

NOTE: This disposition is nonprecedential.

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

VICTORINO MONTALVO, JR.,
Petitioner

v.

MERIT SYSTEMS PROTECTION BOARD,
Respondent

2017-1081

Petition for review of the Merit Systems Protection Board in No. AT-831M-16-0268-I-1.

Decided: April 7, 2017

VICTORINO MONTALVO, JR., Orlando, FL, pro se.

CALVIN M. MORROW, Office of the General Counsel, United States Merit Systems Protection Board, Washington, DC, for respondent. Also represented by BRYAN G. POLISUK, KATHERINE M. SMITH.

Before LOURIE, MOORE, and HUGHES, *Circuit Judges*.
PER CURIAM.

Victorino Montalvo, Jr. appeals from a final decision of the Merit Systems Protection Board (the “Board”) dismissing his appeal for lack of jurisdiction. Because the Board lacked jurisdiction to hear Mr. Montalvo’s appeal, we *affirm*.

BACKGROUND

Mr. Montalvo retired from the U.S. Postal Service in April 1999 and immediately began receiving disability retirement benefits. On January 18, 2006, the U.S. Office of Personnel Management (“OPM”) informed Mr. Montalvo that as of June 2002, he was no longer eligible to receive disability benefits and had been overpaid for four years. OPM requested Mr. Montalvo repay all overpayments.

Mr. Montalvo responded to OPM’s letter on February 1, 2006, asking OPM to waive its demand for repayment due to financial hardship. OPM did not respond until September 15, 2015, requesting additional information regarding Mr. Montalvo’s finances. After receiving the additional materials, OPM denied his request for reconsideration on December 17, 2015.

Mr. Montalvo appealed OPM’s decision to the Board. One month later, OPM sent a letter to the presiding administrative judge stating that “[b]ased on existing case law, OPM has rescinded its December 17, 2015 final decision.” The letter also indicated OPM would issue a new final decision regarding Mr. Montalvo’s case after his appeal to the Board was dismissed. Based on OPM’s representations in its letter, the administrative judge dismissed the appeal for lack of jurisdiction. Mr. Montalvo appealed to the Board, which affirmed the dismissal.

Mr. Montalvo appeals to our court. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(9).

DISCUSSION

We must affirm a Board decision unless it 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). Whether the Board has jurisdiction to adjudicate a case is a question of law, which we review de novo. *Forest v. Merit Sys. Prot. Bd.*, 47 F.3d 409, 410 (Fed. Cir. 1995). We review the Board's factual findings supporting its jurisdictional determination for substantial evidence. *Bolton v. Merit Sys. Prot. Bd.*, 154 F.3d 1313, 1316 (Fed. Cir. 1998).

OPM rescinded its December 17, 2015 final decision before the administrative judge or the Board could address the merits of Mr. Montalvo's appeal. As both the administrative judge and the Board found, once OPM rescinded its final judgment, the Board was divested of jurisdiction over Mr. Montalvo's appeal. *See Snyder v. Office of Pers. Mgmt.*, 136 F.3d 1474, 1476 (Fed. Cir. 1998). OPM stated it will issue a new decision once Mr. Montalvo's current appeal is dismissed. After OPM issues that new final decision, the Board will have jurisdiction to review the merits of Mr. Montalvo's case should he challenge OPM's substantive decision.

CONCLUSION

The Board's decision dismissing Mr. Montalvo's appeal for lack of jurisdiction is *affirmed*.

AFFIRMED

COSTS

No costs.