-10-0856-I-1 (Constructive suspension appeals were joined on review and remanded for further adjudication in a nonprecedential order, *Favors v. U.S. Postal Service*, 116 M.S.P.R. 409 (2011) (Table)); *Favors v. U.S. Postal Service*, MSPB Docket Nos. AT-0752-09-0606-B-1 & AT-0752-10-0856-B-1 (Remand Initial Decision dismissing the consolidated constructive suspension appeals pursuant to a global settlement agreement became the final decision of the Board on September 2, 2011, when neither party filed a petition for review); *Favors v. U.S. Postal Service*, MSPB Docket No. AT-0752-10-1093-I-1 (Initial Decision dismissing this constructive suspension appeal pursuant to a global settlement agreement became the final decision of the Board on April 1, 2011, when neither party filed a petition for review); *Favors v. U.S. Postal Service*, MSPB Docket No. AT-0752-11-0098-I-1 (Initial Decision dismissing this removal appeal pursuant to a global settlement agreement became the final decision of the Board on April 20, 2011, when neither party filed a petition for review); *Favors v. U.S. Postal Service*, MSPB Docket No. AT-0752-10-1093-C-1 (August 2, 2011 Compliance Initial Decision recommending relief in part; referred to full Board as MSPB Docket No. AT-0752-10-1093-X-1 and later dismissed as moot when agency provided evidence of compliance).

review, the appellant notes that she and the agency entered into a settlement agreement in her removal appeal (*Favors v. U.S. Postal Service*, MSPB Docket No. AT-0752-11-0098-I-1), in which she was awarded back pay and “all other rights and privileges were to be restored.” Petition for Review (PFR) File, Tab 1 at 1. The appellant asserts on review that the agency has failed to properly restore her to duty by denying her health care benefits. *Id.* at 2.³

We find that the administrative judge properly dismissed this appeal. Furthermore, because our review of the appellant’s previous appeals before the Board shows that the appellant raised the claim that the agency had denied her health care benefits upon her return to work in a petition for enforcement of the settlement agreement in *Favors v. U.S. Postal Service*, MSPB Docket No. AT-0752-10-1093-C-1, we find that the doctrine of collateral estoppel bars her from relitigating that claim in the context of this appeal.⁴ In the August 2, 2011 Recommendation decision in that appeal, the administrative judge made the following findings regarding the merits of the appellant’s claim that the agency had denied her health care benefits upon her return to work:

Health Care Benefits

As shown above, the appellant claims that the agency failed to restore her health care benefits. The documentary record reflects that the appellant’s health care benefits were terminated by her carrier because of excessive, continuous use of leave without pay. The agency notified the appellant of the steps she would need to take and the forms she needed to complete to apply for her benefits to be

³ The appellant does not renew her contention below that the agency failed to pay her for the actual hours she worked; nor does she challenge the administrative judge’s determination that this contention does not constitute a nonfrivolous allegation of jurisdiction over her restoration appeal. Initial Decision at 2. We find no error in the administrative judge’s determination.

⁴ We have taken notice of certain documents and actions referenced in the appellant’s prior Board appeals, which are not part of the record in the instant appeal. The Board may take official notice of matters that can be verified, including documents or actions in other Board appeals. *Pacilli v. Department of Veterans Affairs*, 113 M.S.P.R. 526, ¶ 2 n.1 (2010), *aff’d*, 404 F. App’x. 466 (Fed. Cir. 2010); 5 C.F.R. § 1201.64.

restored. The appellant, however, believes that the agency is obligated to restore her benefits and she need not take any action in that regard.

The appellant is incorrect; the appellant has a duty to cooperate with the agency in ensuring that that the agency can comply with the terms of the agreement. *See Timberlake v. U.S. Postal Service*, 81 M.S.P.R. 83, 86 (1999). Furthermore, I note that it is not the agency that provides health benefits, it is a health insurance carrier and both the agency and the appellant must follow the rules of the carrier in restoring the health benefits. Therefore, I find the agency in compliance with the settlement agreement on this issue.

Favors v. U.S. Postal Service, MSPB Docket No. AT-0752-10-1093-C-1, Slip op. at 4-5 (Recommendation, August 2, 2011). Because the administrative judge found that the agency was in partial noncompliance with the settlement agreement, the matter was referred to the Board for its consideration. Upon receiving evidence from the agency had paid the appellant interest on her back pay, as directed by the administrative judge's recommendation, the Board issued a final decision dismissing the petition for enforcement as moot. *Favors v. U.S. Postal Service*, MSPB Docket No. AT-0752-10-1093-X-1 (Final Decision, Nov. 22, 2011).

Because the appellant's claim regarding her health care benefits was addressed on the merits in her petition for enforcement of the settlement agreement in *Favors v. U.S. Postal Service*, MSPB Docket No. AT-0752-10-1093-C-1, we find that her present appeal was properly dismissed, albeit on the grounds of collateral estoppel,⁵ which applies when: (1) The issue is identical to

⁵ We also note that the appellant's health benefits claim is most likely precluded under the doctrine of res judicata because a final judgment on the merits includes an earlier dismissal based on a settlement agreement. *See Ford-Clifton v. Department of Veterans Affairs*, 661 F.3d 655, 660 (Fed. Cir. 2011). Unfortunately, the settlement agreement is not in the record in this appeal; therefore, we are unable to verify that it was a full and complete settlement of all issues arising from MSPB Docket No. AT-0752-10-1093-I-1. Therefore, we are cannot make a determination regarding the applicability of res judicata to this appeal. Furthermore, given the other bases for dismissing this appeal,

that involved in the prior action; (2) the issue was actually litigated in the prior action; (3) the determination on the issue in the prior action was necessary to the resulting judgment; and (4) the party against whom issue preclusion is sought had a full and fair opportunity to litigate the issue in the prior action, either as a party to the earlier action or as one whose interests were otherwise fully represented in that action. *See McNeil v. Department of Defense*, 100 M.S.P.R. 146, ¶ 15 (2005); *see also Morgan v. Department of Energy*, 424 F.3d 1271, 1274-75 (Fed. Cir. 2005).

We note that, before dismissing this appeal on the basis of collateral estoppel, we issued an order to show cause that provided information on the grounds for finding a claim barred by the doctrine of collateral estoppel, and ordered the appellant to file evidence and argument showing why her appeal should not be dismissed on the basis of collateral estoppel. PFR File, Tab 3. The order was sent by certified mail to the address the appellant provided as her return address in filing her petition for review, which became her address of record with the Board. *Id.* at 3. The order was returned as unclaimed with no forwarding address. PFR File, Tab 4. The appellant is responsible for ensuring the receipt and forwarding of her mail and for informing the Board of any change in her address. *Moore v. Office of Personnel Management*, 112 M.S.P.R. 512, ¶ 6 (2009); *Johnson v. Department of the Navy*, 73 M.S.P.R. 431, 433 (1997). The appellant was notified of her obligation to notify the Board in writing of any changes in her address in both the administrative judge's acknowledgement order below and in the December 30, 2011 petition for review acknowledgment order (which was not returned to Board as undeliverable). IAF, Tab 2 at 3; PFR File, Tab 2 at 1.

we find that it would be inefficient to reopen the record to adjudicate the applicability of res judicata here.

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 is AFFIRMED AS MODIFIED by this Final Order.

**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 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.ca9c.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.