

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

SEAN BROWN,

Appellant,

DOCKET NUMBER

AT-0752-10-0168-I-1

v.

UNITED STATES POSTAL SERVICE,

Agency.

DATE: September 13, 2012

THIS FINAL ORDER IS NONPRECEDENTIAL*

Sean Brown, Wesley Chapel, Florida, pro se.

Jeffrey L. Sheldon, Esquire, Tampa, Florida, 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

* A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions.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 petition for review is late by nearly 23 months, as the finality date was April 7, 2010, and the appellant filed it on February 18, 2012. *See* Petition for Review (PFR) File, Tab 1; Initial Appeal File, Tab 24, Initial Decision at 2. The Board will waive its time limit for filing a petition for review only upon a showing of good cause for the delay in filing. [5 C.F.R. § 1201.114](#)(f). The appellant in two motions has sought to establish good cause for the delay. *See* PFR File, Tabs 5-6.

The Board has considered the initial motion, but not the revised one. The acknowledgment letter stated that the record on review would close on March 17, 2012, after the agency had an opportunity to respond. PFR File, Tab 2 at 1. The appellant's deadline for filing his motion was March 16, 2012, *id.* at 2, but, because the U.S. Postal Service initially returned the acknowledgment letter and the appellant used his new address in his February 4, 2012 request for a copy of the initial decision, PFR File, Tab 5 at 7, 11, *see also* PFR File, Tab 3 at 1, we deem as timely his first motion, filed on March 30, 2012. The agency replied to this motion electronically on April 5, 2012, one day after it was docketed. PFR File, Tabs 4-5. The appellant filed the revised motion on April 12, 2012. PFR File, Tab 6.

The record on review closed upon receipt of the agency's April 5, 2012 response. *See* [5 C.F.R. § 1201.115](#)(i) ("The record closes on expiration of the period for filing the response to the petition for review, or to the cross petition for review, or to the brief on intervention, if any, or on any other date the Board sets for this purpose."); [5 C.F.R. § 1201.114](#)(f) ("The response [to the motion to show good cause] will not extend the time provided by paragraph (d) of this section to file a cross petition for review or to respond to the petition or cross petition."). The revised motion was filed a week after the record closed. *See*

PFR File, Tab 6. The Board's regulations do not provide for the submission of supplemental arguments after the record on review closes, unless they are based on new and material evidence not available before the record closed. *Krzewinski v. U.S. Postal Service*, [72 M.S.P.R. 353](#), 356 (1996); 5 C.F.R. § 1201.114(i). The appellant has not presented any such arguments regarding the timeliness issue.

The October 21, 2011 Social Security decision denying the appellant disability benefits under the Social Security Act is the newest of the additional items the appellant submitted in support of his argument. *See* PFR File, Tab 1 at 4-13. He filed the petition for review on February 21, 2012, approximately 4 months after the Social Security decision was issued. PFR File, Tab 1. The appellant has not suggested that he met with any significant delay in receiving the decision, and he has not explained why he waited so long after he received the decision to request a copy of the initial decision or to file his petition for review. We thus conclude that he failed to act with due diligence in bringing this potential evidence before the Board. *Cf. Nichols v. Department of the Air Force*, [102 M.S.P.R. 551](#), ¶ 9 (2006) (the appellant did not show good cause for delay where she waited 3 months after receiving newly-discovered documents before filing her petition for review alleging that her settlement agreement was based on fraud); *Saunders v. Department of the Interior*, [56 M.S.P.R. 671](#), 673-74 (1993) (the appellant did not show due diligence or ordinary prudence where he delayed for 8 weeks before raising the agency's alleged misrepresentation in relation to a settlement agreement).

The appellant has not shown good cause for the delay in filing the petition for review. We therefore DISMISS the petition for review as untimely filed without good cause shown for the delay in filing. This is the Board's final decision concerning the timeliness of the petition for review. [5 C.F.R. § 1201.113](#)(b).

**NOTICE TO THE APPELLANT REGARDING
YOUR FURTHER REVIEW RIGHTS**

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. 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.