

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

ROSEMARY BROCKS,  
Appellant,

DOCKET NUMBER  
DC-0752-11-0628-I-1

v.

UNITED STATES POSTAL SERVICE,  
Agency.

DATE: August 22, 2012

**THIS FINAL ORDER IS NONPRECEDENTIAL**\*

Neil C. Bonney, Esquire, Virginia Beach, Virginia, for the appellant.

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 initial decision issued by the administrative judge. We grant petitions such as this one only when significant new evidence is presented to us that was not available for consideration earlier or when the administrative judge

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\* A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

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 preference-eligible appellant is a full-time City Carrier in Norfolk, Virginia. Initial Appeal File (IAF), Tab 7, Subtab 4c. The undisputed facts show that the appellant sustained a compensable foot injury on September 13, 2004, for which she received surgery in 2005, and she thereafter returned to work in a full-time modified City Carrier assignment within her medical restrictions. IAF, Tab 11 at 6-8; Tab 15, Subtab 1 at 4, 6; Subtab 3. Shortly after the agency altered her modified duty assignment in August 2009, the appellant asserted that she had sustained a recurrence of her compensable foot injury in September 2009, she stopped reporting for work at that time, and she filed a claim for disability compensation with the Department of Labor's Office of Workers' Compensation Programs (OWCP). IAF, Tab 15, Subtab 1 at 4, 6-8. OWCP issued a November 29, 2010 decision, following a hearing in which it found that the appellant had failed to present sufficient evidence to establish a September 2009 recurrence of her September 2004 work-related injury. *Id.* at 4-9.

The appellant reported to work again on April 30, 2011, and she provided the agency with a copy of an OWCP Form CA-17 dated April 29, 2011, which indicated that her medical restrictions were such that she was limited to doing nothing but sitting for 40 hours per week. IAF, Tab 1 at 1; Tab 7, Subtab 4b. The agency informed the appellant that, with her limitations of no standing, walking, grasping, or fine manipulation, "there are simply no positions within the Postal Service that do not require at least one of [those] activities," and it sent the appellant home. IAF, Tab 7, Subtab 4a at 2 (emphasis added).

The appellant filed a timely May 16, 2011 appeal in which she made a general assertion that the agency had constructively suspended her for more than 14 days, beginning on April 30, 2011. IAF, Tab 1 at 1. The administrative judge issued separate orders to show cause why the appeal should not be dismissed for

failure to assert nonfrivolous allegations of the Board's constructive suspension or restoration rights appeal jurisdiction. IAF, Tabs 8, 10. In neither of the appellant's two responses did she assert that there was work available for her to perform within her medical restrictions, which restricted her to simply sitting for 40 hours per week. IAF, Tabs 9, 11. The administrative judge dismissed the appeal for lack of jurisdiction as a result of the appellant's failure to assert nonfrivolous allegations of the Board's restoration rights or constructive suspension jurisdiction. IAF, Tab 17 at 1, 8.

The appellant asserts on review that the administrative judge erred in finding that she failed to raise nonfrivolous allegations of the Board's constructive suspension or restoration jurisdiction because he erroneously relied on the 2010 OWCP decision finding that she had failed to prove a 2009 recurrence of her 2004 compensable injury in making that finding. Petition for Review (PFR) File, Tab 1 at 2-4. The appellant has submitted as new evidence a September 19, 2011 OWCP reconsideration decision in which OWCP finds that the appellant had subsequently presented additional evidence satisfying her burden of proving a recurrence of her compensable injury. *Id.*, Exhibit A. Although we have considered this new evidence, we find that it is not material because, as explained below, it does not warrant a different outcome on review. *See Russo v. Veterans Administration*, [3 M.S.P.R. 345](#), 349 (1980) (the Board will not grant a petition for review based on new evidence absent a showing that it is of sufficient weight to warrant an outcome different from that of the initial decision).

The appellant asserts that she raised nonfrivolous allegations of a constructive suspension because she asserted below that she reported to work on April 30, 2011, and requested to be returned to work, but the agency refused her request. PFR File, Tab 1 at 2-3. The appellant also asserts that the administrative judge failed to address this issue and only responded to the restoration rights issue. *Id.* at 1. As explained below, we disagree.

An employee alleging a constructive suspension must prove that her absence was involuntary. *Tardio v. Department of Justice*, [112 M.S.P.R. 371](#), ¶ 23 (2009). As the administrative judge properly informed the appellant under the circumstances of this case, “[a]n agency constructively suspends an employee when it fails to return the employee to work within her medical restrictions, when she requests it, for more than 14 days, where it is bound to do so by policy, regulation, or the accommodation obligation under the Rehabilitation Act. *See Simpson v. U.S. Postal Service*, [113 M.S.P.R. 346](#), ¶ 15 (2010).” IAF, Tab 17 at 3. The uncontested record demonstrates that the appellant failed to make a nonfrivolous allegation that the agency refused to return her to work within her medical restrictions on April 30, 2010. On that date, the appellant presented the agency with an OWCP Form CA-17 showing that her medical restrictions prohibited her from doing anything but sitting for 40 hours per week. IAF, Tab 7, Subtab 4b. Those medical restrictions plainly exceeded the physical requirements of her modified City Carrier assignment. IAF, Tab 11 at 8. The agency therefore did not refuse to return the appellant to work within her medical restrictions, but, rather, informed the appellant that there was no work within the Postal Service that would be within her medical restrictions. IAF, Tab 7, Subtab 4a at 2. The appellant did not contest below the fact that there is no such work in the Postal Service, nor has she done so on review. Thus, the appellant’s continued voluntary absence from work was due to the lack of any work within the Postal Service within her medical restrictions, not the agency’s refusal to return her to work. She has therefore failed to raise a nonfrivolous allegation that her continued absence from work had become involuntary. *See Tardio*, [112 M.S.P.R. 371](#), ¶¶ 27-29; *McFadden v. Department of Defense*, [85 M.S.P.R. 18](#), ¶ 13 (1999).

On review, the appellant claims that the administrative judge did not address her constructive suspension claim in the initial decision. PFR File, Tab 1 at 2. However, in response to the show cause order directing the appellant to make nonfrivolous allegations as to the constructive suspension, the appellant

“completely ignored the issue of her alleged constructive suspension,” focusing instead on her restoration claim. IAF, Tab 17 at 4. Therefore, we do not believe that the administrative judge erred in not making jurisdictional findings as to the appellant’s constructive suspension claim.

Similarly, medical restrictions prohibiting an agency from requiring an employee to do anything but sit for 40 hours per week preclude finding that the appellant raised a nonfrivolous allegation that she had recovered sufficiently to work, such that the agency had denied her restoration rights, or that there was a reasonable accommodation that would have enabled her to perform the duties of an actual position, such that the agency had violated the Rehabilitation Act. *See Latham v. U.S. Postal Service*, [117 M.S.P.R. 400](#), ¶ 10 (2012); *McFadden*, [85 M.S.P.R. 18](#), ¶ 20; *see Marino v. Office of Personnel Management*, [243 F.3d 1375](#), 1377 (Fed. Cir. 2001) (permanent assignment to light duties is not an accommodation allowing an employee to perform the essential functions of her position). Thus, the appellant has not shown that the administrative judge erred in finding that she had failed to raise a nonfrivolous allegation of the Board’s constructive suspension or restoration jurisdiction.

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:

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William D. Spencer  
Clerk of the Board

Washington, D.C.