UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

GREGORY W. INGRAM, Appellant, v. OFFICE OF PERSONNEL MANAGEMENT, Agency.	DOCKET NUMBER DC-831E-09-0776-M-1 DATE: August 27, 2012

THIS FINAL ORDER IS NONPRECEDENTIAL[1]

Gregory W. Ingram, Phoenix, Arizona, 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 that was not available for consideration earlier or when the administrative judge

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[1] A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

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 an appeal with the Board challenging the Office of Personnel Management (OPM)'s denial of his application for disability retirement. Initial Appeal File (IAF), Tab 1. The administrative judge affirmed OPM's decision, finding that the record did not show that the appellant suffered from a medical condition requiring his absence from the workplace or affecting his ability to perform the essential duties of his job. *Id*., Tab 15, Initial Decision (ID) at 8-9. The Board then denied the appellant's petition for review in a July 23, 2010 Final Order and the appellant appealed to the U.S. Court of Appeals for the Federal Circuit. *See Ingram v. Office of Personnel Management*, MSPB Docket No. DC-831E-09-0776-I-1, Final Order (July 23, 2010). OPM filed an unopposed motion with the court to remand the appeal so that it could consider the effect of the award of Social Security Administration (SSA) disability benefits upon its determination. Remand File (RF), Tab 6. The court granted OPM's motion, vacated the Final Order, but remanded the appeal to the Board for further proceedings. *Ingram v. Office of Personnel Management*, 422 F. App'x 892 (Fed. Cir. 2011); RF, Tab 1.

On remand, the Clerk of the Board ordered the parties to file copies of any briefs or other submissions with the regional office that had been filed with the court, but not previously filed with the Board. *Id*. Without further development of the record, the administrative judge issued the remand initial decision, which summarized the evidence and again affirmed OPM's July 29, 2009 reconsideration decision disallowing the appellant's application for disability retirement. RF, Tab 7, Remand Initial Decision (RID). The only new evidence and argument received before the administrative judge were the arguments that the parties made before the court. *Id*., Tabs 5, 6. However, the record did not contain any statement of OPM's position as to whether the appellant's receipt of

SSA disability benefits affected its original decision rejecting his application for disability retirement.

The administrative judge found in the remand initial decision that the appellant failed to establish by preponderant evidence that he was entitled to disability retirement benefits because he did not show that he was unable to render useful and efficient service in his position prior to his separation because of disease or injury. RID at 9. The administrative judge further found that the appellant failed to show that his employing agency was unable to accommodate the appellant's medical conditions before his separation from service. RID at 3. In reaching his decision, the administrative judge considered, inter alia, SSA's March 23, 2007 decision denying the appellant's claim for disability benefits, and the May 2, 2010 decision awarding benefits to the appellant beginning in March 2010 based upon the finding that the appellant became disabled, under SSA's rules, on September 18, 2009. RID at 8-9; *see* IAF, Tab 8, Subtab II(B) at 8-11; RF, Tab 6 at 18.

The appellant has filed a petition for review challenging the administrative judge's remand initial decision. Petition for Review (PFR) File, Tab 4. Because the administrative judge closed the record without providing the parties with an opportunity to submit additional evidence or argument on the essential question regarding the effect of the award of SSA benefits on the appellant's disability retirement claim, the Board issued a show cause order directing the parties to submit any further evidence and argument in support of their respective positions in this matter. PFR File, Tab 7. Both parties responded. PFR File, Tabs 8 and 9. In its response, OPM states that the SSA award does not affect its final decision in this case because SSA's determination that the appellant became disabled as of September 18, 2009, does not demonstrate that the appellant was disabled prior to his separation from service in July 2007 as would be required in order to receive disability benefits under the Civil Service Retirement System (CSRS). PFR File, Tab 9 at 4. The appellant submitted the SSA letter notifying him of his

entitlement to disability benefits as of September 18, 2009, and a document entitled Mental Residual Functional Capacity Assessment containing a statement by an SSA medical consultant saying that "cl last worked 7/06 and it appears reasonable to conclude that cl has been disabled since that time." PFR File, Tab 8 at 3, 7.

The Board has held that, while it is not bound by decisions by SSA to award social security benefits, such decisions will be considered in adjudicating disability retirement cases where the conditions underlying the applications to OPM and SSA are the same. *See Givens v. Office of Personnel Management*, 95 M.S.P.R. 120, ¶ 9 (2003); *see also Trevan v. Office of Personnel Management*, 69 F.3d 520, 526 (Fed. Cir. 1995). Where "there is no indication as to the basis for SSA's determination," however, "it is not a significant factor in deciding the disability retirement question[.]" *Guthrie v. Office of Personnel Management*, 105 M.S.P.R. 530, ¶ 5 (2007). Such is the case here.

The March 23, 2007 SSA notice of disapproved claim determined that: (1) while the appellant had "a history of mental problems," the appellant was not entitled to disability benefits because the records showed that he was able to "act, think and communicate in [his] own best interest;" (2) while he had "a history of back problems and arthritis," the appellant was "able to move about and get around in a satisfactory manner;" and (3) while he had "a history of Tourette syndrome," the record showed that "this condition [did] not prevent [the appellant] from performing most of [his] normal activities." IAF, Tab 8, Subtab II(B) at 8. SSA also stated in its 2007 decision that, while the appellant's condition prevented him "from doing any of [his] past work," it did not prevent him from doing less physically demanding work and that, based on his age, education, and past work experience, the appellant could do other work. *Id*.

The May 2, 2010 SSA award stated that the appellant became disabled under SSA rules on September 18, 2009. RF, Tab 6 at 18. In his response to the Board's order, the appellant contends that, even though he did not become

eligible for disability benefits under SSA's rules until September 18, 2009, it is still probative of his entitlement to CSRS disability retirement because it is possible that he met OPM's less restrictive eligibility requirement at an earlier date. PFR File, Tab 8. The appellant also submitted a copy of an SSA Mental Residual Functional Capacity Assessment, dated February 19, 2010, that included a brief note by Dr. Patricia Cott, Ph.D., that the appellant "last worked in 7/06 and it appears reasonable to conclude that [he] has been disabled since that time." *Id.*

In its response, OPM argued that the May 2, 2010 SSA award did not change its final decision and it agreed with the administrative judge's assessment of the evidence in the remand initial decision. PFR File, Tab 9. OPM asserted that the SSA, after reviewing all available medical evidence, reached a conclusion that the appellant did not become disabled until September 18, 2009, and that such a determination does not show how the appellant was disabled under the CSRS prior to his separation in July 2007. *Id.* OPM also argued that Dr. Cott's speculation in the functional assessment that it appears reasonable that the appellant became disabled in "7/06" is not probative because it is apparent that the SSA did not agree with this conclusion, as evidenced by its determination that the appellant did not become disabled until September 2009. *Id.*

Moreover, we note that, in the March 2, 2010 notice of award, SSA offered no opinion about the appellant's ability to do any of his past work. *Id.* Additionally, nothing in the 2010 award of SSA benefits casts doubt upon SSA's 2007 decision denying the appellant benefits at that time, a period when he was still a federal employee. RF, Tab 6 at 18–21.

Accordingly, we find that the appellant's May 2, 2010 SSA award, when considered with the other evidence of disability, does not show by preponderant evidence that the appellant qualified for disability retirement before his termination in July 2007. *See Burckley v. Office of Personnel Management*, 80 M.S.P.R. 617, ¶ 10 (1999).

The appellant also argues that the administrative judge did not recognize that the requirements for obtaining an award of disability benefits from SSA are completely different from the requirements for obtaining disability retirement benefits from OPM. PFR File, Tab 4 at 2. As discussed above and based on our review of the record, we conclude that the administrative judge properly applied the law regarding the entitlement to disability benefits under the CSRS.[2] *See* RID at 3-9.

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.

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

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[2] The appellant also asserts for the first time on review that his financial distress and his eviction from his apartment in June 2011 are further evidence that he would not have abandoned his new, lucrative, federal job, if he had been capable of performing useful and efficient federal service between July 2006 and September 2009. PFR File, Tab 4 at 3. In support of his argument, the appellant submits a copy of the writ of possession documenting his eviction in 2011. *Id*. at 6. We find that this evidence is not material or probative of the appellant's medical condition at the time of his separation in July 2007.

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:

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William D. Spencer
Clerk of the Board

Washington, D.C.