



U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for February 12, 2021

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NONPRECEDENTIAL COURT DECISIONS

Harty v. Office of Personnel Management, No. [2020-2133](#) (Fed. Cir. Feb. 11, 2021) (MSPB Docket No. NY-844E-20-0153-I-1): The court affirmed the administrative judge's initial decision that upheld the Office of Personnel Management's (OPM) final decision denying the petitioner's application for disability retirement benefits. OPM denied the petitioner's disability retirement application on the basis that her job-related injury did not render her disabled from useful and efficient service. After reviewing the medical evidence, the administrative judge affirmed. The court dismissed the petitioner's appeal because she sought only to challenge the administrative judge's evaluation of the medical evidence. This sort of re-weighing of evidence is precluded by 5 U.S.C. § 8347(c), and thus, the court lacked jurisdiction to review the petitioner's fact-based challenge.

Shu v. Merit Systems Protection Board, No. [2020-2055](#) (Fed. Cir. Feb. 10, 2021) (MSPB Docket No. SF-0842-20-0488-I-1): The court affirmed the administrative judge's initial decision that dismissed the petitioner's Federal Employees' Retirement System (FERS) basic retirement appeal for lack of jurisdiction. After separating from Federal service, the petitioner sought advice from OPM on filing a retirement application, but OPM never responded to his inquiries. On appeal, the administrative judge found, and the court agreed, that OPM

never issued a final decision, or any decision, affecting the petitioner's rights or interests under FERS that would vest the Board with jurisdiction over the matter. This case did not fall under the narrow exception that the Board may assume jurisdiction over such an appeal when OPM fails or refuses to issue a final decision because the petitioner never even sought such a decision by filing a retirement application. The court rejected the petitioner's allegation that the administrative judge was biased.

Zachariasiewicz v. Merit Systems Protection Board, No. [2020-1782](#) (Fed. Cir. Feb. 8, 2021) (MSPB Docket No. DC-1221-18-0556-W-2): The court affirmed the administrative judge's initial decision that dismissed the petitioner's individual right of action appeal as untimely refiled without good cause shown for the delay. The administrative judge granted the petitioner's motion, over the respondent agency's objection, to dismiss his appeal without prejudice pending the outcome of equal employment opportunity litigation. The administrative judge set a refiling deadline of 90 days, but the petitioner refiled approximately 11 months late. The administrative judge considered the factors generally relevant to determine whether there is good cause to waive a refiling deadline, and the court found that the administrative judge did not abuse his discretion in finding no good cause shown.

Turner v. Merit Systems Protection Board, No. [2020-1650](#) (Fed. Cir. Feb. 8, 2021) (MSPB Docket No. AT-3330-20-0125-I-1): The court affirmed the administrative judge's initial decision that dismissed the petitioner's Veterans Employment Opportunities Act of 1998 (VEOA) appeal for lack of jurisdiction. In 2016, the petitioner filed a VEOA appeal, but he withdrew it before the administrative judge ruled on the jurisdictional issue. In 2019, the petitioner filed a second VEOA appeal substantially similar to the first. The administrative judge dismissed that appeal for lack of jurisdiction, finding that the petitioner was attempting to relitigate his previously withdrawn appeal. The court agreed and found that the administrative judge properly apprised the petitioner of the consequences of his withdrawal prior to dismissing his 2016 appeal with prejudice.