

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of GLEN M. LUSCO and DEPARTMENT OF TRANSPORTATION,  
FEDERAL AVIATION ADMINISTRATION, Martinsburg, PA

*Docket No. 03-1442; Submitted on the Record;  
Issued November 14, 2003*

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DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,  
MICHAEL E. GROOM

The issue is whether appellant is entitled to compensation for the period November 27, 1999 to September 18, 2001.

On February 23, 1999 appellant, then a 49-year-old air traffic controller, filed an occupational disease claim alleging that he sustained an adjustment disorder with depression and anxiety due to factors of his federal employment. He stopped work on December 14, 1999. The Office of Workers' Compensation Programs accepted appellant's claim for post-traumatic stress disorder.<sup>1</sup>

On September 24, 2001 appellant filed a claim for compensation from November 27, 1999 to September 18, 2001. The employing establishment submitted information showing that appellant received sick or annual leave for lost time from work between August 29, 1999 and October 6, 2001.<sup>2</sup>

On December 10, 2001 appellant filed a second claim for compensation from November 27, 1999 to September 22, 2001. In an accompanying letter, he requested compensation from the Office for night differential pay, Sunday premium pay and holiday pay as well as the payment of taxes for 1999 to 2001.<sup>3</sup>

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<sup>1</sup> By decision dated June 23, 2000, the Office denied appellant's claim on the grounds that he did not establish an injury in the performance of duty. In a July 12, 2001 reconsideration decision, the Office vacated its June 23, 2000 decision.

<sup>2</sup> The Office placed appellant on the periodic rolls effective November 18, 2001. Appellant retired from the employing establishment on disability effective December 1, 2001 and elected to receive workers' compensation benefits from the Office.

<sup>3</sup> In a letter dated July 22, 2002, the employing establishment informed appellant that a leave buyback request could only be processed if he returned to work.

By decision dated December 19, 2002, the Office denied appellant's request for compensation for the period November 27, 1999 through September 22, 2001 on the grounds that he had received compensation for time lost from work from the employing establishment.<sup>4</sup> In a decision dated May 9, 2003, a hearing representative affirmed the Office's December 19, 2002 decision.

The Board finds that the case is not in posture for decision.

In situations where compensation is claimed for periods when leave was used, the Office has the authority and responsibility to determine whether the employee was disabled during the period for which compensation is claimed.<sup>5</sup>

By proposed rule published in the *Federal Register* on December 23, 1997,<sup>6</sup> the Department of Labor proposed revisions to its regulations governing the administration of the Federal Employees' Compensation Act. Among the proposals was one to remove the regulations regarding leave buy back on the basis that this process was not authorized or required by the Act and not controlled by the Office.<sup>7</sup> The final rule published in the *Federal Register* on November 25, 1998, after noting the comments received in response to the proposed rule's removal of the leave buyback provision, states:

"The reasons for removal of the leave buyback provision have not changed. However, since the Office does in fact have a procedure for paying compensation when leave is restorable, a brief mention of this process in this rule is considered warranted and it is being added as new [section] 10.425.... Current practice is not altered."<sup>8</sup>

The Office's new regulations were effective January 4, 1999. The new regulations, at 20 C.F.R. § 10.425, titled "May compensation be claimed for periods of restorable leave?" states, "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."

In this case, the Office denied appellant's claim based on the employing establishment's denial of leave buyback without considering whether the medical evidence was sufficient to establish disability during the period claimed. However, as discussed above, the Office's

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<sup>4</sup> In a decision dated August 6, 2002, the Office denied payment of medical bills in excess of the fee schedule. Appellant has not appealed this decision and, therefore, it is not before the Board.

<sup>5</sup> *Laurie S. Swanson*, 53 ECAB \_\_\_\_ (Docket Nos. 01-1406 and 02-765, issued May 2, 2002).

<sup>6</sup> 62 Fed. Reg. 67120 (to be codified at 20 C.F.R. Parts 10 and 25).

<sup>7</sup> This regulation, found at 20 C.F.R. § 10.310, provided in part: "If the employee uses leave during a period of disability caused by an occupational disease or illness and a claim for compensation is approved, the employee may, with the approval of the employing establishment, 'buy back' the used leave and have it recredited to the employee's account."

<sup>8</sup> 63 Fed. Reg. 65304 (1998).

regulations provide that appellant can claim compensation for periods covered by annual or sick leave if the periods claimed are restorable.<sup>9</sup> Further, the Office's procedure manual provides that the Office is responsible for reviewing the medical evidence to determine if it establishes entitlement to compensation for periods during which leave buyback is claimed.<sup>10</sup> The Office, therefore, should determine whether the medical evidence establishes that an employee is disabled by an employment-related condition during the period claimed for leave buyback. The employing establishment will then determine whether it will allow the employee to buy back the leave used. Consequently, this case is remanded for the Office to adjudicate whether the medical evidence establishes appellant was disabled due to his employment injury during the period November 27, 1999 to September 18, 2001.

The decisions of the Office of Workers' Compensation Programs dated May 9, 2003 and December 19, 2002 are set aside and the case is remanded for further proceedings consistent with this opinion.

Dated, Washington, DC  
November 14, 2003

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member

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<sup>9</sup> 20 C.F.R. § 10.425.

<sup>10</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Computing Compensation*, Chapter 2.901.19 (July 2000).