

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

BECKY M. MENDOZA,
Appellant,

DOCKET NUMBER
SF-831E-12-0094-I-1

v.

OFFICE OF PERSONNEL
MANAGEMENT,
Agency.

DATE: November 13, 2012

THIS FINAL ORDER IS NONPRECEDENTIAL¹

Becky M. Mendoza, Monterey Park, California, pro se.

Linnette Scott, 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

¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

In the proceeding below, the administrative judge affirmed the Office of Personnel Management (OPM)'s decision dismissing as untimely filed the appellant's application for disability retirement. Initial Decision (ID) at 1, 7. In her petition for review, the appellant argues that the administrative judge did not appreciate "the severity of [her] problem." Petition for Review File, Tab 1 at 1. She states that her medications are costly, *id.*, and that her parents are not well enough to assist her, *id.* at 2. She has submitted documents that are a part of the record below, *id.* at 3-11, and documents related to an equal employment opportunity (EEO) complaint she filed in 2009, *id.* at 12, 14, and her 2009 removal which presumably precipitated her resignation, *id.* at 13, 15-16.

As the administrative judge correctly found, under [5 U.S.C. § 8337\(b\)](#), an application for disability retirement under the Civil Service Retirement System must be filed with OPM, the employing agency, or the former employing agency before the employee is separated from the service or within 1 year thereafter. ID at 4; *see* [5 C.F.R. § 831.1204\(a\)](#). The statute further provides that the time limitation may be waived if the employee at the date of separation from service or within 1 year thereafter is mentally incompetent, so long as the application is filed with OPM or the former employing agency within 1 year from the date of restoration of the employee to competency. The statute permits waiver of the time limit only if the applicant is mentally incompetent. *Ford v. Office of Personnel Management*, 374 F. App'x 994, 996 (Fed. Cir. 2010); *Crane v. Office of Personnel Management*, [55 M.S.P.R. 16](#), 18 (1992), *aff'd*, 996 F.2d 1235 (Fed. Cir. 1993) (Table). Although the appellant claims that she suffered, and still suffers, from numerous physical ailments, and although she has supported her claim by medical evidence, she has not shown that she was mentally incompetent

during the pertinent period so as to allow for waiver of the 1-year time limit for filing her application.

The documents the appellant has submitted with her petition for review that are already a part of the record are not new, and therefore the Board need not consider them. *See Meier v. Department of the Interior*, [3 M.S.P.R. 247](#), 256 (1980). And the documents relating to the appellant's earlier EEO complaint and her 2009 removal are neither new nor material. *See Avansino v. U.S. Postal Service*, [3 M.S.P.R. 211](#), 214 (1980); *Russo v. Veterans Administration*, [3 M.S.P.R. 345](#), 349 (1980).

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 review² and AFFIRM the initial decision issued by the administrative judge, which is now the Board's final decision. [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

² In view of this disposition, we have made no findings on the timeliness of the appellant's petition for review.

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.