Mr. Roney

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DECISION

THE COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

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FILE: B-200613 DATE: March 23, 1981

MATTER OF: Aaron L. Blanton - Backpay for Medical Disqualification

DIGEST: An air traffic controller who was medically disqualified for air traffic control duties, requests restoration of his annual and sick leave and award of premium pay for period of removal. Employee did not appeal disqualification to FAA Board of Review nor file grievance concerning this matter. Claim is denied since there has been no finding of an unjustified or unwarranted personnel action as required under Back Pay Act, 5 U.S.C. § 5596 (1976) and since this Office will not review merits of medical disqualification.

The Professional Air Traffic Controllers Organization (PATCO) requests that we restore the sick and annual leave and premium pay of an Air Traffic Control Specialist who was medically disqualified to perform his duties. Service pursuant to 4 C.F.R. § 21.5 (1980) was made upon the Federal Aviation Administration (FAA) and their response was received in this Office on October 8, 1980. For the reasons set forth below, the claim is disallowed.

On December 13, 1979, Mr. Aaron L. Blanton, an Air Traffic Control Specialist at the Albany Air Traffic Control Tower, Albany, Georgia, filed a Federal Employee's Notice of Occupational Disease and Claim for Compensation, which was forwarded to the U.S. Department of Labor, Office of Workers' Compensation Programs (OWCP).

Mr. Blanton met with the Chief, Air Traffic Control Tower, Albany, Mr. Robert L. Ferguson, on December 26, 1979, and reported that his condition was persisting and that he would need to have some relief from extended periods of approach control duties. On December 28, 1979, Mr. Ferguson requested

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that the Assistant Regional Flight Surgeon, Southern Region, review Mr. Blanton's medical history to determine whether he was medically qualified to perform his duties as a controller. On January 2, 1980, the Assistant Regional Flight Surgeon issued a medical opinion that Mr. Blanton was "medically restricted from all controller duties," whereupon Mr. Blanton applied for sick leave. His application was approved on January 7, 1980. He remained on sick leave until April 21, 1980, when he requested annual leave on which he remained through June 5, 1980.

Mr. Blanton filed an application with the Office of Personnel Management (OPM) for disability retirement on February 1, 1980. The FAA reports that his application was based on his personal statement and was not agency initiated. However, the application was denied by the Office of Personnel Management on May 27, 1980, because the medical disorder was not disqualifying for full performance of the duties of the employee's position under the qualification standards.

On July 7, 1980, the Assistant Regional Flight Surgeon returned Mr. Blanton to active control duties. Mr. Blanton has since appealed the denial of his disability retirement application. The FAA states that, at the time it filed its reply, final action had not been taken on that appeal.

It is argued by PATCO that FAA violated its own regulations by relying solely on the diagnosis of Mr. Blanton's personal physician and, thus, his sick and annual leave and premium pay should be restored based on our decision in David E. Bright, B-188125, October 31, 1977.

In that decision, we awarded premium pay to an employee whose medical disqualification was reversed by the FAA's Board of Review. We held that the Board's decision in favor of the employee was tantamount to a finding of an unjustified or unwarranted personnel action under the provisions of 5 U.S.C. § 5596 (1976). In so deciding, we stated the long-standing rule that Government employees who are reassigned or placed in an involuntary leave status

for medical reasons are entitled to recover lost compensation, including premium pay, when it is shown that the employees were ready, willing, and able to perform their duties and were not, in fact, medically incapacitated at the time of the reassignment or suspension. Thus, where the medical findings on which the personnel action was based were overturned or where there were no medical findings to support the administrative determination, our Office has held the suspension to be an unjustified or unwarranted personnel action. 39 Comp. Gen. 154 (1959) and B-170092, September 1, 1970. Of course, where there are competent medical findings that the employee was in fact incapacitated at the time of the suspension, a personnel action based thereon would not be unjustified or unwarranted. 41 Comp. Gen. 774 (1962). See Connie R. Cecalas, B-184522, March 16, 1976, sustained upon reconsideration, April 21, 1977.

In this case, Mr. Blanton never appealed his medical disqualification to the Board of Review, as is his right under 5 U.S.C. § 3383 (1976). Furthermore, he has not submitted this matter through a negotiated grievance procedure. Thus, there has not been a finding of an unjustified or unwarranted personnel action, which is necessary for an award of backpay under 5 U.S.C. § 5596 (1976).

We note that Mr. Blanton's return to duty on July 7, 1980, did not result from the original disqualification being overturned. Rather, we have been informally advised that his return to full duties was based on a determination that his medical disorder was being controlled by medication. Thus, the present record does not indicate that a finding of an unjustified or unwarranted personnel action has been made.

If PATCO is urging that we find an unjustified or unwarranted personnel action based on the merits of the medical evidence, we refer them to the language of Bright, where we stated:

> "Our decision is not intended to second-guess the reasonableness of the

> initial decision to reassign the claimant, nor to imply that that decision was arbitrary or capricious. The FAA clearly has the right to remove its employees from air traffic control duties in the interest of aviation safety, and it need not and should not avoid its duty to protect aviation safety even in close cases. Where, however, under the statutory review procedures, the Board of Review determines that a removal action was not supported by the medical evidence, the agency must restore the employee to his position and reimburse him for the mistaken action taken to his detriment."

Since Mr. Blanton did not appeal his medical disqualification to the Board of Review and there has not been a finding of an unjustified or unwarranted personnel action, and since we will not review the merits of Mr. Blanton's medical disqualification, relief may not be granted under the Bright decision.

Finally, PATCO argues that the FAA is guilty of a procedural error in that they relied solely on the diagnosis of Mr. Blanton's personal physician in violation of Paragraph 51(c) of FAA Order 3930.3A. That paragraph provides:

> "If the ATCS does not meet the retention standards the Flight Surgeon may carry out further medical evaluation including medical tests and laboratory determinations, and medical specialty evaluations by selected physicians or other medical specialists. The Flight Surgeon normally will not determine that an ATCS does not meet medical retention standards solely on the basis of information provided by the ATCS's own physicians." (Emphasis added.)

This Office has recognized that an agency's administrative error in failing to comply with its nondiscretionary administrative regulations may be remedied under the Back Pay Act, 5 U.S.C. § 5596, (1976). Billy M. Medaugh, 55 Comp. Gen. 1443 (1976).

In interpreting the above-quoted regulation, we believe that the use of the qualifying term "normally" implies that the FAA has some discretion and may, in instances that are outside the norm, rely on information provided by the employee's physician. In any event, the record here indicates that the FAA considered other factors, such as Mr. Blanton's statement that his illness required that he receive some relief from extended periods of approach control duties and his applications to the Department of Labor for workmen's compensation and to OPM for disability retirement. Accordingly, we do not find that the regulation absolutely prohibited the FAA in every case from relying solely on the diagnosis of the employee's attending physician.

Accordingly, since Mr. Blanton's medical disqualification has not been overturned by appropriate authority and we find no violation of a mandatory FAA regulation, we can neither restore Mr. Blanton's leave nor allow his claim for premium pay.

Milton J. Socolar

Acting Comptroller General
of the United States