

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

K.J., Appellant)
)
and)
)
DEPARTMENT OF LABOR, OFFICE OF THE)
ASSISTANT SECRETARY FOR)
ADMINISTRATION & MANAGEMENT,)
Boston, MA, Employer)

Docket No. 11-571
Issued: January 25, 2012

Appearances:
William E. Shanahan, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 28, 2010 appellant, through her representative, filed a timely appeal from the July 7, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP) denying her claim for compensation from July 13 through September 30, 2006. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant met her burden of proof to establish disability from July 13 through September 30, 2006.

On appeal, appellant, through counsel, contends that OWCP failed to adjudicate this claim and that it was improper for OWCP to advise the employing establishment that it could

¹ 5 U.S.C. § 8101 *et seq.*

prohibit the leave buyback. He argued that the employing establishment arbitrarily refused leave buyback in this instance.

FACTUAL HISTORY

On August 15, 2006 appellant, then a 52-year-old attorney, filed an occupational disease claim alleging that as a result of repetitive use of the computer and the telephone she suffered entrapment of the ulnar nerve at the elbow.² She first realized that her injury was related to her work on April 18, 2006. Appellant stopped work on August 18, 2006. On April 26, 2007 OWCP accepted her claim for left cubital tunnel.

Appellant filed a claim for a recurrence of the employment injury on August 18, 2006.

By decision dated June 27, 2007, OWCP denied appellant's claim for a recurrence, finding that she had not submitted the necessary factual or medical evidence to establish a recurrence of left elbow disability beginning August 18, 2006 causally related to her initial work injury.

On July 12, 2007 appellant, through counsel, requested an oral hearing. However, by letter dated July 20, 2007 counsel contended that the case was not in posture for an oral hearing as appellant did not have a recurrence of disability as there was no interruption of treatment and she did not return to work.

By decision dated August 23, 2007, the hearing representative reversed the July 27, 2007 decision and determined that the medical evidence was sufficient to establish that appellant was disabled from her job as an attorney since August 18, 2006 due to residuals of the work-related cubital tunnel syndrome.

OWCP paid appellant compensation benefits commencing November 1, 2006. On August 18, 2008 appellant began employment as the Executive Director of a disability law center. By decision dated December 3, 2008, OWCP determined that her actual earning in this position represented her wage-earning capacity. It reduced appellant's wage-loss benefits accordingly.

On October 7, 2009 appellant completed a claim for leave buyback for intermittent periods from July 13 through September 30, 2006. She attached a copy of her timesheets for this period, which noted periods of annual leave, sick leave, advanced annual leave and advanced sick leave. Appellant also submitted a form in which the employing establishment noted that she owed \$12,132.57 to repurchase advanced leave, that there was an estimate of \$5,567.49 for FECA entitlement, which left a balance due the employing establishment of \$6,565.08. She elected FECA compensation to repurchase leave.

By letter dated October 27, 2009, OWCP informed appellant that it was unable to process her request because the employing establishment had disallowed leave buyback. By letter dated

² Appellant has been a paraplegic since 1975 when she was injured in a fall and uses a wheelchair. Prior to January 2006 she performed her duties at an office, but beginning in January 2006, the employing establishment allowed her to work from home full time with use of the computer and telephone.

November 10, 2009, it informed appellant, through her attorney, that in accordance with “Chapter 2-0901-19,” appellant may elect to buyback sick or annual leave during a period of disability “*with the concurrence of the employing agency.*” (Emphasis in the original.) It was unable to process her request because the employing establishment disallowed the leave buyback. On November 20, 2009 Mr. Dietrich from the employing establishment wrote a letter to appellant’s counsel stating that appellant owed a debt to the United States Government for a negative leave balance when she resigned from federal employment. The leave appellant received was not associated with a workers’ compensation claim but represented leave that was advanced to her by her supervisor and was not her leave to buyback. Mr. Dietrich noted that as of June 20, 2009 appellant still owed \$16,072.78 to the government which must be repaid.

By decision dated December 9, 2009, OWCP denied appellant’s claim for compensation as she received paid leave or advanced leave for the claimed period of disability. As the employing establishment had not placed her in a leave without pay status, she was not entitled to also receive wage-loss compensation under FECA. It noted that the employing establishment “does not concur with the buyback of leave to create a period of leave without pay.”

On December 12, 2009 appellant requested an oral hearing. On March 29, 2010 counsel requested that OWCP conduct a review of the written record instead of an oral hearing.

By decision dated July 7, 2010, OWCP’s hearing representative affirmed the December 9, 2009 decision.

LEGAL PRECEDENT

FECA provides that an employee who uses sick or annual leave may not receive compensation for any period covered by such leave.³ Pursuant to OWCP’s procedural manual, “When an employee elects to use sick or annual leave during the period of disability, he or she may later, with the concurrence of the employing [establishment], claim compensation for the period of disability and ‘buyback’ the leave used.”⁴ Accordingly, an employee may, with the concurrence of the employing establishment, buyback sick or annual leave and thereby create a period of wage loss for which he may claim compensation, but the decision to allow such a buyback rests with the employing establishment, not with OWCP or the Board.⁵ FECA does not govern whether a claimant may or may not buyback leave from an employing establishment, and any decision by the employing establishment to disallow leave buyback is not a decision of OWCP over which the Board may exercise jurisdiction.⁶

ANALYSIS

OWCP accepted appellant’s claim for left cubital tunnel. Appellant requested leave buyback for intermittent periods from July 13 through September 30, 2006. She attached time

³ *Joseph E. Salomons*, 4 ECAB 435 (1982) (citing 5 U.S.C. § 8118(c)).

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Computing Compensation*, Chapter 2.901.19 (July 2000).

⁵ *Aberline Smith*, Docket No. 96-1699 (issued June 4, 1998).

⁶ See 20 C.F.R. § 501.2(c) (defining the Board’s jurisdiction).

sheets, however, which established that for this time period, she utilized periods of annual leave, sick leave and advanced annual and sick leave. Appellant submitted materials from the employing establishment noting that she still owed \$6,565.08 to repurchase leave that had been advanced to her. Appellant completed a form indicating that she elected leave buyback for this period of time. OWCP based its denial of appellant's request as the employing establishment had disallowed leave buyback.

There is no evidence in the record that the employing establishment allowed appellant to buyback her leave. Rather, the evidence reflects that she owes a debt to the Federal Government for leave advanced to her during her employment. The record contains a note from Mr. Dietrich who stated that the leave appellant received was not associated with her workers' compensation claim and represented leave that was advanced to her by her supervisor and was not her leave to buyback. OWCP does not have authority to order the employing establishment to permit the requested leave buyback. Appellant may not receive wage-loss compensation for the period in which she was advanced leave.⁷

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish her claim for employment-related disability for the period July 13 through September 30, 2006.

⁷ *Aberline Smith, supra* note 5.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 7, 2010 is affirmed.

Issued: January 25, 2012
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

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