UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

NATHANIEL A. BELL, Appellant,	DOCKET NUMBER DA-0752-12-0003-I-1
v.	
UNITED STATES POSTAL SERVICE, Agency.	DATE: December 11, 2012

THIS FINAL ORDER IS NONPRECEDENTIAL[1]

Nathaniel A. Bell, Richmond, Texas, pro se.

Lisa A. Stegall, Esquire, Dallas, Texas, 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, which sustained his removal for medical inability to meet the essential requirements of his position. Generally, we grant petitions such as this one only when: the initial

---

[1] A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

decision 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).[2] 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. Except as expressly modified by this Final Order, we AFFIRM the initial decision issued by the administrative judge.

The appellant asserts on review that the administrative judge erred in finding that the agency "fully complied" with the portion of Employee and Labor Relations Manual (ELM) § 365.34 pertaining to the absence of a "complete medical report." Petition for Review (PFR) File, Tab 1 at 6. It appears the appellant is referring to ELM § 365.342(e), which provides as follows:

> An employee who is eligible for disability retirement but chooses not to apply is not separated for disability until a complete medical report has been received and the employee has received retirement counseling.

Initial Appeal File (IAF), Tab 6 at 26. We first note that the administrative judge did not make a finding as to whether the agency complied with ELM § 365.342(e); rather, she found that, even if the agency violated that provision,

---

[2] 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 error was not harmful. IAF, Tab 10, Initial Decision at 6-7. In any event, we find that the appellant failed to establish that the agency violated ELM § 365.342(e) because he did not prove, or even allege, that: (1) he was eligible for disability retirement; (2) he chose not to apply; and (3) at the time of his separation, the agency had not received a complete medical report and/or he had not received retirement counseling. Furthermore, we discern no error in the administrative judge's finding that the agency complied with the other relevant provisions of ELM § 365.34. Thus, we conclude that the appellant failed to meet his burden of proving his affirmative defense of harmful error by a preponderance of the evidence. *See* 5 C.F.R. § 1201.56(a)(2)(iii).

The appellant also asserts on review that the administrative judge erred in finding that he did not respond to the notice of proposed removal. PFR File, Tab 1 at 6. In support of his contention, the appellant submits for the first time a copy of a Step 2 grievance decision, dated August 9, 2011, and a Step 3 grievance form, dated August 12, 2011. PFR File, Tab 1 at 8-9. These documents provide no basis for disturbing the initial decision because the appellant has not shown that they were unavailable before the record was closed despite his due diligence. *See Avansino v. U.S. Postal Service*, 3 M.S.P.R. 211, 214 (1980). Moreover, the documents are not material because, even if they supported the appellant's claim that the administrative judge erred in finding that he did not respond to the proposal notice, the alleged error would not have affected the outcome of the case. *See Panter v. Department of the Air Force*, 22 M.S.P.R. 281, 282 (1984); *Russo v. Veterans Administration*, 3 M.S.P.R. 345, 349 (1980).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

The initial decision, as supplemented by this Final Order, constitute the Board's final decision in this matter. 5 C.F.R. § 1201.113. You have the right to request further review of this final decision.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review this final decision on your discrimination claims. *See* Title 5 of the United States Code, section 7702(b)(1) (5 U.S.C. § 7702(b)(1)). If you submit your request by regular U.S. mail, the address of the EEOC is:

Office of Federal Operations
Equal Employment Opportunity Commission
P.O. Box 77960
Washington, D.C. 20013

If you submit your request via commercial delivery or by a method requiring a signature, it must be addressed to:

Office of Federal Operations
Equal Employment Opportunity Commission
131 M Street, NE
Suite 5SW12G
Washington, D.C. 20507

You should send your request to EEOC no later than 30 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 EEOC no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time.

Discrimination and Other Claims: Judicial Action

If you do not request EEOC to review this final decision on your discrimination claims, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. *See* 5 U.S.C. § 7703(b)(2). You must file your civil action with the district court no later than 30 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 district court no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to

file on time. If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e-5(f) and 29 U.S.C. § 794a.

Other Claims: Judicial Review

If you do not want to request review of this final decision concerning your discrimination claims, but you do want to request review of the Board's decision without regard to your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review this final decision on the other issues in your appeal. 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.