

NOTE: This disposition is nonprecedential.

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

MITZI BAKER,
Petitioner

v.

SOCIAL SECURITY ADMINISTRATION,
Respondent

2024-2179

Petition for review of the Merit Systems Protection
Board in No. CH-1221-18-0412-W-1.

Decided: March 10, 2025

MITZI G. BAKER, Chicago, IL, pro se.

COLLIN T. MATHIAS, Commercial Litigation Branch,
Civil Division, United States Department of Justice, Wash-
ington, DC, for respondent. Also represented by BRIAN M.
BOYNTON, ELIZABETH MARIE HOSFORD, PATRICIA M.
MCCARTHY.

Before PROST, LINN, and REYNA, *Circuit Judges*.

PER CURIAM.

Ms. Mitzi Baker appeals pro se a final order of the Merit Systems Protection Board, which denied Ms. Baker's petition for review and affirmed the administrative judge's initial decision. For the following reasons, we affirm.

BACKGROUND

Since 2010, Ms. Baker worked as a case manager in the U.S. Social Security Administration ("SSA"). SAppx1, SAppx20.¹ During the time relevant to this appeal, Ms. Jamie Barton was Ms. Baker's immediate supervisor. SAppx2.

On April 17, 2017, Ms. Baker filed an individual right of action ("IRA") with the Merit Systems Protection Board ("MSPB" or "Board") alleging that the SSA retaliated against her for her various protected disclosures. SAppx2, SAppx20, ("April 2017 IRA Claim"). While the April 2017 IRA Claim was pending, Ms. Barton issued Ms. Baker's 2017 annual performance appraisal, which was based on four categories: "Interpersonal Skills," "Participation," "Demonstrates Job Knowledge," and "Achieves Business Results." SAppx34. For the former two categories, Ms. Baker received a "3" and for the latter two, she received a "5." *Id.* This resulted in an overall "Summary Appraisal" of "Successful Contribution." *Id.* Ms. Baker received the same individual ratings and overall summary appraisal in her 2016 annual performance appraisal. SAppx44.

Ms. Baker then filed a complaint with the Office of Special Counsel ("OSC"), arguing that her 2017 annual performance appraisal was retaliation for her April 2017 IRA

¹ "SAppx" refers to the supplemental appendix accompanying the appellee's responding brief.

Claim, a “protected activity.”² SAppx56–75. No party disputes that Ms. Baker’s April 2017 IRA Claim constituted a protected activity. *See* Appellant Br. 10; Appellee Br. 4. After review, OSC determined that Ms. Baker did not provide sufficient information or evidence to establish retaliation. SAppx69, SAppx77. OSC closed Ms. Baker’s file but informed her that she may seek corrective action from the MSPB. SAppx77–78.

On June 1, 2018, Ms. Baker filed the instant appeal before the MSPB, arguing that her rating of “3” for the participation category was retaliation for her April 2017 IRA Claim. SAppx47–55. Ms. Baker requested that the SSA take corrective action. SAppx21. In the Board’s initial decision, the administrative judge (“AJ”) assigned to Ms. Baker’s case denied her request for corrective action. SAppx1. The AJ noted that Ms. Baker failed to show by preponderant evidence that her protected activity was a contributing factor in Ms. Barton’s decision to issue her a “3” for the participation category. SAppx1, SAppx7. The AJ credited Ms. Barton’s testimony that she was unaware

² A “protected activity” refers to an activity protected under the Whistleblower Protection Action (“WPA”), as amended by the Whistleblower Protection Enhancement Act, from employer retaliation, including an employee’s “exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation . . . with regard to remedying a violation of paragraph (8)” of the statutory provision. 5 U.S.C. § 2302(b)(9)(A). Paragraph 8 protects from employer reprisal “any disclosure of information by an employee” that she “reasonably believes evidences (i) any violation of any law, rule, or regulation, or (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.” *Id.* § 2302(b)(8)(A)(i)–(ii).

of Ms. Baker's April 2017 IRA Claim at the time of evaluating Ms. Baker's performance. SAppx6–7.

Ms. Baker then filed a petition for review with the full Board, which the Board denied. SAppx20, SAppx81–90. The Board also affirmed the AJ's initial decision, expanding the AJ's analysis in one limited respect. SAppx20. The Board noted that the AJ only considered the “knowledge/timing” test when determining whether Ms. Baker carried her burden to prove retaliation.³ SAppx22. The Board, however, explained that if a party fails to satisfy the knowledge/timing test, the Board will consider other evidence, such as evidence pertaining to the strength or weakness of the agency's reasons for taking the personnel action. *Id.* The Board then considered additional evidence but still found no reason to disturb the AJ's decision. SAppx23. Finally, the Board considered and rejected Ms. Baker's various other arguments, such as bias and improper venue. SAppx27.

Ms. Baker appeals. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(9) and 5 U.S.C. § 7703(b)(1)(A).

DISCUSSION

This court's review of Board decisions is limited. *See Rickel v. Dep't of Navy*, 31 F.4th 1358, 1363 (Fed. Cir. 2022). This court may only set aside the Board's decision if it was “(1) arbitrary, capricious, an abuse of discretion,

³ The knowledge/timing test refers to one way an individual can establish that her protected activity was a contributing factor in the agency's adverse personnel action. *See* 5 U.S.C. § 1221(e)(1). Under this test, a party must show that the official taking the personnel action knew of the disclosure, and that the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure or activity was a contributing factor. *Id.*

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 court reviews the Board’s legal conclusions de novo and its findings of fact for substantial evidence. *See McIntosh v. Dep’t of Def.*, 53 F.4th 630, 638 (Fed. Cir. 2022).

Ms. Baker raises two general arguments. First, she argues that the Board failed to consider another protected disclosure she made to OSC, aside from her April 2017 IRA Claim, when deciding her retaliation claim. Appellant Br. 9, 17–18. Second, Ms. Baker challenges the Board’s finding that her April 2017 IRA Claim was not a contributing factor in the agency’s evaluation of her performance. *Id.* at 18–24. We address each argument in turn.

Ms. Baker argues that the Board erred when it did not consider that she “engaged in protected activity by filing an EEO [Equal Employment Opportunity] complaint and a 2017 Board appeal.” Appellant Br. 10 (emphasis in original). We reject Ms. Baker’s argument, which attempts to untimely expand the scope of the protected activity on appeal. Assuming a complaint alleging EEO violations is a protected activity under the WPA, generally, an individual has a right to appeal directly to the Board only after she first presented the claim to OSC.⁴ 5 U.S.C. § 1214(a)(3). The Board’s jurisdiction is thus generally limited to issues previously raised before OSC. *McCarthy v. Merit Sys. Prot. Bd.*, 809 F.3d 1365, 1374 (Fed. Cir. 2016). Here, the record

⁴ To the extent Ms. Baker is arguing on appeal that an EEO complaint is a protected activity under the WPA, Ms. Baker did not present that argument to the Board and thus it is waived on appeal. *See Lovshin v. Dep’t of Navy*, 767 F.2d 826, 846 (Fed. Cir. 1985) (“The record before us does not indicate that this specific argument was raised below, so that it may properly be considered on appeal.”).

shows that the instant appeal was focused solely on Ms. Baker's April 2017 IRA Claim as the source of protected activity. Ms. Baker's letter to OSC, which initiated this appeal, only listed her April 2017 IRA Claim as a "protected activity." See SAppx69–70. OSC, in turn, noted that it examined Ms. Baker's allegations for potential retaliation due solely to her "protected activity (your MSPB appeal [i.e., April 2017 IRA Claim])." SAppx77. Thus, Ms. Baker's allegation of an EEO complaint as a protected disclosure is not properly before this court.

Ms. Baker then argues that the Board erred in determining that her April 2017 IRA Claim was not a contributing factor in the agency's performance evaluation of Ms. Baker. We also reject this argument. The Board's decision is supported by substantial evidence. The Board relied on the testimony of Ms. Barton that she did not have knowledge of Ms. Baker's April 2017 IRA Claim when completing Ms. Baker's performance evaluation. SAppx24–25. The Board also relied on evidence other than knowledge or timing. SAppx25. The Board noted that Ms. Barton testified that she had no desire or motive to retaliate against Ms. Baker. *Id.* The Board noted that Ms. Barton testified that Ms. Baker's performance rating was justified because Ms. Baker did not consistently complete additional work, i.e., work beyond what was required of her, that would merit a higher rating. *Id.* Finally, the Board noted that Ms. Baker received the same ratings as in her 2016 performance appraisal, which showed that Ms. Barton did not harbor a retaliatory motive towards Ms. Baker. SAppx26. This is substantial evidence supporting the Board's finding that Ms. Baker's April 2017 IRA Claim was not a contributing factor to her performance rating.

CONCLUSION

We have considered Ms. Baker's remaining arguments and find them unpersuasive. For the foregoing reasons, we affirm the Board's decision.

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AFFIRMED

COSTS

No costs.