

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

DANUEL J. BOYKIN,  
Appellant,

DOCKET NUMBER  
CH-844E-12-0166-I-1

v.

OFFICE OF PERSONNEL  
MANAGEMENT,  
Agency.

DATE: December 26, 2012

**THIS FINAL ORDER IS NONPRECEDENTIAL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

Daniel J. Boykin, South Holland, Illinois, pro se.

Matthew D. MacIsaac, 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, which affirmed the reconsideration decision issued by the Office of Personnel Management

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 A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

(OPM). 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 and AFFIRM the initial decision issued by the administrative judge, which is now the Board's final decision. [5 C.F.R. § 1201.113\(b\)](#).

### **DISCUSSION OF ARGUMENTS ON REVIEW**

A request for reconsideration of an OPM initial decision must be filed with OPM no later than 30 days after the date of the initial decision. *See Dacus v. Office of Personnel Management*, [106 M.S.P.R. 567](#), ¶ 7 (2007)<sup>3</sup>; [5 C.F.R. § 841.306\(d\)\(1\)](#). The time limit for filing a reconsideration request may be waived only if the appellant was not informed of the time limit and was not

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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 appellant in *Dacus* was covered under the Civil Service Retirement System (CSRS) and the appellant in this appeal is covered under the Federal Employees' Retirement System (FERS), the applicable regulatory standards governing the timeliness of reconsideration requests under CSRS and FERS are essentially identical. *Compare* [5 C.F.R. § 831.109\(e\)](#), with [5 C.F.R. § 841.306\(d\)](#).

otherwise aware of it, or if circumstance beyond his control prevented him from requesting reconsideration within the time limit. *See Dacus*, [106 M.S.P.R. 567](#), ¶ 7; [5 C.F.R. § 841.306\(d\)\(2\)](#).

The administrative judge properly found that the appellant's reconsideration request was untimely, and the appellant does not dispute this finding on review. Initial Appeal File (IAF), Tab 10, Initial Decision (ID) at 2, 5.<sup>4</sup> Further, as noted by the administrative judge, the appellant admits that he was aware of the 30-day deadline for submitting a request for reconsideration. *Id.* at 6; IAF, Tab 9 at 2. Accordingly, the only issue to be resolved is whether circumstances beyond the appellant's control prevented him from requesting reconsideration within the time limit.

On review, the appellant reiterates his argument that OPM caused his delay in submitting his reconsideration request. Petition for Review (PFR) File, Tab 1 at 5, 7. Specifically, the appellant contends that Francine Johnson, a Legal Administrative Specialist, misled him by informing him that he could not send OPM his entire medical record. *Id.* at 5. The appellant further asserts that the administrative judge erred in not requiring Ms. Johnson to appear and testify regarding her instructions to the appellant. *Id.* at 4.

In the initial decision, the administrative judge addressed the appellant's argument that Ms. Johnson caused his delay in submitting his request for reconsideration by informing him that he could not submit his entire medical record. ID at 6. The administrative judge found that it was likely that Ms. Johnson had advised the appellant to not submit his entire medical record. *Id.* However, the administrative judge found that the reconsideration request form indicated that the appellant did not need to submit additional evidence in order to file a reconsideration request, and that there was no evidence that Ms. Johnson

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<sup>4</sup> The administrative judge found that the request for reconsideration was untimely filed by at least 10 months. ID at 5-6; IAF, Tab 4 at 552-53.

had discouraged the appellant from filing a reconsideration request. *Id.* Accordingly, the administrative judge found that Ms. Johnson's instructions to the appellant to not submit his entire medical record did not provide a rational basis for the appellant's failure to submit his reconsideration request in a timely manner, and that the appellant had failed to show that circumstances beyond his control prevented him from requesting reconsideration within the time limit. *Id.* Because the administrative judge's findings regarding this issue are supported by the weight of the record evidence and the applicable law, we discern no reason to disturb them on review. *See Crosby v. U.S. Postal Service*, [74 M.S.P.R. 98](#), 106 (1997) (finding no reason to disturb the administrative judge's findings where the administrative judge considered the evidence as a whole, drew appropriate inferences, and made reasoned conclusions); *Broughton v. Department of Health & Human Services*, [33 M.S.P.R. 357](#), 359 (1987) (same).

Regarding the appellant's contention that the administrative judge erred in not ordering Ms. Johnson to appear and testify, an administrative judge has wide discretion to exclude witnesses where it has not been shown that their testimony would be relevant, material, and nonrepetitious. *See Franco v. U.S. Postal Service*, [27 M.S.P.R. 322](#), 325 (1985). Here, the appellant did not submit a list of witnesses for the hearing. IAF, Tab 8 at 2. In addition, even assuming that Ms. Johnson's testimony regarding her instructions to the appellant would have been consistent with the appellant's recollections, we find, for the reasons stated above, that such testimony would not have been material to the outcome of the appeal. Accordingly, the appellant has failed to show that the administrative judge abused his discretion in not ordering Ms. Johnson to testify. *Cf. Franco*, 27 M.S.P.R. at 325.

**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](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.