

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

WILLIAM J. PAWLAK,  
Appellant,

DOCKET NUMBER  
SF-0842-10-0395-I-3

v.

OFFICE OF PERSONNEL  
MANAGEMENT,  
Agency.

DATE: December 7, 2012

**THIS FINAL ORDER IS NONPRECEDENTIAL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

William J. Pawlak, Rancho Palos Verdes, California, pro se.

Kristine Prentice, 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 petitioned for review of the initial decision that affirmed the reconsideration decision by the Office of Personnel Management (OPM). Generally, we grant petitions such as this one only when: the initial decision

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 A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

contains erroneous findings of material fact; the initial decision is based on an erroneous interpretation of statute or regulation or the erroneous application of the law to the facts of the case; the judge's rulings during either the course of the appeal or the initial decision were not consistent with required procedures or involved an abuse of discretion, and the resulting error affected the outcome of the case; or new and material evidence or legal argument is available that, despite the petitioner's due diligence, was not available when the record closed. *See* Title 5 of the Code of Federal Regulations, section 1201.115 ([5 C.F.R. § 1201.115](#)).<sup>2</sup> After fully considering the filings in this appeal, and based on the following points and authorities, we conclude that the petitioner has not established any basis under section 1201.115 for granting the petition for review. Therefore, we DENY the petition for review. We AFFIRM the initial decision issued by the administrative judge, which is now the Board's final decision. [5 C.F.R. § 1201.113\(b\)](#).

On petition for review, the appellant concedes that the amendments to the Federal Employees' Retirement System (FERS) statute made by the National Defense Authorization Act of Fiscal Year 2010, Pub. L. No. 111-84, 123 Stat. 2190 (2009), were not retroactive and that the FERS statute in effect at the times relevant to this appeal did not permit the redeposit of a refund of FERS contributions. *See* [5 U.S.C. § 8424\(a\)](#) (2009). However, the appellant objects that the administrative judge did not consider the essence of his claim, which is that his election to receive a refund was void *ab initio*, based on denial of due process, violation of the duty of care, and contract law. We consider these arguments below.

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<sup>2</sup> Except as otherwise noted in this decision, we have applied the Board's regulations that became effective November 13, 2012. We note, however, that the petition for review in this case was filed before that date. Even if we considered the petition under the previous version of the Board's regulations, the outcome would be the same.

The appellant first argues that the refund election is void on the grounds that he was denied due process. Benefits that are a matter of statutory entitlement for persons qualified to receive them may not be terminated without affording the recipient procedural due process. *Goldberg v. Kelly*, [397 U.S. 254](#), 262-63 (1970); *May v. Office of Personnel Management*, [38 M.S.P.R. 534](#), 538-39 (1988). The essence of this due process is the requirement that the person in jeopardy of serious loss be given notice of the case against him and an opportunity to be heard at a meaningful time and in a meaningful manner. *Matthews v. Eldridge*, [424 U.S. 319](#), 333 (1976); *May*, 38 M.S.P.R. at 539. Regardless of whether the appellant received adequate counseling regarding the consequences of taking a refund, the alleged denial of due process provides no basis for voiding the refund election because the government took no action at that time to deprive him of any benefit to which he was entitled. The appellant was not then eligible to receive an annuity, and OPM duly provided him with the refund to which he was entitled under [5 U.S.C. § 8424\(a\)](#).<sup>3</sup>

Furthermore, we reject the appellant's contention that the refund election was void based on unilateral mistake or violation of the duty of care. It is a settled proposition that one is not relieved from the consequences of a written election absent a showing that mental incompetence, duress, or fraud is the reason for an election one later seeks to void. *Collins v. Office of Personnel Management*, [45 F.3d 1569](#), 1573 (Fed. Cir. 1995). Hence, an allegation of unilateral mistake is not a ground for voiding an election where, as here, there is

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<sup>3</sup> With regard to the appellant's subsequent request to redeposit his FERS contributions, OPM provided due process by issuing an initial decision explaining the basis for denying his request and offering him an opportunity to request reconsideration of that decision. While OPM could not have ordered the payment of benefits in contravention of statute, *see Office of Personnel Management v. Richmond*, [496 U.S. 414](#), 434 (1990), the opportunity to respond was meaningful insofar as OPM could have found on reconsideration that the refund election was invalid and therefore did not void the appellant's annuity rights.

no law or regulation requiring that the government provide notice of the consequences of that election. *See id.* (declining to void petitioner's election not to make deposit for post-1956 military service); *Carlton v. Office of Personnel Management*, [52 M.S.P.R. 225](#), 229 (1992) (mistaken election of full survivor annuity not voidable based on unilateral mistake when agency acted properly). The appellant's claim that OPM and his employing agency violated their duty of care likewise does not constitute a claim that his election was void due to mental incompetence, duress, or fraud.<sup>4</sup>

### **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

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<sup>4</sup> We note that the appellant has alleged that his decision to apply for a refund was the result of "economic duress" due to his wife's illness. *See* MSPB Docket No. SF-0842-10-0395-I-1, Initial Appeal File (IAF-1), Tab 3, Subtab 2B at 1. However, we find the appellant's financial situation does not rise to the level of economic duress, particularly in light of his admission that he could have found an alternative source of finance, such as a second mortgage. *Id.*; IAF-1, Tab 6 at 2; *see* Black's Law Dictionary, 9th ed. (2009) (defining "economic duress" as "unlawful coercion to perform by threatening financial injury at a time when one cannot exercise free will").

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.