UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2011 MSPB 6

Docket No. AT-0353-00-0909-B-1

Jane L. Gallo,

Appellant,

v.

Department of Transportation,

Agency.

January 7, 2011

William L. Bransford, Esquire, Washington, D.C., for the appellant.

Theresa Dunn, Esquire, Fort Worth, Texas, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member
Vice Chairman Wagner issues a dissenting opinion.

OPINION AND ORDER

¶1 The appellant has petitioned for review of an initial decision that dismissed her improper restoration appeal for failure to state a claim upon which relief can be granted. For the reasons set forth below, we GRANT the petition for review and AFFIRM the initial decision as modified by this Opinion and Order. The appellant's request for corrective action is DENIED.

BACKGROUND

¶2 The material facts in this appeal are not in dispute. *See* Petition for Review (PFR) File, Tab 1 at 4-10; PFR File, Tab 3 at 2-6.[1] In January 1995, while working as an operational Air Traffic Control Specialist (ATCS), GS-2152-14, in Miami, Florida, the appellant suffered a compensable job-related injury. Between January 24, 1995, and March 2, 1995, she received continuation of pay benefits through the Office of Workers' Compensation Programs (OWCP) while she was absent from work. The appellant returned to work on March 3, 1995, but because she was medically restricted from performing her normal duties due to her compensable injury, she worked light duty. On January 10, 1996, the Federal Aviation Administration (FAA) Flight Surgeon determined that the appellant was "indefinitely incapacitated" and that she did not meet the medical qualifications to perform the duties of an operational ATCS.

¶3 Effective April 14, 1996, the appellant accepted a reassignment to an Automation Specialist position. Although the Automation Specialist position was at the same GS-14 grade level as her ATCS position, the appellant received wage compensation benefits from OWCP while working in the Automation Specialist position for the loss of night differential and Sunday premium pay she suffered when she was no longer able to work as an operational ATCS. The appellant worked in the Automation Specialist position and received wage compensation benefits for more than 4 years.

¶4 In April 2000, the Department of Labor determined that the appellant had recovered from her compensable injury, and in June 2000, it notified the appellant that it was terminating her entitlement to compensation and informed her of her right to restoration to duty. A few days after receiving that notice, the appellant submitted a written request for priority consideration for a position as

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[1] The facts set forth in ¶¶ 2-5 of this Opinion and Order are supported by the parties' assertions in their pleadings on petition for review.

an operational ATCS or supervisory ATCS. In July 2000, the FAA medically cleared the appellant to perform operational ATCS duties.

¶5 On August 7, 2000, the agency informed the appellant that she had been selected for a supervisory ATCS position. The appellant's pay in that position is lower than it would have been if she had remained in her operational ATCS position between 1996 and 2000. In addition, if the appellant had remained in the operational ATCS position she occupied at the time of her injury, she would have been eligible to retire at age 50 in October 2006 under a special statutory provision covering air traffic controllers.

¶6 The appellant filed a Board appeal challenging her alleged improper restoration based upon allegations that she was entitled to the restoration of deficient Air Traffic Control pay and lost early retirement benefits. Initial Appeal File (IAF), Tab 1. The administrative judge to whom the appeal was assigned dismissed the appeal for lack of jurisdiction and failure to state a claim on which relief can be granted upon determining that the Office of Personnel Management (OPM) regulations which grant individuals the right to file restoration appeals with the Board did not afford employees whose full recovery from a compensable injury takes longer than 1 year the right to appeal an "improper restoration" to the Board. IAF, Tab 14. The appellant later sought relief before the U.S. Court of Federal Claims, which agreed that the Board lacked jurisdiction over the appellant's claim, but found that it lacked jurisdiction over the claim as well. *Gallo v. United States*, 76 Fed. Cl. 593, 599-610 (2007). The Court of Federal Claims also held that the appellant failed to state a claim upon which relief could be granted. *Id.* at 610-11. The appellant then sought review before the U.S. Court of Appeals for the Federal Circuit (Federal Circuit), which held, contrary to the holdings of both the Board and the Court of Federal Claims, that, under 5 U.S.C. § 8151(a), the Board has jurisdiction over certain claims of improper restoration brought by employees whose complete recovery from a compensable injury took more than a year. *Gallo v. United States*, 529

F.3d 1345, 1350-52 (Fed. Cir. 2008). The Federal Circuit declined to address whether the appellant failed to state a claim upon which relief could be granted because she did not "resume" employment within the meaning 5 U.S.C. § 8151(a), finding that the Board should address that issue in the first instance. *Id.* at 1352.

¶7 In light of the Federal Circuit's holding, the Board granted the appellant's request to reopen her appeal and remanded it to the Atlanta Regional Office for further adjudication. Remand Appeal File (RAF), Tab 1. On remand, after holding the appellant's requested hearing, the administrative judge issued an initial decision dismissing the appeal for failure to state a claim upon which relief can be granted. RAF, Tab 26. He found that the appellant was an employee who fully recovered from a compensable injury after more than 1 year and that she was therefore entitled to priority consideration for restoration to the position she left or an equivalent one. *Id.* at 7-8. He further found that the supervisory ATCS position to which the appellant was appointed in August 2000 was not equivalent to the operational ATCS position she occupied prior to her compensable injury because the supervisory ATCS position was higher-graded and higher-paid, and that her assignment to the supervisory ATCS position therefore did not constitute a "restoration" for purposes of 5 U.S.C. chapter 81 and 5 C.F.R. Part 353. *Id.* at 9-12. The administrative judge found that 5 U.S.C. § 8151(a) applies to any individual who "resumes employment with the Federal Government," a term that could encompass more than restoration. *Id.* at 13. However, he found that the appellant did not resume employment with the federal government when she was promoted from her Automation Specialist position to the supervisory ATCS position in August 2000, *id.* at 13-15, and that she was therefore not entitled to the protection of 5 U.S.C. § 8151(a), *id.* at 15.

¶8 The appellant has filed a petition for review of the initial decision. PFR File, Tab 1. On petition for review, she argues that the administrative judge confused the issues of job restoration and pay restoration, *id.* at 12-14, that her

placement in a supervisory position constituted a restoration, *id.* at 14-19, and that the administrative judge's definition of the term "resumes employment" was too narrow, *id.* at 19-22. The agency has responded in opposition to the petition for review. PFR File, Tab 3. In addition to defending the initial decision, *id.* at 9-16, the agency also argues that the appellant is not entitled to the relief she seeks, *id.* at 16-20.

ANALYSIS

The appellant did not resume employment with the federal government.

¶9 Generally, once an employee with a compensable injury is restored to the same or an equivalent position, including "the same attendant rights, such as tenure and promotion eligibility," as the employee occupied prior to the compensable injury, she is entitled to receive credit for the entire time she received compensation for purposes of calculating rights and benefits based on length of service. *Gallo*, 529 F.3d at 1349. The outcome of this appeal depends on the proper interpretation of 5 U.S.C. § 8151(a):

> In the event the individual **resumes employment** with the Federal Government, the entire time during which the employee was receiving compensation under this chapter shall be credited to the employee for the purposes of within-grade step increases, retention purposes, and other rights and benefits based upon length of service.

(emphasis added). As applied to this case, the question is whether and how this language applies to an individual who, following a compensable injury sustained while employed as an ATCS, voluntarily accepted a reassignment to a different position (Automation Specialist) that was less physically demanding and, 4 years later, when she had fully recovered from her injury, received an appointment as a supervisory ATCS. The appellant contends that she is entitled to the higher pay and other benefits that would have applied had she remained in her original position instead of working as an Automation Specialist. For the reasons set forth below, we agree with the administrative judge that the appellant did not

"resume employment" within the meaning of the statute because she continued working for the government throughout the period of her compensable injury. [2]

¶10 The appellant argues that the administrative judge's interpretation of the term "resume" is "inconsistent with the spirit and intent of 5 U.S.C. § 8151(a)." PFR File, Tab 1 at 19. She cites legislative history indicating that Congress intended that employees with a compensable injury would not lose any benefits that they would have received absent the injury. *Id.* at 20. The appellant also points out that the effect of the administrative judge's statutory interpretation is that an employee who remains completely off duty while injured and who subsequently resumes employment with the federal government could have greater rights than an employee who works in a different position during her injury. *Id.* at 22.

¶11 It is undisputed that the appellant would have been eligible to retire earlier and would have a higher salary if she had never been injured and had remained in her operational ATCS position until the time of her promotion. *See* PFR File, Tab 3 at 5-6. Congress may have intended, in a general sense, that someone in

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[2] The appellant argues on petition for review that her placement in a supervisory position constituted a restoration. PFR File, Tab 1 at 14-19. However, there can be no entitlement to employment benefits for "improper restoration" under 5 C.F.R. § 353.304 unless the individual meets the "resumes employment" criterion of 5 U.S.C. § 8151(a). As the Federal Circuit noted in its decision,

> The Board regulation's authorization of appeal rights from improper restorations would appear to encompass appeals based on section 8151(a). A violation of section 8151(a) – entailing the restoration of an employee without proper crediting of the time during which that employee was receiving disability-related compensation – appears to constitute an improper restoration within the scope of the appeal rights provided by 5 C.F.R. § 1201.3(a)(12).

529 F.3d at 1351. An individual can only suffer a violation of section 8151(a) if she first "resumes employment with the Federal Government." Therefore, the appellant's improper restoration claim based on section 8151(a) necessarily fails if she did not resume employment with the federal government. Accordingly, we need not determine whether her placement in a supervisory position constitutes a restoration.

the appellant's position be made whole upon recovery from her injury. We also recognize the apparent unfairness in the fact that an employee who remains off duty while injured potentially has greater statutory protection than one who works in another position while injured. However, the Board must interpret and apply the language Congress actually used. *See Watson v. Department of the Navy*, 86 M.S.P.R. 318, ¶ 7 (2000) (it is axiomatic that statutory interpretation begins with the language of the statute), *aff'd*, 262 F.3d 1292 (Fed. Cir. 2001). The administrative judge properly found that the plain meaning of the phrase "resumes employment with the Federal Government" does not encompass a situation, such as that presented here, in which an employee is continuously employed by the federal government, albeit in different positions. *See* RAF, Tab 26 at 13-15. The appellant has not proposed a meaningful interpretation of the phrase "resumes employment with the Federal Government" that would encompass her situation. She essentially asks the Board to read the phrase "with the Federal Government" out of the statute because applying the statutory language as written leads to a result Congress would not have intended. We decline to read that phrase out of the statute. *See Hall v. Office of Personnel Management*, 102 M.S.P.R. 682, ¶ 9 (2006) (the Board should interpret statutes so as not to leave any provision "inoperative or superfluous or redundant or contradictory"). We therefore find that the appellant did not resume employment with the federal government and is not entitled to the protections provided in 5 U.S.C. § 8151(a).

Even if the appellant had resumed employment with the federal government, she would not be entitled to the relief she seeks.

¶12 Having found that the appellant is not entitled to the protection of 5 U.S.C. § 8151(a) because she did not resume employment with the federal

government, we must deny her request for corrective action.[3] The dissent argues that the appellant was restored to duty under 5 U.S.C. § 8151(b)(2), and that she should therefore be deemed to have resumed employment with the federal government. While we do not agree with the dissent on that question of law, we recognize the dissent's position and we acknowledge that this is not a matter on which either the Board or its reviewing court has previously spoken. However, even if the dissent is correct that the appellant resumed employment with the federal government, we hold the appellant would not be entitled to the relief she seeks because the benefits she seeks are not based upon length of service.

¶13 The appellant seeks both pay and retirement credit that she would have received had she not been injured. *See* PFR File, Tab 1 at 23. Under 5 U.S.C. § 8151(a), an employee who resumes employment with the federal government is entitled to credit for time spent on OWCP compensation "for purposes of within-grade step increases, retention purposes, and other rights and benefits based upon length of service." *Id.* Our reviewing court has held that credit towards a civil service retirement annuity is not a right or benefit based on length of service within the meaning of 5 U.S.C. § 8151(a). *True v. Office of Personnel Management*, 926 F.2d 1151, 1155-56 (Fed. Cir. 1991). We therefore find that the Air Traffic Controller retirement credit the appellant seeks is not a right or benefit based on length of service. We note that the dissent does not take issue with our finding with respect to retirement credit.

¶14 The additional pay the appellant seeks is based on length of service in a particular position, i.e., an operational ATCS position, rather than length of service in the government generally. We find that the term "length of service" in the statute refers to overall government service. First, we note that the statutory

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[3] Because the Board has considered evidence beyond the appellant's allegations, the proper disposition of the appeal is a denial on the merits, rather than a dismissal for failure to state claim upon which relief can be granted. *See Haasz v. Department of Veterans Affairs*, 108 M.S.P.R. 349, ¶ 8 (2008).

provision deals with an individual who "resumes employment *with the Federal Government*," 5 U.S.C. § 8151(a) (italics added), so it would be reasonable to interpret the term "length of service" as "length of service [with the federal government]." Moreover, we find that the phrase "other rights and benefits based upon length of service" should be interpreted in light of the specific examples that precede it in the statute. *See Johnston v. Department of the Treasury*, 100 M.S.P.R. 78, ¶ 14 n.* (2005) (under the interpretive rule of *ejusdem generis*, "where a general word or phrase follows an enumeration of specific things, the general word or phrase is held to refer to things of the same kind as those specified"). The specific examples of rights or benefits based on length of service set forth in § 8151(a) are within-grade step increases and retention. Retention standing in a reduction in force is based on length of service as a federal employee. *See* 5 C.F.R. §§ 351.501(a), 351.502(a), 351.503(a). We also find that within-grade step increases are based on length of service with the federal government, or since the receipt of an equivalent increase, 5 C.F.R. § 531.405(b)(1), (2), not length of service in a specific position. Because the specific examples included in the statute are rights and benefits based on length of government service, rather than service in a particular position, we find that the term "length of service" as used in 5 U.S.C. § 8151(a) means length of service with the government. Therefore, additional pay based on the amount of time spent as an operational ATCS is not a right or benefit based on length of service.

¶15 The dissent argues that "within-grade pay increases are very much determined by an employee's service in a specific position." However, OPM's regulations governing such increases do not support the dissent's assertion. In order to receive a within-grade increase, an employee (1) must be performing at an acceptable level of competence, (2) must have completed the required waiting period, and (3) must not have received an equivalent increase during the waiting period. 5 C.F.R. § 531.404. The waiting period consists of a specified number of weeks of creditable service, depending upon the step at which the employee's rate

of basic pay is set. *See* 5 C.F.R. § 531.405. "Creditable service" includes "[c]ivilian employment in any branch of the Federal Government . . ." 5 C.F.R. § 531.406(a). Notably, creditable service is not limited to service in one particular position. Indeed, OPM's regulations specifically contemplate combining service in different positions for purposes of completing the waiting period. *See* 5 C.F.R. § 531.405(c) ("A waiting period is not interrupted by non-workdays intervening between an employee's last scheduled workday in one position and his or her first scheduled workday in a new position.").

¶16 The dissent notes that an equivalent increase triggers the commencement of a new waiting period. That much is certainly true. *See* 5 C.F.R. § 531.405(b)(2). However, the dissent then states that an equivalent increase is a promotion, which it describes as "a position specific action." Whatever the phrase "position specific action" means, it is unclear how a promotion falls within its definition. OPM's regulations governing within-grade increases define promotion as "an employee's movement from one grade or level to a higher grade or level while continuously employed (including such a movement in conjunction with a transfer)." 5 C.F.R. § 531.403. Clearly, an employee who is selected for a different position at a higher grade has been promoted under the definition set forth at 5 C.F.R. § 531.403. However, an employee who was hired at a grade lower than the promotion potential of her position and is subsequently moved to a higher grade without a change in position has also been promoted under the same definition. Therefore, whether an employee has been promoted does not depend on the particular position the employee holds.

¶17 We note that our understanding of 5 U.S.C. § 8151(a) with respect to within-grade increases is consistent with OPM's regulations. We interpret § 8151(a) as providing that if an individual resumes employment with the federal government following a compensable injury, the time she spent on compensation constitutes creditable service towards completion of the waiting period for one or more within-grade increases. That is exactly what OPM's regulations provide.

See 5 C.F.R. § 531.406(c)(3). As noted above, creditable service is service as a civilian federal employee, not service in any particular position. Because entitlement to a within-grade increase is not based on the amount of time the employee has spent in any particular position, we do not believe that the inclusion of within-grade increases among the benefits specifically guaranteed under 5 U.S.C. § 8151(a) supports the dissent's view that § 8151(a) guarantees credit for performance in a particular position.

¶18 The dissent argues that § 8151(a) should be read so that the appellant can receive "benefits that are based upon the specific position encumbered by the employee at the time of the compensable injury." The dissent's position is based on legislative history indicating that Congress intended that employees injured on duty "will incur no loss of benefits which they would have received absent the injury or disease." However, we do not believe that such a general statement of Congressional intent is itself sufficient to overcome our interpretation of the statutory language that was actually enacted. If Congress wanted to provide employees injured on duty with all of the benefits which they would have received absent their injury or disease, it could have done so explicitly. However, the language of § 8151(a) clearly does not do that. As the dissent recognizes, § 8151(a) does not guarantee the appellant air traffic controller retirement service credit for the time she spent on OWCP compensation, despite the fact that she would have received such credit had she not been injured on duty.[4]

¶19 As noted above, we recognize that the result in this case may seem unfair. One could reasonably argue that the statutory language does not affect the intent of Congress that is reflected in the legislative history. However, we are bound by

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[4] We also note that air traffic controller retirement service credit appears to be a benefit that is based upon the specific position encumbered by the appellant at the time of the compensable injury, the very type of benefit the dissent argues is covered by § 8151(a) in the context of the appellant's claim for additional pay.

precedent and the canons of statutory interpretation to find that Congress did not provide for the relief the appellant seeks.[5]

¶20 For all of the above reasons, we find that the appellant is not entitled to corrective action.

ORDER

¶21 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not

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[5] The agency argues on review that even if the Board finds that § 8151(a) provides for the additional pay the appellant seeks in this appeal, it could only order the agency to increase the appellant's pay prospectively because the Board lacks authority to award back pay to FAA employees. PFR File, Tab 3 at 18-20. We need not address that argument in light of our disposition of this appeal.

comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

_____
William D. Spencer
Clerk of the Board
Washington, D.C.

DISSENTING OPINION OF ANNE M. WAGNER

in

Jane L. Gallo v. Department of Transportation

MSPB Docket No. AT-0353-00-0909-B-1

¶1 The majority holds that the appellant was not entitled to the rights and benefits under 5 U.S.C. § 8151(a) because she did not "resume employment with the Federal Government" when she was placed in the supervisory Air Traffic Control Specialist (ATCS) position. *See* Opinion and Order (O&O), ¶¶ 8-10. Construing the phrase "resumes employment with the Federal Government" in section 8151(a) as not encompassing a situation in which an employee is "continuously employed by the federal government, albeit in different positions" throughout the period of compensable injury, the majority concludes that the statutory protections contained therein do not apply here because the appellant "continued working for the government throughout the period of her compensatory injury." *Id.*, ¶ 10. The majority also declines to reach the appellant's argument that her placement in the supervisory ATCS position constitutes a restoration entitling her to employment benefits on the grounds that "there can be no entitlement to employment benefits for 'improper restoration' under 5 C.F.R. § 353.304 unless the individual meets the 'resumes employment' criterion of 5 U.S.C. § 8151(a)." *Id.*, ¶ 8 n.2. I respectfully disagree with both conclusions.

¶2 In *Gallo v. United States*, 529 F.3d 1345, 1350 (Fed. Cir. 2008), our reviewing court determined that the Board had jurisdiction over the appellant's claims of improper restoration under section 8151(a). It found that, inter alia, "OPM regulations appear to grant appeal rights to employees in Gallo's position." *Id.* at 1351. Specifically, it cited 5 C.F.R. § 353.304(a) as "appl[ying] broadly to all improper restoration claims," including claims of violation of 5 U.S.C.

§ 8151(a) by employees whose recovery took longer than 1 year and by employees who partially recovered from a compensable injury. *Id.* In so holding, the court also had occasion to examine 5 U.S.C. § 8151(a) and found that, while subsections (a) and (b) confer distinct substantive rights, they remain interrelated insofar as "[s]ubsection (a), . . . provides that, **once an employee has been restored as directed by subsection (b),** the entire time during which the employee was receiving compensation must be credited for purposes of calculating rights and benefits that are based on length of service." *Gallo*, 529 F.3d at 1349 (emphasis added).

¶3 Here, the undisputed record reflects that the appellant suffered a compensable job-related injury, was absent from duty between January 24, 1995, and March 2, 1995, and initially returned to work to her operational ATCS position with light duties on March 3, 1995. Petition for Review (PFR) File, Tab 1 at 4-10, Tab 3 at 2-6. When the agency subsequently found her medically unqualified to perform her ATCS duties, the appellant accepted a reassignment in lieu of removal to an Automation Specialist position on April 14, 1996, at the same grade and step as her ATCS position. *Id.*, Tab 1 at 5-6, Tab 3 at 2-3. She thereafter received Office of Workers' Compensation Programs (OWCP) compensation benefits to offset the resulting loss of her night differential and Sunday premium pay that she would have received had she remained in the ATCS position. *Id.*, Tab 1 at 7, Tab 3 at 3.

¶4 The appellant continued to receive OWCP compensation until being notified by the Department of Labor in a letter dated June 19, 2000, that it had determined her to be fully recovered from her compensable injury. Remand File, (RF) Tab 11, Ex. C. The Department further informed her that it was terminating her OWCP compensation and that she was entitled to restoration to duty. *Id.* On June 22, 2000, the appellant requested priority consideration for a position within the Air Traffic Division, Southern Region. RF, Tab 11, Ex. E. The agency thereafter medically cleared the appellant to perform operational ATCS duties,

and assigned her to a supervisory ATCS position in Atlanta in August 2000. RF, Tab 26, Initial Decision (ID) at 5. Where, as here, an agency places an employee, whose compensable injury is overcome more than a year after the date of compensation, in her former or equivalent position within months after the Department of Labor deems the employee fully recovered and entitled to restoration, I would find that the placement constitutes a restoration under 5 U.S.C. § 8151(b)(2).

¶5 In its response to the petition for review, the agency contends that the administrative judge properly found that the appellant's assignment to the supervisory ATCS position was not a restoration following compensable injury because the supervisory position was not "equivalent" to the appellant's former operational ATCS position and because the agency selected the appellant to the supervisory position through its competitive promotion procedures and not through the restoration process. PFR File, Tab 3 at 9, 11-12. The relevant statutory provision states:

> Under regulations issued by the Office of Personnel Management . . . (2) the department or agency which was the last employer shall, if the injury or disability is overcome within a period of more than one year after the date of commencement of compensation, make all reasonable efforts to place, and accord priority in placing, the employee in his former or equivalent position within such department of agency.

5 U.S.C. § 8151(b). The Office of Personnel Management's (OPM) regulation provides:

> An employee who separated because of a compensable injury and whose full recovery takes longer than 1 year from the date eligibility for compensation began . . . is entitled to priority consideration, agencywide, for restoration to the position he or she left of an equivalent provided . . . .

5 C.F.R. § 353.301(b). Although neither the statute nor regulation defines "equivalent position," the Board has previously held that for purposes of 5 C.F.R.

§ 353.301(b), "an equivalent position is one of like seniority, status, and pay" and that "standing within the organization, such as first or second supervisory level, is not a factor." *Nixon v. Department of the Treasury*, 104 M.S.P.R. 189, ¶ 11 (2006).

¶6 The administrative judge cited *Pugh v. U.S. Postal Service*, 81 M.S.P.R. 313, 323 (1999) in finding that the appellant's assignment was not a restoration on the grounds that the supervisory ATCS position was not "equivalent" to the appellant's former operational ATCS position. ID at 12. However, in *Pugh*, the Board merely held that it had no authority to order an agency to restore an appellant to a higher-graded position than the one that he formerly occupied. This unobjectionable statement of the Board's remedial authority in restoration cases does not, in my view, preclude us from finding that a restoration has occurred where, as here, the agency voluntarily assigns a fully recovered employee to the same functional position, albeit at a supervisory level.

¶7 In fact, OPM's restoration regulations specifically require that agency promotion plans provide a mechanism by which employees, who are absent because of compensable injury, can be considered for promotion. *See* 5 C.F.R. § 353.106(c). It would be an absurd result and contrary to the purpose of the Federal Employees Compensation Act (FECA), 5 U.S.C. §§ 8101-8193, to hold that an agency could extinguish an employee's restoration rights by selecting her for promotion while she was absent from her position because of compensable injury. *See Hanauer v. Reich*, 82 F.3d 1304, 1314 (4th Cir. 1996) ("FECA is a remedial statute, which should be interpreted broadly in favor of beneficiaries in order to give the statute full effect.") Thus, even accepting the administrative judge's findings that employees in supervisory ACTS positions were more highly graded and received more pay than employees in non-supervisory ATCS positions, I would find that this difference amounts to one of "standing within the organization" that is not dispositive with regard to determining whether the appellant's assignment to the supervisory ATCS position upon recovery from her

compensable injury was a restoration within the meaning of 5 U.S.C. § 8151(b)(2).

¶8 With regard to the agency's contention that the appellant was not restored within the meaning of section 8151(b)(2), but rather selected for promotion through its competitive promotion procedures, the record reflects, and the administrative judge found, that "as her recovery was nearing completion, the appellant began to seek opportunities to return to a position in the Air Traffic Division." ID at 4. Thus, in December 1999, she submitted a request to be considered for an advertised position as a supervisory ATCS in Atlanta. ID at 5. While the record reflects that the agency considered the appellant for this position as part of a competitive hiring process in early 2000, it is undisputed that the appellant was not, in fact, selected for the position until eight months later, *after* (1) OWCP terminated her benefits and advised her of her right to restoration to duty under 5 U.S.C. § 8151, and (2) the appellant submitted a written request for restoration to a position in the Air Traffic Division, Southern Region pursuant to 5 U.S.C. § 8151. RF, Tab 11, Exs. C and E; ID at 5. Thus, the timing and chain of events leading up to the appellant's assignment to the supervisory ATCS supports the conclusion that her assignment more likely than not resulted from the restoration process rather than a competitive selection process.

¶9 Based on my conclusion that the appellant was restored to duty within the meaning of 5 U.S.C. § 8151(b)(2), I would find that she should be credited with the entire time that she was receiving OWCP compensation for purposes of calculating rights and benefits based upon length of service under section 8151(a). Specifically, I do not construe the statutory protection afforded by section 8151(a) as limited only to those employees who have been "separated" from federal employment as a result of a compensable injury. Instead, I believe that Congress intended section 8151(a) to encompass situations, such as exists here, in which an employee resumes her former position or equivalent thereof after having been forced to leave it due to a compensable injury, but who

remained otherwise employed by the federal government during the interim period while receiving OWCP compensation. *Cf.* 5 C.F.R. § 353.106(b) (OPM has interpreted the statute to provide that an employee who is absent because of compensable injury may be carried on leave without pay or separated, unless the employee elects to use sick or annual leave).

¶10 As a threshold matter, I do not discern a plain meaning in the phrase "resumes employment with the Federal Government" as used in section 8151(a). Rather, this language is, in my view, quite ambiguous. Whereas the majority construes it as limited to circumstances in which an employee returns to federal employment after having been separated, I believe that the more contextually tenable construction of this language is that suggested by the Federal Circuit in *Gallo*, 529 F.3d at 1349, namely, that an employee who is restored within the meaning of section 8151(b) is entitled to the benefits provided in section 8151(a). Given this ambiguity, it is appropriate to look to the legislative history to discern Congressional intent. *Martin J. Simko Construction, Inc. v. United States*, 852 F.2d 540, 542-43 (Fed. Cir. 1988) (where the language of a statute does not clearly state the legislature's intent, it is necessary to look to the legislative history for an explanation of legislative intentions).

¶11 The legislative history of FECA supports a broader interpretation of section 8151(a) than that adopted by the majority here. Senate Committee on Labor and Public Welfare, Compensation for Work Injuries, S. Rep. No. 93-1081 at 3-4 (1974), in pertinent part, states:

> The bill assures Federal employees, including those of the United States Postal Service, who are injured on the job and receiving disability compensation, that during their period of disability they **will incur no loss of benefits which they would have received absent the injury or disease**.

(emphasis added). Further, it should be noted that FECA is a remedial statute. It was enacted to provide a "comprehensive plan" for addressing injuries suffered

by government employees in the performance of their duties. *Johansen v. United States*, 343 U.S. 427, 439-40 (1952). Like other workmen's compensation statutes, FECA "is typically given liberal construction by the courts to effectuate its humanitarian purposes, with exemptions and exceptions narrowly construed and doubts resolved in favor of the employees." *Brown v. Jefferson*, 451 A.2d 74, 77 (D.C. 1982) and cases cited therein.

¶12 The majority's narrow reading of section 8151 also appears to be inconsistent with OPM's understanding as reflected in its restoration regulations. Significantly, OPM defines "persons covered" by the regulations as employees who were "separated or furloughed **from an appointment** without time limitation . . . ." 5 C.F.R. § 353.103(b) (emphasis added). In addition, the regulations expressly provide that restoration rights apply to employees, such as the appellant, who have accepted another position for which they are qualified in lieu of separation and later are restored to full duties after one year. *See* 5 C.F.R. §§ 353.301(b)-(d). In particular, the regulation, in pertinent part, states:

> (b) *Fully recovered after 1 year*. An employee who is separated because of a compensable injury and whose full recovery takes longer than 1 year from the date eligibility for compensation began . . . is entitled to priority consideration, agencywide, for restoration to the position he or she left or an equivalent one provided he or she applies for reappointment within 30 days of the cessation of compensation . . . . **This subpart also applies when an injured employee accepts a lower-graded position in lieu of separation and subsequently fully recovers**.

(emphasis added).

¶13 Although the Board has not previously addressed the particular question presented here, its treatment of the analogous issue of whether an appellant must have been "absent from duty" in order to trigger the Board's jurisdiction over a restoration claim is instructive. For example, in *Wilson*, the Board reversed an initial decision where the administrative judge dismissed the appeal for lack of jurisdiction because the appellant was in leave without pay for several years and

was never formally separated from her position. *Wilson v. U.S. Postal Service*, 98 M.S.P.R. 679, ¶ 9 (2005). The Board noted that, although the typical restoration involves a situation in which a fully or partially recovered employee exercises a restoration right after having been separated from federal service for a period of time, the restoration regulations expressly contemplate restorations where the employee was not separated from the rolls. *Id.* The Board, thus, found the appellant in *Wilson* did not need to show that she was separated from duty, but "merely that she was **absent from her position due to a compensable injury**." *Id.* (emphasis added).

¶14 In another jurisdictional decision, the Board found that the appellant made a nonfrivolous allegation of improper restoration for purposes of establishing Board jurisdiction in claiming that the agency failed to place him in a position equivalent to his former GS-12 position. *Nixon*, 104 M.S.P.R. 189, ¶ 12. The fact that the appellant was working as a GS-9 Revenue Officer when OWCP terminated his benefits did not deter the Board from finding that it had the power to address his restoration rights under section 8151. Where, as here, the Board is considering the merits of a restoration claim, it should similarly interpret the "resume employment" language in section 8151(a) more broadly to include the circumstances presented in this appeal.

¶15 Finally, I note that the majority alternatively finds in this case that, even if the appellant had resumed employment with the federal government, she would not have been entitled to the relief she seeks. O&O, ¶¶ 11-13. I concur insofar as controlling precedent compels finding that the appellant would not have been entitled to additional credit toward a civil service retirement annuity. *Id.*, ¶ 12 (citing *True v. Office of Personnel Management*, 926 F.2d 1151, 1155-56 (Fed. Cir. 1991)). However, I disagree with my colleagues with regard to the determination that the appellant would not have been entitled to any additional pay based on her length of service in an operational ATCS position. They find that section 8151(a) entitles restored employees only to rights and benefits based

on length of service with the federal government and not length of service in a specific position. *Id.*, ¶ 14. Employing the interpretive rule of *ejusdem generis*, they assert that the types of benefits contemplated by section 8151(a) must be like those specifically identified in that provision, e.g., within-grade step increases, which the majority characterizes as based on length of service with the federal government, not on length of service in a specific position. *Id.* However, within-grade pay increases are very much determined by an employee's service in a specific position. OPM's regulations require that an employee be at an acceptable level of competence in her position in order to earn a step increase, must have completed the required waiting period for advancement to the next step of the position, and must not have received an equivalent increase, i.e., a promotion, during the waiting period. 5 C.F.R. §§ 531.404; 531.407; 531.409. The regulations also provide that the commencement of the waiting period for an increase begins upon first appointment to federal service or upon receiving an equivalent increase, i.e., a promotion, which is a position specific action. 5 C.F.R. § 531.405(b). Thus, in my view, the enumeration of particular rights and benefits set forth in 8151(a) does not compel the conclusion that that section provides only for rights and benefits based solely on length of federal service.

¶16 In any event, the same reasons that convince me to conclude that section 8151(a) accords restoration rights to the appellant persuade me that she is thereby entitled to all the rights and benefits that she would have received had she remained in her operational ATCS position but for her compensable injury. In particular, the legislative history and purpose of this remedial statute manifestly reflect Congressional intent to ensure that federal employees who are injured on the job not incur a loss of work-related rights and benefits as a result of their injury. Therefore, I believe that this provision should be read to ensure that an employee receives all of the rights and benefits based on length of service, to

include benefits that are based upon the specific position encumbered by the employee at the time of the compensable injury.*

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Anne M. Wagner
Vice Chairman

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* As noted by the majority, the agency contends that the Board does not have authority to award back pay to FAA employees. Regardless of whether the Board can award back pay to FAA employees, there is no question that Chapter 81 is included under 49 U.S.C. § 40122(g)(2). Thus, the Board may enforce section 8151(a) as to FAA employees by ordering that the agency credit the appellant with the entire time during which she was receiving OWCP compensation for purposes of "other rights and benefits based upon length of service" in the specific position encumbered by the employee at the time of the compensable injury.