

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**F.M., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Mission Viejo, CA, Employer**

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**Docket No. 06-2062  
Issued: January 22, 2007**

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge  
DAVID S. GERSON, Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On September 11, 2006 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decisions dated November 22, 2005 and June 21, 2006 denying his claim for leave buyback and July 28, 2006, denying his request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUES**

The issues are: (1) whether appellant is entitled to leave buyback for intermittent dates between September 28 and December 10, 2004; and (2) whether the Office abused its discretion in denying his request for reconsideration.

**FACTUAL HISTORY**

On September 29, 2004 appellant, then a 42-year-old letter carrier, filed an occupational disease claim alleging that on September 25, 2004 he developed low back pain while casing mail. The Office accepted his claim for a lumbar strain. In reports dated September 25 and October 4, 2004, Dr. Linh N. Vu, an attending Board-certified internist, and Dr. Behzad Haghi,

an attending Board-certified family practitioner and specialist in occupational medicine, indicated that appellant could perform light-duty work with no bending, no repetitive twisting and no lifting over 10 pounds.

In an October 29, 2004 report, Dr. Haghi stated that appellant could return to work on October 30, 2004 without restrictions. In a November 16, 2004 report, he indicated that appellant was totally disabled on November 16, 2004 but could return to modified work on November 17, 2004 for 4 hours a day with restrictions of no bending, squatting, stooping, sitting, standing and walking limited to 30 minutes per hour and no lifting over 10 pounds. In a November 24, 2004 report, Dr. Lilly A. Tran, an attending Board-certified physiatrist, indicated that appellant could return to work without restrictions on November 25, 2004.

On May 4, 2005 appellant filed a claim for leave buyback for September 25 to December 10, 2004.<sup>1</sup>

In a November 16, 2005 letter, the employing establishment stated that work within appellant's restrictions was always available but he chose to use sick or annual leave for certain days rather than work.

By decision dated November 22, 2005, the Office approved leave buyback in the amount of \$447.97 for 32.42 hours of disability including 8 hours for November 16, 2004,<sup>2</sup> 4 hours for November 17, 19, 20 and 24, 2004, 3.77 hours for November 22, 2004, 2.65 hours for November 23, 2004 and 2 hours for December 1, 2004. The Office noted that compensation was not payable for September 27, October 26 and November 12, 2004 as these days were within the "wait" period provided in the Federal Employees' Compensation Act.<sup>3</sup>

Appellant requested an oral hearing that was held on April 18, 2006.

By letter dated May 3, 2006, the employing establishment stated that, between September 25 and December 10, 2004, work was available within appellant's work restrictions. He was never told to go home. Appellant chose to take leave. He was assigned to case mail until he was offered a job for four hours a day on November 18, 2004 because he provided medical restrictions that precluded him from any carrier duties. On September 28, 2004 appellant called in and requested 8 hours of sick leave, on September 30, 2004 he used 1.44 hours of annual leave, 4.74 hours of annual leave on October 1, 2004, 4.37 hours of annual leave on October 2, 2004, 16 hours of prescheduled annual leave (vacation) for October 4 to 5, 2004, 1.80 hours of sick leave on October 6, 2004, 2.75 hours of annual leave on October 8, 2004, 2.21 hours of sick leave October 9, 2004, 2.83 hours of sick leave on October 12, 2004, 3.44 hours of sick leave on October 13, 2004 and 3.63 hours of sick leave on October 14, 2004. On

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<sup>1</sup> Appellant submitted leave slips and timesheets for intermittent dates between September 28 and December 10, 2004.

<sup>2</sup> The employing establishment indicated that appellant should receive eight hours of leave on November 16, 2004 because his restrictions changed and a job offer had to be prepared.

<sup>3</sup> An employee is not entitled to compensation for the first 3 days of temporary disability when the disability does not exceed 14 days. 5 U.S.C. § 8117; *see also* 20 C.F.R. § 10.401(a).

October 23, 2004 appellant requested 3.41 hours of annual leave indicating it was for vacation, 8 hours of sick leave for November 15, 2004. November 25, 2004 was Thanksgiving Day, a paid holiday. On December 2, 2004 appellant requested two hours of sick leave.<sup>4</sup>

By decision dated June 21, 2006, an Office hearing representative affirmed the November 22, 2005 decision.

Appellant requested reconsideration. He argued that he was claiming leave buyback for only those days when work was available within his medical restrictions, but he chose not to work. Appellant stated that the employing establishment had conducted an investigation to determine whether he had committed fraud in connection with his compensation claim. He stated that the employing establishment did not send a representative to the oral hearing who would have been required to testify under oath.

By decision dated July 28, 2006, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted did not warrant further merit review.<sup>5</sup>

### **LEGAL PRECEDENT -- ISSUE 1**

Appellant has the burden of proving by the preponderance of the reliable, probative and substantial evidence that he was disabled for work as the result of an employment injury.<sup>6</sup> Monetary compensation benefits are payable to an employee who has sustained wage loss due to disability for employment resulting from the employment injury.<sup>7</sup> Whether a particular employment injury causes disability for employment and the duration of that disability are medical issues which must be proved by a preponderance of reliable, probative and substantial medical evidence.<sup>8</sup>

In situations where compensation is claimed for periods where leave was used, the Office has the authority and the responsibility to determine whether the employee was disabled during the period for which compensation is claimed.<sup>9</sup> It determines whether the medical evidence establishes that an employee is disabled by an employment-related condition during the period

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<sup>4</sup> The actual timesheets indicate that some of the requests for sick leave were changed to annual leave and vice versa.

<sup>5</sup> Appellant submitted additional evidence subsequent to the Office decision of July 28, 2006. The Board's jurisdiction is limited to the evidence that was before the Office at the time it issued its final decision. *See* 20 C.F.R. § 501.2(c). The Board may not consider this evidence for the first time on appeal.

<sup>6</sup> *David H. Goss*, 32 ECAB 24 (1980).

<sup>7</sup> *Debra A. Kirk-Littleton*, 41 ECAB 703 (1990).

<sup>8</sup> *Edward H. Horten*, 41 ECAB 301 (1989).

<sup>9</sup> *Laurie S. Swanson*, 53 ECAB 517 (2002); *see also* 20 C.F.R. § 10.425, which provides: "The employee may claim compensation for periods of annual and sick leave which are restorable in accordance with the rules of the employing [establishment]. Forms CA-7 and CA-7b are used for this purpose."

claimed for leave buyback, after which the employing establishment will determine whether it will allow the employee to buyback the leave used.<sup>10</sup>

### **ANALYSIS -- ISSUE 1**

The medical evidence establishes that appellant was limited to modified duty from September 28 through October 29, 2004. He was released to full duty as of October 30, 2004. Beginning November 17, 2004 appellant was placed on work restrictions four hours a day. As of November 25, 2004 he was again returned to full duty.

There is no leave slip or timesheet entry of record for September 25, 2004. Light duty was available for eight hours a day from September 28 through October 29, 2004. Appellant requested annual leave and sick leave during this period but there is no medical documentation establishing total disability. October 4 and 5, 2004 were dates when appellant had preapproved annual leave. He used eight hours of annual leave for November 15, 2004 but there is no medical evidence indicating disability. At this time he was medically cleared for full duty. November 25, 2004 was a holiday, Thanksgiving. Appellant requested 1.50 hours of sick leave for December 10, 2004, indicating that he had a doctor's appointment. However, there is no medical evidence regarding an appointment on that date. With the exception of the dates approved by the Office in its November 22, 2005 decision, appellant failed to establish that he was disabled for any dates between September 28 and December 10, 2004 due to his accepted lumbar strain. Therefore, he was not entitled to leave buyback.

The Office indicated that appellant was not entitled to compensation for September 27, October 26 or November 12, 2004 because an employee is not entitled to compensation for the first 3 days of temporary disability when the disability does not exceed 14 days.<sup>11</sup> The Office approved only 11 days of compensable disability between November 16 and December 1, 2004. However, these three unapproved dates are not the first three days of disability. It is unclear why the Office did not deny compensation for September 28 and 30, 2004 due to section 8117 of the Act. However, regardless of whether section 8117 applies to October 26 and November 12, 2004, October 26, 2004 is not compensable because modified duty was available and appellant did not provide medical documentation of total disability. November 12, 2004 is not compensable because he was cleared for full duty at that time and did not provide medical evidence establishing disability.

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<sup>10</sup> *Laurie S. Swanson, supra* note 9.

<sup>11</sup> *See supra* note 2.

## **LEGAL PRECEDENT -- ISSUE 2**

Section 8128(a) of the Act<sup>12</sup> vests the Office with discretionary authority to determine whether it will review an award for or against compensation. The Act states:

“The Secretary of Labor may review an award for or against payment of compensation at any time on [her] own motion or on application. The Secretary, in accordance with the facts found on review may --

- (1) end, decrease, or increase the compensation awarded; or
- (2) award compensation previously refused or discontinued.”

The Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a specific point of law; or (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office.<sup>13</sup> When an application for review of the merits of a claim does not meet at least one of these requirements, the Office will deny the application for review without reviewing the merits of the claim.<sup>14</sup>

## **ANALYSIS -- ISSUE 2**

Appellant argued that he was claiming leave buyback only for those days when work was available within his medical restrictions, but he chose not to work. However, if he refused to work when work within his restrictions was provided, appellant is not entitled to compensation. Appellant stated that the employing establishment had conducted an investigation to determine whether he had committed fraud in connection with his compensation claim. However, he provided no details of the investigation or any evidence establishing that appropriate light duty was not available on the days for which he claimed compensation. Appellant stated that the employing establishment did not send a representative to the oral hearing who would have been required to testify under oath. However, the fact that the employing establishment did not send a representative to the hearing to testify under oath does not establish that he provided sufficient evidence that he was disabled due to his accepted condition. Because appellant did not show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument or submit relevant and pertinent evidence not previously considered by the Office the Office properly denied his request for reconsideration.

## **CONCLUSION**

The Board finds that appellant failed to establish that he was entitled to leave buyback for intermittent dates between September 28 and December 10, 2004. The Board further finds that the Office did not abuse its discretion in denying appellant’s request for reconsideration.

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<sup>12</sup> 5 U.S.C. § 8128(a).

<sup>13</sup> 20 C.F.R. § 10.606(b)(2).

<sup>14</sup> 20 C.F.R. § 10.608(b).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated July 28 and June 21, 2006 and November 22, 2005 are affirmed.

Issued: January 22, 2007  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

David S. Gerson, Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board