

DECISION

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

FILE: B-205950

DATE: January 10, 1984

MATTER OF: Isma B. Saloshin - Backpay - Agency-
Initiated Disability Retirement Application

DIGEST:

1. Employee was placed in an involuntary leave status pending Civil Service Commission (CSC) approval of agency-initiated disability retirement application based on orthopedic examinations, including one performed by employee's own physician, all of which found her physically incapacitated to perform assigned nursing duties. Even though the application for disability retirement was ultimately denied by the Merit Systems Protection Board (MSPB), her claim for backpay is denied. The issue before the MSPB was whether the earlier determined physical incapacity was sufficient to support disability retirement. While it was determined that retirement criteria were not met, the validity of the earlier medical findings was not questioned. Therefore, placement of employee on involuntary leave was not unwarranted or unjustified.
2. Agency appealed a Civil Service Commission (CSC) initial rejection of their disability retirement application, and won. The employee, in turn, appealed retirement action to the Merit Systems Protection Board (MSPB). Pending outcome, employee was continued in a non-pay status. Claim for backpay (5 U.S.C. § 5596), asserted because MSPB overturned retirement approval, is denied. Once disability retirement application is approved, it is appropriate for agency to retire employee then, and no basis exists for employee to assert continuing employment rights thereafter.

Fact that MSPB overturned CSC retirement approval did not make agency action continuing employee in non-pay status pending appeal outcome improper or unjustified.

3. Employee has received backpay for a portion of period she was in a non-pay status, while agency-initiated disability retirement application was in appellate process. Employee is not entitled to interest on the backpay award since it is not specifically authorized by Back Pay Act, 5 U.S.C. § 5596.

This decision is in response to a letter dated April 15, 1983, from Ms. Isma Saloshin. She has requested further consideration of her claim for backpay and recredit of leave used during the period June 1, 1977, to May 11, 1980, incident to her employment with the Veterans Administration Medical Center (VAMC), Lexington, Kentucky. For the reasons stated below, the claim for additional backpay is denied.

BACKGROUND

The matter of Ms. Saloshin's claim was the subject of a settlement by our Claims Group, Z-2828516 dated March 7, 1983. That settlement allowed backpay and leave recredit for the periods November 30, 1978, to February 22, 1979, and May 17, 1979, to May 11, 1980, based on a finding that the action of the agency during those periods constituted an unjustified and unwarranted personnel action. Backpay and leave recredit was disallowed for the remaining periods (June 1, 1977, to November 29, 1978, and February 23, 1979, to May 16, 1979), since it was determined that the personnel actions immediately preceding those periods were justified.

In her appeal of the disallowed periods, Ms. Saloshin contends that the law (5 U.S.C. § 5596), and the regulations governing, require that the employee be made whole if the personnel actions are determined to be unjustified. In support of that view, she asserts, in essence, that the action of the Atlanta Regional Office of the Merit Systems

Protection Board (MSPB) on May 17, 1979, which ruled in her favor, and which became the final decision of the MSPB, established conclusively that the administrative actions taken prior to that time were totally improper and unjustified. Additionally, Ms. Saloshin contends that she is entitled to interest on all the backpay awarded.

FACTS

Ms. Saloshin began her employment with the Veterans Administration Medical Center in January 1971, as Assistant Chief, Nursing Service. She previously had been a United States Army Nurse in Vietnam, but had left the military in 1970 due to a service connected back injury, which injury and resultant disability was a matter of record with the VAMC.

Between 1971 and 1977, Ms. Saloshin had been assigned and reassigned to a number of different units in VAMC. Effective May 16, 1977, she was assigned to the Intermediate Medical Care Unit. Ms. Saloshin objected to this assignment for medical reasons, asserting that her back condition would not permit the frequency of bending, stooping and lifting required of a nurse in that unit. She was granted sick leave from May 16 until May 31, 1977.

During that time, Ms. Saloshin was examined by her own private physician who, by report dated May 26, 1977, stated that she could return to work on May 31, 1977, but unequivocally stated: "No lifting or bending allowed." Based on this report, VAMC refused to permit her to return to duty, but continued her in a sick leave status and referred her to their employee health physician.

On June 6, 1977, Ms. Saloshin was placed in an off-duty status because she refused to request sick leave to cover her off-duty time. By memorandum dated June 17, 1977, VAMC advised her, in part, that so long as her physician would not permit her to perform any lifting and bending she would not be permitted to return to duty. Further, the use of sick leave to cover her off-duty status, previously authorized, would continue to be authorized if requested by her. That memorandum went on to state that the VAMC could not return her to duty so long as her physician's statement

remained unchanged and that if she failed to request sick, annual or leave without pay to cover her off-duty time, she would be placed in an absence without leave (AWOL) status. She refused to comply and effective June 24, 1977, was placed in an AWOL status.

On June 30, 1977, a VAMC requested fitness-for-duty orthopedic examination was performed by Dr. William Winter. He found that it was medically undesirable for Ms. Saloshin to do any significant bending, stooping, or lifting. Based on those two medical findings, Ms. Saloshin's AWOL status was rescinded and she was involuntarily placed on sick leave effective July 1, 1977. The VAMC thereafter submitted the results of the fitness-for-duty examination to the Director, VAMC Nashville, Tennessee, for an independent evaluation. When VAMC Nashville advised they could not reach a firm conclusion about Ms. Saloshin's condition, a local Physical Standards Board was requested by VAMC Lexington, to evaluate those results. On September 26, 1977, that board ruled that Ms. Saloshin was disabled for the position of staff nurse.

Based on that ruling, VAMC Lexington, initiated a disability retirement application with the Civil Service Commission (CSC) on February 23, 1978. During the course of adjudicating the question as to whether Ms. Saloshin's physical condition was sufficiently disabling so as to qualify her for disability retirement, an additional orthopedic examination ordered by the CSC was performed. According to the file, it was medically concluded at the time of that examination that her physical condition was "essentially normal" noting that she had an overall bodily function impairment of 10 percent as a result of an old healed compression fracture of T11 of the thoracic spine. Based on that finding, the Bureau of Retirement, Insurance and Occupational Health of the CSC rejected the retirement application by a letter dated November 30, 1978, for the reason that total disability for useful and efficient service had not been shown by the medical evidence.

Subsequent to that ruling, VAMC Lexington, filed an appeal. On February 22, 1979, the Office of Personnel Management (OPM) overturned the earlier action and approved Ms. Saloshin's disability retirement. Thereafter, she appealed that decision to the Atlanta Regional Office of

the Merit Systems Protection Board (MSPB), which by action dated May 17, 1979, ruled that she had not become totally disabled for Civil Service retirement purposes. When the full MSPB refused, on September 9, 1979, to reopen the case at the VAMC's request, the VAMC initiated a separation action on October 4, 1979, based on disability. Ms. Saloshin appealed that action to the VA Central Office, which by decision of April 15, 1980, overruled the separation request and directed her return to duty, which was accomplished May 12, 1980.

Ms. Saloshin contends that because the retirement application was rejected first by the CSC and later by the MSPB, it is established that all prior actions taken by the agency placing her on sick leave, annual leave, absence without leave, and leave without pay, were improper and, thus, under the provisions of 5 U.S.C. § 5596, she is entitled to backpay and recredit for leave. We disagree.

OPINION

Section 5596 of title 5, United States Code, governing an employee's entitlement to backpay, provides in part:

"(b) An employee of an agency who, on the basis of an administrative determination or a timely appeal, is found * * * to have undergone an unjustified or unwarranted personnel action that has resulted in the withdrawal or reduction of * * * pay, allowances, or differentials of the employee--

"(1) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect an amount equal to * * * the pay, allowances, or differentials, as applicable, that the employee normally would have earned during that period if the personnel action had not occurred * * *; and

"(2) for all purposes, is deemed to have performed service for the agency during that period except that--

"(A) annual leave restored * * *
in excess of the maximum leave accumu-
lation permitted by law shall be
credited to a separate leave account
* * *."

This Office has long held that an employee may be placed in an involuntary leave status for a variety of reasons, including medical, before and while an agency-filed disability retirement application is pending before the Civil Service Commission (now Office of Personnel Management), when it is administratively determined that an employee is incapacitated for the performance of assigned duties based upon competent medical evidence. Further, such action does not constitute an unjustified or unwarranted personnel action under the Back Pay Act. 41 Comp. Gen. 774 (1962), and William J. Heisler, B-181313, February 7, 1975. See also 5 C.F.R. § 831.1206 and Federal Personnel Manual Supplement 831-1, S10-10a(6). Additionally, the Court of Claims has held that Government employees who are placed in an involuntary leave status for medical reasons are entitled to recover lost compensation for the period, but only when it is shown that the employees were ready, willing and able to perform their duties and were not medically incapacitated at the time they were placed on leave. Kleinfelter v. United States, 318 F.2d 929 (Ct. Cl. 1963), and Seebach v. United States, 182 Ct. Cl. 342 (1968).

Based on the foregoing, in _____, B-184522, March 16, 1977, we considered the effect of a CSC determination that an employee was not eligible for disability retirement on the question of the competency of the medical finding of a physical incapacity at the time the employee was placed in an involuntary leave status. We ruled therein that the CSC ruling did not establish that the employee was not at least temporarily disabled at the time of placement on involuntary leave. We concluded that, in the absence of an administrative determination that the earlier medical evidence was improper, the involuntary leave placement based thereon would not be considered unjustified or unwarranted. That decision was sustained on reconsideration. _____, B-184522, April 21, 1977.

In the present case, Ms. Saloshin's position reassignment in May 1977 was indicated to have been for nonmedical reasons. Her only objection to that reassignment was her assertion that she was physically unable to perform the required duties. That assertion was supported by her own physician's statement of May 26, 1977, that she would be permitted to return to work on May 31, 1977, but that no lifting or bending was allowed. This conclusion was further supported by the agency's orthopedic physician in the fitness-for-duty examination performed on June 30, 1977, and later by a local Physical Standards Board.

The issue before CSC at the time that the agency-initiated disability retirement application was considered, was not the validity of those medical findings. The only issue was whether the disability demonstrated by that medical evidence was sufficient to warrant her retirement. The fact that CSC concluded that it was not, does not establish that the earlier medical findings were invalid, only that her condition at the time of CSC adjudication was not sufficiently disabling to require her retirement.

On the question of whether Ms. Saloshin was ready, willing and able to work and was not medically incapacitated at the time she was involuntarily placed on leave on June 1, 1977, it has been held that where an employee is determined to be incapacitated from performing assigned duties at a particular time by competent medical findings, the placement of an employee in an involuntary leave status is not unjustified. _____, cited above. In view of the fact that Ms. Saloshin complained that she could not physically perform the required duties, coupled with her own physician stating that she was not permitted to lift or bend, the conclusion that she was incapacitated from performing her assigned nursing duties at that time is not unreasonable. Therefore, based on the record before us, we find no basis upon which to allow backpay and leave recredit for the period June 1, 1977, to November 30, 1978, when the CSC rejected the agency-initiated disability retirement application.

With regard to the subsequent period (February 23, 1979, to May 16, 1979), the record shows that the CSC action rejecting the retirement application in Ms. Saloshin's case

was agency appealed. On February 22, 1979, the Office of Personnel Management (the successor to the Civil Service Commission), overturned the earlier CSC action and approved her disability retirement. While it is to be noted that Ms. Saloshin was in an involuntary leave status from her employment throughout the entire period (June 1, 1977, to May 11, 1980), our Claims Group stated in its settlement of March 7, 1983, that:

** * * If Mrs. Saloshin had been on duty throughout that time, and if the agency had placed her in an involuntary leave status when her disability retirement was finally approved on February 22, we do not believe such action at that time would have been considered unjustified or unwarranted.
* * *

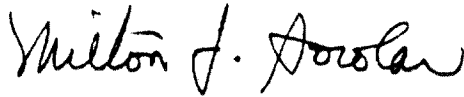
We concur with that view. While our Claims Group ruled that the failure of VAMC to return Ms. Saloshin to duty on November 30, 1978, when the initial disability retirement application was rejected, was unwarranted and unjustified, thus, permitting backpay beginning on that date, once that CSC decision was overturned on February 22, 1979, and the disability retirement application approved, no basis existed for her to continue to assert employment rights for backpay purposes thereafter, since it was appropriate for the VAMC to retire her for disability at that time. The only reason why the processing of her retirement was delayed beyond that time was because she appealed the OPM ruling to the MSPB. Further, the fact that it was eventually determined by the MSPB on May 17, 1979, that she was not sufficiently disabled for retirement purposes, thus, canceling the OPM disability retirement approval, did not make the required VAMC action placing her in a non-pay status pending the appeal outcome improper or unjustified.

With regard to Ms. Saloshin's claimed entitlement to interest on her backpay award, in the absence of a statute so providing, interest does not accrue on claims against the United States. Seaboard Air Line Railway v. United States, 261 U.S. 299 (1923); and Smyth v. United States, 302 U.S. 329, (1937). See also 45 Comp. Gen. 169 (1965). Therefore, since the backpay statute does not specifically provide for

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the payment of interest, no interest may be paid on the backpay awarded to Ms. Saloshin. Van Winkle v. McLucas, 537 F. 2d 246 (6th Cir. 1976), cert. den. 429 U.S. 1093 (1977).

Ms. Saloshin has raised various other issues including violation of veterans preference and discrimination based on physical handicap, none of which come within the jurisdiction of this Office to resolve.

for 
Comptroller General
of the United States