

NOTE: This disposition is nonprecedential.

**United States Court of Appeals  
for the Federal Circuit**

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**GENNETT M. HOLMES-SMITH,**  
*Petitioner*

v.

**MERIT SYSTEMS PROTECTION BOARD,**  
*Respondent*

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2021-2235

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Petition for review of the Merit Systems Protection Board in No. AT-3443-21-0379-I-1.

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Decided: April 8, 2022

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GENNETT M. HOLMES-SMITH, Stockbridge, GA, pro se.

CALVIN M. MORROW, Office of General Counsel, United States Merit Systems Protection Board, Washington, DC, for respondent. Also represented by TRISTAN L. LEAVITT, KATHERINE MICHELLE SMITH.

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Before PROST, MAYER, and TARANTO, *Circuit Judges*.

PER CURIAM.

Ms. Holmes-Smith sought monetary benefits for an injury that she alleges resulted from her work as an employee of the Department of Veterans Affairs. After her claim was denied by the Office of Workers' Compensation Programs ("OWCP"), Ms. Holmes-Smith appealed the decision to the Merit Systems Protection Board ("Board"). The Board dismissed her appeal for lack of jurisdiction under 5 U.S.C. § 8128(b). Ms. Holmes-Smith now appeals to this court. We affirm the Board's dismissal because the Board properly determined that it lacked jurisdiction.

#### BACKGROUND

Ms. Holmes-Smith filed a claim for workers' compensation with the Department of Labor, which referred her claim to OWCP. OWCP then denied the claim both upon initial filing and upon reconsideration. Ms. Holmes-Smith appealed OWCP's denial upon reconsideration to the Board, and the Board dismissed. The Board determined that it lacked jurisdiction to review OWCP's denial of Ms. Holmes-Smith's claim under 5 U.S.C. § 8128. Ms. Holmes-Smith appeals.

#### DISCUSSION

Federal courts are courts of limited jurisdiction—meaning they cannot hear a case unless they have been given the authority to do so by Congress or the Constitution. See *Gunn v. Minton*, 568 U.S. 251, 256 (2013). We have subject matter jurisdiction over this appeal under 28 U.S.C. § 1295(a)(9), which grants the Federal Circuit the ability to review appeals from final decisions of the Board. But our review of the Board is also limited by law: we must affirm the Board unless its decision is "(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence." 5 U.S.C. § 7703(c).

The question on appeal is whether the Board had jurisdiction to hear Ms. Holmes-Smith's case. This is a legal question that we review without deference to the Board's answer. *Forest v. Merit Sys. Prot. Bd.*, 47 F.3d 409, 410 (Fed. Cir. 1995). Since we conclude that the Board did indeed lack jurisdiction, we affirm.

The Board, similar to federal courts, cannot hear every claim brought before it. *See Maddox v. Merit Sys. Prot. Bd.*, 759 F.2d 9, 10 (Fed. Cir. 1985). Congress can deny the Board the authority to hear certain cases, and 5 U.S.C. § 8128 is an example of a law that does just that: it says that the denial of a payment by OWCP, which is part of the Department of Labor, is "not subject to review by another official of the United States or by a court by mandamus or otherwise." The Board falls within the broad scope of those unable to review OWCP's denial of benefits under this law. And Ms. Holmes-Smith's appeal to the Board sought exactly what the law precludes—review of a denial of benefits by OWCP—so the Board was correct to dismiss her appeal for lack of jurisdiction.

#### CONCLUSION

For the foregoing reasons, we affirm the Board's dismissal because it lacked jurisdiction to review Ms. Holmes-Smith's appeal.

#### AFFIRMED

#### COSTS

No costs.

**UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD  
ATLANTA REGIONAL OFFICE**

GENNETT M. HOLMES-SMITH,  
Appellant,

DOCKET NUMBER  
AT-3443-21-0379-I-1

v.

DEPARTMENT OF VETERANS  
AFFAIRS,  
Agency.

DATE: August 17, 2021

Brenda Bledsoe, Salisbury, North Carolina, for the appellant.

Caroline E. Johnson, Esquire, St. Petersburg, Florida, for the agency.

**BEFORE**

Silvia de la Cruz  
Administrative Judge

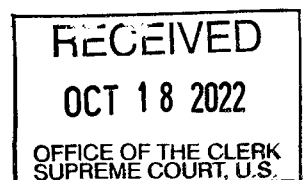
**INITIAL DECISION**

On April 28, 2021, Gennett M. Holmes-Smith filed an appeal with the Atlanta Regional Office seeking back pay and damages associated with her alleged on the job injuries covered under the Office of Workers' Compensation Programs (OWCP).

For the reasons below, the appeal is DISMISSED for lack of jurisdiction.

**JURISDICTION**

The Board's jurisdiction is not plenary as it is limited to those areas specifically granted by law, rule, or regulation. 5 U.S.C. § 7701(a); *Cowan v. United States*, 710 F.2d. 803, 905 (Fed. Cir. 1983). The appellant has the burden



of proving by preponderant evidence that the matter she seeks to appeal is within the Board's appellate jurisdiction. 5 C.F.R. § 1201.56(a)(2)(i).<sup>1</sup>

In her initial appeal, the appellant described how she allegedly suffered on the job injuries in 2011, 2013, and 2015, and the way agency employees handled her claim. Appeal File (AF), Tab 1. She asked for back pay, compensatory and punitive damages, damages for past and future pain, and damages for mental anguish. *Id.* The appellant attached a copy of a letter from the U.S. Department of Labor, OWCP, dated July 23, 2019, responding to the correspondence she sent concerning its June 20, 2019 proposal to terminate her "medical benefits and wage loss compensation based on the weight of medical evidence as established by the second opinion physician, Dr. Alexander Doman." AF, Tab 1 at 45. On May 25, 2021, the agency filed its response to this appeal asserting that the Board lacks jurisdiction over claims concerning OWCP benefits. AF, Tabs 7.

By Order dated May 26, 2021, I afforded the appellant the opportunity to submit evidence and/or argument concerning the Board's jurisdiction over her appeal. AF, Tab 8. In response, the appellant described her injuries and the actions agency employees allegedly took in handling her claims. AF, Tabs 9 and 10. She alleged that the agency and OWCP should be held liable for back pay and other damages. *Id.*

The Board's jurisdiction is not plenary; it is limited to those matters over which it has been given jurisdiction by law, rule or regulation. *Maddox v. Merit Systems Protection Board*, 759 F.2d 9, 10 (Fed. Cir. 1985). Thus, it follows that the Board does not have jurisdiction over all matters alleged to be unfair or incorrect. *Noble v. Tennessee Valley Authority*, 892 F.2d 1013, 1014 (Fed. Cir. 1989) (en banc), *cert. denied*, 496 U.S. 936 (1990). An appellant is entitled to a

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<sup>1</sup> Preponderance of the evidence is defined as the "degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue." 5 C.F.R. § 1201.4(q).

jurisdictional hearing only where she makes a non-frivolous allegation the Board has jurisdiction over her appeal. *See Smirne v. Department of Army*, 115 M.S.P.R. 51, ¶ 8 (2010); *Yusuf v. U.S. Postal Service*, 112 M.S.P.R. 465, ¶ 15 (2009); *Yiying Liu v. Department of Agriculture*, 106 M.S.P.R. 178, ¶ 8 (2007); *Lara v. Department of Homeland Security*, 101 M.S.P.R. 190, ¶ 7 (2006); *Ferdon v. U.S. Postal Service*, 60 M.S.P.R. 325, 329 (1994).<sup>2</sup>

In this appeal, the appellant is requesting damages for the way the agency and OWCP handled her claims. AF, Tabs 1 and 8-10. However, the Board lacks jurisdiction over cases where consideration of a claim would entail reviewing OWCP's decision to pay, or deny, benefits in the first place. *See Clavin v. U.S. Postal Service*, 99 M.S.P.R. 619, ¶ 4 (2005) (finding that the Board lacks jurisdiction to review a denial of workers' compensation benefits); *see also Lee v. Department of Labor*, 76 M.S.P.R. 142, 146 (1997) (same).

Because the Board lacks jurisdiction to review a denial of OWCP benefits and the appellant failed to identify a personnel action within the Board's jurisdiction, the appeal must be dismissed.

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<sup>2</sup> "A nonfrivolous allegation is an assertion that, if proven, could establish the matter at issue. An allegation generally will be considered nonfrivolous when, under oath or penalty of perjury, an individual makes an allegation that: (1) Is more than conclusory; (2) Is plausible on its face; and (3) Is material to the legal issues in the appeal." 5 C.F.R. § 1201.4(s).



The Clerk of the Board  
Merit Systems Protection Board  
1615 M Street, NW.  
Washington, DC 20419

A petition or cross petition for review may be filed by mail, facsimile (fax), personal or commercial delivery, or electronic filing. A petition submitted by electronic filing must comply with the requirements of 5 C.F.R. § 1201.14, and may only be accomplished at the Board's e-Appeal website (<https://e-appeal.mspb.gov>).

### **NOTICE OF LACK OF QUORUM**

The Merit Systems Protection Board ordinarily is composed of three members, 5 U.S.C. § 1201, but currently there are no members in place. Because a majority vote of the Board is required to decide a case, *see* 5 C.F.R. § 1200.3(a), (e), the Board is unable to issue decisions on petitions for review filed with it at this time. *See* 5 U.S.C. § 1203. Thus, while parties may continue to file petitions for review during this period, no decisions will be issued until at least two members are appointed by the President and confirmed by the Senate. The lack of a quorum does not serve to extend the time limit for filing a petition or cross petition. Any party who files such a petition must comply with the time limits specified herein.

For alternative review options, please consult the section below titled "Notice of Appeal Rights," which sets forth other review options.

#### **Criteria for Granting a Petition or Cross Petition for Review**

Pursuant to 5 C.F.R. § 1201.115, the Board normally will consider only issues raised in a timely filed petition or cross petition for review. Situations in which the Board may grant a petition or cross petition for review include, but are not limited to, a showing that:

(a) The initial decision contains erroneous findings of material fact. (1) Any alleged factual error must be material, meaning of sufficient weight to



warrant an outcome different from that of the initial decision. (2) A petitioner who alleges that the judge made erroneous findings of material fact must explain why the challenged factual determination is incorrect and identify specific evidence in the record that demonstrates the error. In reviewing a claim of an erroneous finding of fact, the Board will give deference to an administrative judge's credibility determinations when they are based, explicitly or implicitly, on the observation of the demeanor of witnesses testifying at a hearing.

(b) 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 petitioner must explain how the error affected the outcome of the case.

(c) 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.

(d) New and material evidence or legal argument is available that, despite the petitioner's due diligence, was not available when the record closed. To constitute new evidence, the information contained in the documents, not just the documents themselves, must have been unavailable despite due diligence when the record closed.

As stated in 5 C.F.R. § 1201.114(h), a petition for review, a cross petition for review, or a response to a petition for review, whether computer generated, typed, or handwritten, is limited to 30 pages or 7500 words, whichever is less. A reply to a response to a petition for review is limited to 15 pages or 3750 words, whichever is less. Computer generated and typed pleadings must use no less than 12 point typeface and 1-inch margins and must be double spaced and only use one side of a page. The length limitation is exclusive of any table of contents, table of authorities, attachments, and certificate of service. A request for leave to file a pleading that exceeds the limitations prescribed in this paragraph must be received by the Clerk of the Board at least 3 days before the filing deadline. Such requests must give the reasons for a waiver as well as the desired length of the

pleading and are granted only in exceptional circumstances. The page and word limits set forth above are maximum limits. Parties are not expected or required to submit pleadings of the maximum length. Typically, a well-written petition for review is between 5 and 10 pages long.

If you file a petition or cross petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. A petition for review must be filed with the Clerk of the Board no later than the date this initial decision becomes final, or if this initial decision is received by you or your representative more than 5 days after the date of issuance, 30 days after the date you or your representative actually received the initial decision, whichever was first. If you claim that you and your representative both received this decision more than 5 days after its issuance, you have the burden to prove to the Board the earlier date of receipt. You must also show that any delay in receiving the initial decision was not due to the deliberate evasion of receipt. You may meet your burden by filing evidence and argument, sworn or under penalty of perjury (*see* 5 C.F.R. Part 1201, Appendix 4) to support your claim. The date of filing by mail is determined by the postmark date. The date of filing by fax or by electronic filing is the date of submission. The date of filing by personal delivery is the date on which the Board receives the document. The date of filing by commercial delivery is the date the document was delivered to the commercial delivery service. Your petition may be rejected and returned to you if you fail to provide a statement of how you served your petition on the other party. *See* 5 C.F.R. § 1201.4(j). If the petition is filed electronically, the online process itself will serve the petition on other e-filers. *See* 5 C.F.R. § 1201.14(j)(1).

A cross petition for review must be filed within 25 days after the date of service of the petition for review.

## NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

## NOTICE OF APPEAL RIGHTS

You may obtain review of this initial decision only after it becomes final, as explained in the "Notice to Appellant" section above. 5 U.S.C. § 7703(a)(1). By statute, the nature of your claims determines the time limit for seeking such review and the appropriate forum with which to file. 5 U.S.C. § 7703(b). Although we offer the following summary of available appeal rights, the Merit Systems Protection Board does not provide legal advice on which option is most appropriate for your situation and the rights described below do not represent a statement of how courts will rule regarding which cases fall within their jurisdiction. If you wish to seek review of this decision when it becomes final, you should immediately review the law applicable to your claims and carefully follow all filing time limits and requirements. Failure to file within the applicable time limit may result in the dismissal of your case by your chosen forum.

Please read carefully each of the three main possible choices of review below to decide which one applies to your particular case. If you have questions about whether a particular forum is the appropriate one to review your case, you should contact that forum for more information.

**(1) Judicial review in general.** As a general rule, an appellant seeking judicial review of a final Board order must file a petition for review with the U.S. Court of Appeals for the Federal Circuit, which must be received by the court within **60 calendar days** of the date this decision becomes final. 5 U.S.C. § 7703(b)(1)(A).

If you submit a petition for review to the U.S. Court of Appeals for the Federal Circuit, you must submit your petition to the court at the following address:

U.S. Court of Appeals  
for the Federal Circuit  
717 Madison Place, N.W.  
Washington, D.C. 20439

Additional information about the U.S. Court of Appeals for the Federal Circuit is available at the court's website, [www.cafc.uscourts.gov](http://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, 10, and 11.

If you are interested in securing pro bono representation for an appeal to the U.S. Court of Appeals for the Federal Circuit, you may visit our website at <http://www.mspb.gov/probono> for information regarding pro bono representation for Merit Systems Protection Board appellants before the Federal Circuit. The Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.

**(2) Judicial or EEOC review of cases involving a claim of discrimination.** This option applies to you only if you have claimed that you were affected by an action that is appealable to the Board and that such action was based, in whole or in part, on unlawful discrimination. If so, you may obtain judicial review of this decision—including a disposition of your discrimination claims—by filing a civil action with an appropriate U.S. district court (*not* the U.S. Court of Appeals for the Federal Circuit), within **30 calendar days after this decision becomes final** under the rules set out in the Notice to Appellant section, above. 5 U.S.C. § 7703(b)(2); *see Perry v. Merit Systems Protection Board*, 582 U.S. \_\_\_\_ , 137 S. Ct. 1975 (2017). 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. § 2000e-5(f) and 29 U.S.C. § 794a.

Contact information for U.S. district courts can be found at their respective websites, which can be accessed through the link below:

[http://www.uscourts.gov/Court\\_Locator/CourtWebsites.aspx](http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx).

Alternatively, you may request review by the Equal Employment Opportunity Commission (EEOC) of your discrimination claims only, excluding all other issues. 5 U.S.C. § 7702(b)(1). You must file any such request with the EEOC's Office of Federal Operations within **30 calendar days after this decision becomes final** as explained above. 5 U.S.C. § 7702(b)(1).

If you submit a request for review to the EEOC by regular U.S. mail, the address of the EEOC is:

Office of Federal Operations  
Equal Employment Opportunity Commission  
P.O. Box 77960  
Washington, D.C. 20013

If you submit a request for review to the EEOC via commercial delivery or by a method requiring a signature, it must be addressed to:

Office of Federal Operations  
Equal Employment Opportunity Commission  
131 M Street, N.E.  
Suite 5SW12G  
Washington, D.C. 20507

**(3) Judicial review pursuant to the Whistleblower Protection Enhancement Act of 2012.** This option applies to you only if you have raised claims of reprisal for whistleblowing disclosures under 5 U.S.C. § 2302(b)(8) or other protected activities listed in 5 U.S.C. § 2302(b)(9)(A)(i), (B), (C), or (D). If so, and your judicial petition for review “raises no challenge to the Board's disposition of allegations of a prohibited personnel practice described in section 2302(b) other than practices described in section 2302(b)(8) or 2302(b)(9)(A)(i), (B), (C), or (D),” then you may file a petition for judicial review with the U.S.

Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction. The court of appeals must receive your petition for review within **60 days** of the date this decision becomes final under the rules set out in the Notice to Appellant section, above. 5 U.S.C. § 7703(b)(1)(B).

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Contact information for the courts of appeals can be found at their respective websites, which can be accessed through the link below:

[http://www.uscourts.gov/Court\\_Locator/CourtWebsites.aspx](http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx)