

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

MILLICENT P. PRESCOTT,
Appellant,

DOCKET NUMBER
DC-0752-11-0422-I-1

v.

UNITED STATES POSTAL SERVICE,
Agency.

DATE: November 9, 2011

THIS FINAL ORDER IS NONPRECEDENTIAL¹

Steve Newman, Esquire, New York, New York, for the appellant.

Norma B. Hutcheson, Esquire, Landover, Maryland, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, 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. We grant petitions such as this one only when significant new evidence is presented to us

¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

that was not available for consideration earlier or when the administrative 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).

DISCUSSION OF ARGUMENTS ON REVIEW

In her initial decision, the administrative judge found that the appellant made nonfrivolous allegations that she was able to work within certain restrictions, that she communicated her willingness to work, and that the agency prevented her from returning to work. Initial Decision at 4; *see Johnson v. U.S. Postal Service*, 110 M.S.P.R. 679, ¶ 9 (2009). The appellant does not dispute and we find no reason to disturb the administrative judge's findings on these issues.²

In her petition for review, the appellant essentially asserts that the agency failed to prove that it looked for available work for her. Petition for Review (PFR) File, Tab 1 at 2. She asserts that, while Ms. Willard-Ruffin claimed that she could not find available work within the appellant's medical restrictions, the appellant "ha[s] a witness" that maintains that he requested to have the appellant work in his unit but that Ms. Willard-Ruffin would not allow it. *Id.* at 1. Our review of the record indicates that the appellant failed to raise this assertion before the administrative judge. *See Banks v. Department of the Air Force*, 4 M.S.P.R. 268, 271 (1980) (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

² The appellant asserts in her petition for review that the medical documentation she provided to Ms. Taylor was the same type of information that had been deemed acceptable previously. Petition for Review File, Tab 1 at 1. Because we discern no reason to disturb the administrative judge's findings that the appellant made nonfrivolous allegations that she was able to work within certain restrictions, that she communicated her willingness to work, and that the agency prevented her from returning to work, the sole remaining issue, as recognized by the administrative judge, is whether the agency met its burden in showing that there was no light duty work available within the appellant's medical restrictions. *See Johnson*, 110 M.S.P.R. 679, ¶ 9.

material evidence not previously available despite the party's due diligence). Further, none of the documents submitted by the appellant with her petition for review substantiate this vague assertion, and each of the documents was also submitted into the record before the administrative judge. *See* Initial Appeal File (IAF), Tab at 10, Exhibit (Ex.) I at 7-8; *id.*, Ex. J at 59; *id.*, Ex. K at 1-2; PFR File, Tab 1 at 7-13. Thus, they are not new. *See Meier v. Department of the Interior*, 3 M.S.P.R. 247, 256 (1980). The appellant has failed to identify the witness, submit a sworn declaration from the witness supporting the appellant's assertion that work was actually available in another unit, or establish that her assertion is based on new and material evidence not previously available. Accordingly, this assertion is without merit.

With respect to light duty, the Employee and Labor Relations Manual provides only that the agency will give each request for light duty "careful attention" and will "reassign such employees *to the extent possible in the employee's office.*" IAF, Tab 8 at 86 (emphasis added). The appellant has failed to submit evidence disputing the testimony of Ms. Taylor and Ms. Willard-Ruffin that neither had light-duty work available for the appellant within her medical restrictions. *See* Initial Decision at 4-5; Hearing Tape (HT) 1B (testimony of Ms. Taylor); HT 2A (testimony of Ms. Willard-Ruffin). Moreover, while the appellant asserts in her petition for review that she has "a witness" who claimed that he sought to have the appellant work in his unit, as noted above, the appellant failed to make this assertion before the administrative judge and failed, even on review, to identify the witness or to provide any details substantiating her bald assertion.

While the appellant further asserts in her petition for review that she received the information for her District Reasonable Accommodation Committee appointment after the scheduled date, the evidence in the record does not support this assertion. *See* PFR File, Tab 1 at 2; IAF, Tab 8 at 67. Lastly, while the appellant vaguely asserts that her attorney representative did a "poor job" in

representing her before the administrative judge, the Board has consistently held that the appellant is responsible for the errors of her chosen representative. *Mauldin v. U.S. Postal Service*, 115 M.S.P.R. 513, ¶ 13 (2011); *Sofio v. Internal Revenue Service*, 7 M.S.P.R. 667, 670 (1981); PFR File, Tab 1 at 3.

After fully considering the filings in this appeal, we conclude that there is no new, previously unavailable, evidence and that the administrative 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 judge is the Board's final decision.

**NOTICE TO THE APPELLANT 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:

William D. Spencer
Clerk of the Board

Washington, D.C.