Leave Claim Decision Under section 3702 of title 31, United States Code

Claimant: [name]

Agency classification: Transportation Security Screener

SV-0019-D

Organization: [airport]

Transportation Security Administration U.S. Department of Homeland Security

[city & State]

Claim: Denied Leave under the Family and

Medical Leave Act and Related

Actions

OPM decision: FMLA Claim Denied; Related Actions

Denied-Lack of Jurisdiction

OPM file number: 06-0013

/s/ for

Robert D. Hendler

Classification and Pay Claims

Program Manager

Center for Merit System Accountability

6/8/2007

Date

Introduction

The claimant is employed in a Transportation Security Screener, SV-0019-D, position with the Transportation Security Administration (TSA), U.S. Department of Homeland Security (DHS), at [airport], in [city & State]. In her initial claim request, which we received on March 15, 2005, she asks the Office of Personnel Management (OPM) to enforce her Family and Medical Leave Act (FMLA) rights. This request is intertwined with related agency actions she wishes to contest, *inter alia*, declaring her to be Absent Without Leave (AWOL) on January 2, and 3, 2005, after denying her request to return to work on December 25, 2004; causing what she asserts is "unnecessary wage loss and FMLA leave time" due to "Delayed Medical Benefits-Administrative Error;" and failing to properly document what she asserts is the proper date regarding her fitness for duty certification.

In her January 25, 2006, letter following up on her claim's status and our clarification it had been accepted for adjudication under the provisions of title 5, Code of Federal Regulations (CFR), part 178, she states "the preponderance of proof is still with the employer." The claimant further states "This is not just a pay claim. There are administrative issues that need to be addressed." She points to the AWOL charge as impacting her chance for promotion and her concerns regarding "the seniority list" at the airport. In her April 4, 2006, letter the claimant asks we issue a default judgment on the case. Our April 11, 2006, letter advised the claimant 5 CFR 178.105-106 does not provide for default judgments. In her April 21, 2006, letter the claimant points to the authority of OPM's Director to grant a variation from regulation, and states:

Leave compensation is not the only injury or damage I have incurred....I still have not heard anything from OPM or TSA regarding the (3) promotion pass-over explanations I ask [sic] for three weeks ago....My claim seems to be an administrative claim pursuant under the Tort Claims Act for loss or damage of property and personal injury. A wrongful act of a TSA employee while acting within the scope of their office or employment under the Tort Claims Act, should be mailed to the General Counsel, United States Office of Personnel Management....Please let me know why my claim is not being handled under the FTLA [sic] [Federal Tort Claims Act] regulation.

In her "Rebuttal to the Agency's...Final Decision submitted to the Office of Personnel Management on April 17, 2006," which OPM received on July 10, 2006, the claimant indicates she received OPM's response to her April 21, 2006, letter advising her that: (1) OPM's claim decision will only address issues pertaining to the leave compensation claim; (2) OPM's authority to grant a variation to regulations is not intended and would not apply to administrative delays in processing a claim or complaint; and (3) indicating the promotion and other issues she cited in her letters to OPM fall under the jurisdiction of the agency, not OPM. Her "Rebuttal" requests that her "concern [be] noted in the record," again referring to and paraphrasing portions of the FTCA.

Jurisdiction

The agency asserts in its April 5, 2006, [we note this date conflicts with the previously cited April 17, 2006, agency decision on this matter] response to OPM's request for an agency administrative report (AAR) that pursuant to the Aviation and Transportation Security Act (ATSA) (Public Law 107-71, November 19, 2001): "OPM does not have authority to make determinations on leave and pay claims for the TSA TSO [Transportation Security Officer] workforce." In its April 17, 2006, decision sent to the claimant, TSA reiterated this assertion, adding:

Congress, through ATSA, gave the TSA Administrator (formerly the Undersecretary of Transportation for Security) exclusive control over personnel and compensation actions involving TSOs. Section 111(d) of ATSA, codified at 49 U.S.C. § 44935, Note, authorizes the TSA Administrator to "employ, appoint, discipline, terminate and fix the compensation, terms, and conditions of employment" for the screening workforce "[n]otwithstanding any other provision of law." Therefore, OPM does not have the authority to review TSA actions on claims such as yours.

TSA appears to assert that its authority over all compensation and benefits matters for screener personnel is without limit based on the language of section 111(d) of the ATSA:

SCREENER PERSONNEL- Notwithstanding any other provision of law, the Under Secretary of Transportation for Security may employ, appoint, discipline, terminate, and fix the compensation, terms, and conditions of employment of Federal service for such a number of individuals as the Under Secretary determines to be necessary to carry out the screening functions of the Under Secretary under section 44901 of title 49, United States Code. The Under Secretary shall establish levels of compensation and other benefits for individuals so employed.

An analysis of the agency's position requires an understanding of basic principles of statutory construction. It is well settled that "[t]he starting point for interpretation of a statute is the language of the statute itself," and "[a]bsent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 835, 110 S. Ct. 1570, 1575 (1990), citing *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S. Ct. 2051, 2056 (1980).

Further, laws *in pari material* (i.e., upon the same subject matter) must be construed with reference to each other and should be interpreted harmoniously. *Sullivan v. Finkelstein*, 496 U.S. 617, 632 (1990); *United States v. Freeman*, 44 U.S. (3 How.) 556, 564-566 (1845); *Alexander v. Mayor and Commonality of Alexandria*, 9 U.S. (5 Cranch) 1, 7-8 (1809). This assumes that, when Congress passes a new statute, it is aware of all previous statutes on the same subject. *Erlenbaugh v. United States*, 409 U.S. 239, 243-244 (1972). Where the provisions of two different statutes may be read together to give effect to provisions in both statutes, such an

interpretation will prevail. If possible, the provisions of both statutes must be given effect unless: 1) provisions of one statute conflict with the other so as to require a different reading, 2) the later-enacted statute amends or overrides the provisions of the previously-enacted statute, or 3) provisions of one statute specifically authorize a different reading (e.g., statutory language specifically excludes one statute from coverage under another).

We agree section 111(d) of the ATSA provides apparent unfettered discretion to the agency "to employ, appoint, discipline, terminate, and fix the compensation, terms, and conditions of employment of Federal service" for screener personnel. However, we reject the agency's assertion OPM does not have the authority to review TSA actions on compensation and leave claims. The ATSA does not provide claims settlement authority to TSA. OPM's compensation and leave claims settlement authority under 31 U.S.C. §.3702 does not interfere or conflict with TSA's authority to "fix the compensation" of, "establish levels of compensation," or determine the "conditions of employment," e.g. leave, for screener personnel. There is no specific statutory language in the ATSA excluding these employees from the compensation and leave claims settlement provisions applicable to Federal civilian employees under 31 U.S.C. § 3702. Therefore, this claim is subject to OPM's compensation and leave claims adjudication authority. See OPM decision Number F-0019-F-01.

The claimant asserts OPM has claims jurisdiction based on:

the Homeland Security Act of 2002, section 761, "allows the Secretary of DHS with the Director of OPM to establish and adjust the human resources rules of the Department." It is a flexible provision. In addition, the Federal Tort Claims Act statute (1948) removed the power of the Federal government to claim immunity from lawsuit or damages due to negligent or intentional injury by a federal employee in the scope of his work for the government....In short, the Transportation Security Administration can be held [sic] for their actions and are not immune from the federal laws that protect employees.

Under 28 U.S.C. § 2675 (2005), It [sic] mandated that before an individual can recover money damages from the United States for injury caused by a governmental employee's negligence, the individual must first file a claim with the appropriate federal agency and the agency must deny his or her claim. This requirement has already been met.

The claimant's reliance on Public Law 107-296 of November 25, 2002, the Homeland Security Act of 2002, to establish claims jurisdiction is misplaced. As discussed with regard to the ATSA, Public Law 107-296 does not address claims settlement authority and, therefore, cannot be construed as conferring claims settlement authority on either OPM or DHS. Further, Public Law 107-296 does not address and, therefore, does not modify, limit, or set aside the human resources authorities granted to the TSA Administrator in the ASTA. *Castro v. Secretary of Homeland Security*, 472 F.3d 1334 (11th Cir. 2006); *Morton v. Mancari*, 417 U.S. 535, 94 S.Ct. 2474.

The claimant's reliance on the FTCA as determinative of jurisdiction in pursuing her claim with OPM is similarly misplaced as is her attempt to graft the provisions of the FTCA to the claims settlement provisions of a separate and unrelated statute; i.e., 31 U.S.C. § 3702. As we discussed in our letter to the claimant on this issue:

Based on your reference to what appears to be the OPM's Office of General Counsel, I assume you referring to 5 CFR part 177-Administrative Claims Under the Federal Tort Claims Act (FTCA). As stated in 5 CFR 177.101, these regulations pertain to "the negligent or wrongful act or omission of an *officer or employee of OPM* (emphasis added) while acting within the scope of his or her office or employment." It does not pertain to actions of TSA employees which would be covered under that agency's FTCA regulations.

The claimant asserts wrongdoing on the part of TSA employees. Therefore, as stipulated in 28 U.S.C. 2672, any action under the FTCA must be filed with TSA:

The head of each Federal agency or his designee, in accordance with regulations prescribed by the Attorney General, may consider, ascertain, adjust, determine, compromise, and settle any claim for money damages against the United States for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of *any employee of the agency* (emphasis added) while acting within the scope of his office or employment....

Therefore, we will not address any of the matters the claimant has raised under the FTCA as they are outside the jurisdiction of 31 U.S.C. § 3702 and OPM's responsibilities under the FTCA. The authority in 31 U.S.C. § 3702 is narrow and limited to adjudications of compensation and leave claims. Section 3702 does not include any authority to intervene in or decide whether TSA staffing and promotion actions are appropriate and, therefore, those "administrative" issues are outside the jurisdiction of 31 U.S.C. § 3702.

Coverage of FMLA

The claimant asserts, and her rationale relies on her assertion that the TSA screener workforce is directly covered by the FMLA. OPM reached a similar conclusion with regard to application of the Fair Labor Standards Act to the TSA screener workforce, a conclusion we now reverse for the same reasons we find FMLA is not directly applicable to the claimant (see OPM Decision Number F-0019-01, July 17, 2006).

It is well established that, in the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable. *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 456-457, 65 S.Ct. 716, 725-726, 89 L.Ed. 1051 (1945). This is not the case here. Further, as noted in *Morton v. Mancari*, 417 U.S. 535, 94 S.Ct. 2474, the courts are not at liberty to pick and choose among congressional enactments; and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective. "When there are two acts upon the same subject, the rule is to give effect to both if possible The

intention of the legislature to repeal 'must be clear and manifest.'" *United States v. Borden Co.*, 308 U.S. 188, 198, 60 S.Ct. 182, 188, 84 L.Ed. 181 (1939). In the instant case, the intention to repeal is clear and manifest. The ATSA conference report (147 Cong. Rec. S11974-02) makes clear the TSA screener workforce is not directly covered by FMLA. Rather, as noted in the Senate report, FMLA coverage is at the sole discretion of the TSA Administrator:

In the end, national security prevailed, but the misplaced focus on unionization meant that the House would not yield on including the most basic rights of Federal workers: health care, worker's compensation, and civil rights and whistleblower protection. These critical matters are left to the discretion of the Department of Transportation, and it is my hope and expectation that the Secretary will have no choice but to offer a good package to fill so many positions so quickly. In fact, DOT has assured us that they will offer rights and benefits at least as good as those afforded other Federal workers, and I intend to hold them to that promise.

The House report (147 Cong. Rec. H8262-01) affirms this conclusion:

The Conferees recognize that, in order to ensure that Federal screeners are able to provide the best security possible, the Secretary must be given wide latitude to determine the terms of employment of screeners. The Conference Committee expects that, in fixing the terms and conditions of employment the Secretary shall establish benefits and conditions of employment. The Conference Committee also recognizes that, in order to hire and retain screeners, the Secretary should also ensure that screeners have access to Federal health, life insurance, and retirement benefits, as well as workers' compensation benefits. The Committee believes that screening personnel must also be given whistleblower protections so that screeners may report security conditions without fear of reprisal.

We note the claimant's rationale is also based on application of Title I of the FMLA, codified in chapter 28 of 29 U.S.C. However, Title II of the FMLA, codified in subchapter V, of chapter 63 of 5 U.S.C., covers Federal employees not serving under an intermittent or temporary appointment that will expire in one year or less. Assuming, *arguendo*, that the claimant was directly covered by the FMLA, she would be covered by Title II.

The record includes a copy of a TSA human resources policy, identified as HRM-630-3, dated March 4, 2004, Subject: Policy on Sick Leave and Family Medical Leave Act, which states it "applies to all TSA employees." This policy was in effect during the beginning period of the claim. (Note: The claimant incorrectly cites and relies on TSA Management Directive 1100.63-1, which did not go into effect until January 13, 2005, for her claim rationale.) Despite OPM's numerous attempts to contact TSA to clarify the record, TSA failed to provide its rationale regarding the extent of its adoption of the FMLA under its own legislative authority. Therefore, since claims under 31 U.S.C. 3702 must be based solely on the written record (5 CFR § 178.105), we are led to the conclusion that TSA, under its own authority to set terms and conditions of employment for screener personnel, adopted the pertinent provisions of subchapter V, of chapter 63 of 5 U.S.C (sections 6381-6387), for the screener workforce for purposes of FMLA as discussed previously, and that TSA employees also fall under the implementing

regulations in subpart L of part 630 of 5 CFR to the extent provided for in TSA's implementing policies. Given the agency's citation of OPM Decision S9601031 in its claim decision, we conclude the agency has also adopted the pertinent provisions of chapter 63 of 5 U.S.C (sections 6301, 6302, and 6307), for the screener workforce for purposes of sick leave, and that TSA employees also fall under the implementing regulations in subpart D of part 630 of title 5, CFR to the extent provided for in TSA's implementing policies. Therefore, any and all portions of the claimant's rationale based on Title I of the Act, including Federal court decisions, are not germane to and will not be discussed in our adjudication of this claim.

Evaluation of the Leave Claim

We will now review whether the claimant was improperly denied FMLA benefits. In her initial claim letter, the claimant asserts she was not given written notification of either approval or disapproval of FMLA and the denial of her request to return to duty on December 25, 2004, improperly required her to take more FMLA leave than necessary.

1. Did the claimant properly invoke the FMLA?

The claimant asserts she invoked FMLA prior to her December 15, 2004, written request to do so on OPM Form 71. Responding to the TSA AAR, the claimant states:

In contrast to TSA's report, FMLA was invoked before December 15th. I inquired about FMLA when I became ill. I asked Susan if I still could get paid when I was on FMLA leave during the beginning of my illness. The reply was yes and I was paid until October 17th. The truth is the paperwork (OP 71) was not completed until December 15th because I was incapacitated. Under FMLA, "an employee may retroactively invoke her entitlement to FMLA leave within two workdays after returning to work," especially if they have a serious illness or an emergency situation.

Based on information provided by the agency, we conclude TSA, under its own authority to set terms and conditions of employment for screener personnel, has adopted the pertinent provisions of subchapters I through VII of chapter 63 of title 5, U.S.C. (sections 6301-6187), regarding leave and, therefore, TSA employees also fall under the implementing regulations in part 630 of 5 CFR to the extent provided for in TSA's policies applicable to the screener workforce.

The agency states the claimant was on approved paid leave from September 17, 2004, until October 16, 2004, and on approved Leave Without Pay (LWOP) from October 17, 2004, through January 1, 2005, but informed the claimant:

You were never on LWOP under the provisions of the Family and Medical Leave Act (FMLA). In order to be on FMLA LWOP you must invoke the leave in advance and provide acceptable medical documentation....According to the documentation in this matter, you did not attempt to invoke FMLA until December 15, 2004, when you had already been out on LWOP for approximately two months....Additionally, at no time did you submit the appropriate medical

documentation to support a request for leave under FMLA. The airport nevertheless approved LWOP for the period beginning on October 17, 2004 through January 1, 2005.

The claimant provided multiple medical documents beginning with an August 12, 2004, receipt for emergency room care received on July 16, 2004. This is cited on U.S. Department of Labor Form WH-381, Certification of Health Care Provider (Family and Medical Leave Act 1993). The claimant's signature of that WH-381 is dated December 24, 2004, but the health care provider's signature is dated January 6, 2007. The form describes the date the condition commenced was "7/16/2004 Place: Ingham Medical Center Emergency Room probable duration of incapacity to be determined by health care provider." Block 5.b. concerning the need for intermittent work or work on less than a full time schedule states: "Employee work will only be interrupted for medical appointments over a six month period." The response to Block 5.b. "If the condition is a chronic condition (condition #4) or a pregnancy, state if the patient is incapacitated and the likely duration and frequency of episodes of incapacity," states: Incapacity from September 17, 2004 caused by delay of patient's health coverage by TSA. Other blocks in the form indicate the number of additional treatments is "undetermined," the "Employee is able to work, but with lifting only up to 40 lbs. in addition to attending scheduled appointments," and "Next scheduled Appt 30 day notice 2/2/2005 Appt."

The claimant submitted a Radiology Report, dated November 10, 2004, for an ultrasound examination on October 1, 2004, indicating "Gallbladder is filled with stones...." It states: Impression: CHOLELITHIASIS. CHOLECYSTITIS" and "attention needed." Another document shows surgery for "LAPARSCOPIC CHOLECYSTECTOMY WITH GRAM, POSSIBLE OPEN, on November 16, 2004, was rescheduled with the annotation: [claimant], I have tried to reach you and left a message for you. Your surgery had to be rescheduled. If this date doesn't work for you, please call me." The claimant provided a series of return to duty/release forms. They include one annotated by the claimant as "my surgeon clearing me from surgery only" from the Department of Surgery, Michigan States University (MSU), stating the claimant was under care from November 8, 2004, to December 9, 2004; one from the MSU Nursing Care Health Center (NCHC) annotated by the claimant "Family Doctor released to duty, signed by a Nurse Practitioner, stating the claimant was released for work as of December 25, 2004, with the restriction "No lifting over 35#); and a second one signed by the same Nurse Practitioner for December 25, 2004, with "40 #lb Wgt restriction until January 19," annotated by the claimant it was "new... because weight requirements."

The claimant also provided a form signed by the same Nurse Practitioner and a Registered Nurse stating the claimant "is ill and unable to work until Oct 5th, 04...Note: Pt. has been off work since 9-17-04. Will update before Oct 5, 04; and a similar form annotated by the claimant with "12/[illegible]/2004 Doc by MSU" stating the claimant "is ill and unable to work until 01-01-05." A second copy of this same form, annotated November 5, 2004, states:

[Claimant],

Would you please fill this out & sign & return your first day of absence was 9-16. The latest slip on file is return to work date 11-29-04. Please request LWOP for balance unpaid. Call me with questions.

Thank you Susan

The claimant annotated the form: "Talked with Susan on November 18th let her know I would not return to work on Nov 29th."

Based on the claimant's own assertions, she was aware of her potential entitlement to FMLA; i.e., "I inquired about it when I became ill." The only document in the record explicitly referring to FMLA is an OPM-71 form signed by the claimant on December 15, 2004, invoking FMLA for "Serious health condition of self" for "illness began 09-17-2004," requesting LWOP from October 17, 2004 to January 1, 2005, with the remark: "All follow-up Appts need to be kept, because still bleeding internally. This is not from surgery." The claimant argues this:

paperwork (OP 71) was not completed until December 15th because I was incapacitated. Under FMLA, "an employee may retroactively invoke her entitlement to FMLA leave within two workdays after returning to work," especially if they have a serious illness or an emergency situation.

A Serious Health Condition means, an illness, injury impairment or physical or mental condition can involve one of the following: Subsequent treatment in connection with or consequent to such inpatient care...My medical treatments included three surgeries. The first surgery in November was rescheduled due to medical complications I sustained. Stones from the gallbladder had blocked the medication from metabolizing. The second surgery was conducted two weeks after the first attempt. The gallbladder and part of the liver was taken out for biopsy. The third surgery in March was for internal bleeding.

The preponderance of the evidence clearly shows that TSA had knowledge of the serious medical condition, but did not take the necessary steps and made me wait over six weeks to change my healthcare provider. This can be easily proven by the disapproved OP71 dated September 1 (Exhibit 19). The OP71 has the appointment card copied right from the form.

The claimant's Exhibit 19 in her "Rebuttal" is a request for two hours of advance sick leave for October 4, 2004. Under "Remarks" it states "11-4-2004 Thurs 10:40." The claimant signed and dated the form September 1, 2004, and the advance sick leave was denied on September 8, 2004. Exhibit 19 does not invoke FMLA and, it is unclear why the claimant was requesting "advance leave" since she remained in a paid leave status until October 17, 2004.

We find the claimant's argument that she properly invoked FMLA is contradicted by the documentary evidence she presented in support of her claim. Exhibit 19 does not invoke FMLA and its preparation and submission by the claimant undermines her argument she was unable to invoke FMLA in writing until December 15, 2004, due to incapacitation. Indeed, the claimant provided "Telephone Logs" and "Fax Logs" as exhibits showing she was in contact with the agency during the course of her illness and had ample opportunity to invoke FMLA. Her assertion that she was sufficiently incapacitated so as not to be able to do the "paperwork" until December 15th conflicts with the remainder of the documentation she provided.

OPM's December 5, 1996, FMLA regulations were revised on May 8, 2000. As discussed in the Supplementary Information:

The requirement that an employee must initiate action to take FMLA is consistent with all other Federal leave policies and programs in that the employee is responsible for requesting leave or other time off from work....The legislative history establishes an intent to authorize the use of leave "to be taken" under the FMLA –*i.e.*, on a prospective basis. If necessary, an employee may invoke his or her entitlement to FMLA leave on the day of the emergency. In the final regulations, we have added a sentence in 5 CFR 630.1203(b) to state that an employee may not retroactively invoke his or her entitlement to family and medical leave.

We realize that unique situations may require some flexibility in meeting this requirement. Therefore, 5 CFR 630.1203(b) of the final regulations provides that if an employee or his or her personal representative is physically or mentally incapable of invoking the employee's entitlement to FMLA leave *during the entire period in which the employee is absent from work for an [sic] FMLA-qualifying purpose* [emphasis added], the employee may retroactively invoke his or her entitlement to FMLA within 2 workdays after returning to work.

Therefore, we find the claimant had ample opportunity to invoke FMLA but did not do so properly and, therefore, was not covered by the provisions of FMLA for the period of this claim.

2. Did the agency improperly fail to return the claimant to duty?

Because we find the claimant did not properly invoke and, therefore, was not covered by the provisions of FMLA for the period of this claim, we must determine whether TSA's failure to return her to duty on December 25, 2004, violated applicable leave statutes and regulations. TSA's HRM-630-3, dated March 4, 2004, does not cite but tracks the provisions of subpart D of part 630 of title 5, CFR regarding the management of sick leave. Those regulations and procedures address the supporting evidence necessary to permit granting of sick leave (5 CFR § 630.403), but do not directly address the supporting evidence an employee must provide in order to return to duty.

Attachment 2 to the AAR is a December 6, 2004, letter to the claimant signed by Karen Keys-Turner, Human Resources Manager, from TSA-Lansing LAN/FNT/MBS, Re: Extended Absence and Medical Documentation. The letter states:

Prior to returning to work, your physician must provide a medical statement, which is legible, on his/her letterhead, signed with an original signature, which speaks to your ability to perform all of the following duties:

- (2) The employee must have the ability to:
 - (a) complete a full hand-wanding screening of people in the standing position that includes the requirement to reach and wand the individual from floor to over the head;
 - (b) do a full leg squat;
 - (c) stand and remain standing for periods up to 3 hours without sitting;
 - (d) pick-up (off the ground) from a standing position an object weighing 40 pounds, transport the object a minimum of 8 feet, and place the object on a tabletop a minimum of 36 inches in height. This must be done without assistance a minimum of 12 times in 30 minutes; and (e) assist another individual to lift (from the ground) an object weighing 75 pounds, transport the object a minimum of 8 feet, and place the object on a tabletop a minimum of 36 inches in height. This must be done a minimum of 12 times in 30 minutes.

Attachment 5 to the AAR includes a December 27, 2004, e-mail from Ms. Turner to Denise Amicucci, Deputy Federal Security Director at [airport], Subject: [Claimant] Return to Duty, stating:

[Claimant's] return to work certification is conflicting. We can return her to duty once we receive proper documentation of her fitness for duty. What we have so far is this:

- 1. Documentation submitted on 12/15/2004 from the MSU Healthcare Center (internist's office?) indicating a release to return to full duty without restrictions effective 1-1-05. Based on that information [claimant] is scheduled to return to duty on 1-2-05.
- 2. On 12/22/2004 documentation was submitted from the MSU Healthcare Center (internist?) indicating a release to return to duty effective 12-25-04 with a 35# lifting restriction. This documentation should have been accompanied by a written request for a light duty assignment to be taken under advisement prior to scheduling an early return to work. I have not received a written request for a light duty assignment from [claimant] to date. I informed [claimant] that this request is incomplete and cannot be acted upon until a written request for light duty is received as such requests must be reviewed in terms of availability of light duty work and operational need.

3. On 12/27/1004 documentation was received via fax dated 12/9/2004 from the MSU Department of Surgery indicating [claimant] was released to return to full duty as of 12/13/2004. This conflicts with the information above.

As [claimant] has been under the care of both a surgeon and referring physician (internist) for her condition, there must be concurrence by both medical professionals with respect to the date of her release to return to duty with or without restrictions. In the absence of that, we will be unable to return [claimant] to duty without restrictions on 1-2-05, the earliest date both physician's [sic] indicate that she is able.

Please convey this information to [claimant] via e-mail and inform her that I will be available to entertain any additional questions via 3-way conference call with you should that become necessary. If there will be a return to duty prior to 1-2-05 I must receive proper documentation no later than 12noon [sic] on Wednesday 12-29-04. Thank you.

Associated e-mails show the message was conveyed by e-mail by Ms. Amicucci to what appears to be the claimant's private e-mail, and includes a December 29, 2004, e-mail message from Karen Keys-Turner to the claimant stating:

[Claimant],

I am in receipt of your memorandum incorrectly entitled "Written Confirmation of Returning to Work Denial" which is grossly inaccurate and does not reflect the information conveyed to you below [the previously described e-mails] in any way. Further, your correspondence does not request a light duty (35 lb. lifting restriction) request to return to work prior to your release to full duty. Please make clear your request to return to duty with restrictions in writing prior to 1-2-05 or report to full duty on 1-2-05.

The e-mail is hand annotated at the end "at 1200 hours KK-T, and appears to refer to the "Rebuttal's" Exhibit 4 with that subject line to "Ms. Keys" which states:

This confirms our conversation on December 24th, 2004, in which you were offered paperwork on December 23rd that included medical certification from [claimant's] surgeon and physician. Description of physical requirements and duties of [claimant's] position were outlined and reviewed by the medical personnel. The medical certification reflected the employee was released to return to duty on December 25th, 2004 instructed in FMLA directive.

The Transportation Security Administration's Human Resources Department notified [claimant] by telephone and by e-mail she could not return to work on December 25th. Pat needed to request in writing light duty when the letter of instruction from human resources did not reflect this requirement. [Claimant] is able to perform all the essential functions of her job, so the Transportation Security Administration will not suffer any substantial or grievous injury in their

operations from [claimant's] lifting restriction of 35 lbs for a few weeks. On December 22nd, TSA management agreed to keep [claimant] employed at a security checkpoint while she recovers.

Human resources must provide reasons in writing for denying job restoration no later than January 3rd, and provide the employee a reasonable opportunity to reply. Notice of any opportunity to change plans or benefits in the future must be given to the employee. Failure to comply will result in notifying the Secretary of Labor and OIC.

Attachment 6 of the AAR is an undated memorandum from the claimant to "Susan Winger, Flint Bishop Airport, Administration" with that subject heading. The memorandum states:

Unless I get written notification to return to work before 5:00 PM, Thursday, December 30th, I will not be returning to duty on January 1st because Human Resources already denied my medical certifications to return to work on December 25th.

I sent Karen Keys-Turner a certified letter. Human Resources must explain in writing reasons for denying job restoration no later than January 3rd. This is mandated by federal law. I provided medical certification as directed by FMLA and TSA regulation. If TSA doubts the validity of the submitted medical certification, second and third opinions may be sought at TSA's expense.

Exhibit 4 of the "Rebuttal" also includes a "Memorandum for Record" from the claimant dated January 3, 2004, which expands upon her application of DoL's FMLA regulations as they pertain to return to duty from FMLA leave. Exhibit 6 of the "Rebuttal" includes a "memorandum for Office of Personnel Management" from the claimant dated January 6, 2005, with "Subject-Official Return to Duty Date-error Notification of personnel Action SF50" which states:

Report to duty date January 2nd is an error (attached)[sic] The periodic status *November* report (attached) Karen-Keyes-Turner is using reflected an estimated date to return to duty of 1-1-2005. This 1-1-2005 date is obsolete, since the doctor wrote this report on December 3rd before [claimant's] surgery. Carol Hill wrote a current report on December 21, 2004 (attached), releasing [claimant] to return-to-duty on 12-25-2005 with weight restrictions of 35 lbs. Karen did not include this report and used 1-2-2005 as the return to duty date. On January 6th, Carol Hill gave [claimant] another weight restriction of 40 lbs with the same release date of 12-25-2004 (enclosed).

The remainder of the memorandum discusses the claimant's rationale regarding the application of DoL FMLA regulations to her return to duty situation at issue in this claim.

The claimant would ask us to find that TSA's refusal to allow her to return to duty was an unwarranted personnel action in that she had provided all documentation required by controlling law and regulation to permit her to do so effective December 25, 2004. As a result, the claimant

asserts the agency improperly placed in an AWOL status on January 2 and 3, 2005, (although she also uses the dates December 25, 2004, to January 4, 2005) after denying her return to duty on December 25, 2004. It appears she believes this prevented her from being paid for the time she would have work from December 25, 2004, through January 3, 2005. The claimant also contests being placed in an AWOL status on September 16, 2004, which the agency explained was the result of her "failure to report to duty without seeking approved leave...." The claimant failed to respond to the agency's characterization of why she was placed on AWOL on September 16, 2004. We note the December 15, 2004, OPM Form 71 submitted by the claimant for FMLA leave is for the period beginning September 17, 2004.

Under 5 CFR § 630.101, the head of an agency having employees subject to 5 CFR part 630 "is responsible for proper administration of this part so far as it pertains to employees under his jurisdiction...." Section 111(d) of the ATSA tracks and, indeed, amplifies this authority in providing the TSA Administrator the discretion to "to employ, appoint, discipline, terminate, and fix the compensation, terms, and conditions of employment of Federal service" for screener personnel, which includes leave. Under 5 CFR § 630.402, an employee must *request* sick leave. The purpose of sick leave in this case is provided for under 5 CFR § 630.401(a)(2); i.e., when the employee "Is incapacitated for the performance of his or her duties by physical...illness...." The agency "may grant sick leave only when the need for sick leave is supported by administratively acceptable evidence" and delegates to the agency the authority to determine what constitutes administratively acceptable evidence.

Administration of sick leave includes ascertaining, through administratively acceptable evidence, that the employee is no longer incapacitated "for the performance of his or her duties." The agency's December 6, 2004, letter to the claimant provided precise instructions on what the claimant needed to submit to meet this requirement. The claimant would have us conclude she met her burden in this regard. However, the record shows she failed to do so despite receiving repeated instructions to do so by the agency as evidenced by the e-mails discussed previously.

The ATSA, codified in 49 U.S.C., establishes specific physical requirements for the screener workforce. Section 44935(f)(iv) of 49 U.S.C. states:

Screeners performing physical searches or other related operations shall be able to efficiently and thoroughly manipulate and handle such baggage, containers, and other objects subject to security processing.

Given these statutory requirements, it appears TSA requires screener personnel to be able to lift 40 pounds "for the performance of his or her duties." The claimant's assertion "the Transportation Security Administration will not suffer any substantial or grievous injury in their operations from [claimant's] lifting restriction of 35 lbs for a few weeks" and her memorandum to Ms. Winger that "Unless I get written notification to return to work before 5:00 PM, Thursday, December 30th, I will not be returning to duty on January 1^{st"} misses the point. By statute, TSA establishes employment policy and employees, such as the claimant, have no authority to ignore or waive those policies as the claimant seeks to do in this assertion. In her initial claim request, the claimant states:

On January 6th, Carol Hill gave [claimant] another weight restriction of 40 pounds with the same release date of 12-25-2004 again, HR insisted that the 12-25-2004 date would not be used as the effective date.

Thus, by her own admission, the claimant did not present administratively acceptable evidence she was able to perform the full range of her permanently assigned duties until after she returned from AWOL. Thus, TSA's actions placing her in AWOL status were fully within its statutory and regulatory authority as discussed in OPM Compensation and Leave Decisions Case #S9601031:

An employee may be placed in a leave status when it is administratively determined that the employee is incapacitated for the performance of assigned duties based upon competent medical evidence. Such action does not constitute an unjustified or unwarranted personnel action under the Back Pay Act. See Memphis Defense Depot, B-214631, August 24, 1984; David G. Reyes, B-206237, August 16, 1982; and Connie R. Cecalas, B-184522, April 21, 1977. A claim for back pay must be denied when competent medical evidence indicates that the claimant was incapacitated for performance of his or her assigned duties. See Isma B. Saloshin, B-205950, January 10, 1984.

Although the claimant was not covered by FMLA during the period of her claim, we note her application of FMLA and its implementing regulations is similarly unsupportable. Under 5 U.S.C. § 6383(d), agencies are statutorily authorized to:

As a condition to restoration under subsection (a) [an employee returning to work from FMLA leave] for an employee who takes leave under section 6382(a)(1)(D) ["Because of a serious health condition that makes the employee unable to perform the functions of the employee's position"], the employing agency may have a uniformly applied practice or policy that requires each such employee to receive certification from the health care provider of the employee that the employee is able to resume work.

OPM's implementing regulations at 5 CFR § 630.1208(h) state: "An agency may delay the return of an employee until the medical certification is provided." By her own admission, the claimant did not submit medical certification that she was able to perform the full scope of her duties, including lifting 40 pounds, until January 6, 2005.

Decision

OPM does not conduct investigations or preside over adversary hearings in adjudicating claims, but relies on the written record submitted by the parties. *See Frank A. Barone*, B-229439, May 25, 1988. Where the record presents a factual dispute, the burden of proof is on the claimant to establish the liability of the United States; and where the agency's determination is reasonable, OPM will not substitute its judgment for that of the agency. *See*, *e.g.*, *Jimmie D. Brewer*, B-205452, March 15, 1982, as cited in *Philip M. Brey*, B-261517, December 26, 1995. Where the written record presents an irreconcilable dispute of fact between a Government

agency and an individual claimant, the factual dispute is settled in favor of the agency, absent clear and convincing evidence to the contrary. 5 CFR 178.105; *Matter of Staff Sergeant Eugene K. Krampotich*, B-249027, November 5, 1992; *Matter of Elias S. Frey*, B-208911, March 6, 1984; *Matter of Charles F. Callis*, B-205118, March 8, 1982. Therefore, we find the agency did not err in determining the claimant failed to properly invoke FMLA; and the agency's action to place the claimant in an involuntary leave status was based on controlling statute and regulation and, thus, was not arbitrary, capricious, or unreasonable. Accordingly, the claim is denied.

This settlement is final. No further administrative review is available within OPM. Nothing in this settlement limits the claimant's right to bring an action in an appropriate United States court.