

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

DONNA L. MILEY, Appellant

and

**DEPARTMENT OF THE ARMY, BROOKE
ARMY MEDICAL CENTER,
Fort Sam Houston, TX, Employer**

)
)
)
)
)
)
)
)
)
)
)

**Docket No. 05-727
Issued: July 15, 2005**

Appearances:
Cynthia A. Hartsfield, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On February 7, 2005 appellant filed a timely appeal of an October 26, 2004 merit decision of the Office of Workers' Compensation Programs that found that she was not entitled to continuation of pay for her February 12, 2000 employment injury. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the October 26, 2004 decision denying continuation of pay.

ISSUE

The issue is whether appellant is entitled to continuation of pay.

FACTUAL HISTORY

On April 10, 2000 appellant, then a 58-year-old occupational therapist, filed a claim for continuation of pay/compensation for a traumatic injury to her back and left leg sustained on February 12, 2000 when a chair went out from under her during a training session. Appellant stopped work on March 29, 2000. By decision dated May 12, 2000, the Office found the

evidence insufficient to establish that appellant sustained an injury in the performance of duty. Appellant appealed this decision to the Board, which, by decision dated October 3, 2001, found that further development of the evidence was necessary to determine if appellant's injury was sustained during training for her regular job.¹

After obtaining further evidence from the employing establishment, the Office, by decision dated December 21, 2001, found that the evidence was sufficient to establish that appellant was in the performance of duty on February 12, 2002, but that the medical evidence was insufficient to establish that her condition was causally related to the incident on that date. Appellant requested reconsideration and submitted additional medical evidence. In a September 15, 2003 decision, the Office found the medical evidence was insufficient to establish causal relationship.

Appellant again requested reconsideration on September 1, 2004, and submitted additional medical evidence. By decision dated October 26, 2004, the Office found that the evidence established that she sustained a contusion of the sacrum on February 12, 2000, but that it did not support that she sustained an exacerbation of her underlying low back and knee conditions. By a separate decision dated October 26, 2004, the Office found that appellant was not entitled to continuation of pay for the February 12, 2000 injury, on the grounds that she did not file a written claim within 30 days of the injury and that she first stopped work over 45 days after the injury.

LEGAL PRECEDENT

Section 8118² of the Federal Employees' Compensation Act 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 his immediate superior on a form approved by the Secretary of Labor within the time specified in section 8122(a)(2)³ of this title." The latter section provides that written notice of injury shall be given "within 30 days." The context of section 8122 makes clear that this means within 30 days of the injury.⁴ The Board has held that oral notice is not sufficient to satisfy the time limitation provision for continuation of pay.⁵ The Board also has held that unawareness of the seriousness of an injury is no excuse for waiving the applicable time limitation provision.⁶ Further, 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 provision for filing a claim for compensation because of "exceptional circumstances," is not applicable to

¹ Docket No. 01-643 (issued October 3, 2001).

² 5 U.S.C. § 8118.

³ 5 U.S.C. § 8122(a)(2).

⁴ *Myra Lenburg*, 36 ECAB 487 (1985); see *George A. Harrell*, 29 ECAB 338 (1978). Section 10.205 of the Office's regulations (20 C.F.R. § 10.205) also provides that, to be eligible for continuation of pay, an employee must file a claim within 30 days of the date of the injury.

⁵ *Russell P. Chambers*, 32 ECAB 550 (1981).

⁶ *Michael R. Hrynchuk*, 35 ECAB 1094 (1984).

section 8118(a) which sets forth the filing requirements for continuation of pay. There is no provision in the Act for excusing an employee's failure to file a written claim for continuation of pay within 30 days of the employment injury. The rationale for this finding is set forth fully in the Board's decision in *William E. Ostertag*.⁷ The Office's regulations provide that, to be eligible for continuation of pay, the employee must begin losing time from work due to the traumatic injury within 45 days of the injury.⁸

ANALYSIS

On April 10, 2000 appellant filed her claim for continuation of pay/compensation for a traumatic injury sustained on February 12, 2000. As this filing was more than 30 days after the injury, appellant is not entitled to continuation of pay. Appellant also is not entitled to continuation of pay because she did not begin losing time from work due to the February 12, 2000 injury until March 29, 2000, which is more than 45 days after the injury.

CONCLUSION

The Office properly found that appellant was not entitled to continuation of pay.

ORDER

IT IS HEREBY ORDERED THAT the October 26, 2004 decision of the Office of Workers' Compensation Programs finding that appellant was not entitled to continuation of pay is affirmed.

Issued: July 15, 2005
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

⁷ 33 ECAB 1925 (1982).

⁸ 20 C.F.R. § 10.205(a).