

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LORETTA R. CELI and DEPARTMENT OF HEALTH &
HUMAN SERVICES, SOCIAL SECURITY ADMINISTRATION,
Montebello, CA

*Docket No. 99-1353; Submitted on the Record;
Issued June 26, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly denied appellant continuation of pay on the grounds that written notice of injury was not filed within 30 days of the date of the injury; and (2) whether the Office abused its discretion by refusing to reopen appellant's case for review of the merits pursuant to 5 U.S.C. § 8128(a) of the Federal Employees' Compensation Act.

Appellant filed a notice of traumatic injury and claim for compensation on November 2, 1998, alleging that on September 15, 1998 she was bitten on the leg by an insect, later believed to be a brown recluse spider while performing her work duties. Appellant stopped work on October 14, 1998 due to pain and the appearance of her leg and did not return until October 27, 1998.

By decision dated November 16, 1998, the Office denied appellant continuation of pay during her absence from work for the period October 14 through 26, 1996 because the injury was not properly reported within 30 days. The Office informed appellant that the decision only concerned continuation of pay and would not affect her entitlement to other compensation benefits.¹

On November 28, 1998 appellant requested reconsideration of the November 16, 1998 decision. Appellant argued that she reported the injury to her supervisor and to the employing establishment physician; however, she was not informed of further requirements for filing a claim for workers' compensation. She argued further that she initially believed that the insect

¹ The Office accepted appellant's claim for insect bite and gangrene of the left leg on December 8, 1998.

bite was a minor injury and that the affects of the injury were not apparent for three to four weeks after the incident.

By decision dated February 3, 1999, the Office denied appellant's request for review of the merits on the grounds that the evidence submitted was found to be cumulative and insufficient to warrant review of the prior decision.

The Board finds that appellant's claim for continuation of pay is barred by the time limitation provisions of the Act.

Section 8118 of the Act² provides for payment of continuation of pay, not to exceed 45 days, to an employee "who has filed a claim for a period of wage loss due to a traumatic injury with [her] immediate superior on a form approved by the Secretary of Labor within the time specified in section 8122(a)(2) of this title."³ Section 8122 provides that written notice of the injury shall be given within 30 days as specified in section 8119.⁴ Section 8119⁵ requires, in pertinent part, that written notice of the injury shall be given to the employee's immediate superior within 30 days after the injury.

The record shows that appellant sustained her employment-related leg injury on September 15, 1998 but that she did not file a written notice of traumatic injury until November 2, 1998. As this claim was filed more than 30 days after the September 15, 1998 employment injury, appellant's claim for continuation of pay is barred by statute.

Appellant contends on appeal that the law can be interpreted that notification be given within 30 days of a person's actual knowledge of the seriousness of the injury, or within 30 days that a "reasonable" person would become aware that there had been an injury for which wages were lost. It appears that appellant has made reference to an exception to 8122(a)(1)⁶ of the Act, which provides that an original claim for compensation for disability or death must be filed within three years after the injury or death, unless the immediate superior had actual knowledge of the injury or death within 30 days, which knowledge must be such to put the immediate superior reasonably on notice of an on-the-job injury or death, as provided by 5 U.S.C. § 8122(a)(1), or written notice of injury or death was given within 30 days. Section 8118 of the Act, however, is the relevant statute in this case as it provides for payment of continuation of pay within the time specified in section 8122(a)(2), which simply states that written notice of injury or death as specified in section 8119, be given within 30 days. There is a clear distinction between the filing of a claim for compensation and a claim for continuation of pay. Actual notice is an exception to the three-year filing requirement of a claim for compensation benefits and has no bearing at all on the 30-day filing requirement of continuation of pay. The Office

² 5 U.S.C. § 8118(a).

³ See 5 U.S.C. § 8118 (a); see also 20 C.F.R. § 10.201(a)(3) (1998).

⁴ See 5 U.S.C. § 8122(a)(2).

⁵ 5 U.S.C. § 8119.

⁶ 5 U.S.C. § 8122(a).

pointed out in its November 16, 1998 decision that its ruling only concerned continuation of pay and would not affect her entitlement to other compensation benefits.

Appellant further contends on appeal that good cause should be found for her delay in filing, under the circumstances. She argues that she did not fill out the paper work because she was not at work to do so. Appellant also argues that October 14, 1998 should be preserved as the actual date of notification because she notified her supervisor of the injury on that date. These contentions amount to a request by appellant for the Office to excuse or waive the filing requirement because of exceptional circumstances. The Board has held that section 8122(d)(3) of the Act, which allows the Office to excuse failure to comply with the time limitation provisions for filing a claim for compensation because of “exceptional circumstances,” is not applicable to section 8118(a) which sets forth the filing requirements for continuation of pay.⁷ The rationale for this finding is set forth fully in the Board’s decision in *William E. Ostertag*.⁸ There is, therefore, no provision under the Act for excusing an employee’s failure to file a claim for continuation of pay within 30 days of the employment injury.⁹ There can be no showing of good cause to waive the filing requirements for continuation of pay as set forth by the Act. Accordingly, the Office properly denied appellant continuation of pay.

The Board further finds that the Office did not abuse its discretion in denying appellant’s request for reconsideration under 5 U.S.C. § 8128.

To require the Office to reopen a case for merit review under section 8128(a) of the Act,¹⁰ the Office’s regulations provide that a claimant must: (i) show that the Office erroneously applied or interpreted a point of law; (ii) advance a relevant legal argument point of law or a fact not previously considered by the Office; or (iii) submit relevant and pertinent evidence not previously considered by the Office.¹¹ To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.¹² When a claimant fails to meet one of the above standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.¹³

In the instant case, the Office had denied appellant’s claim on the grounds that the evidence submitted was cumulative and insufficient to warrant review of the prior decision.

⁷ See *William E. Ostertag*, 33 ECAB 1925, 1932 (1982); see also *Robert E. Kimzey*, 40 ECAB 762, 764 (1989); *Patricia J. Kelsesky*, 35 ECAB 549, 551 (1984).

⁸ See *supra* note 7.

⁹ *Robert E. Kimzey*, *supra* note 7 at 765; *Patricia J. Kelsesky*, *supra* note 7 at 551-52.

¹⁰ 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, “[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.” 5 U.S.C. § 8128(a).

¹¹ 20 C.F.R. § 10.606(b) (1999).

¹² 20 C.F.R. § 10.138(b)(2); 10.607(a) (1999).

¹³ *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

Appellant submitted a statement in support of her request for reconsideration and a copy of her telephone bill, which she contends, evidences calls to her supervisor to provide him with notice. The arguments advanced by appellant, however, were immaterial in terms of establishing that she was entitled to continuation of pay during her absence from work. Appellant alleged that she was unaware of the affects of her injury for three to four weeks after the incident occurred; that no one informed her of the requisite forms for filing; that she had reported the injury to her supervisor; and that management failed to report and investigate her injury. These allegations simply do not provide any new factual or legal evidence to support that appellant made a timely request for continuation of pay. Even if the telephone bills submitted by appellant on reconsideration were sufficient to establish that appellant gave her supervisor verbal notice within 30 days, the Office had previously determined that such notice was not sufficient in making application for continuation of pay. Although appellant offered the above issues to be determined in her request, none of them establish that the Office had erroneously applied or interpreted a point of law in her case. Generally, an abuse of discretion is shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from established facts.¹⁴ The Office did not abuse its discretion in denying a merit review in this case.

The decisions of the Office of Workers' Compensation Programs dated February 3, 1999 and November 16, 1998 are affirmed.

Dated, Washington, D.C.
June 26, 2000

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

¹⁴ *Daniel J. Perea*, 42 ECAB 214 (1990).