

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BRODRICK L. HARRELL and DEPARTMENT OF THE NAVY,
U.S. NAVAL SUPPORT ACTIVITY, Naples, Italy

*Docket No. 98-2263; Submitted on the Record;
Issued September 27, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's claim for continuation of pay on the grounds that he failed to give written notice of his injury within 30 days of its occurrence as specified by the Federal Employees' Compensation Act.¹

The Board has duly reviewed the case record in the present appeal and finds that the case is not in posture for decision.

In a January 9, 1998 statement, appellant's immediate supervisor, Bert Hood, stated that on October 23, 1997 appellant, then a 38-year-old store worker, returned to him a claim for an occupational disease (Form CA-2). Mr. Hood stated that on November 26, 1997 he was informed by the human resources office that appellant needed to fill out a Form CA-1 which he gave to appellant on December 31, 1997. Mr. Hood also stated that appellant returned the Form CA-1 to him on January 7, 1998.

On January 7, 1998 appellant, filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1), alleging that on September 23, 1997, "After returning to work two months after foot surgery I was on [light] duty. While on [light] duty they had me pulling pallets of water and other duties that [were] not [light] duty." Appellant went on to say, "The bone that had just been repaired tore [loose] from being on my feet too much and being worked too hard." The Office accepted appellant's claim for aggravation of a preexisting left foot bunion condition and revision (repair) bunionectomy left foot with one metatarsal. By decision dated June 11, 1998, the Office determined that appellant was not entitled to continuation of pay because his claim was made more than 30 days from the date of injury.

¹ 5 U.S.C. §§ 8101-8193.

Section 8118 of the Act² authorizes the continuation of pay of an employee “who has filed a claim for a period of wage loss due to a traumatic injury with his immediate supervisor on a form approved by the Secretary of Labor within the time specified in section 8122(a)(2) of this Title.”³ The context of section 8122 makes clear that this means within 30 days of the date of the injury.⁴ Section 10.205 of the implementing federal regulations⁵ provides in pertinent part: “An employee is not entitled to continuation of pay unless: The employee files a claim for a period of wage loss, as required by 5 U.S.C. § 8118(a), within 30 days of the injury on a form approved by the Secretary. (Form CA-1 may be used for this purpose). Therefore, to be entitled to continuation of pay, an employee must file a claim on an appropriate form within 30 days after the injury.”⁶

The Board finds that the Office improperly denied appellant’s claim for continuation of pay. According to appellant’s immediate supervisor, appellant first gave written notice of his September 23, 1997 employment injury on October 23, 1997 when appellant returned a Form CA-2 to him. The supervisor also stated that on November 26, 1997 the employing establishment’s human resources office informed him that appellant needed to complete a Form CA-1 instead, which was given to appellant on December 31, 1997 and returned to the supervisor on January 7, 1998. The Office’s regulations do not limit the “written claim” to a Form CA-1 and a Form CA-2 can be used to claim continuation of pay.⁷ Appellant’s supervisor was very detailed in explaining what forms were given to appellant and when they were returned to him. The Board finds that appellant’s Form CA-2 returned to his supervisor on October 23, 1997 constitutes a claim for continuation of pay and was given to his immediate supervisor within 30 days of the date of injury.⁸ Therefore, appellant’s claim was timely filed.

² 5 U.S.C. § 8118(a).

³ 5 U.S.C. § 8122(a)(2).

⁴ *Myra Lenburg*, 36 ECAB 487 (1985); *George A. Harrell*, 29 ECAB 338 (1978).

⁵ 20 C.F.R. § 10.205.

⁶ *Bossy W. Anderson*, 41 ECAB 833 (1990).

⁷ *Horace Bailey*, 40 ECAB 866 (1989) (where the Director in motion to remand for payment of continuation of pay, noted that Office regulations and Program Memorandum 252 did not limit the “written claim” to Form CA-1 and that other forms, including a CA-2, could be used to claim continuation of pay; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Continuation of Pay and Initial Payments*, Chapter 2.807.7 (August 2000) (another OWCP-approved form such as Form CA-2 or CA-7 which contains words of claim can be used to satisfy timely filing requirements); Program Memorandum 252 (April 1979) (notice other than CA-1 acceptable for timely filing in continuation of pay cases.)

⁸ The Board also notes that the CA-2 form is not part of the record. However, there is a long-recognized general rule of evidence that all things being equal positive evidence is stronger than negative evidence. *Bossy W. Anderson*, *supra* note 6. In this case, there is positive evidence that appellant filed a CA-2 form on October 23, 1997, *i.e.*, appellant’s immediate supervisor’s January 9, 1998 detailed statement. There is no negative evidence.

On remand the Office should calculate the continuation of pay to which appellant is entitled for the period September 24 through November 5, 1997. Following this and such further development as it deems necessary, the Office shall then issue a *de novo* decision.

The decision of the Office of Workers' Compensation Programs dated June 11, 1998 is set aside and the case is remanded for further action consistent with this decision.

Dated, Washington, DC
September 27, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

Michael E. Groom
Alternate Member