

The issues are: (1) whether the Office properly denied appellant's claim for continuation of pay on the grounds that she failed to give written notice of injury within the time specified by the Federal Employees' Compensation Act; and (2) whether the Office properly refused, pursuant to 5 U.S.C. § 8128(a), to review appellant's case on the merits of the claim.

### **FACTUAL HISTORY**

On December 1, 2005 appellant, then a 57-year-old clerk, filed a traumatic injury claim alleging that on October 24, 2005 she tripped over an empty tray on the floor and fell to the cement floor. As a result, she sustained a bruised knee, pulled muscles in the back and a torn rotator cuff in her left shoulder. The employing establishment controverted continuation of pay, alleging that appellant did not file the claim within 30 days of the incident. By letter dated January 17, 2006, the Office accepted appellant's claim for left rotator cuff tear. However, by decision also dated January 17, 2006, the Office denied appellant's claim for continuation of pay. It determined that she did not report her injury on an Office-approved form within 30 days of the date of injury.

By letter dated March 9, 2006, appellant's attorney requested reconsideration of the denial of continuation of pay. Counsel indicated that he was enclosing a copy of the Service Accident Report for the employing establishment, Form 1769, which was allegedly completed by appellant and signed by her supervisors on October 24, 2005. However, no such document was enclosed.

By letter dated June 23, 2006, the Office accepted appellant's claim for sprain of the left shoulder and upper arm and rotator cuff and contusion of the left knee.

By letters dated June 26 and July 27, 2006, appellant's attorney asked that the Office respond to his reconsideration request.

By decision dated August 11, 2006, the Office denied appellant's request for reconsideration without reviewing the case on the merits. It noted that appellant did not submit new or relevant evidence or present legal contentions not previously presented. The Office noted that the record did not contain the Form 1769 mentioned by counsel.

### **LEGAL PRECEDENT -- ISSUE 1**

Section 8118 of the Act<sup>1</sup> authorizes the continuation of pay for 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) of this Title.<sup>2</sup> The context of section 8122 makes clear that this means within 30 days of the date of injury.<sup>3</sup>

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<sup>1</sup> 5 U.S.C. §§ 8101 *et. seq.*

<sup>2</sup> *Id.*; 5 U.S.C. § 8122(a)(2).

<sup>3</sup> *E.g., Myra Lenburg*, 36 ECAB 487 (1985). *See* 20 C.F.R. § 10.201(a)(3); *George A. Harrell*, 29 ECAB 338 (1978).

The Board has held that the responsibility for filing a claim rests with the injured employee.<sup>4</sup> 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 section 8118(a),<sup>5</sup> which sets forth the filing requirements for continuation of pay.<sup>6</sup> There is, therefore, no provision in the Act for excusing an employee's failure to file a claim for continuation of pay within 30 days of the employment injury.<sup>7</sup>

### **ANALYSIS -- ISSUE 1**

On December 1, 2005 appellant filed a claim for a traumatic injury that occurred on October 24, 2005. Because she did not file a claim for continuation of pay within 30 days, the time specified in sections 8118(a) and 8122(a)(2) of the Act and in the Office procedure manual, she is not entitled to continuation of pay.<sup>8</sup>

Appellant's attorney alleges that appellant completed an accident report, Form 1769, on the date of the incident, that such form was in evidence and appellant was entitled to continuation of pay. The Board notes that no such form is a part of the record in this case. There is no evidence of record that appellant timely filed a claim for continuation of pay or that any type of written notice of injury was provided within 30 days of injury. Accordingly, the Office properly denied appellant continuation of pay.

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8128(a) of the Act<sup>9</sup> vests the Office with discretionary authority to determine whether it will review an award for or against compensation. The Act states:

“The Secretary of Labor may review an award for or against compensation at any time on [her] own motion or on application. The Secretary, in accordance with the facts found on review may--

- (1) end, decrease or increase the compensation awarded; or
- (2) award compensation previously refused or discontinued.”

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<sup>4</sup> See *Catherine Budd*, 33 ECAB 1011 (1982).

<sup>5</sup> 5 U.S.C. § 8118(a).

<sup>6</sup> 5 U.S.C. § 8122(d)(3); see also *Michael R. Hrynychuk*, 35 ECAB 1094 (1984).

<sup>7</sup> *Id.*

<sup>8</sup> See *Dodge Osborne*, 44 ECAB 849 (1993); see *Teresa Samilton*, 40 ECAB 955 (1989); see *William E. Ostertag*, 33 ECAB 1925 (1982).

<sup>9</sup> 5 U.S.C. § 8128(a).

The Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim; by: (1) showing that the Office erroneously applied or interpreted a specific point of law; or (2) advancing a relevant legal argument not previously considered by the Office; or (3) constituting relevant and pertinent evidence not previously considered by the Office.<sup>10</sup> When an application for review of the merits of a claim does not meet at least one of these requirements, the Office will deny the application for review without reviewing the merits of the claim.<sup>11</sup>

### **ANALYSIS -- ISSUE 2**

In his letter requesting reconsideration, counsel alleges that he enclosed a copy of the accident report, Form 1769, with his request. However, no document was enclosed with the letter.

Appellant did not submit any relevant and pertinent new evidence not previously considered by the Office in support of her request for reconsideration. Further, she did not show that the Office erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered by the Office. As appellant did not meet any of the necessary regulatory requirements, the Board finds that she was not entitled to a merit review.<sup>12</sup>

### **CONCLUSION**

The Board finds that appellant is not entitled to continuation of pay for her October 24, 2005 employment injury. The Board further finds that the Office did not abuse its discretion in denying her request for reconsideration.

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<sup>10</sup> 20 C.F.R. § 10.606(b)(2).

<sup>11</sup> 20 C.F.R. § 10.608(b).

<sup>12</sup> See *James E. Norris*, 52 ECAB 93 (2000).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated August 11 and January 17, 2006 are affirmed.

Issued: January 16, 2007  
Washington, DC

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

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

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