UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

DONALD T. MCDOUGALL,
Petitioner,

v.

SOCIAL SECURITY ADMINISTRATION,
Respondent.

DOCKET NUMBER
CB-7521-10-0018-T-1

DATE: December 22, 2011

THIS FINAL ORDER IS NONPRECEDENTIAL[1]

Donald T. McDougall, Esquire, Friendsville, Maryland, pro se.

Nicole A. Schmid, Esquire, and Robert Drum, Esquire, Philadelphia, Pennsylvania, for the respondent.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

FINAL ORDER

The petitioner has filed a petition for review in this case asking us to reconsider the initial decision issued by the administrative law judge. We grant

[1] A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

petitions such as this one only when significant new evidence is presented to us that was not available for consideration earlier or when the administrative law judge made an error interpreting a law or regulation. The regulation that establishes this standard of review is found in Title 5 of the Code of Federal Regulations, section 1201.115 (5 C.F.R. § 1201.115). *See* 5 C.F.R. § 12101.140(a)(2) (an administrative law judge's initial decision will be subject to the procedures for filing a petition for review set forth under 5 C.F.R. part 1201, subpart C).

DISCUSSION OF ARGUMENTS ON REVIEW

In cases such as this one, where the employee alleges that the agency took actions that made working conditions so intolerable that he was driven to an involuntary retirement, the Board will find an action involuntary only if the employee demonstrates that the employer 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, 577-78 (1996). When allegations of discrimination and reprisal are alleged in connection with a determination of voluntariness, such evidence may only be addressed insofar as it relates to the issue of voluntariness and not whether the evidence would establish discrimination or reprisal as an affirmative defense. *See O'Brien v. Department of Agriculture*, 91 M.S.P.R. 139, ¶ 6 (2002).

The petitioner has not shown here that the administrative law judge erred in dismissing the petitioner's complaint for lack of jurisdiction without holding a hearing. On review, the petitioner argues that the administrative law judge failed to consider all of the facts and circumstances relating to the petitioner's decision to retire. The administrative law judge's finding that the petitioner failed to nonfrivolously allege that his retirement was involuntary is supported by the weight of the record evidence and the applicable law, and therefore we discern no

reason to disturb this finding. *See Crosby v. U.S. Postal Service*, 74 M.S.P.R. 98, 106 (1997) (finding no reason to disturb the administrative judge's findings where the administrative judge considered the evidence as a whole, drew appropriate inferences, and made reasoned conclusions); *Broughton v. Department of Health & Human Services*, 33 M.S.P.R. 357, 359 (1987). In any event, even if we were to consider the multiple circumstances and events which the petitioner alleges contributed to an intolerable working environment, we agree with the administrative law judge's finding that these circumstances and events, singularly and collectively, do not constitute nonfrivolous allegations of fact that his working conditions were so intolerable that he was forced to retire. Initial Decision (ID) at 22, 25.

While we acknowledge the petitioner's perception that his working conditions were not pleasant, an employee is not guaranteed a working environment that is free of stress. *Miller v. Department of Defense*, 85 M.S.P.R. 310, ¶ 32 (2000). 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 resign or retire. *Id.; see Baldwin v. Department of Veterans Affairs*, 109 M.S.P.R. 392, ¶¶ 19-20 (2008) (allegations of being assigned to onerous tasks, being unjustifiably threatened with discipline, and being subjected to unnecessary investigations did not suffice to prove an allegation of involuntary resignation). In addition, the petitioner fails to allege how the agency's actions could have forced a reasonable person with his specific medical conditions to retire. *See Henriksen v. Department of Energy*, 79 M.S.P.R. 213, ¶ 12 (1998) (holding that the relevant issue is whether a reasonable person with the employee's specific physical or mental condition would have felt forced to retire).

The petitioner's argument that the administrative law judge erroneously stated that the law requires more than a mere possibility of adverse health consequences lacks merit. While the petitioner cites *Taylor v. Environmental*

Protection Agency, 61 M.S.P.R. 188 (1994), in support of this argument, *Taylor* is distinguishable. Unlike the appellant in *Taylor*, the petitioner has not alleged a clear link between his conditions and alleged harassment on the part of Chief Administrative Law Judge George Mills. *See Taylor*, 61 M.S.P.R. at 193.

Additionally, contrary to the petitioner's assertion, the administrative law judge did not place "great weight" on the fact that the petitioner had not requested an accommodation. Rather, the administrative law judge considered this factor in the context of whether or not the petitioner made a nonfrivolous allegation that his retirement was compelled. We see no reason to disturb the initial decision on this point because it reflects that the administrative law judge considered the evidence as a whole, drew appropriate inferences, and made reasoned conclusions. *See Broughton*, 33 M.S.P.R. at 359.

Further, the petitioner's argument that the administrative law judge improperly considered the amount of time that lapsed between the petitioner's last incident with Chief Administrative Law Judge Mills and his retirement is unpersuasive. The most probative evidence of involuntariness "will usually be evidence in which there is a relatively short period of time between the employer's alleged coercive act[s] and the employee's retirement." *Terban v. Department of Energy*, 216 F.3d 1021, 1024 (Fed. Cir. 2000); *see Axsom v. Department of Veterans Affairs*, 110 M.S.P.R. 605, ¶¶ 15-16 (2009). Here, the administrative law judge correctly noted that, although the petitioner claimed he decided to retire immediately after his alleged last incident with Chief Administrative Law Judge Mills, he did not in fact retire until over four months after that date. ID at 23.

In addition, the petitioner appears to be confused over his burden of proving entitlement to a jurisdictional hearing and his burden of proving Board jurisdiction over his complaint. Contrary to what appears to be the petitioner's belief, the standard for establishing entitlement to a jurisdictional hearing is lower than that for establishing Board jurisdiction. Once an appellant makes

nonfrivolous claims of Board jurisdiction, then the appellant has a right to a hearing. *Garcia v. Department of Homeland Security*, 437 F.3d 1322, 1344 (Fed. Cir. 2006). At the hearing, however, the appellant must prove jurisdiction by a preponderance of the evidence. *Id*. The administrative law judge properly provided the petitioner with the correct standard for making nonfrivolous allegations of jurisdiction, and thus entitlement to a hearing, in an order to show cause and held him to that standard.[2] Moreover, contrary to the petitioner's assertion, in determining whether he was entitled to a jurisdictional hearing, the administrative law judge did not require him to prove coercion and/or duress. Rather, the administrative law judge required him to make nonfrivolous allegations casting doubt on the presumption of voluntariness. ID at 26.

Moreover, regarding the petitioner's argument that he was denied due process because the administrative law judge improperly denied discovery requests contained in his motion to compel dated November 24, 2010, the petitioner's failure to object below to the administrative law judge's discovery ruling precludes him from doing so on review. *See Tarpley v. U.S. Postal Service*, 37 M.S.P.R. 579, 581 (1988). In respect to the petitioner's argument that the administrative law judge set stricter filing deadlines for the petitioner than for the agency, the petitioner fails to show how the administrative law judge prejudiced his substantive rights, and thus fails to provide a basis on which to disturb the initial decision. *See Karapinka v. Department of Energy*, 6 M.S.P.R. 124, 127 (1981).

We have considered the petitioner's remaining arguments, including his allegations that the administrative law judge failed to consider that Chief Administrative Law Judge Mills violated the American Bar Association's Model

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[2] To the extent the administrative law judge may have erred by using "would" rather than "could" when describing the standard for making nonfrivolous allegations of fact in the initial decision, any such error did not prejudice the petitioner's substantive rights. *See Panter v. Department of the Air Force*, 22 M.S.P.R. 281, 282 (1984).

Code, Board precedent, federal law, and common standards of decent office behavior, and find that none of these arguments supports a determination that the initial decision should be overturned. The administrative law judge considered all of the alleged conduct and correctly determined that the petitioner failed to nonfrivolously allege that a reasonable person in the petitioner's position would not have felt compelled to retire.

Concerning the petitioner's assertions that the administrative law judge failed to address his prohibited personnel practices and disability discrimination claims, an appellant's affirmative defenses are not an independent source of jurisdiction. *See Garcia*, 437 F.3d at 1325 (the Board may not reach discrimination issues unless jurisdiction is established with respect to the adverse action alleged); *Davis v. Department of Defense*, 105 M.S.P.R. 604, ¶¶ 15-16 (2007) (absent an otherwise appealable action, claims of prohibited personnel practices cannot be considered). Therefore, in the absence of an appealable action, the Board lacks jurisdiction over the petitioner's prohibited personnel practices and disability discrimination claims.

After fully considering the filings in this appeal, we conclude that there is no new, previously unavailable, evidence and that the administrative law judge made no error in law or regulation that affects the outcome. 5 C.F.R. § 1201.115(d). Therefore, we DENY the petition for review. Except as modified by this Final Order, the initial decision of the administrative law judge is the Board's final decision.

NOTICE TO THE PETITIONER REGARDING YOUR FURTHER REVIEW RIGHTS

This is the Board's final decision in this matter. 5 C.F.R. § 1201.113. 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 your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. 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). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. 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:

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William D. Spencer
Clerk of the Board

Washington, D.C.