UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

THADDEUS A. KNIGHT,
Appellant,

v.

DEPARTMENT OF JUSTICE,
Agency.

DOCKET NUMBER
AT-0353-10-1022-I-1

DATE: May 12, 2011

THIS FINAL ORDER IS NONPRECEDENTIAL

Neil C. Cox, Esquire, Homestead, Florida, for the appellant.

Marlon A. Martinez, Esquire, Washington, D.C., 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 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).

As a partially recovered employee, to establish Board jurisdiction over a restoration claim, the appellant must allege facts that, if proven, would show that:

> (1) [He] was absent from his position due to a compensable injury; (2) [he] recovered sufficiently to return to duty on a part-time basis, or to return to work in a position with less demanding physical requirements than those previously required of [him]; (3) the agency denied [his] request for restoration; and (4) the denial was "arbitrary and capricious."

Chen v. U.S. Postal Service, 97 M.S.P.R. 527, ¶ 13 (2004); *see Fabisiak v. U.S. Postal Service*, 361 F. App'x 144, 146-47 (Fed. Cir. 2010); *Morman v. Department of Defense*, 84 M.S.P.R. 96, ¶ 10 (1999).

The appellant's August 19, 2010 telephone conversation appears to have lacked clarity as to precisely what he was seeking from the agency other than general compliance with 5 C.F.R. § 353.301, and the appellant's own description of the call appears inadequate to have put the agency on notice that he was asking to be restored to work in a position with less demanding physical requirements than those previously required of him. *See* Initial Appeal File (IAF), Tab 12 at 10; Petition for Review (PFR) File, Tab 3 at 3. In contrast, in the appellant's November 9, 2010 letter, he was very clear that he was interested in "vacant positions" and not necessarily Special Agent positions. *See* IAF, Tab 12 at 28.[1] However, the appellant filed the instant appeal on September 2, 2010, only 18 days after the telephone conversation and 69 days *before* he clarified his request. *See* IAF, Tab 1. Given this timeline, and the lack of recent medical documentation in the record, we do not find that the agency was arbitrary or

[1] The appellant's November 9, 2010 letter does not appear to have been accompanied by any new medical documentation, despite the agency's Chief Medical Officer specifically informing the appellant on November 1, 2010 that the agency only had medical documentation from 2008 and inviting him to submit more recent medical documentation. *See* IAF, Tab 12 at 27-28.

capricious in not having acted yet upon the appellant's request.[2] *See generally* IAF.

As for the appellant's references to the agency's prior restoration decisions,

> Collateral estoppel, or issue preclusion, is appropriate when: (1) The issue is identical to that involved in the prior action; (2) the issue was actually litigated in the prior action; (3) the determination on the issue in the prior action was necessary to the resulting judgment; and (4) the party against whom issue preclusion is sought had a full and fair opportunity to litigate the issue in the prior action, either as a party to the earlier action or as one whose interests were otherwise fully represented in that action.

Boechler v. Department of the Interior, 109 M.S.P.R. 619, ¶ 17 (2008), *aff'd*, 328 F. App'x 660 (Fed. Cir. 2009); *see Wadhwa v. Department of Veterans Affairs*, 111 M.S.P.R. 26, ¶ 5 (2009), *aff'd*, 353 F. App'x 434 (Fed. Cir. 2009), *cert. denied*, 130 S. Ct. 2084 (2010). "Collateral estoppel may be applied only when there is a final judgment in the previous litigation." *Wadhwa*, 111 M.S.P.R. 26, ¶ 5. In the appellant's case, the previous litigation became final following the issuance of the Board's denials of his petitions for review when he opted not to file appeals with the Federal Circuit. In the decision for AT-0353-08-0860-I-1, the administrative judge addressed the appellant's eligibility for restoration from 2004 to November 20, 2008. *See* AT-0353-08-0860-I-1, Initial Decision. Therefore, to the extent that the appellant's current appeal raises issues related to these events, the issues were litigated in the prior action, the issues were necessary to the resulting judgment, and the appellant had a full and fair opportunity to litigate the issues in the prior action. Accordingly the administrative judge correctly determined that collateral estoppel precluded the appellant from relitigating these matters.

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[2] In the initial decision, the administrative judge noted that the appellant is not precluded from filing a timely appeal once the agency issues a decision on his pending request for restoration. *See* ID-10 at n*.

The appellant also asserts on petition for review that the Board should reverse the initial decision because the agency allegedly "failed to respond to Appellant's discovery requests[.]" *See* PFR File, Tab 1 at 5. However, the administrative judge ruled below that the appellant's motion to compel discovery was denied because "the appellant's 2010 discovery requests are identical to those submitted by the appellant in his 2008 litigation, and … the agency's responses are the same." *See* IAF, Tab 21 at 2. An administrative judge's errors regarding discovery matters are subject to an abuse of discretion standard. *See Wagner v. Environmental Protection Agency*, 54 M.S.P.R. 447, 452 (1992), *aff'd*, 996 F.2d 1236 (Fed. Cir. 1993) (Table). On petition for review, the appellant has not demonstrated that any of the appellant's discovery requests were material to the issue of Board jurisdiction. *See* PFR File, Tab 1 at 5-6. Accordingly, the appellant has not shown that the administrative judge abused his discretion in denying the appellant's motion to compel discovery. *See* IAF, Tab 21 at 2.

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 final. This is the Board's final decision in this matter. 5 C.F.R. § 1201.113.

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

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.