

Workshop # 5

What is the U.S. Merit Systems Protection Board (MSPB) and How does it Apply to Injured Employees?

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Course Objectives

- An overview of MSPB and how it compares to the EEOC and the ECAB.
- A discussion of the types of appeals an injured employee may bring to the MSPB, versus the EEOC or the ECAB.
- A look at jurisdictional issues and a case study on appropriate venues.

What is MSPB?

The U.S. Merit Systems Protection Board is an independent agency in the Executive branch of the Federal Government.

Created to ensure government agencies follow Federal Merit systems practices.

Authority of MSPB

- **Original Jurisdiction –**
 - Hears and renders decisions on charges of violations of law
- **Policy Oversight and Evaluation**
 - Conduct studies and reviews
- ***Appellant Jurisdiction –***
 - *Hears appeals of actions taken by agencies*

Appellant Jurisdiction

MSPB hears appeals from employees regarding actions that were taken by agencies.

Examples include:

- **Adverse Actions based on misconduct**
- **Terminations of probationary employees in limited circumstances**
- **Reductions-in-Force (RIF)**

Examples (continued):

- Removals or demotions based on medical inability**
- Removals or demotions based on unacceptable performance**
- Denial of a WIGI**
- Suitability Disqualification**
- Certain types of Furloughs**

Examples (continued):

- Decisions by OPM in retirement matters, i.e. disability retirement, survivor annuities, etc.**
- Failure to properly restore to duty following partial or full recovery from a compensable injury.**

The MSPB Process

- **The “Board” is a Presidential appointed, three member board.**
- **Initial decisions on appeals are rendered by an Administrative Judge.**
- **Initial decisions become final if not appealed (by the employee or the agency) to the full Board.**

What does MSPB NOT have authority to do?

- Order the payment of workers' compensation benefits.
- Consider appellant's claim that he should not have been taken off worker's compensation and restored to duty;
- Consider claim that agency gave erroneous information to OWCP.

More specifically, when might an injured employee appeal to MSPB?

- If s/he suffers an adverse action for misconduct or performance. Including removal for failure to “return to work”.
- If OPM denies an application for disability retirement.
- If removed from service based on medical inability to perform.

(Cont.)

- If agency fails to provide restoration rights to employees who have fully or partially recovered from a compensable injury.
- Allegation of a “constructive” denial of restoration rights.

EEOC

- An independent Federal agency created to enforce the various statutes which prohibit employment discrimination on the basis of race, color, sex, national origin, religion, retaliation, age and disability.

More specifically, when might an injured employee file an EEO complaint?

- Denial of a reasonable accommodation to which entitled under the ADA.
- Discrimination based on disability (i.e. non-selection, denial of leave, harassment, etc.).
- Suffers an adverse action believed to be for discriminatory reasons.

ECAB

The Employees' Compensation Appeals Board (ECAB) was created in 1946 by statute to hear appeals taken from determinations and awards under the Federal Employees' Compensation Act with respect to claims of federal employees injured in the course of their employment.

Other Venues

- **Agency Grievances**
 - Typically covers actions or issues not under jurisdiction of MSPB, EEOC, or ECAB
- **Negotiated Grievance Procedures**
 - Those issues covered by the CBA
- **???**

Injured Employee

Appeals to the MSPB

- Adverse actions
- OPM denial of Disability Retirement
- Failure to restore to duty

Appeals to the ECAB

- Final decisions by the OWCP, i.e.
- Amount of compensation
- Termination of compensation
- Scheduled awards

Complaints to EEOC

- Action taken by agency based on disability discrimination
- Denial of Reasonable Accommodation

Choice of Venue

- MSPB, ECAB, and EEOC only accept jurisdiction over those issues and allegations to which it is vested authority to adjudicate.
- Normally, jurisdiction is clear and distinct
- Some overlap in certain types of cases.

Case Study

- **What are the issues?**
- **What appeal options are available to the employee?**
- **Which venues are appropriate for which issues?**

Interesting Decisions

MSPB v. OWCP

- MSPB will not sustain a removal based on AWOL and other leave-related charges when OWCP determines that the employee was entitled to compensation benefits as a result of a work-related injury for the entire time period charged as AWOL.

**Richardson v. Smithsonian Institution,
48 MSPR 546 (1991)**

Interesting Restoration Decisions

MSPB v. OWCP

- Appellant not entitled to restoration where the termination of OWCP payments were due to employee working outside medical restrictions while receiving compensation.
- Kravitz v. Dept of Navy, SF-0353-04-0202-I-1, (April 25, 2005)

Interesting Restoration Decisions

MSPB v. OWCP

- Removal during probation was found to be substantially related to the injury where employee's attendance/performance was marginally acceptable before the injury-related absence began.

Ruppert v. USPS, 8 MSPR 593 (1981)

Interesting Restoration Decisions

MSPB v. OWCP

- Appellant who was removed for cause (participating in a strike) had no right to restoration simply because he received compensation after the removal.

**Cox v. Department of Transportation,
31 MSPR 148 (1986)**

Interesting Restoration Decisions

MSPB v. OWCP

- The Board is not bound by OWCP or ECAB Decisions. Agency's offer of restoration to a limited duty position was "reasonable" even though ECAB ruled the offer was "unsuitable" for purposes of termination of benefits.

Minor v. MSPB, 819 F.2d 280, 283
(Fed. Cir. 1987)

Interesting Restoration Decisions

MSPB v. OWCP

Even though employee was restored to duty it was deemed unreasonable where employee could not perform the duties of the position due to his medical restrictions

Miller v. U.S. Postal Service, 82 MSPR 170 (1999).

Interesting Restoration Decisions

MSPB v. OWCP

- However, when OWCP determines an agency's job offer is "suitable", the Board must rule the agency's job offer is not an arbitrary and capricious denial of restoration.

Miller v. U.S. Postal Service, 82 MSPR 170 (1999)

Resources

- <http://www.mspb.gov>
- <http://www.dol.gov/ecab/>
- <http://www.eeoc.gov/>

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Injured Employee Case Scenario #1

Renee Repetition has an approved claim for carpal tunnel and has been out for several weeks following her surgery. Her physician has indicated she can return to duty for 4 hours a day with no typing or duties of a repetitive nature for 60 days. She is to be re-evaluated in 30 more days for consideration of increasing her work hours and duties.

Renee returns to a light duty position in another department but soon complains to human resources that she should have been returned to her permanent work unit because they have plenty of work that she can do for 4 hours a day within her restrictions. Renee points out a clause in the union contract that says “every effort will be made to provide appropriate work to compensably injured employees within their immediate work unit, workload and restrictions permitting.”

Several more weeks go by and Renee is still unhappy as she hasn’t heard anything back after her trip to HR to express her dissatisfaction with the current light duty job.

Shortly thereafter Renee provides medical documentation from her physician that states “patient’s work environment is causing aggravation of and contrary to optimal post-surgery rehabilitation efforts. Therefore, employee is restricted to 2 hours day of work with no lifting of more than 2 lbs or repetitive motion of any kind.”

When she is advised by her supervisor that she will be expected to continue to report to her light duty position and work within the restrictions set by her physician, Renee states that the light duty position is not suitable because the files she has to carry often weigh several pounds and that she can’t do any of the filing without repetitive motion. She tells HR and her supervisor that she cannot report to work until she is provided an assignment that meets her physician’s restrictions.

What are the issues and what are the appropriate venues?

Issue:	DOL/OWCP?	ECAB?	MSPB?	EEO?	Grievance?
1.					
2.					
3.					
4.					

Injured Employee Case Scenario #2

Joe Tripp has been in and out of work for 4 months based on a physician's statement that he cannot work at times due to a shoulder and back injury he suffered as a result of lifting boxes while at work. Joe has filed a CA-1, but his claim was initially denied. He filed an appeal and is awaiting another decision by OWCP. During this time period, Joe submits medical documentation that says he "cannot work" due to the flare up of his prior back injury or because of severe shoulder pain and is absent for days at a time up to a week and even up to 2 weeks on occasion.

Joe also has a history of leave abuse and has been counseled and placed on leave restriction regularly in the past. He has been previously reprimanded for prior AWOLs (about 18 months ago) and received a 3 day suspension 4 months ago for disrespectful conduct towards his supervisor which occurred in a meeting about his attendance.

Joe feels his boss has been harassing him and holding him to a higher standard in terms of use of sick leave and emergency annual leave. He also feels that the agency violated his rights as a disabled employee by controverting his claim and they are the reason for the denial by OWCP.

Last month, Joe submitted a request to be reassigned to a desk job and to work a flexible work schedule based on his "disability" and as a reasonable accommodation. When the supervisor met with him last week to advise him that the accommodation could not be provided, Joe lost his temper and yelled at the supervisor "It's all because of you I'm in this situation and you are not going to get away with this! You better watch your back because accidents DO happen!" He left the work site and has not been heard from since.

Several days after the above incident, the supervisor sent a notice of proposed removal to Joe at this home address based on charges of AWOL and making threatening comments to his supervisor. The same day Joe received this notice he receives a decision from OWCP saying they've overturned the original decision and accepted his claim for back strain, but not the shoulder injury.

Joe is subsequently removed from federal service 30 days later.

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Injured Employee Case Scenario #3

You are a member of your organization's Light Duty and Accommodation Committee. As such you meet bi-weekly with the Worker's Compensation Program Manager, Safety Specialist, EEO Manager, HR Manager, and several other officials to review new and on-going requests from employees for workplace accommodations and temporary light duty.

Jack B. Nimble has requested an ergonomic chair to relieve regular back pains as a result of aggravation of his degenerative disc disease in his lower back. Although his physician states he would like this chair to relieve his discomfort, his medical documentation is conclusory in nature and provides very little specific information regarding the nature of his condition or other possible remedies for relief.

The records show that Jack has previously filed an OWCP claim for back strain but it was recently denied. His current medical documentation does not indicate his condition is the result of a job related injury.

The chair Jack has requested is \$5,000 and requires it be custom built to his size and weight. Your facility has a local policy regarding the provision of light duty and accommodations for job related injuries and only requires such accommodations for employee suffering work-related injuries.

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Employee Restoration Rights – Compensable Injuries

	Authority	Employee Rights	Appeal Rights
If fully recovered within one year	5 CFR 353.301(a)	Entitled to be restored immediately and unconditionally to his or her former position or equivalent one.	May appeal to MSPB the agency's failure to restore, improper restoration , or failure to return an employee following a leave of absence.
If fully recovered after one year.	5 CFR 353.301(b)	Entitled to priority consideration, agency-wide, to the position s/he left or an equivalent one.	May appeal to MSPB alleging s/he was denied restoration rights because of the employment of another person.
If permanently physically disqualified	5 CFR 353.301(c)	Entitled to be placed in another position for which qualified that will provide the employee with same status, and pay, or the nearest approximation, agency-wide and for a one year period from the date of eligibility.	May appeal to the MSPB alleging the agency acted in an “ arbitrary and capricious ” manner in denying restoration.
If partially recovered	5 CFR 353.301(d)	Agency must make every effort to restore in the local community area.	May appeal to MSPB the agency's failure to restore, improper restoration , or failure to return an employee following a leave of absence.