

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

ROBERT D. ADLER,
Appellant,

DOCKET NUMBER
DC-0843-25-0238-I-1

v.

OFFICE OF PERSONNEL
MANAGEMENT,
Agency.

DATE: September 2, 2026

THIS FINAL ORDER IS NONPRECEDENTIAL¹

Robert D. Adler, Silver Spring, Maryland, pro se.

Eva Ukkola, Angerlia D. Johnson, and Tynika A. Johnson,
Washington, D.C., for the agency.

BEFORE

James J. Woodruff, II, Chairman
Henry J. Kerner, Vice Chairman

FINAL ORDER

The appellant has filed a petition for review of the initial decision, which dismissed for lack of jurisdiction his appeal of an Office of Personnel Management (OPM) reconsideration decision after OPM rescinded its decision. Generally, we grant petitions such as this one only in the following

¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

circumstances: 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 administrative 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. Title 5 of the Code of Federal Regulations, section 1201.115 (5 C.F.R. § 1201.115). After fully considering the filings in this appeal, 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, which is now the Board's final decision. 5 C.F.R. § 1201.113(b).

BACKGROUND

On December 10, 2024, OPM issued the appellant a final reconsideration decision denying his request for a survivor annuity. Initial Appeal File (IAF), Tab 1 at 7-8. OPM determined that the appellant was not eligible for survivor benefits because he did not show, based on the information in OPM's file, that, at the time of his father's death, he was an unmarried dependent child who was incapable of self-support because of mental or physical disability incurred before age 18, within the meaning of 5 U.S.C. § 8341(4)(B). *Id.*

The appellant timely filed an appeal with the Board. *Id.* at 1. During the course of the appeal, he submitted additional medical and other documentation in support of his claim. *See* IAF, Tab 8 at 1-10. OPM subsequently filed a motion to dismiss the appeal, stating that "[a]fter review of the retirement file on appeal and the additional submissions of the appellant, OPM will rescind its final decision to allow the adult disabled child survivor annuity benefit," and it requested that the appeal be dismissed for lack of jurisdiction. IAF, Tab 10 at 4.

OPM stated, “[o]nce this appeal is dismissed and final, OPM will remand the case back to survivor processing to award the benefit” to the appellant. *Id.* at 5. On May 8, 2025, the administrative judge issued an initial decision, without holding the requested hearing, that granted the agency’s motion and dismissed the appeal for lack of jurisdiction. IAF, Tab 12, Initial Decision (ID) at 1-2. The administrative judge noted that if OPM failed to properly grant the appellant retirement benefits as promised, he could file a new Board appeal from any future final OPM decision related to that issue. ID at 2.

On July 1, 2025, the appellant filed a petition for review claiming that OPM had not yet awarded him his survivor annuity benefit as promised. Petition for Review (PFR) File, Tab 1 at 1-2. The Office of the Clerk of the Board notified the appellant that his appeal was untimely filed because it was not postmarked or received on or before June 12, 2025, and it informed him of how to file a motion to accept the filing as timely or to waive the time limit for good cause. PFR File, Tab 2 at 2. On July 23, 2025, OPM submitted a response to the appellant’s petition for review contending that the case was “moot” because “[t]he needed actions on this case have been taken.” PFR File, Tab 4 at 3. OPM attached a letter it had mailed to the appellant dated the same day as its filing that notified him that it had rescinded the final reconsideration decision, completed work on his survivor benefits, and that he would “receive [his] first payment shortly.” *Id.* at 4. The appellant submitted a motion to waive the filing deadline for good cause, postmarked July 22, 2025, and received by the Board on July 29, stating that he waited to file his petition for review until July to see if payment was deposited into his bank and that he thought the deadline was 35 days after June 12, 2025. PFR File, Tab 5 at 1. He also stated, “in the letter from the Board, it says if the OPM failed to grant the retirement funds you can file a new appeal which is what I’m trying to do with the Petition for Review.” *Id.*

Given the overlapping period between OPM’s response to the petition for review and the appellant’s last submission with his motion to waive the filing

deadline for good cause, the Board ordered OPM to update the Board as to the status of the case and provided the appellant with an opportunity to reply. PFR File, Tab 6. OPM responded, noting that the appellant was in active pay status, and it submitted copies of its payment records. PFR File, Tab 7. The appellant did not reply.

DISCUSSION OF ARGUMENTS ON REVIEW

The Board's regulations provide for a waiver of the time limit for filing a petition for review upon a showing of good cause.² 5 C.F.R. § 1201.114(g). Here, although the appellant's petition for review was filed over 2 weeks late, based on the circumstances presented and his confusion over not timely receiving the benefits promised, and because he is proceeding pro se, we find that he has shown that good cause exists to waive the time limit, and so we consider his petition for review. *See Alonzo v. Department of the Air Force*, 4 M.S.P.R. 180, 183-84 (1980) (explaining that "good cause" is an elastic concept that entitles an employee to the application of broad equitable principles of justice and good conscience). Additionally, there is no evidence suggesting that OPM would be prejudiced by a waiver of the filing time limit. *See Moorman v. Department of the Army*, 68 M.S.P.R. 60, 63 (1995), *aff'd*, 79 F.3d 1167 (Fed. Cir. 1996) (Table) (explaining that, once good cause has been demonstrated, the Board must determine whether the agency has shown that it would be prejudiced by a waiver of the time limit).

² To establish good cause, a party must show that he exercised due diligence or ordinary prudence under the particular circumstances of the case. *Alonzo v. Department of the Air Force*, 4 M.S.P.R. 180, 184 (1980). To determine whether an appellant has shown good cause, the Board will consider the length of the delay, the reasonableness of his excuse and his showing of due diligence, whether he is proceeding pro se, and whether he has presented evidence of the existence of circumstances beyond his control that affected his ability to comply with the time limits or of unavoidable casualty or misfortune that similarly shows a causal relationship to his inability to timely file his petition for review. *Gaetos v. Department of Veterans Affairs*, 121 M.S.P.R. 201, ¶ 5 (2014); *Moorman v. Department of the Army*, 68 M.S.P.R. 60, 62-63 (1995), *aff'd*, 79 F.3d 1167 (Fed. Cir. 1996) (Table).

As the administrative judge correctly explained in the initial decision, if OPM completely rescinds a reconsideration decision, its rescission divests the Board of jurisdiction over the appeal in which that reconsideration decision is at issue, and the appeal must be dismissed. ID at 2; *see Frank v. Office of Personnel Management*, 113 M.S.P.R. 164, ¶ 7 (2010). Here, OPM indicated in its motion to dismiss that it was going to rescind its final reconsideration decision, and it confirmed in its petition for review response that “OPM has rescinded its final decision to deny benefits.” PFR File, Tab 4 at 4; *see also* IAF, Tab 10 at 4. Although the appellant raised in his petition for review that he had still yet to receive any actual benefits, he did not dispute that OPM rescinded its final reconsideration decision or identify any basis to find that the Board retains jurisdiction over this appeal despite that rescission. Accordingly, we find that the Board does not have jurisdiction over this appeal and that the administrative judge correctly dismissed it. *See Frank*, 113 M.S.P.R. 164, ¶ 7.

The appellant stated in his motion to waive the time limit on petition for review that he wanted to file a new appeal, consistent with the administrative judge’s statement in the initial decision, because OPM had failed to provide him the retirement benefits as promised. PFR File, Tab 5 at 1; ID at 2. In response to the Board’s order asking for an update, however, OPM provided evidence showing that the appellant is currently receiving monthly payments, and it does not appear as though the appellant objects to this representation. PFR File, Tab 7 at 3-8. Nevertheless, if the appellant is dissatisfied with any subsequent OPM reconsideration or final decision regarding his request for survivor benefits, he may appeal that decision to the Board. *See* 5 U.S.C. § 8461(e)(1); 5 C.F.R. § 841.308. Any future appeal must be filed within the time limits set forth in the Board’s regulations. *See* 5 C.F.R. § 1201.22(b)(1).

NOTICE OF APPEAL RIGHTS³

You may obtain review of this final decision. 5 U.S.C. § 7703(a)(1). By statute, the nature of your claims determines the time limit for seeking such review and the appropriate forum with which to file. 5 U.S.C. § 7703(b). Although we offer the following summary of available appeal rights, the Merit Systems Protection Board does not provide legal advice on which option is most appropriate for your situation and the rights described below do not represent a statement of how courts will rule regarding which cases fall within their jurisdiction. If you wish to seek review of this final decision, you should immediately review the law applicable to your claims and carefully follow all filing time limits and requirements. Failure to file within the applicable time limit may result in the dismissal of your case by your chosen forum.

Please read carefully each of the three main possible choices of review below to decide which one applies to your particular case. If you have questions about whether a particular forum is the appropriate one to review your case, you should contact that forum for more information.

(1) Judicial review in general. As a general rule, an appellant seeking judicial review of a final Board order must file a petition for review with the U.S. Court of Appeals for the Federal Circuit, which must be received by the court within **60 calendar days** of the date of issuance of this decision. 5 U.S.C. § 7703(b)(1)(A).

³ Since the issuance of the initial decision in this matter, the Board may have updated the notice of review rights included in final decisions. As indicated in the notice, the Board cannot advise which option is most appropriate in any matter.

If you submit a petition for review to the U.S. Court of Appeals for the Federal Circuit, you must submit your petition to the court at the following address:

U.S. Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Additional information about the U.S. 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, 10, and 11.

If you are interested in securing pro bono representation for an appeal to the U.S. Court of Appeals for the Federal Circuit, you may visit our website at <http://www.mspb.gov/probono> for information regarding pro bono representation for Merit Systems Protection Board appellants before the Federal Circuit. The Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.

(2) Judicial or EEOC review of cases involving a claim of discrimination. This option applies to you only if you have claimed that you were affected by an action that is appealable to the Board and that such action was based, in whole or in part, on unlawful discrimination. If so, you may obtain judicial review of this decision—including a disposition of your discrimination claims—by filing a civil action with an appropriate U.S. district court (*not* the U.S. Court of Appeals for the Federal Circuit), within **30 calendar days** after you receive this decision. 5 U.S.C. § 7703(b)(2); *see Perry v. Merit Systems Protection Board*, 582 U.S. 420 (2017). If you have a representative in this case, and your representative receives this decision before you do, then you must file with the district court no later than **30 calendar days** after your representative receives this decision. If the action involves a claim of discrimination based on

race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e-5(f) and 29 U.S.C. § 794a.

Contact information for U.S. district courts can be found at their respective websites, which can be accessed through the link below:

http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx.

Alternatively, you may request review by the Equal Employment Opportunity Commission (EEOC) of your discrimination claims only, excluding all other issues. 5 U.S.C. § 7702(b)(1). You must file any such request with the EEOC's Office of Federal Operations within **30 calendar days after you receive** this decision. 5 U.S.C. § 7702(b)(1). If you have a representative in this case, and your representative receives this decision before you do, then you must file with the EEOC no later than **30 calendar days after your representative receives** this decision.

If you submit a request for review to the EEOC by regular U.S. mail, the address of the EEOC is:

Office of Federal Operations
Equal Employment Opportunity Commission
P.O. Box 77960
Washington, D.C. 20013

If you submit a request for review to the EEOC via commercial delivery or by a method requiring a signature, it must be addressed to:

Office of Federal Operations
Equal Employment Opportunity Commission
131 M Street, N.E.
Suite 5SW12G
Washington, D.C. 20507

(3) Judicial review pursuant to the Whistleblower Protection Enhancement Act of 2012. This option applies to you only if you have raised claims of reprisal for whistleblowing disclosures under 5 U.S.C. § 2302(b)(8) or

other protected activities listed in 5 U.S.C. § 2302(b)(9)(A)(i), (B), (C), or (D). If so, and your judicial petition for review “raises no challenge to the Board’s disposition of allegations of a prohibited personnel practice described in section 2302(b) other than practices described in section 2302(b)(8), or 2302(b)(9)(A)(i), (B), (C), or (D),” then you may file a petition for judicial review either with the U.S. Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction.⁴ The court of appeals must receive your petition for review within **60 days** of the date of issuance of this decision. 5 U.S.C. § 7703(b)(1)(B).

If you submit a petition for judicial review to the U.S. Court of Appeals for the Federal Circuit, you must submit your petition to the court at the following address:

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Washington, D.C. 20439

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If you are interested in securing pro bono representation for an appeal to the U.S. Court of Appeals for the Federal Circuit, you may visit our website at <http://www.mspb.gov/probono> for information regarding pro bono representation for Merit Systems Protection Board appellants before the Federal Circuit. The

⁴ The original statutory provision that provided for judicial review of certain whistleblower claims by any court of appeals of competent jurisdiction expired on December 27, 2017. The All Circuit Review Act, signed into law by the President on July 7, 2018, permanently allows appellants to file petitions for judicial review of MSPB decisions in certain whistleblower reprisal cases with the U.S. Court of Appeals for the Federal Circuit or any other circuit court of appeals of competent jurisdiction. The All Circuit Review Act is retroactive to November 26, 2017. Pub. L. No. 115-195, 132 Stat. 1510.

Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.

Contact information for the courts of appeals can be found at their respective websites, which can be accessed through the link below:

http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx.

FOR THE BOARD:

Washington, D.C.

Gina K. Grippando

Gina K. Grippando
Clerk of the Board