

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

JERALD BOND,
Appellant,

v.

DEPARTMENT OF ENERGY,
Agency.

DOCKET NUMBER
NY-0752-97-0298-I-1

DATE: JUN 18 1999

David B. Schultz, Esquire, Virginia Beach, Virginia, for the appellant.

Joan M. Shands, Esquire, Upton, New York, for the agency.

BEFORE

Ben L. Erdreich, Chairman
Beth S. Slavet, Vice Chair
Susanne T. Marshall, Member

OPINION AND ORDER

¶1 The agency has filed a timely petition for review of the March 6, 1998 initial decision that reversed the appellant's removal. For the reasons set forth below, we GRANT the agency's petition for review under 5 C.F.R. § 1201.115, SUSTAIN the initial decision's findings on the charges, REVERSE the initial decision's findings on disability discrimination, and MITIGATE the penalty to a 60-day suspension.

BACKGROUND

¶2 The agency removed the appellant from the position of GS-13 Health Physicist on March 7, 1997, based on two charges: absence without leave (AWOL) (10

specifications); and sleeping while on duty (9 specifications). All of the incidents underlying the charges occurred from October 8 to December 5, 1996. Initial Appeal File (IAF), Tab 4, subtabs 4a, 4b, 4e. The appellant filed a timely petition for appeal of his removal. IAF, Tab 1.

¶3 After holding a hearing, the administrative judge sustained the AWOL charge based on six specifications she found proven. She found that the appellant had stipulated that he was not at his duty station and that he was scheduled to work on those occasions. She further found, *inter alia*, that the appellant should have known that he had to substantiate his need to be absent but that he failed to submit evidence to excuse his absences, that the agency was not obligated to accommodate his transportation problems, and that the failure of his alarm clock did not excuse his absence. Initial Decision (I.D.) at 7-15. The administrative judge sustained the sleeping while on duty charge based on all nine specifications. She found that the appellant stipulated he was asleep on the occasions cited, and that other employees observed him sleeping. I.D. at 15-16.

¶4 The administrative judge reversed the appellant's removal, however, because she found that he proved his affirmative defense of disability discrimination. She found that the appellant is a disabled person, after noting that the agency had stipulated that the appellant suffers from gastroesophageal reflux disease (GERD) and finding that his condition substantially limited his ability to work. She acknowledged but disagreed with the agency's contention that the evidence did not show a causal connection between the appellant's behavior and his condition or between his behavior and Prilosec, the medication he took for his condition. In this regard, she found that the record was replete with evidence of the appellant's difficulty in remaining alert; that the appellant told proposing official Carson L. Nealy that he had trouble sleeping at night; that his doctor, Vinit Shah, told Nealy that GERD could result in severe heartburn and cause the appellant to wake up in the middle of the night; and that the appellant gave Nealy literature from the

manufacturer of Prilosec, which stated that the medication causes fatigue and somnolence in a small number of patients. I.D. at 17-18.

¶5 The administrative judge found that the charge of sleeping while on duty “resulted in the removal action.” I.D. at 18. She acknowledged deciding official Cherri J. Langenfeld’s testimony that either the AWOL charge or the sleeping while on duty charge warranted the appellant’s removal. However, she cited the testimony of the appellant’s team leader, Michael Holland, that there was a “general feeling” that the office lost the respect of its contractor because the appellant was observed sleeping, and Nealy’s testimony that, when he previously suspended the appellant for seven days, he told the appellant that he would recommend removal if the appellant continued to sleep on duty. I.D. at 18.

¶6 The administrative judge further found that the appellant articulated a reasonable accommodation. She found it undisputed that he requested a flexible schedule or permission to make up lost time and that management rejected the request. She further found that the appellant could perform his duties when he was alert. Thus, she found that the appellant was a qualified disabled person. She also found that the agency offered no legitimate justification for not providing reasonable accommodation, finding that the agency did not show that placing the appellant on a flexible schedule would constitute an undue hardship. Accordingly, she reversed the appellant’s removal. I.D. at 18-19.

¶7 The appellant has filed a timely response opposing the agency’s petition for review. Petition for Review (PFR) File, Tab 4.

ANALYSIS

Merits

¶8 The agency asserts that the administrative judge erred in finding that it removed the appellant solely because of the sleeping on duty charge. It contends, inter alia, that the administrative judge disregarded evidence that Langenfeld would have removed the appellant based on the AWOL charge alone. PFR at 4-14. We do not agree. The AJ did not disregard Langenfeld's testimony, as the agency argues.

¶9 Rather, the AJ also took into account testimony bearing on the penalty selection from other agency witnesses, Supervisor Michael Holland and proposing official Dr. Carson Nealy. Considering all of that evidence, the AJ stated:

Although Ms. Langenfeld testified that either charge--the AWOL charged or the sleeping on duty charge--would have warranted the appellant's removal, I find that it was the sleeping on duty that resulted in the removal action. Mr. Holland testified that there was a "general feeling" that the office lost the respect of the contractor because the appellant was observed sleeping. ...Moreover, Dr. Nealy testified that, when he imposed the seven-day suspension, he told the appellant that if he continued to sleep on duty, he (Dr. Nealy) would recommend removal action.

Initial Decision (ID), IAF Tab 13 at 18. *See also* Holland testimony, Transcript at 158.

¶10 The AJ explicitly credited this additional testimony to conclude that the sleeping on duty incidents were regarded by the agency as the more serious of the misconduct alleged, and that this misconduct was the primary basis for the choice of the removal penalty.

¶11 The agency contests the administrative judge's decision not to sustain one of the AWOL specifications. PFR at 5 n.1. We find it unnecessary to address this issue because, as the administrative judge found, the remaining specifications are

sufficient to sustain the charge. *See Crutchfield v. Department of the Navy*, 73 M.S.P.R. 444, 448 (1997). The appellant did not file a petition for review or a cross petition for review contesting the administrative judge's findings on the charges. Thus, we sustain the initial decision's finding that the agency proved the charges. *See, e.g., Fowler v. U.S. Postal Service*, 77 M.S.P.R. 8, 15, *review dismissed*, 135 F.3d 773 (Fed. Cir. 1997) (Table); *Bologna v. Department of Defense*, 73 M.S.P.R. 110, 114, *aff'd*, 135 F.3d 774 (Fed. Cir. 1997) (Table). We further find that discipline for the sustained charges promotes the efficiency of the service. *See, e.g., Davis v. Veterans Administration*, 792 F.2d 1111, 1112-13 (Fed. Cir. 1986).

Disability Discrimination

¶12 The agency asserts that the administrative judge erred in finding that the appellant proved his affirmative defense of disability discrimination. PFR at 14-19. We agree.

¶13 To prove disability discrimination, the appellant must show, *inter alia*, that he is disabled or perceived to be disabled; and that he is otherwise qualified, with or without reasonable accommodation, for the position in question. *See, e.g., Hunter v. Department of the Air Force*, 77 M.S.P.R. 589, 595 (1998). An appellant may show that he is disabled by showing, *inter alia*, that he suffers from a physical or mental impairment that substantially limits one or more of his major life activities. *See, e.g., Robinson v. Department of the Air Force*, 77 M.S.P.R. 486, 490 (1998); *see also Bragdon v. Abbott*, 118 S. Ct. 2196, 2202 (1998); 2 EEOC Compl. Man. (BNA) § 902 at 3-5 (1995).¹

¹ *Bragdon* and the EEOC Compliance Manual specifically address discrimination under the Americans with Disabilities Act of 1990 (ADA). However, the Equal Employment Opportunity Commission has noted that, under the Rehabilitation Act Amendments of 1992, the ADA definition of the term "disability" also applies to sections 501, 503, and 504 of the Rehabilitation Act of 1973. *See* 2 EEOC Compl. Man. (BNA) § 902 at 1 n.3.

¶14 “Major life activity” means a function such as caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, working, sitting, standing, lifting, and reaching. *See, e.g., Patterson v. Department of the Air Force*, 74 M.S.P.R. 648, 659-60 (1997). A person is substantially limited in a major life activity if he is unable to perform the activity as compared to the average person in the general population; or is significantly restricted as to the condition, manner, or duration under which he can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity. *Id.* at 660. Three factors are considered in determining whether a person’s impairment substantially limits a major life activity: its nature and severity; how long it will last or is expected to last; and, its permanent or long term impact, or expected impact. *See, e.g., Bell v. Babbitt*, EEOC No. 01964882 at 3 (Sept. 4, 1998).

¶15 The extent to which an impairment limits an individual’s major life activities should be assessed without regard to the availability of mitigating measures. Specifically, individuals with impairments that substantially limit major life activities are individuals with disabilities, even if medication controls the effects of the impairments. *See* 2 EEOC Compl. Man. (BNA) § 902 at 35-36. However, both the effect of the condition and the effect of the medication taken for the condition may be considered in determining whether an appellant is disabled. *See, e.g., Overton v. Reilly*, 977 F.2d 1190, 1195 (7th Cir. 1992); *Guice-Mills v. Derwinski*, 967 F.2d 794, 796 (2d Cir. 1992); *Fehr v. McLean Packaging Corp.*, 860 F.Supp. 198, 200 (E.D. Pa. 1994).

¶16 As the administrative judge found, the agency stipulated that the appellant has a physical impairment, i.e., GERD. IAF, Tab 8, Appellant’s Ex. A. However, we find that he has failed to show that his impairment, or the medication he took for it, Prilosec, substantially limited a major life activity.

¶17 Concerning the condition of GERD itself, the appellant testified without dispute that it is considered permanent. Tr. at 321. However, the effect of the Prilosec cannot be considered permanent because the appellant also testified that he was later placed on another drug that did not have the same adverse effects. Tr. at 330-31.

¶18 Moreover, the appellant has not shown that his condition is of a severity to warrant finding that it substantially limited a major life activity. The only documents from doctors that the appellant submitted possibly supporting his claim of disability were an October 21, 1996 letter from Shah to Nealy submitted in connection with the appellant's previous suspension, IAF, Tab 4, subtab 4i7, and a May 15, 1997 letter from Dr. Debrah B. Aronson to the appellant's representative, IAF, Tab 8, Appellant's Ex. E. Shah's letter stated that the appellant had been under his care since August 30, 1996; that he first saw the appellant for "moderately severe" GERD for which the appellant had an endoscopy² on September 10, 1996; that he saw the appellant again on September 18 and October 9, 1996; and that the appellant "did mention to me that he had received a letter from [Nealy] regarding his absences from work, and these absences were due to his medical condition for which I am treating him." IAF, Tab 4, subtab 4i7. However, the letter did not indicate that the appellant's condition was disabling, restrict the appellant's activities or working conditions, or explain the effect of the appellant's condition on his major life activities.

¶19 Nealy subsequently contacted Shah concerning the appellant's condition. In his October 23, 1996 memorandum summarizing their conversation, he stated that Shah stated that the appellant had moderately severe GERD but that "it could not

² An endoscopy is a test that involves passing a small lighted flexible tube through the mouth into the esophagus and stomach to examine for abnormalities. IAF, Tab 8, Appellant's Ex. D at 7. The appellant testified that the endoscopy revealed ulcerations on his esophagus. Tr. at 284.

account for all of his problems of not coming to work and sleeping on the job,” “that GERD could result in severe heart burn in the middle of the night which might awaken [the appellant],” and that “the medication was not the cause of [the appellant’s] sleeping or work conduct problems.” IAF, Tab 4, subtab 4i5; *see also* Tr. at 112-13. Thus, at least according to Nealy’s memorandum, Shah did not state that either the appellant’s GERD or his medication impaired his major life activities. Although the appellant testified that Shah told him that the medication could make him sleepy, Tr. at 335-36, he also testified that Shah did not see why the Prilosec would cause the appellant problems and that he considered the three percent of people adversely affected by the Prilosec to be negligible, *id.* at 333.

¶20 Aronson’s letter to the appellant’s representative stated that the appellant “reports experiencing urticaria, lethargy and fatigue which interfered with his ability to work,”³ that symptoms of GERD can be “extremely severe and can impair a person’s ability to be employed,” and that side effects from Prilosec “do occur and have the potential to significantly impair a person’s functional ability.” IAF, Tab 8, Appellant’s Ex. E. However, she also stated that side effects of somnolence and urticaria were reported infrequently. *Id.* Thus, although Aronson reported that GERD and Prilosec, in general, could impair an individual’s functional abilities, she did not state that the appellant’s condition or the Prilosec he took for it was disabling or caused such a significant impairment as to limit a major life activity.

¶21 The appellant also submitted a manufacturer’s insert describing Prilosec. IAF, Tab 8, Appellant’s Ex. H. That insert, however, lists adverse reactions of fatigue and somnolence as occurring in less than 1 percent of patients. *Id.*

³ Urticaria is an eruption of itching wheals, usually of systemic origin. PDR Medical Dictionary (1st ed. 1995).

Moreover, the evidence submitted by the appellant indicated that, with effective treatment, an individual suffering from GERD could become symptom free. *See* IAF, Tab 7, Appellant's Ex. D at 4, 13. Thus, the evidence does not show that the appellant's condition or medication is expected to have a long-term impact on his ability to perform major life activities.

¶22 Therefore, because the appellant has failed to show that his GERD, or the Prilosec he took for it, substantially limited a major life activity, he has not shown that he is “disabled.”

¶23 The agency asserts that, even if the appellant proved that he was disabled, it reasonably accommodated him. It notes that it offered to place the appellant on leave without pay whenever it became apparent that he was unable to stay awake.⁴ *See, e.g.*, IAF, Tab 4, subtab 4b at 5; Tr. at 62, 103. It further contends that the administrative judge erred in finding that the appellant could be reasonably accommodated by being given a flexible schedule. PFR at 18-19. We agree. As the agency points out, the appellant fell asleep on the job at different times throughout the day, including on days when he started work later than he usually did. *See, e.g.*, IAF, Tab 4, subtab 4g1, subtab 4d at 5; Tr. at 206. Thus, allowing him to come in later in the morning would not ensure that he could perform the essential functions of his position. In addition, Holland testified in substance that allowing the appellant to come in on weekends to make up time would not be appropriate because there would be nobody in the office. Tr. at 157; *see also* Tr. at 206-07. Moreover, the Board has held that open-ended “latitude” granted to an appellant in leave and attendance matters constitutes an unduly burdensome accommodation. *Stevens v. Department of the Army*, 73 M.S.P.R. 619, 628-29 (1997); *see also Guice-Mills*, 967 F.2d at 797-98. Thus, even if the appellant

⁴ Langenfeld offered un rebutted testimony that the appellant had exhausted his leave balances. Tr. at 62; *see also* Tr. at 156.

showed he was a disabled person, he has not shown that he is a qualified disabled person. Accordingly, we find that the appellant has failed to establish his affirmative defense of disability discrimination.

Penalty

¶24 When the Board sustains all of the agency's charges, but not some of the underlying specifications, it will review the agency-imposed penalty only to determine whether it is within the parameters of reasonableness. If the agency's penalty is beyond reasonableness, the Board will mitigate it only to the extent necessary to bring it within the parameters of reasonableness, i.e., the Board will apply a maximum reasonable penalty standard. In applying this standard, the Board will consider the agency's failure to sustain all of its supporting specifications. That failure may require, or contribute to, a finding that the agency's penalty is not reasonable. *Payne v. U.S. Postal Service*, 72 M.S.P.R. 646, 650-51 (1996).

¶25 The written record shows that Langenfeld considered some of the *Douglas* factors in deciding to remove the appellant based on the sustained charges. Specifically, she noted the seriousness of the appellant's offenses; his supervisors' loss of confidence in his ability to perform; the important responsibilities of his position; his past disciplinary record; his "unremarkable" performance; his short tenure with the agency; the consistency of the penalty with the agency's table of penalties; the notoriety of the appellant's offense because contractors saw him sleeping; the written notices given to the appellant that his attendance must improve and that sleeping on duty would not be tolerated; his lack of potential for rehabilitation; and the lack of mitigating circumstances. IAF, Tab 4, subtabs 4b, 4c. Similarly, Langenfeld testified that she considered the appellant's past disciplinary record in determining the penalty. Tr. at 32-34. The record supports Langenfeld's statements on the removal decision notice given to the appellant, his prior disciplinary record, and the consistency of the penalty imposed with the

agency's table of penalties. IAF, Tab 4, subtabs 4i2, 4i8, 4i13, 4j, 4k; Tab 6, Agency Exs. 1, 2, 7; *see, e.g., Howard v. U.S. Postal Service*, 72 M.S.P.R. 422, 426 (1996) (warning notices and disciplinary actions may be used to impose an enhanced penalty if the notice or action was mentioned in the notice of proposed action and the decision letter).

¶26 However, Langenfeld considered that the appellant had only two years of service with the agency. IAF, Tab 4, subtab 4b at 6, subtab 4b at 2. The record shows that the appellant had over nine years of federal service. *Id.*, subtab 4a. Moreover, as Langenfeld noted, *see* IAF, Tab 4, subtab 4c, the appellant was not a supervisor, and thus is not held to a higher standard of conduct. *See, e.g., Howard*, 72 M.S.P.R. at 427. In addition, Langenfeld testified that, after she found the charges were proven, she did not consider any alternative to removal. Tr. at 31.

¶27 As previously found, the AJ concluded that the sleeping on duty misconduct was the primary basis for the choice of the removal penalty. Evidence that an employee's medical condition "played a part in the charged conduct is ordinarily entitled to considerable weight as a significant mitigating factor." *Roseman v. Department of the Treasury*, 76 M.S.P.R. 334, 345 (1997); *see, e.g., Robb v. Department of Defense*, 77 M.S.P.R. 130, 137 (1998). Even where the condition does not rise to the level of a disability, if the agency knew about it before taking the action at issue, we may consider the condition in determining the appropriate penalty. *Roseman*, 76 M.S.P.R. at 345. Moreover, the effect of an appellant's use of a prescription drug that played a part in the charged conduct is a relevant factor that, when properly weighed, substantially mitigates the offense. *Howard*, 72 M.S.P.R. at 427.

¶28 Here, the agency undisputedly knew about the appellant's condition and the medication he was taking. *See, e.g., IAF*, Tab 4, subtab 4i3. In addition, although not sufficient to prove the appellant's affirmative defense of disability

discrimination, the doctors' previously cited statements recognized that the appellant's condition could affect his conduct. Specifically, they noted that the appellant had a "moderately severe" condition, that symptoms from the condition could impair a person's ability to be employed, and that side effects from Prilosec have the potential to impair a person's functional ability. *See, e.g.*, IAF, Tab 4, subtab 4i7; Tab 8, Appellant's Ex. E. In that regard, the appellant testified that he believed that his GERD and the Prilosec affected his attendance and his ability to stay awake at work. Specifically, he testified that he was unable to get a good night's sleep, to adequately digest food, and to endure the constant chest pains. He testified that the adverse effects of the medication would continue throughout the day, and, when he was on the increased dosage, he felt exhausted, fatigued, and would "drop off" without knowing why. Tr. at 291-92. We find no basis for discrediting the appellant's undisputed testimony. We thus find that, even though the appellant's condition does not rise to the level of a disability, his condition and the side effects of the prescription drug he was taking for his condition played a part in the charged conduct. Moreover, we note that appellant's prior disciplinary actions of a reprimand and two suspensions occurred in the two months immediately preceding the actions which formed the basis of his removal. (IAF, Tab 4, Subtabs 4j, 4i2, 4i4 and 4e).

¶29 The record does not indicate that Langenfeld considered the appellant's condition to be a mitigating factor. *See* Tr. at 33-36; IAF, Tab 4, subtabs 4b, 4c. In that regard, the evidence indicates that Langenfeld did not consider all the evidence in finding that the appellant was not a candidate for rehabilitation. For example, in her removal decision letter, Langenfeld noted that neither "Shah nor any of the other medical professionals providing notes" suggested that the situation was "likely to improve in the future." IAF, Tab 4, subtab 4b at 5. However, in written response to the notice of proposed removal, the appellant's representative stated that the appellant seemed to be adjusting to the medication,

that he was no longer falling asleep during the day, that it was not anticipated that he would fall asleep again at work, and that he was experiencing the other side effects of the medication (such as dizziness and headaches) far less often. IAF, Tab 4, subtab 4d.

¶30 Furthermore, the appellant testified that he recognized his conduct was unacceptable and that he has taken steps to prevent it in the future. Tr. at 297, 318-19, 366. Specifically, he testified that, right before his removal was proposed, he moved to within ten minutes of the agency, and that he is now taking a new medication that does not cause sleepiness. Tr. at 318-21, 330-31. The Board has found that an appellant's seeking treatment for his medical problems indicates a potential for rehabilitation. *Robb*, 77 M.S.P.R. at 137. Moreover, we note that the appellant's prior disciplinary actions of a reprimand and seven-day suspension occurred in the two months immediately preceding the actions that formed the basis of his removal. IAF, Tab 4, subtabs 4e, 4i2, 4i8, 4j. Admittedly the agency was entitled to rely on these actions and properly imposed progressive discipline. However, the actions were based on the same type of misconduct at issue in this case. Because we have found that the appellant's medical condition, which was also present at the time of those actions, is a significant mitigating factor, we find that the appellant's prior disciplinary record is not a significant aggravating factor under the particular circumstances of this case.

¶31 Therefore, we find that there are significant mitigating factors present and the appellant has shown a potential for rehabilitation. Accordingly we find that a 60-day suspension is the maximum reasonable penalty in this case. *See, e.g., Robb*, 77 M.S.P.R. at 137-38; *Howard*, 72 M.S.P.R. at 427.

ORDER

We ORDER the agency to substitute a 60-day suspension for the appellant's removal. *See Kerr v. National Endowment for the Arts*, 726 F.2d 730 (Fed. Cir.

1984). The agency must accomplish this action within 20 days of the date of this decision.

We also ORDER the agency to issue a check to the appellant for the appropriate amount of back pay, interest on back pay, and other benefits under the Office of Personnel Management's regulations no later than 60 calendar days after the date of this decision. We ORDER the appellant to cooperate in good faith in the agency's efforts to compute the amount of back pay, interest, and benefits due, and to provide all necessary information the agency requests to help it comply. If there is a dispute about the amount of back pay, interest due, and/or other benefits, we ORDER the agency to issue a check to the appellant for the undisputed amount no later than 60 calendar days after the date of this decision.

We further ORDER the agency to inform the appellant in writing of all actions taken to comply with the Board's Order and of the date on which the agency believes it has fully complied. If not notified, the appellant should ask the agency about its efforts to comply.

Within 30 days of the agency's notification of compliance, the appellant may file a petition for enforcement with the regional office to resolve any disputed compliance issue or issues. The petition should contain specific reasons why the appellant believes that there is insufficient compliance, and should include the dates and results of any communications with the agency about compliance.

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

NOTICE TO THE APPELLANT REGARDING FEES

You may be entitled to be reimbursed by the agency for your reasonable attorney fees and costs. To be reimbursed, you must meet the criteria set out at 5 U.S.C. §§ 7701(g) or 1221(g), and 5 C.F.R. § 1201.202. If you believe you meet these criteria, you must file a motion for attorney fees WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION. Your attorney fee

motion must be filed with the regional office or field office that issued the initial decision on your appeal.

NOTICE TO THE APPELLANT REGARDING
FURTHER REVIEW RIGHTS

You have the right to request further review of the Board's final decision in your appeal.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review the Board's final decision on your discrimination claims. *See* 5 U.S.C. § 7702(b)(1). You must submit your request to the EEOC at the following address:

Equal Employment Opportunity Commission
Office of Federal Operations
P.O. Box 19848
Washington, DC 20036

You should submit your request to the EEOC no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. 5 U.S.C. § 7702(b)(1).

Discrimination and Other Claims: Judicial Action

If you do not request review of this order on your discrimination claims by the EEOC, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. *See* 5 U.S.C. § 7703(b)(2). You should file your civil action with the district court no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(2). 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. § 2000e5(f); 29 U.S.C. § 794a.

Other Claims: Judicial Review

If you choose not to seek review of the Board's decision on your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review the Board's final decision on other issues in your appeal if the court has jurisdiction. *See* 5 U.S.C. § 7703(b)(1). 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 receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.