

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

KEVIN CORTEZ BEAN,  
Appellant,

DOCKET NUMBER  
AT-4324-12-0293-I-1

v.

UNITED STATES POSTAL SERVICE,  
Agency.

DATE: December 19, 2012

**THIS FINAL ORDER IS NONPRECEDENTIAL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

Aubrey E. Grant, Memphis, Tennessee, for the appellant.

Arthur S. Kramer, Esquire, Philadelphia, Pennsylvania, 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 dismissed his Uniformed Services Employment and Reemployment Rights Act of 1994 (codified at [38 U.S.C. §§ 4301-4333](#)) (USERRA) appeal for lack of

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 A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

jurisdiction. Generally, we grant petitions such as this one only when: the initial 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](#)).<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. Except as expressly modified by this Final Order, we AFFIRM the initial decision issued by the administrative judge.

On petition for review, the appellant states that he seeks to have his day in court and to have sanctions issued in his favor. These bare assertions do not warrant a reversal of the initial decision. We also discern no error with the administrative judge's analysis of the jurisdictional issue,<sup>3</sup> and we deny the appellant's hearing request. *See Downs v. Department of Veterans Affairs*, [110 M.S.P.R. 139](#), ¶¶ 17-18 (2008) (an appellant has an unconditional right to a Board hearing once he has established jurisdiction over his USERRA appeal). To

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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.

<sup>3</sup> Although the administrative judge stated in the initial decision that the appellant did not respond to her Order on Jurisdiction, it appears that the appellant did include a response as an exhibit to his hearing request submission. We have considered his response, but it does not change the outcome on review.

establish jurisdiction under [38 U.S.C. § 4311\(a\)](#), an appellant must allege that: (1) He performed duty or has an obligation to perform duty in a uniformed service of the United States; (2) the agency denied him initial employment, reemployment, retention, promotion, or any benefit of employment; and (3) the denial was due to the performance of duty or obligation to perform duty in the uniformed service. *Hillman v. Tennessee Valley Authority*, [95 M.S.P.R. 162](#), ¶ 5 (2003). There is no dispute that the appellant performed military service, and, for the purpose of our analysis, we assume that the appellant's requested accommodation for his PTSD constitutes a benefit of employment. However, as the administrative judge stated in the initial decision, the appellant did not make a nonfrivolous allegation that the agency's denial of his request for an accommodation was due to or because of his military service. Moreover, the administrative judge correctly noted that the appellant's attempt to reframe his disability discrimination claim as a USERRA claim based on the fact that his condition was service-connected does not constitute a viable USERRA claim. *See Henson v. U.S. Postal Service*, [110 M.S.P.R. 629](#), ¶ 8 (2009) ("Thus, contrary to the appellant's argument on [petition for review], the fact that his disability is service-connected does not make the appellant's claim a USERRA claim."); *McBride v. U.S. Postal Service*, 78 M.S.P.R. 411, 415 (1998) ("The fact that the appellant incurred a back injury while performing military service is incidental to her claim of disability discrimination. She has not, therefore, raised a USERRA claim."). Thus, the administrative judge properly dismissed this USERRA appeal for lack of jurisdiction.

#### **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 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](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.