

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

JAMES R. WELCOME,
Appellant,

DOCKET NUMBER
AT-0752-12-0469-I-1

v.

DEPARTMENT OF THE NAVY,
Agency.

DATE: February 5, 2013

THIS FINAL ORDER IS NONPRECEDENTIAL¹

James R. Welcome, Pensacola, Florida, pro se.

Bob D. Brown, Pensacola, Florida, 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 his alleged involuntary retirement appeal for lack of jurisdiction. Generally, we grant petitions such as this one only when: the initial decision

¹A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

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\(b\)](#).

In his petition for review, the appellant essentially reasserts his argument from below that the agency knew that it could not remove him for excessive absences based on his use of approved sick leave. Petition for Review (PFR) File, Tab 1 at 8-9; Initial Appeal File (IAF), Tab 1 at 6, 8-9; Tab 3 at 4-6. In support of this argument, the appellant relied on *Holderness v. Defense Commissary Agency*, [75 M.S.P.R. 401](#) (1997), which he cited for the proposition that a federal agency cannot remove an employee for excessive use of approved sick leave. IAF, Tab 1 at 9; Tab 3 at 5. The administrative judge properly rejected this argument in the initial decision, correctly finding that the agency had a valid basis for removing the appellant for excessive use of approved sick leave based on the Board's decision in *McCauley v. Department of the Interior*,

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.

[116 M.S.P.R. 484](#) (2011), which overruled *Holderness*. IAF, Tab 6, Initial Decision (ID) at 5. The administrative judge explained that in *McCauley* the Board held that whether the leave used is sick leave, annual leave, Leave Without Pay, or Absence Without Leave is not dispositive to a charge of excessive absences because the efficiency of the service may suffer in the absence of an employee's services.³ *Id.* (citing *McCauley*, [116 M.S.P.R. 484](#), ¶ 10). The administrative judge found that “the record contains nothing to even suggest that the agency's reasons for the proposed removal could not be substantiated.” ID at 6. We discern no reason to disturb this finding.

The appellant also argues on review that, because he was removed for medical inability to perform the duties of his position, his case is “a prime example of [t]he Bruner [p]resumption and is within the jurisdiction of the Merit Systems Protection Board.” PFR File, Tab 1 at 9-11. In *Bruner v. Office of Personnel Management*, [996 F.2d 290](#), 294 (Fed. Cir. 1993), our reviewing court held that an employee's removal for physical inability to perform the essential functions of his position constitutes prima facie evidence that he is entitled to disability retirement; the burden of production then shifts to the Office of Personnel Management (OPM) to produce evidence sufficient to support a finding that the applicant is not entitled to disability retirement benefits; and, if OPM produces such evidence, the applicant must then come forward with evidence to rebut OPM's assertion that he is not entitled to benefits.

The appellant's reliance on *Bruner* is misplaced. In an appeal of a decision denying disability retirement, *Bruner* may support an assertion that a person is

³ However, to the extent that a charge of excessive absence is based upon use of approved leave, the agency must prove with respect to those absences that “the employee was absent for compelling reasons beyond his or her control so that agency approval or disapproval was immaterial because the employee could not be on the job.” *McCauley*, [116 M.S.P.R. 484](#), ¶ 12 (quoting *Cook v. Department of the Army*, [18 M.S.P.R. 610](#), 611-12 (1984)).

entitled to disability retirement. *Bruner* has no relevance to this alleged involuntary retirement appeal, however.

For the first time on review the appellant alleges that he was coerced to retire because of racial discrimination and retaliation for his prior protected equal employment opportunity (EEO) activity. PFR File, Tab 1 at 7-8. The Board will not consider an argument raised for the first time in a petition for review absent a showing that it is based on new and material evidence not previously available despite the party's due diligence. *Banks v. Department of the Air Force*, [4 M.S.P.R. 268](#), 271 (1980). The appellant has made no such showing.

In any event, even if the Board were to consider the appellant's discrimination and retaliation claims, they provide no reason to disturb the initial decision. The appellant is essentially arguing that the agency made working conditions so unpleasant that his separation from service was involuntary. PFR File, Tab 1 at 7-8, 16. In cases where intolerable working conditions are alleged, the Board will find an action involuntary only if the employee demonstrates that the employer or agency engaged in a course of action that made working conditions so difficult or unpleasant that a reasonable person in that employee's position would have felt compelled to resign or retire. *Markon v. Department of State*, [71 M.S.P.R. 574](#), 577 (1996). When an appellant raises allegations of discrimination and reprisal in connection with an involuntariness claim, evidence of discrimination may be considered only in terms of the standard for voluntariness. *Id.* at 578. Thus, in an involuntary retirement or resignation appeal, evidence of discrimination or EEO retaliation goes to the ultimate question of coercion, i.e., whether under all of the circumstances working conditions were made so difficult by the agency, that a reasonable person in the employee's position would have felt compelled to resign or retire. *Id.*

Applying the standard set forth in *Markon*, we find that the appellant failed to nonfrivolously assert that his daily working conditions were so intolerable that a reasonable person in his position would have felt compelled to retire. While the

appellant repeatedly claims on review that he was subjected to discrimination and retaliation, PFR File, Tab 1 at 6-9, 14-16, the only specific instance of alleged retaliation he cites is an October 5, 2007 incident in which his supervisor informed him that he had to take annual leave if he wanted to walk and have lunch during his lunch break. *Id.* at 6. An employee is not guaranteed a working environment free of stress, however. Dissatisfaction with work assignments, a feeling of being unfairly criticized, or difficult or unpleasant working conditions are generally not so intolerable as to compel a reasonable person to retire. *Miller v. Department of Defense*, [85 M.S.P.R. 310](#), ¶ 32 (2000). Based on our review of the record, we find that the appellant's allegations that he was coerced to retire based on discrimination and retaliation do not constitute nonfrivolous allegations of Board jurisdiction.

**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. See [5 U.S.C. § 7703\(b\)\(1\)\(A\)](#) (as rev. eff. Dec. 27, 2012). 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](#)) (as rev. eff. Dec. 27, 2012). You may read this law as well as other sections of the United States Code, at our website, <http://www.mspb.gov/appeals/uscode/htm>. 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.