



U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for June 19, 2015

BOARD DECISIONS

Appellant: Philip J. Kerrigan

Agency: Department of Labor

Decision Number: [2015 MSPB 42](#)

MSPB Docket No.: SF-1221-14-0742-W-1

Issuance Date: June 11, 2015

Appeal Type: Individual Right of Action (IRA) Appeal

Action Type: Denial of OWCP Benefits

Jurisdiction - FECA Claims

The appellant was awarded Office of Workers' Compensation Programs (OWCP) Benefits after being injured during the performance of his duties while working for the Department of Defense. The benefits were later terminated based on the appellant's refusal to participate in vocational rehabilitation. The appellant subsequently filed a complaint with the Office of Special Counsel ("OSC"), alleging that OWCP terminated his compensation in retaliation for his making a protected disclosure that OWCP employees engaged in illegal activity. After OSC closed its investigation, the appellant filed an IRA appeal with the Board. The administrative judge dismissed the appeal for lack of jurisdiction, finding that the appellant's disclosure was not protected because he was not employed by OWCP, and because the filing of an OWCP claim was not protected activity under 5 U.S.C. § 2302(b)(9). The administrative judge further found that the termination of the OWCP benefits was not a "personnel action" as construed by 5 U.S.C. § 2302(a)(1) because the term "personnel action" was intended to cover actions taken by agencies against their own employees. The appellant filed a petition for review, and the agency filed a

response. In the agency's response, it contended that the administrative judge erred by not addressing the issue of whether the Board has jurisdiction over FECA claims.

Holding: The Board denied the appellant's petition for review, vacated the initial decision, and dismissed the appeal for lack of jurisdiction on other grounds.

1. The Board found that the AJ erred under *Spithaler v. Office of Personnel Management* in not addressing the agency's contention that the Board lacked jurisdiction over Federal Employees' Compensation Act ("FECA") claims.
2. The Board does not have jurisdiction over a claim that the Department of Labor committed whistleblower reprisal by terminating FECA benefits because 5 U.S.C. § 8128(b) precludes Board jurisdiction over cases where consideration of a claim would entail reviewing OWCP's decision to pay or deny benefits.

- **The U.S. Court of Appeals for the Federal Circuit issued no MSPB decisions this week.**