

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

KATRINA D. CONWAY,
Appellant,

DOCKET NUMBER
NY-0752-07-0253-I-1

v.

DEPARTMENT OF THE TREASURY,
Agency.

DATE: January 3, 2013

THIS FINAL ORDER IS NONPRECEDENTIAL¹

Katrina D. Conway, Amityville, New York, pro se.

Heather A. Southwell, Esquire, New York, New York, 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 the appeal for lack of Board jurisdiction. Generally, we grant petitions such as this one only when: the initial decision contains erroneous findings of

¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

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.² See Title 5 of the Code of Federal Regulations, section 1201.115 ([5 C.F.R. § 1201.115](#)).

The petition for review is untimely, and the appellant is seeking waiver of the deadline for filing. Petition for Review (PFR) File, Tab 3 at 1. The appellant claims that she was under the care of a psychotherapist for depression following the death of a close relative. *Id.* at 1-2. To establish that an untimely filing was the result of an illness, a party must (1) identify the time period during which she suffered from the illness; (2) submit medical evidence showing that she suffered from the alleged illness during that time period; and (3) explain how the illness prevented her from timely filing her appeal or a request for an extension of time. *Ortiz v. Department of Justice*, [103 M.S.P.R. 621](#), ¶ 19 (2006). The party's evidence must specifically explain how the problem prevented her from meeting the filing deadline. *Gross v. U.S. Postal Service*, [103 M.S.P.R. 334](#), ¶ 11 (2006).

Here, the finality date was September 18, 2007. Initial Decision (ID) at 5. The appellant submitted a note from her psychotherapist stating that she saw him for individual counseling between August and October 2007. See PFR File, Tab 6, Ex. C. She also enclosed with her motion her aunt's obituary from September 20, 2007. PFR File, Tab 3 at 4-4A. Although the note reflects that the appellant saw a therapist during the relevant time period, it does not state that she

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.

suffered from any illness, or assert that an illness prevented her from timely filing her petition for review. See PFR File, Tab 6, Ex. C. Even if it did, she has not explained why she waited over four years after her treatment ended to file her petition. See *Jerusalem v. Department of the Air Force*, [107 M.S.P.R. 660](#), ¶ 5 (medical evidence intended to show to show that untimely filing was the result of illness must address entire period of the delay), *aff'd*, 280 F. App'x 973 (Fed. Cir. 2008).

We also note that the appellant's alleged illness did not prevent her from seeking relief in other fora before returning to the Board. The agency documented the appellant's litigation history before the Equal Employment Opportunity Commission and in the courts between February 2008 and January 2012. PFR File, Tab 5 at 4; *id.*, Atts. 1-5; see *Phillips v. Department of the Army*, [77 M.S.P.R. 305](#), 309-10 (1998) (depression did not excuse 20-month delay in filing petition for review where appellant was able to file a discrimination complaint and pursue a court case during that time). The appellant thus has not shown how her alleged condition prevented her from meeting the Board's filing deadline, and in fact, the agency's evidence shows that she was clearly capable of pursuing litigation during the delay.

The appellant alleges that agency managers have denied her the necessary documentation to win her appeal. PFR File, Tab 3 at 1-2. She claims that the managers are still holding information underlying her dismissal that was found to be false after the record closed. *Id.* at 1-3. She does not, however, offer any proof of this claim. She did not request an extension of time in which to file in order to obtain the information from the agency that she believes might change the outcome of her appeal, despite having initially requested such information on February 10, 2011. See PFR File, Tab 3 at 9; PFR File, Tab 4 at 2, 9.

The appellant also argues that the agency misinformed her as to her right to union representation. PFR File, Tab 3 at 2. She does not offer proof of this claim or show how the agency's alleged action affected her ability to timely file a

petition for review. To the extent that she is arguing that she needed representation in order to understand the Board's filing requirements, *see* PFR File, Tab 3 at 1, the initial decision clearly states the deadline and procedure for filing a petition for review, ID at 5-6. The Board has declined to find good cause for waiver of the time limit where, as here, the initial decision clearly notified the appellant of the time limit for filing a petition for review. *See Valdez v. Office of Personnel Management*, [103 M.S.P.R. 88](#), ¶ 7 (2006).

Accordingly, the appellant has not shown good cause for the delay in filing. *See Alonzo v. Department of the Air Force*, [4 M.S.P.R. 180](#), 184 (1980) (to establish good cause for an untimely filing, a party must show that she exercised due diligence or ordinary prudence under the particular circumstances of the case). We therefore DISMISS the petition for review as untimely filed without good cause shown for the delay in filing.

This is the final decision of the Merit Systems Protection Board concerning the timeliness of the petition for review. The initial decision will remain the final decision of the Board with regard to the disposition of the underlying appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) ([5 C.F.R. § 1201.113\(c\)](#)).

**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 the date of this order. 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.