



On appeal appellant generally asserted that she was disabled during the period claimed due to her employment-related back condition.<sup>2</sup>

### **FACTUAL HISTORY**

On May 16, 2006 OWCP accepted that on March 30, 2005 appellant, then a 35-year-old chemist, sustained an employment-related lumbar sprain while moving boxes at work. Appellant was granted leave buyback for 118 hours for the period June 27 through October 6, 2006. On January 10, 2007 she applied for leave buyback for the 181.5 hours from October 16 to November 22, 2006. A CA-7a form indicated that appellant took partial leave from October 16 to 25, 2006 for doctor visits and therapy, and medical leave for the period October 25 to November 22, 2006.<sup>3</sup> On June 14, 2007 OWCP accepted that she sustained a recurrence of disability on April 26, 2007. Appellant's claim was expanded to include lumbar neuritis and lumbar disc displacement. On August 7, 2007 Dr. Hugo Benalcazar, a Board-certified neurosurgeon, performed anterior discectomy at L4-5 and L5-S1. Appellant was placed on the periodic compensation rolls. She returned to modified duty for four hours daily on March 17, 2008.

Appellant had an initial physical therapy evaluation on August 14, 2006 and continued with therapy through October 25, 2006. This included therapy sessions on October 16, 19, 24 and 25, 2006. On October 18, 2006 Dr. P.L. Sitaras, a Board-certified neurosurgeon, reported a history that the previous weekend appellant was at a festival and had a difficult time with the cold, damp weather and that she had two more festival weekends scheduled in North Carolina in November. He advised that she was to continue her current physical restrictions. On Wednesday, October 25, 2006 Dr. Sitaras reported that appellant was being seen as an emergency. Appellant had helped her husband load his vehicle and bring his equipment home from a weekend festival, noting that she made about 20 trips. She tried to carry light material from the park to the vehicle and then into her home and experienced severe back pain with radiation into her lower extremities. Dr. Sitaras advised that appellant was to remain off work until November 15, 2006. An October 30, 2006 magnetic resonance imaging (MRI) scan of the lumbar spine, when compared with a June 27, 2006 study, demonstrated an interval increase in the degree of a left paracentral disc protrusion at L5-S1, which caused mild posterior

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<sup>2</sup> Appellant requested oral argument before the Board. The Board has duly considered the matter and finds that the request should be denied. Pursuant to section 501.5(a) of the Board's regulations, oral argument may be held at the discretion of the Board. 20 C.F.R. § 501.5(a). Section 501.5(b) provides that the application for oral argument must specify the issue or issues to be argued and provide a statement supporting the need for oral argument. 20 C.F.R. § 501.5(b). Although appellant's request was timely filed, she failed to provide the need for oral argument. On appeal she generally asserted that the evidence established her claim. In the opinion of the Board, oral argument in this appeal would further delay issuance of a decision and not serve a useful purpose. As appellant's contentions on appeal can be adequately addressed in a decision based on the case record as submitted, oral argument is denied.

<sup>3</sup> Appellant claimed four hours for therapy on October 16, 2006, two hours for a doctor visit on October 18, 2006, one and a half hours for therapy on October 19, 2006, one hour for therapy on October 20, 2006, four hours for therapy on October 24, 2006, nine hours for therapy and a doctor visit on October 25, 2006, and eight or nine hours medical leave daily for October 26 through November 22, 2006.

displacement of the descending left S1 nerve root.<sup>4</sup> On November 2, 2006 Dr. Sitaras advised that appellant was unable to work until November 29, 2006.

By letter dated August 18, 2010, OWCP advised appellant that her claim for leave buyback for the period October 16 to November 22, 2006 could not be processed because the medical evidence did not support that the claimed disability was caused by the March 30, 2005 employment injury. Appellant was asked to provide a detailed narrative medical report from a physician within 30 days that showed that her work stoppage was due to the accepted work-related conditions.

On September 10, 2010 OWCP approved leave buyback for 20.5 hours for the period November 29, 2006 to February 28, 2007 and for 19 hours for the period March 9 to April 26, 2007.

An August 21, 2010 x-ray and MRI scan studies of the lumbar spine demonstrated surgical changes and no evidence of acute abnormality. In a September 30, 2010 report, Dr. Ritu T. Bhambhani, Board-certified in anesthesiology and pain medicine, reported that she was awaiting authorization for additional surgery. He reviewed diagnostic studies, provided physical examination findings, and diagnosed low back and left leg pain secondary to postlaminectomy/fusion failed back syndrome, bulging lumbar disc and left lumbar radiculopathy/radiculitis.

By decision dated October 8, 2010, OWCP denied appellant's claim for leave buyback for the period October 16 through November 22, 2006 on the grounds that the medical evidence did not establish that her disability was due to the March 30, 2005 employment injury.

On October 26, 2010 appellant requested a hearing that was held on March 29, 2011. At the hearing she complained about the delay in processing her claim for leave buyback. The hearing representative explained that appellant needed to provide medical evidence explaining that the claimed disability was caused by the employment injury. In a March 31, 2011 letter, appellant stated that weather had a big impact on her level of pain, and that it would be difficult for her to get an additional report from Dr. Sitaras after four years.

In a June 10, 2011 decision, an OWCP hearing representative affirmed the October 8, 2010 decision.

### **LEGAL PRECEDENT**

In situations where compensation is claimed for periods when leave was used, OWCP has the authority and the responsibility to determine whether the employee was disabled during the period for which compensation is claimed.<sup>5</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 June 27, 2006 MRI scan study demonstrated a mild disc bulge at L3-4, mild spondylosis and disc bulge at L4-5, and mild spondylosis, disc bulge and small left-sided disc herniation at L5-S1.

<sup>5</sup> See *Glen M. Lusco*, 55 ECAB 148 (2003); see also 20 C.F.R. § 10.425 (1999).

claimed for leave buyback, after which the employing establishment will determine whether it will allow the employee to buyback the leave used.<sup>6</sup>

Under FECA, the term “disability” means the incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury. Disability is thus not synonymous with physical impairment, which may or may not result in an incapacity to earn wages. An employee who has a physical impairment causally related to a federal employment injury, but who nevertheless has the capacity to earn the wages he or she was receiving at the time of injury, has no disability as that term is used in FECA.<sup>7</sup> Whether a particular injury causes an employee to be disabled for employment and the duration of that disability are medical issues which must be proved by a preponderance of the reliable, probative and substantial medical evidence.<sup>8</sup> When the medical evidence establishes that the residuals of an employment injury are such that, from a medical standpoint, they prevent the employee from continuing in the employment held when injured, the employee is entitled to compensation for any loss of wage-earning capacity resulting from such incapacity.<sup>9</sup> The Board will not require OWCP to pay compensation for disability in the absence of any medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so would essentially allow employees to self-certify their disability and entitlement to compensation.<sup>10</sup>

OWCP’s procedure manual provides that no more than four hours of compensation or continuation of pay should be allowed for routine medical appointments. Longer periods of time may be allowed when required by the nature or the medical procedure and/or the need to travel a substantial distance to obtain the medical care.<sup>11</sup>

### ANALYSIS

OWCP accepted that appellant sustained a lumbar sprain, lumbar neuritis and a lumbar disc displacement on March 30, 2005 while moving boxes at work. Appellant filed claims for leave buyback that were granted for the periods June 27 through October 6, 2006, November 29, 2006 to February 28, 2007 and March 9 to April 26, 2007. OWCP found that she was not entitled to compensation, and thus leave buyback was denied, for the period October 16 through November 22, 2006.

For the period beginning Monday, October 23 through November 22, 2006, appellant submitted insufficient medical evidence to establish that she became disabled for work due to the accepted March 30, 2006 employment injury. Dr. Sitaras explained on Wednesday, October 25,

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<sup>6</sup> *Glen M. Lusco, id.*

<sup>7</sup> See 20 C.F.R. § 10.5(f) (1999); *Cheryl L. Decavitch*, 50 ECAB 397 (1999).

<sup>8</sup> *Fereidoon Kharabi*, 52 ECAB 291 (2001).

<sup>9</sup> *S.D.*, Docket No. 10-1820 (issued March 18, 2011).

<sup>10</sup> *William A. Archer*, 55 ECAB 674 (2004).

<sup>11</sup> Federal (FECA) Procedure Manual, Part 3 -- Medical, *Administrative Matters*, Chapter 3.900.8 (November 1998).

2006, that appellant was seen as an emergency. Appellant reported a history that the previous weekend she made about 20 trips helping her husband load his vehicle to bring equipment home from a weekend festival. She experienced severe back pain with radiation into her lower extremities. Whether a particular injury causes an employee to be disabled for employment and the duration of that disability are medical issues which must be proved by a preponderance of the reliable, probative and substantial medical evidence.<sup>12</sup> Dr. Sitaras clearly advised that appellant's condition worsened after helping her husband load equipment following a weekend festival. There is no evidence that such activity was incidental to her federal employment as a chemist. Appellant failed to meet her burden of proof to establish that she became disabled for the period October 23 through November 22, 2006 due to the accepted March 30, 2006 employment injury.

The Board finds the case not in posture regarding whether appellant is entitled to compensation for leave buyback for four hours on October 16, 2006, one and a half hours on October 19, 2006, and one hour on October 20, 2006 for claimed physical therapy visits, or two hours on October 18, 2006 for a physician visit. Appellant received regular physical therapy treatments as of August 14, 2006, and she visited Dr. Sitaras on October 18, 2006. In an October 25, 2006 report, Dr. Sitaras advised that she had been helping her husband carry equipment the previous weekend. OWCP denied compensation for these visits in its October 8, 2010 and June 10, 2011 decisions. The case will be remanded to OWCP to determine if appellant is entitled to compensation for eight and a half hours compensation for October 16, 18, 19 and 20, 2006 because she missed work on these days for medical treatment related to the March 30, 2005 employment injury.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

### **CONCLUSION**

The Board finds that appellant has not established entitlement to leave buyback for the period October 24 through November 22, 2006, and that the case is not in posture for decision for the dates October 16, 18, 19 and 20, 2006.

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<sup>12</sup> *Fereidoon Kharabi, supra* note 8.

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 10, 2011 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part and the case is remanded to OWCP for proceedings consistent with this decision of the Board.

Issued: June 1, 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