

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

EDWARD J. SIMPKINS,  
Appellant,

DOCKET NUMBER  
DC-844E-11-0968-I-1

v.

OFFICE OF PERSONNEL  
MANAGEMENT,  
Agency.

DATE: August 22, 2012

**THIS FINAL ORDER IS NONPRECEDENTIAL<sup>1</sup>**

Edward J. Simpkins, Greenbelt, Maryland, pro se.

Matthew D. MacIsaac, Washington, D.C., 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

---

<sup>1</sup> A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions.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 have considered the appellant's arguments that the administrative judge erred in dismissing the appeal under the doctrine of res judicata. However, to the extent that the appellant is attempting to file a new appeal of the Office of Personnel Management's (OPM) June 11, 2009 final decision denying his disability retirement application, we agree with the administrative judge that the appellant's claim is precluded under the doctrine of res judicata.<sup>2</sup>

Res judicata applies if (1) the prior decision was rendered by a forum with competent jurisdiction; (2) the prior decision was a final decision on the merits; and (3) the same cause of action and the same parties or their privies were involved in both cases. *Carson v. Department of Energy*, [398 F.3d 1369](#), 1375 (Fed. Cir. 2005); *Peartree v. U.S. Postal Service*, [66 M.S.P.R. 332](#), 337 (1995). We find that all of these criteria are satisfied here. Specifically, the prior judgment was rendered by a forum of competent jurisdiction, *Simpkins v. Office of Personnel Management*, [113 M.S.P.R. 411](#) (2010), *aff'd*, 411 F. App'x 323 (Fed. Cir. 2011); it was a final decision on the merits that the appellant had not established his entitlement to disability retirement; it was based on the same cause of action, i.e. OPM's June 11, 2009 final decision; and the parties—the appellant and OPM—are the same in both cases.

We recognize that the appellant has come to the Board with previously unavailable evidence in the form of a Department of Veterans Affairs (DVA)

---

<sup>2</sup> The appellant has indicated throughout this appeal that his claims pertain to OPM's June 11, 2009 final decision on the merits rather than to its September 6, 2011 final decision denying his apparent subsequent application for benefits as untimely. Finding that the appellant did not intend to file a new application for benefits, the administrative judge did not address OPM's September 6, 2011 decision. Initial Appeal File, Tab 9, Initial Decision at 5 n.2. The appellant has not alleged any error in this regard.

100% total disability rating. This disability rating is greater than the one that was in effect during the pendency of his prior appeal. In light of this new evidence, we have also considered the appellant's petition for review as a request to reopen his prior appeal.<sup>3</sup> Nevertheless, for the following reasons, we decline to reopen the prior appeal.

In deciding whether to reopen, the Board will balance the desirability of finality against the public interest in reaching the right result. *Anthony v. Office of Personnel Management*, [70 M.S.P.R. 214](#), 219 (1996). The Board will consider all of the relevant facts and circumstances, including the length of time that has elapsed since the prior decision, the likelihood of reaching a new result based on the evidence and argument presented, and whether the party seeking reopening has acted diligently in doing so. *See id.* at 218-19. In this case, we find that the appellant acted diligently in seeking reopening after the DVA awarded him a new disability rating on March 15, 2011, and that this factor weighs in favor of reopening. We further find that the time between the Federal Circuit's February 9, 2011 final decision and the appellant's June 18, 2011 letter bringing the new disability rating to OPM's attention was, although not very brief, also not very lengthy. *See generally Dean v. U.S. Postal Service*, [101 M.S.P.R. 356](#), ¶ 13 (2006) (the Board's authority to reopen an appeal is limited by the requirement that such authority be exercised within a reasonably short period of time, usually measured in weeks, not years). This is especially so considering that this case involves an OPM retirement benefits decision. *See Matson v. Office of Personnel Management*, [105 M.S.P.R. 547](#), ¶ 16 (2007) (given the interests involved in a retirement benefits appeal, the Board is generally more willing to exercise its discretion to reopen such appeals).

---

<sup>3</sup> Although the administrative judge discussed this new evidence in her initial decision, she was unable to consider whether it might support a request to reopen since the power to reopen a case is reserved for the full Board alone. *See Barker v. Department of the Navy*, [34 M.S.P.R. 248](#), 251, *aff'd*, 835 F.2d 871 (Fed. Cir. 1987) (Table).

Nevertheless, we agree with the administrative judge that the DVA's revised disability rating does not constitute strong evidence in favor of the appellant's application for disability retirement benefits. Although the Board will consider a DVA disability rating along with all other relevant evidence in disability retirement appeals, DVA disability ratings are based on different criteria than are Federal Employees' Retirement System disability retirement claims, and they are not binding on the Board in disability retirement matters. *See Hunt v. Office of Personnel Management*, [105 M.S.P.R. 264](#), ¶ 37 (2007). Moreover, none of the appellant's submissions show that the DVA increased his disability rating from 80% to 100% after the adjudication of his earlier appeal based on a change in any of the medical conditions at issue in that appeal. *Cf. Sachs v. Office of Personnel Management*, [99 M.S.P.R. 521](#), ¶ 11 (2005) (the Board and OPM must consider an award of benefits by the DVA based on the same medical conditions as the appellant's disability retirement application). The DVA's evaluation of the percent disability caused by the appellant's hypertension and mitral valve prolapse remained the same in 2011 as it was when the appellant filed his earlier appeal. Initial Appeal File, Tab 3 at 15-16 (2011 DVA Rating Decision showing no change in the percent disability rating for hypertension and mitral valve prolapse). The increased disability rating was based on new conditions not raised before OPM or the Board in the prior appeal. Because the DVA's new disability rating does not constitute strong evidence in favor of a different outcome for this appeal, we deny the appellant's request to reopen.

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 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.cafc.uscourts.gov](http://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.