

Paul

16028



**DECISION**

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

*[Request for Reconsideration of Claim for Backpay]*

FILE: B-199263

DATE: February 4, 1981

MATTER OF: Harold E. Richards - Backpay

**DIGEST:** Civilian employee of Department of Navy claims backpay on basis of Merit Systems Protection Board decision overturning his separation. Claim was disallowed based on agency's report that during the period of improper separation employee was not ready, willing, and able to perform his duties because of an incapacitating illness. See 5 C.F.R. § 550.804(d). Claimant now requests reconsideration alleging that during period in question he was physically fit for duty. Resulting factual dispute on which appeal is based is of insufficient probative value to permit payment of the claim.

Mr. Harold E. Richards requests reconsideration of his claim for backpay incident to the cancellation of his separation at the Naval Weapons Station, Seal Beach, California. Pursuant to the following analysis we are sustaining our Claims Group's denial of Mr. Richards' claim on May 19, 1980.

On October 16, 1979, the Merit Systems Protection Board decided that Mr. Richards' separation on the basis of abandonment of position was defective. On November 13, 1979, the separation was cancelled retroactive to May 18, 1979. Predicated on the Board's determination Mr. Richards petitioned his employing activity for backpay and substitution of annual and sick leave during the period covered by the Board's decision. The agency denied Mr. Richards' claim stating that notwithstanding the improper separation, Mr. Richards was nevertheless in a nonpay nonduty status during the period in question since he was not physically able to perform his duties due to an incapacitating illness and he had exhausted all of his leave. Upon referral of the matter to our Claims Group these same findings were reflected in the agency's administrative report on Mr. Richards' claim

~~015015~~ / 114244

with the added observation that as of the date of the administrative report, March 24, 1980, Mr. Richards was still not physically fit for duty.

In view of the agency's certification that Mr. Richards was not physically fit for duty during the period of the improper separation, our Claims Group disallowed his claim because section 550.804(d) of title 5, Code of Federal Regulations requires that in computing the amount of backpay pursuant to section 5596 of title 5, United States Code, the agency may not include any period for which the employee was not ready, willing, and able to perform his duties because of an incapacitating illness or injury. Further, although section 550.804(d) of title 5, Code of Federal Regulations, provides that the agency shall grant, upon request of the employee, any sick or annual leave available to the employee, such action was precluded in Mr. Richards' case since the agency had certified that he had exhausted all of his leave.

In support of his present appeal Mr. Richards states as follows:

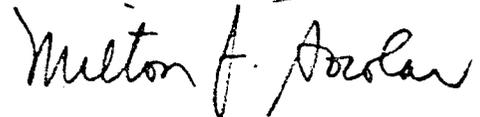
"Please be advised that I did return to work and that the only reason I was not working on 24 March 1980 is that the agency in question has and is preventing me from returning to work even though I have been released by my doctor."

Our procedures for review and reconsideration of claims settlements are set forth in Part 32 of title 4, Code of Federal Regulations which provides that applications for reconsideration should state the errors which the applicant believes have been made in the settlement and which form the basis of his request for reconsideration. In the present case, Mr. Richards' appeal is clearly predicated on a factual dispute with the agency in regard to whether or not he was ready, willing, and able to perform his duties during the period of his claim, and, whether or not his leave accounts were exhausted at the time in question. This factual dispute cannot be resolved through resort to the administrative record.

In regard to the sufficiency of the evidence required to support an award of backpay in the circumstances presented we should point out that this Office decides cases involving claims against the Government on the basis of the written record. Claims against the United States cannot be allowed unless they are corroborated by Government records or other documentary evidence. As stated in section 31.7 of title 4 of the Code of Federal Regulations, claim settlements are based on the facts as established by the Government agency concerned and by evidence submitted by the claimant, and the burden is on the claimant to establish the liability of the United States for payment. Furthermore, where an administrative agency and a claimant disagree as to the facts in a case, it is our policy to accept the facts as presented by the agency in the absence of clear and convincing proof to the contrary.

As a result, the factual dispute on which Mr. Richards' appeal is based is of insufficient probative value to permit payment of the claim. Since the claim is of doubtful validity due to a lack of suitable evidence, we must deny the claim and leave the claimant to his remedy in the courts. See generally Louis Osborne, B-197980, May 9, 1980, and cases cited therein.

Therefore, we sustain the Claims Group's disallowance of Mr. Richards' claim for backpay.



For the Comptroller General  
of the United States