

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

ADONIS BERLE WHITBY,
Appellant,

DOCKET NUMBER
DC-0842-13-0500-I-1

v.

OFFICE OF PERSONNEL
MANAGEMENT,
Agency.

DATE: December 30, 2013

THIS FINAL ORDER IS NONPRECEDENTIAL¹

Adonis Berle Whitby, Macon, Georgia, pro se.

Kristine Prentice, Washington, D.C., for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

FINAL ORDER

The appellant has filed a petition for review of the initial decision, which dismissed the appeal under the doctrine of res judicata. Generally, we grant petitions such as this one only when: the initial decision contains erroneous

¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

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 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. *See* 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, and based on the following points and authorities, 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 April 1, 2010, the appellant filed an appeal from a March 26, 2010 reconsideration decision issued by the Office of Personnel Management (OPM) in which OPM denied his application for retirement under the Federal Employees Retirement System (FERS). *See Whitby v. Office of Personnel Management*, MSPB Docket No. AT-0842-10-0562-I-I (*Whitby I*), Initial Decision (July 16, 2010); Initial Appeal File (IAF), Tab 4 at 9. OPM based its decision denying the appellant's retirement application on its determination that the appellant lacked at least ten years of creditable service. *Whitby I* IAF, Tab 4 at 10-11. The appellant had requested a refund of his military and civilian retirement fund contributions on April 4, 1993, and a check for such funds was issued to him per his instructions. *Id.* After conducting a telephonic hearing, the administrative judge issued an initial decision affirming OPM's reconsideration decision. *Id.* at 9. The appellant petitioned for review of the initial decision, but the Board denied his petition in a final order issued on September 28, 2010. *Whitby I*, Final Order

(Sept. 28, 2010); IAF, Tab 4 at 6. The appellant then sought review of the Board's final order at the U.S. Court of Appeals for the Federal Circuit, which affirmed the Board's decision. *Whitby v. Office of Personnel Management*, 417 F. App'x 967 (Fed. Cir. 2011). The appellant filed requests to reopen his prior Board appeal in November 2012 and April 2013. The Board denied both requests, indicating that it had issued a final decision and the appellant had no right to further review.

On April 17, 2013, the appellant filed the instant appeal in which he alleged that he was "[d]enied retirement for years served in the military and civilian jobs." IAF, Tab 1. In response, OPM filed a motion to dismiss under the doctrine of res judicata. IAF, Tab 4 at 4. The appellant, in response to an order to show cause why his appeal should not be dismissed under the doctrine of res judicata, argued that he had new evidence showing that he suffered from Post-Traumatic Stress Disorder (PTSD), and alleged that OPM made several mistakes in handling his retirement benefits. IAF, Tabs 6, 7.

In the initial decision, the administrative judge found that the requirements for the application of res judicata were met, and she therefore dismissed the appeal. IAF, Tab 8 at 4. The appellant has timely filed a petition for review. Petition for Review (PFR) File, Tab 1. The appellant argues that his appeal is not barred by res judicata because "the merits of why the Appellant was unaware of applying [the military and civilian service refund check] and not remembering the application was not examined." PFR File, Tab 1 at 2. The appellant further contends that the "reasonable person" standard applied in *Frantz v. Office of Personnel Management*, [778 F.2d 783](#) (Fed. Cir. 1985), should be applied to a "reasonable person with PTSD and with Severe Depression." *Id.*

ANALYSIS

Under the doctrine of res judicata, a valid, final judgment on the merits of an action bars a second action involving the same parties or their privies based on

the same cause of action. *Peartree v. U.S. Postal Service*, [66 M.S.P.R. 332](#), 337 (1995). Res judicata precludes parties from relitigating issues that were, or could have been, raised in the prior action, and is applicable if: (1) the prior judgment was rendered by a forum with competent jurisdiction; (2) the prior judgment was a final judgment on the merits; and (3) the same cause of action and the same parties or their privies were involved in both cases. *Id.*

Neither party disputes that the first and third requirements for the application of res judicata are met in this case. The appellant argues that the second requirement is not met because the evidence of his PTSD, in light of the administrative judge's credibility determination, means that the judgment could not have been made "on the merits." PFR File, Tab 1. However, the appellant's arguments actually go to whether the prior decision was correct, not whether it was a decision on the merits. We therefore agree with the administrative judge that all of the requirements for the application of res judicata are met, and we find that the appeal was properly dismissed on that basis.²

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request review of this final decision by the United States Court of Appeals for the Federal Circuit. 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 the date of this order. See [5 U.S.C. § 7703\(b\)\(1\)\(A\)](#) (as rev. eff. Dec. 27, 2012). If you choose to file, be very careful to file on time. The court has held

² To the extent the appellant's arguments in this appeal can be construed as yet another request to reopen his prior appeal, that request is denied.

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](#)) (as rev. eff. Dec. 27, 2012). You may read this law as well as other sections of the United States Code, at our website, <http://www.mspb.gov/appeals/uscode/htm>. 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.