

## **MSPB RESEARCH NOTES**

- 1. Restoration rights after on-the-job injury**
- 2. Disability retirement as a constructive termination**

### **1. RESTORATION RIGHTS AFTER ON-THE-JOB INJURY**

- a. in general

MSPB Appellant was entitled to priority consideration for restoration since agency removed her for reasons substantially related to her compensable injury, namely her refusal to return to work because (1) agency's accommodations did not sufficiently comport with her physician's recommendations and (2) working under those conditions could endanger her health. [New v Department of Veterans Affairs \(1998, CA FC\) 142 F3d 1259.](#)

Nurse who was partially recovered from her work-related injury bore burden of proof on whether she was terminated because of compensable injury so as to establish that she was denied priority consideration retention rights; if merits issue is one that is also jurisdictional, burden of proof on merits issue remains with employee even though, as technical matter, Board's jurisdiction is established by nonfrivolous allegation. [Walley v VA \(2002, CA FC\) 279 F3d 1010.](#)

Agency is required to make all reasonable efforts to place and accord priority to placing employee in former or equivalent position when employee recovers from disability more than one year after compensation started; employee in good standing at time of injury must be placed on priority employment list and re-employed when vacancy arises; veteran must be on priority list for 2 years; in order to establish violation of restoration rights, employee must show that he was denied position because other person was employed. *White v United States Postal Service (8/26/83 MSPB) Docket No. AT03538110563.*

[5 USCS § 8151](#) requires agency to make every effort to place employee who has been separated because of compensable injury in former position or equivalent upon employee's recovery; employee whose benefits are terminated has right to priority consideration, despite fact that he alleges that he has not fully recovered; Merit Systems Protection Board cannot review agency's denial for priority consideration where Office of Worker's Compensation Programs reinstates compensation benefits. *Montgomery v United States Postal Service (9/20/83 MSPB) Docket No. AT03538110352.*

Agency did not accord appellant priority consideration to which he was entitled as fully recovered employee; although appellant was entitled to agencywide priority consideration, agency offered no evidence to demonstrate that it considered appellant for any position other than positions in facility in which he had previously worked. [Pugh v United States Postal Serv. \(1999, MSPB\) 81 MSPR 313.](#)

- b. unsatisfactory conduct before disability

In considering whether to restore employee to employment after recovering from job injury more than one year from commencement of compensation benefits, the agency may not take account of previous unsatisfactory service where that service would not have resulted in dismissal had injury not occurred. [Raicovich v United States Postal Service \(1982, App DC\) 218 US App DC 398, 675 F2d 417.](#)

Appellant was entitled to jurisdictional hearing on whether specifications underlying his removal that were unrelated to his compensable injury, standing alone, could support removal, where appellant submitted evidence that much of unauthorized absence with which he was charged fell within period covered by grant of compensation. [Allen v United States Postal Serv. \(2001, MSPB\) 88 MSPR 491.](#)

Employee in good standing at time of his injury must be placed on priority list and re-employed when vacancy arises unless employee previously engaged in egregious behavior; evidence that employee, before becoming disabled, twice received warning letters and once was briefly suspended does not constitute egregious behavior. Thompson v United States Postal Service (11/3/83 MSPB) Docket No. DA03537990002.

Priority consideration for employment requires that employee in good standing at time of entry be placed on priority list and reemployed when vacancy occurs unless employee has engaged in egregious conduct; agency may not consider employee's unsatisfactory service where service would not have resulted in dismissal had employee not been injured. Emelio v United States Postal Service (7/9/84 MSPB) Docket No. DC03538110880.

Absences approved by agency do not constitute unsatisfactory service which disqualifies employee from re-employment after recovery from compensable injury. [Emelio v United States Postal Service \(1985, MSPB\) Docket No. DC03538110880ADD, 27 MSPR 233.](#)

c. appeal

Administrative judge erred in dismissing, for lack of jurisdiction, employee's appeal of agency's failure to accord him priority consideration for placement, since where appellant alleges violation of his priority restoration rights, it is part of agency's burden to submit evidence regarding available positions, and any restrictive qualification requirements, in order to show that it has made all reasonable efforts to re-employ appellant. [Metsopulos v US Postal Service \(5/6/87, MSPB\) Doc. No. NY03538610482, 33 MSPR 536.](#)

Board lacks jurisdiction of appeal from denial of restoration following employee's recovery from compensable injury when employee is not serving under regular full-time position. [Garcia v Dept. of Army \(8/10/89\) 41 MSPR 416.](#)

MSPB has appellate jurisdiction over employee's appeal of his removal where employee had more than "one year of current continuous service" as employee worked over 2 months in position before being separated for disability resulting from on job injury, and had approximately 6 years of credit attributable to time he was receiving compensation as well as 10 months service in same position upon reinstatement. [Strawbridge v U.S. Postal Service \(8/12/86 MSPB\) Docket No. CH 07528510579, 31 MSPR 386.](#)

Denial of restoration rights following absence due to compensable injury would constitute otherwise appealable action and also vest Board with authority to consider claim of reprisal for whistleblowing. [Deloach v Department of the Treasury \(1993, MSPB\) 58 MSPR 574.](#)

Employee's restoration appeal was rendered moot by agency's restoring employee to his former position and agreeing to pay him for period between time he originally intended to return to duty and time agency allowed him to return. [Goblet v Department of Veterans Affairs \(1993, MSPB\) 59 MSPR 514.](#)

Cessation of OWCP benefits, standing alone, was not determinative of whether appellant's removal was related to her compensable injury; although parties apparently agreed that job offer of some time was made, there was no evidence of findings and evaluations by OWCP and in any case appellant appealed cessation of OWCP benefits, claiming they were halted for reasons other than her refusal of offered position. [Artis v United States Postal Serv. \(2001, MSPB\) 88 MSPR 309.](#)

For purposes of determining re-employment priority rights under [5 USCS § 8151](#), "compensation" does not include benefits under Civil Service Retirement Act ([5 USCS §§ 8331-8348](#)) because re-employment rights are limited to those who suffered job-related injuries, and word "compensation" is used to refer to benefits under Federal Employees Compensation Act ([5 USCS §§ 8101-8193](#)) and term "annuity" to refer to benefits under Retirement Act. [Johnson v Merit Systems Protection Bd. \(1987, CA\) 812 F2d 705.](#)

Employee was properly removed from agency where arbitrator determined that employee received workers' compensation award through making false claim, even though Labor Department initially determined that employee was entitled to receive compensation award, as finality of Labor Department's decisions relates only to making or denying of compensation awards, and does not prevent employing agency from deciding, in authorized adverse action, that employee had received compensation award through making false claim, for which removal was appropriate penalty, and as employee was not preference eligible she had no right to appeal her removal to MSPB and decision of arbitrator was final. [Minor v Merit Systems Protection Bd. \(1987, CA\) 819 F2d 280.](#)

Pursuant to [5 USCS §§ 8151](#)(a) and 8332(f), in order for individual to receive service credit for those periods during which he or she received Office of Workers' Compensation Benefits, he or she must return to duty upon cessation of those benefits, regardless of whether he or she was "employee or former employee" during time he received such benefits. [Losh v Office of Personnel Management \(6/17/88, MSPB\) Docket No. CH08318710300, 37 MSPR 150.](#)

Although employee is only entitled to restoration to his former or equivalent position following recovery from compensable injury, where employee is originally removed for absence without leave but is subsequently awarded Office of Workers' Compensation benefits for period covered by AWOL, is it likely that had such information been before Board when it considered removal case AWOL charges would not have been sustained, such that case must be remanded to regional office for consideration of OAWCP decision with respect to employee's contention that he was removed from his position because of compensable injury. [Green v Department of Army \(9/6/88, MSPB\) Docket No. SF03538710527, 38 MSPR 52.](#)

Agency is required to accord restored employee any promotion rights he would have had but for his compensable injury or disability and is thus required to consider employee for promotions during disability period as though employee had not been absent because of compensable injury. [Gavette v Department of Treasury \(3/6/90\) 44 MSPR 166.](#)

When position is upgraded during employee absence due to injury, returning employee is to be placed in upgraded position; employee whose recovery takes longer than one year is entitled to priority consideration for position at higher grade than the one he or she left where employee's position has been upgraded during absence. *Phillips v Department of Transportation (7/17/84 MSPB) Docket No. DE03538210033.*

Upon restoration to position after recovery from disability, entire time during which employee has received workers compensation benefits is deemed to have been leave of absence without pay and must be credited for purposes of within-grade step increases, retention purposes, and other rights and benefits based upon length of service. [Phillips v Office of Personnel Management \(1985, MSPB\) Docket No. DE08318510072, 29 MSPR 420.](#)

In balancing former employee's duty and right to return to federal employment as soon as possible after recovery from compensable injury, with agency's duty and right to ensure that employee is able to perform duties of position in question, when restoration is sought in absence of cessation of benefits on basis of full recovery from compensable injury, board will examine whether employee was in fact recovered, whether agency acted reasonably in ascertaining medical status of employee and in providing that employee restoration rights warranted under circumstances. [Brumley v DOT \(1991, MSPB\) 46 MSPR 666](#) (ovrld on other grounds by [Hasler v Department of the Air Force \(1998, MSPB\) 79 MSPR 415](#)).

Agency can properly offset workers' compensation from employee's backpay award; since receipt of backpay is part of employee's right to restoration, he is entitled only to that pay he would have received beyond workers' compensation payments he actually received. [Gay v U.S. Postal Service \(5/18/90\) 47 MSPR 1.](#)

Agency was not precluded from removing employee for medical inability to perform requirements of her position, even though OWCP benefits had been terminated, since OWCP made no finding of medical recovery when it terminated benefits, rather benefits were terminated due to employee's failure to accept offered position and medical evidence indicated that employee was unable to work in any position with agency. [Kimble v U.S. Postal Service \(3/11/91\) 47 MSPR 251.](#)

Reduction of employee's leave benefits because of her non-pay status was not erroneous since agency's regulation precluding accrual of annual and sick leave applies to all employees in non-pay status, not just to those receiving OWCP compensation. [Burtch v U.S. Postal Service \(4/4/91\) 47 MSPR 518.](#)

Appellant was properly considered reemployed annuitant where agency effected his retirement as disability retirement even though he elected to receive OWCP benefits in lieu of annuity benefits under CSRS, but his status as reemployed annuitant did not require that he serve at will of appointing authority pursuant to [5 USCS § 3323](#), since his rights under 5 USCS Chapter 81 must be considered as well

since he was entitled to OWCP benefits on basis of same injury that caused him to qualify for disability retirement, including significant restoration rights that do not attach to disability annuitant separated for non-compensable injury. [Ochoa v Department of the Navy \(1994, MSPB\) 65 MSPR 39.](#)

Remand was required to determine whether agency searched throughout local commuting distance for position to which employee who had partially recovered from compensable injury could have been restored; ALJ made no specific findings whether agency district throughout which agency allegedly searched geographically encompassed entire local commuting area. [Sapp v United States Postal Serv. \(1997, MSPB\) 73 MSPR 189.](#) remanded (1999, MSPB) [82 MSPR 411.](#)

Appellant failed to state claim upon which relief could be granted since Board has no authority to overrule Office of Worker's Compensation's determination that agency's restoration offer was suitable. [Miller v United States Postal Serv. \(1999, MSPB\) 82 MSPR 170.](#)

Office of Personnel Management does not have jurisdiction to adjudicate alleged denials of restoration rights; Merit Systems Protection Board has jurisdiction to consider such allegations. OPM Case No. S98000606 (6/8/99).

## **2. DISABILITY RETIREMENT AS CONSTRUCTIVE TERMINATION**

The Board may find that a disability retirement was in fact a constructive termination, where it is involuntary – i.e., where the Agency could have accommodated the employee or could have provided a position within the employee's capabilities and failed to do so. The retirement is not involuntary, however, if the employee is truly disabled from working in his present position or an available vacant position to which he could be reassigned. [Rule v. VA](#), 81 MSPR 282, 284-85 (1999); [Nordhoff v. Dept. of Navy](#), 78 MSPR 88 (1998), *aff'd* Nordhoff v. Dept. of Navy (Fed. Cir. nonprecedential No. 98-3210).

The Board may find that the agency's refusal to consider the employee for a position of lower grade or pay was discriminatory, making the retirement from his/her former position involuntary. The employee must have indicated to the agency that he wished to continue working despite his medical limitations, and must prove the agency failed to accommodate him during the period from the accommodation inquiry to the date of his separation. [Rule v. VA](#), 85 MSPR 388, 391-95 (2000)(CSRS retirement – citing 5 USC 8337(a), 29 CFR 1614.203(g)) .

An employee does not make out a claim for involuntary disability retirement by proving that the agency failed to provide him with a non-permanent light duty position or continuing assignment to light duty in his own position. [Mengine v. USPS](#), 82 MSPR 123, 127-29 (1999).

Copyright © 2004, Steven E. Brown, all rights reserved.