UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

JOEL LOPEZ, Appellant,	DOCKET NUMBER DA-0752-10-0464-I-1
v.	
UNITED STATES POSTAL SERVICE, Agency.	DATE: January 18, 2013

THIS ORDER IS NONPRECEDENTIAL[1]

Charles M. Tillman, Dallas, Texas, for the appellant.

Richard C. Mosher, Esquire, Dallas, Texas, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

ORDER

This case was forwarded to the Board by the administrative judge, who determined that a pleading filed by the appellant in April 2012 was a petition for review of an initial decision issued in February 2011 in the above-entitled action.

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[1] A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

Because we determine that the April 2012 pleading was in fact a new appeal, we FORWARD it to the regional office for adjudication as such.

BACKGROUND

In May 2010, the appellant filed an appeal alleging that the agency failed to restore him to duty following his partial recovery from a compensable injury and had constructively suspended him. Initial Appeal File (IAF), Tab 1. In an initial decision issued on February 3, 2011, the administrative judge dismissed the appeal for lack of jurisdiction, finding that the appellant had failed to make the requisite nonfrivolous allegations. IAF, Tab 11. More than a year later, in April 2012, the appellant submitted a completed MSPB Form 185 (Appeal Form) to the Dallas Regional Office. In item 13, which asks what personnel action(s) is being challenged, the appellant checked two boxes: Suspension for more than 14 days; and Failure to restore. In item 18, the appellant stated that the agency had failed to restore him following his partial recovery from a compensable injury and that the agency had effectively suspended him. Attached to the appeal form was a Department of Labor Form CA-17 (Duty Status Report) dated February 7, 2012, which contained information about the appellant's then-current medical restrictions. Nothing in this filing referred to the initial decision issued on February 3, 2011. Nevertheless, the Dallas Regional Office forwarded this pleading to the Clerk of the Board in Washington, D.C., for processing as a petition for review of the February 2011 initial decision. The Clerk of the Board notified the appellant and the agency that the "petition for review" appeared to be untimely filed and warned that the petition might be dismissed for that reason. Neither the appellant nor the agency responded to that notice.

ANALYSIS

Under the circumstances of this case, we conclude that the appellant's April 3, 2012 filing should have been treated as a new petition for appeal. The appellant used MSPB Form 185, which is specifically designed and intended for

filing new appeals with the Board. The filing did not even mention the February 2011 initial decision, much less argue that it was incorrectly decided. In addition, the appellant attached new medical evidence regarding his ability to work that post-dated the February 2011 initial decision. Finally, we note that agencies have an ongoing obligation to "make every effort" to restore to duty an individual who has partially recovered from a compensable injury. 5 C.F.R. § 353.302(d). Under these circumstances, there was no basis for treating the pleading as anything other than a new appeal.[2]

ORDER

For the reasons discussed above, we FORWARD this case to the regional office for adjudication as a new appeal.

FOR THE BOARD:

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William D. Spencer
Clerk of the Board

Washington, D.C.

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[2] If the appellant's April 2012 pleading were considered as a petition for review, it would be appropriate to dismiss it as untimely filed without good cause shown for the delay, as it was filed about a year after the deadline for timely filing, and the appellant did not respond to the Clerk of the Board's timeliness notice. *See* 5 C.F.R. § 1201.114(d) & (f) (Jan. 1, 2012).