

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

CYNTHIA MAUREEN JOHNSON,  
Appellant,

DOCKET NUMBER  
DC-831E-12-0305-I-1

v.

OFFICE OF PERSONNEL  
MANAGEMENT,  
Agency.

DATE: January 17, 2013

**THIS FINAL ORDER IS NONPRECEDENTIAL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

Mindy G. Farber, Esquire, Bethesda, Maryland, for the appellant.

Thomas L. Styer, 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 Office of Personnel Management's decision denying the appellant's

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 A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

application for disability retirement. 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\(b\)](#).

The appellant does not, in her petition for review, challenge the findings and conclusions reached by the administrative judge in the initial decision, and, because he considered the evidence as a whole, drew appropriate inferences, and made reasoned conclusions, we find no basis to disturb them. *See Crosby v. U.S. Postal Service*, [74 M.S.P.R. 98](#), 105-06 (1997); *cf. Heiter v. Office of Personnel Management*, [107 M.S.P.R. 514](#), ¶¶ 13-14 (2007) (appellant established his entitlement to continuation of his disability retirement benefits; his testimony and his doctor's was not controverted and was supported by objective medical evidence).

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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.

In her petition for review, the appellant's attorney states that, 2 days before the initial decision was issued, the appellant received new medical documentation that corroborates the appellant's claim that she suffers from persistent back and lower extremities pain, "reviving the need for and reconsideration of long-term disability," and she has submitted that evidence. Petition for Review (PFR) File, Tab 1 at 1-2.

We first consider whether the proffered evidence is new, that is, whether it was unavailable before the record closed below despite her due diligence. *Avansino v. U.S. Postal Service*, [3 M.S.P.R. 211](#), 214 (1980). The record normally closes at the conclusion of the hearing, [5 C.F.R. § 1201.58\(a\)](#), which in this case was April 4, 2102. However, the administrative judge may, in his discretion, allow the parties additional time to submit further argument or evidence, *id.*, and the administrative judge did so in this case, extending the close of the record date until April 16, 2012, *see* Compact Disc, but there were no further submissions. Nor did the appellant request additional time to submit further evidence.

The documents the appellant's attorney has included with her petition for review are a May 29, 2012 doctor's report and the undated results of the MRI that was conducted on May 19, 2012.<sup>3</sup> PFR File, Tab 1 at 5-7. These documents are arguably new, although it is unclear whether the information contained in them was unavailable despite the appellant's due diligence when the record closed. *See Grassell v. Department of Transportation*, [40 M.S.P.R. 554](#), 564 (1989). The

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<sup>3</sup> A third document was also submitted with the petition for review, an undated list of the appellant's medications (valium and tramadol for pain, paroxetine and bupropion for depression). During adjudication, on March 8, 2012, the appellant responded to written interrogatories propounded by the agency, and the administrative judge admitted those answers into the record at the hearing as Appellant's Exhibit 1. Initial Appeal File, Tab 8. In responding to question 5, which asked the appellant to name the medications she was currently taking, she responded, at that time, that she was taking ketorolac for sciatic nerve damage and paroxetine for depression. *Id.* at 11.

appellant's attorney states only that the appellant would have preferred to have had the MRI sooner, but she could not afford it. PFR File, Tab 1 at 2.

Even if we consider the documents as new, they are not of sufficient weight to warrant an outcome different from that of the initial decision. *Tawadrous v. Department of the Treasury*, [110 M.S.P.R. 475](#), ¶ 13 (2009). Dr. El-Mawan, the appellant's physician, opined that she is not able to work because her pain (in her back, spreading to her lower extremities and buttocks) "is so severe sometimes that [she] needs strong pain medicine and muscle relaxant and bed rest." PFR File, Tab 1 at 5. Dr. El-Mawan read the MRI as showing disc degeneration at the level of L4-L5, with diffuse disc bulge, thickening of ligamentum flavum, hypertrophy of the facet resulting in mild to moderate central canal and moderate to severe bilateral foramina stenosis, and disc degeneration at the level of L5-S1 with diffuse disc bulge and bilateral facet hypertrophy causing moderate central canal and bilateral foramina stenosis. He repeated that the appellant will need to be on strong pain medication and muscle relaxants when the pain flares up, and he advises her to stay off any work commitments until she sees a back specialist to whom he would refer her. *Id.*

The administrative judge found that the appellant failed to show that, based on her medical condition, there was any service deficiency in her performance, conduct, or attendance when she was last on the job, prior to her indefinite suspension. Initial Decision at 3, 7-8. Moreover, because she has not been at work since July 26, 2011, the proffered medical documentation cannot support a finding that it caused an actual service deficiency. And, while the documentation is probative, we find that it is insufficient to show that the appellant's condition is incompatible with working in general, working in a particular line of work, or working in a particular type of setting, *see Henderson v. Office of Personnel Management*, [117 M.S.P.R. 313](#), ¶ 16 (2012), and that therefore it does not establish her entitlement to disability retirement.

We note, however, that, because the appellant is still an agency employee, she can file a new application for disability retirement now or in the future if her condition worsens. [5 C.F.R. § 831.1203\(a\)\(2\)](#).

**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](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.