

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

ROBERT E. GREEN,
Appellant,

v.

DEPARTMENT OF THE ARMY,
Agency.

DOCKET NUMBER
SF03538710527

DATE: SEP 6 1988

Robert E. Green, Lakewood, California, pro se.

Elizabeth F. Buchanan, Sacramento, California, for the
agency.

BEFORE

Daniel R. Levinson, Chairman
Maria L. Johnson, Vice Chairman

OPINION AND ORDER

The appellant petitions for review of an initial decision issued on August 18, 1987, that dismissed his appeal from the agency's action denying his request for restoration following his recovery from a compensable injury. The agency filed a cross-petition for review alleging that the appellant, in addition to his removal for cause, was not entitled to restoration because of his egregious misconduct. For the reasons discussed below, we GRANT both the appellant's petition for review and the agency's cross-petition for review, pursuant to 5 U.S.C.

§ 7701(e)(1), REVERSE the initial decision, and REMAND the case to the San Francisco Regional Office for further action in accordance with this decision.

BACKGROUND

The appellant was removed effective November 18, 1983, from his position of Electric Measurement Equipment Mechanic for falsification of lodging costs, absence without official leave (AWOL) for two months, insubordination, and violation of agency leave regulations. He appealed the removal action to the Board. In *Green v. Department of the Army*, 25 M.S.P.R. 342 (1984), the Board, finding the falsification charge not supported by preponderant evidence, nonetheless affirmed the agency's removal action based upon the sustained charges of AWOL, insubordination, and violation of leave regulations. See *id.* at 345. The Board's decision was affirmed by the U.S. Court of Appeals for the Federal Circuit. See *Green v. Department of the Army*, 785 F.2d 326 (Fed. Cir. 1985).

In November 1983, the appellant filed a workers' compensation claim, contending that his tinnitis (ringing in the ears) was aggravated by job stress. Although his claim was initially denied, it was approved on October 22, 1985, and on February 19, 1987, the Office of Workers' Compensation Programs (OWCP) approved benefits for the period between July 1, 1983, and February 28, 1986. On March 30, 1987, the appellant requested restoration, but the agency denied his request on June 4, 1987. He then appealed

the agency's decision to the Board's San Francisco Regional Office. In her initial decision, the administrative judge dismissed his appeal for lack of appellate jurisdiction. The appellant now petitions for review of the initial decision, claiming that he has new evidence and that the administrative judge erred in dismissing his appeal.

ANALYSIS

An employee is entitled under 5 U.S.C. § 8151(b)(2) to restoration to his former or equivalent position following recovery from a compensable injury, but only where the employee's separation resulted from the compensable injury. See *Cox v. Department of Transportation*, 31 M.S.P.R. 148, 251 (1986) (separation or furlough must have resulted from compensable injury alone for restoration rights to accrue), *aff'd*, 795 F.2d 1013 (Fed. Cir. 1986). In her initial decision, the administrative judge found that the appellant's claim that his removal was substantially related to his compensable injury was previously litigated in the appeal of the removal action before the Board and the U.S. Court of Appeals for the Federal Circuit, and the appellant was barred under the doctrine of *res judicata* from relitigating issues that were, or could have been, raised in the earlier appeal. She then concluded that, because the appellant was removed for cause, rather than for a reason substantially related to his compensable injury, he had no right to restoration or to appeal to the Board. See Initial Decision at 4.

The record shows that, although the appellant alleged during the hearing on his appeal from the removal action that he was unable to work due to stress during the AWOL period, the Board found the charges of AWOL, insubordination, and violation of leave regulations supported by preponderant evidence and that the removal penalty was reasonable. See Initial Decision at 3-4. The Board's decision was affirmed by the U.S. Court of Appeals for the Federal Circuit, which found that "all of petitioner's contentions, which were properly raised in the administrative proceedings, were adequately considered and correctly disposed of." See Initial Appeal File, Vol. III, Tab 26.

In his petition for review, the appellant argues that the OWCP determination dated February 19, 1987, granting him compensation for the period between July 1, 1983, and February 28, 1986, was issued after the Board decision and that it materially affects the results in the removal case. We agree. The record shows that the period covered by the AWOL is included in the period determined by OWCP to be compensable. Therefore, had this information been before the Board when it considered the removal case, it is likely that the AWOL and remaining charges would not have been sustained. See *Smith v. Department of Housing and Urban Development*, 21 M.S.P.R. 321, 331-32 (1984) (charges of failure to follow orders to report for work and AWOL could not be sustained where the OWCP later found that the

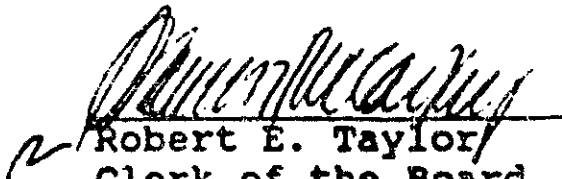
appellant was entitled to compensation for the period involved in the conduct charged).

Moreover, although the appellant asked the U.S. Court of Appeals for the Federal Circuit to take judicial notice of the October 22, 1985, decision of the Employees' Compensation Appeals Board (ECAB), that decision only remanded the appellant's compensation case to OWCP for further proceedings. See IAF, Vol. III, Tab 24. The court found it unnecessary to grant the appellant's motion, "in view of [its] disposition of this case." See *id.*, Tab 26. The February 19, 1987, OWCP decision was issued after the court decision, and therefore, was not before the court in the removal case.

Accordingly, the case is remanded to the San Francisco Regional Office for consideration of the February 19, 1987, OWCP decision with respect to the appellant's contention that he was removed from his position because of a compensable injury, and for further action consistent with this decision. On remand, the administrative judge will also consider the agency's argument in its cross-petition for review that, in addition to his removal for cause, the appellant was not entitled to restoration because of his egregious misconduct.

FOR THE BOARD:

Washington, D.C.


Robert E. Taylor
Clerk of the Board