

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

STEPHEN MARK CARR,
Appellant,

DOCKET NUMBER
PH-3330-12-0130-I-1

v.

DEPARTMENT OF THE TREASURY,
Agency.

DATE: January 10, 2013

THIS FINAL ORDER IS NONPRECEDENTIAL¹

Stephen Mark Carr, Phoenixville, Pennsylvania, pro se.

Carolyn D. Talley, 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 denied the appellant's request for corrective action under the Veterans Employment

¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

Opportunity Act of 1998 (VEOA). 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](#)).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 and AFFIRM the initial decision issued by the administrative judge, which is now the Board's final decision. [5 C.F.R. § 1201.113\(b\)](#).

Under [5 U.S.C. § 3330a\(a\)\(1\)\(A\)](#), "[a] preference eligible who alleges that an agency has violated such individual's rights under any statute or regulation relating to veterans' preference may file a complaint with the Secretary of Labor." Such a complaint "must be filed within 60 days after the date of the alleged violation." [5 U.S.C. § 3330a\(a\)\(2\)\(A\)](#). The 60-day filing deadline set forth at [5 U.S.C. § 3330a\(a\)\(2\)\(A\)](#), however, is subject to equitable tolling. *Hayes v. Department of the Army*, [111 M.S.P.R. 41](#), ¶ 10 (2009).

Here, the administrative judge properly found that the appellant failed to file his complaint with the U.S. Department of Labor (DOL) within the 60-day statutory deadline, and the appellant does not contest this finding on review.

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.

Initial Appeal File, Tab 18, Initial Decision (ID) at 4-5; Petition for Review (PFR) File, Tab 1. Further, we agree with the administrative judge's finding that there are no grounds for equitable tolling of the deadline. ID at 5. Specifically, the appellant has not alleged either below or on review that he actively pursued a remedy by filing a defective pleading within the statutory time limit or that he was induced or tricked by the agency's misconduct to miss the deadline. *Cf. Irwin v. Department of Veterans Affairs*, [498 U.S. 89](#), 96 (1990) (describing circumstances in which equitable tolling may apply). Because the appellant filed an untimely DOL complaint, and because equitable tolling does not apply, the administrative judge properly denied the appellant's request for corrective action. ID at 2, 6; *see Hayes*, [111 M.S.P.R. 41](#), ¶ 13.

While the appellant asserts on review that the administrative judge improperly denied him a hearing, we find this argument to be unpersuasive. PFR File, Tab 1 at 4. Because the administrative judge properly found that there was no dispute of material fact regarding the dispositive issue of timeliness in this case and that the agency had to prevail as a matter of law, he correctly denied the appellant's request for a hearing. ID at 5; *see Haasz v. Department of Veterans Affairs*, [108 M.S.P.R. 349](#), ¶ 9 (2008) (the Board may decide a VEOA appeal on the merits without a hearing where there is no genuine dispute of material fact and one party must prevail as a matter of law). Moreover, the appellant's remaining arguments regarding the merits of his VEOA claim do not provide a basis to disturb the initial decision because they do not address the dispositive issue of timeliness in this appeal. PFR File, Tab 1 at 4-5.

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. *See* 5 U.S.C. § 7703(b)(1)(B), as revised effective December 27, 2012, Pub. L. No. 112-199, § 108, [126 Stat. 1465](#), 1469. Additional information about the United States Court of Appeals for the Federal Circuit 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.