

treatment of a human immunodeficiency virus (HIV) positive patient. Appellant indicated that the date of the notice was June 19, 2007 which was also the date that appellant signed the form. Appellant's supervisor reported having notice of the injury on June 19, 2007, the date that he signed the form. The employing establishment advised that the injury was not reported on a Form CA-1 within 30 days. Appellant stopped work on April 25, 2007 and returned to work on April 30, 2007.

Appellant submitted several treatment reports from Billy Joe Hansford, a physician's assistant, and Dr. Anne Ruderman, a Board-certified internist. In an April 26, 2007 report, Dr. Ruderman advised that appellant would be unable to work from April 25 to 30, 2007, due to the side effect of medications used to treat the instrument stick injury.

After the Office requested additional information, appellant and the employing establishment provided further evidence, including another Form CA-1 received by the Office on July 23, 2007. On this form, appellant reported the date of injury and the date of the notice as April 24, 2007. However, she signed the form on June 19, 2007. The employing establishment also indicated that it received notice on April 24, 2007 but appellant's supervisor signed the form on June 19, 2007. In the receipt of notice section of the form, appellant's supervisor signed the form on July 17, 2007. A witness statement on the form was dated July 2, 2007 and indicated that appellant notified her on the date of injury of the instrument stick incident.

In a statement dated July 17, 2007, appellant noted that she had reported her injury to her supervisor who was new and did not know of the Office's filing policies and procedures. She was also not aware of the filing requirements.

On August 1, 2007 the Office accepted appellant's claim for an open wound of the right finger without complications.

By decision dated August 17, 2007, the Office denied appellant's claim for continuation of pay finding that she did not file her claim within 30 days of April 24, 2007, the date of her injury. The Office further advised appellant that its decision concerned entitlement to continuation of pay only and did not affect her entitlement to other compensation benefits, including her possible entitlement to wage-loss compensation.

In a May 21, 2008 letter, addressed to the Office's Branch of Hearings and Review, appellant noted that she had verbally informed her supervisor of her injury. She indicated that she and her supervisor were not aware of the written notice requirement. The Office treated this letter as a request for an oral hearing.

By decision dated August 1, 2008, the Office denied appellant's request for an oral hearing finding that she did not file her request within 30 days. It also exercised its discretion and determined that appellant's case could be equally well addressed by requesting reconsideration and submitting evidence not previously considered.

LEGAL PRECEDENT -- ISSUE 1

Section 8118¹ of the Federal Employees' Compensation 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 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." Section 8122(a)(2) provides that written notice of injury must be given as specified in section 8119.³ The latter section provides in part that notice of injury shall be given in writing within 30 days after the injury.⁴

Section 10.205 of the Office's regulations provide in pertinent part that to be eligible for continuation of pay, a person must: (1) have a traumatic injury which is job related and the cause of the disability, and/or the cause of lost time due to the need for medical examination and treatment; (2) file Form CA-1 within 30 days of the date of the injury; and (3) begin losing time from work due to the traumatic injury within 45 days of the injury.⁵

ANALYSIS -- ISSUE 1

The record reflects that the earliest written claim filed by appellant is the Form CA-1, dated June 19, 2007. As appellant filed her claim more than 30 days after her April 24, 2007 injury, she is barred from receiving continuation of pay.⁶ Although appellant submitted another Form CA-1, received by the Office on July 23, 2007, this form is insufficient to establish that a timely Form CA-1 was filed. Appellant again reported the date of injury as April 24, 2007 and the employing establishment also indicated that it received notice on April 24, 2007. However, appellant signed this form on June 19, 2007 as did her supervisor. In another section of the form, regarding receipt of the notice, appellant's supervisor signed the form on July 17, 2007. The supervisor did not indicate that he received written notice before June 19, 2007. This form supports that appellant's supervisor was aware of the injury on April 24, 2007; however, it does not establish that an actual Form CA-1, or any other written claim for continuation of pay, was filed within 30 days of April 24, 2007. The fact that appellant's immediate supervisor had actual knowledge of the injury does not waive appellant's requirement under 5 U.S.C. § 8118 to provide written notice of the claim.⁷ There is no evidence that a CA-1 form was filed within 30 days of April 24, 2007.

¹ 5 U.S.C. § 8118.

² *Id.* at §§ 8101-8193.

³ *Id.* at § 8122(a)(2).

⁴ *Id.* at § 8119. See *Gwen Cohen-Wise*, 54 ECAB 732 (2003).

⁵ 20 C.F.R. § 10.205(a).

⁶ *Teresa Samilton*, 40 ECAB 955 (1989).

⁷ See *Robert E. Kimzey*, 40 ECAB 762 (1989); see also *Russell P. Chambers*, 32 ECAB 550 (1981) (where the Board held that oral notice is insufficient to satisfy the requirements of the law).

Appellant contends that she failed to file the claim form within the 30-day time limit because she was unaware of the form and filing requirement. However, the fact that appellant may have been unaware of the applicable time limitation is not sufficient to toll the running of the 30-day filing requirement. There is no provision under the Act for excusing an employee's failure to file a claim for continuation of pay within 30 days of the date of injury.⁸ With respect to appellant's contention on appeal that she was too sick to file a claim within the 30-day requirement, the Board has held that section 8122(d)(3)⁹ 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), which sets forth the filing requirements for continuation of pay.¹⁰ Appellant also contends that she was prejudiced because her supervisor failed to advise her of the appropriate procedure and deadline to file a claim. However, as noted, the fact that appellant's immediate supervisor had actual knowledge of the injury does not waive appellant's requirement under 5 U.S.C. § 8118 to provide written notice of the claim. The Board has held that the responsibility for filing a claim rests with the injured employee.¹¹

Consequently, appellant is barred from receiving continuation of pay because she failed to file a written claim within the time specified in the Act. This decision only affects appellant's entitlement to continuation of pay and does not affect her possible entitlement to other benefits under the Act for her accepted injury.

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of the Act provides that a claimant not satisfied with a decision of the Office is entitled to a hearing before an Office hearing representative when the request is made within 30 days after issuance of the Office's decision.¹² Under the implementing regulations, a claimant who has received a final adverse decision by the Office is entitled to a hearing by writing to the address specified in the decision within 30 days (as determined by postmark or other carrier's date marking) of the date of the decision for which a hearing is sought.¹³ If the request is not made within 30 days or if it is made after a reconsideration request, a claimant is not entitled to a hearing or a review of the written record as a matter of right.¹⁴

⁸ *Robert E. Kimzey, supra* note 7.

⁹ 5 U.S.C. § 8122(d)(3).

¹⁰ *See William E. Ostertag*, 33 ECAB 1925 (1982) (where the Board held that appellant's claim did not qualify as an "exceptional circumstance" as it would be inconsistent with the legislative intent of sections 8118(a), 8122(a)(2) and 8122(d)(3) of the Act).

¹¹ *See supra* note 7.

¹² 5 U.S.C. § 8124(b)(1).

¹³ 20 C.F.R. § 10.616(a); 5 U.S.C. § 8124(b)(1).

¹⁴ *Teresa Valle*, 57 ECAB 542 (2006).

The Board has held that the Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and that the Office must exercise this discretionary authority in deciding whether to grant a hearing. The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when the request is untimely or made after reconsideration, are a proper interpretation of Board precedent.¹⁵

ANALYSIS -- ISSUE 2

The Office denied appellant's claim on August 17, 2007. Appellant's request for an oral hearing was dated May 21, 2008 and postmarked on July 2, 2008. Because the hearing request was made more than 30 days after the August 17, 2007 decision, the Board finds that the Office properly denied appellant's request for a hearing as untimely filed. Appellant is not entitled to a hearing as a matter of right. The Board has held that section 8124(b)(1) is unequivocal in setting forth the time limitation in requests for hearing.¹⁶

The Office exercised its discretionary authority under section 8124 in considering whether to grant a hearing. It found that appellant's request could be equally well addressed through a request for reconsideration under section 8128 and the submission of new evidence. The Board has held that it is an appropriate exercise of discretion for the Office to apprise appellant of the right to further proceedings under the reconsideration provisions of section 8128.¹⁷ The Board finds that the Office properly exercised its discretion in denying appellant's request for an oral hearing.

CONCLUSION

The Board finds that the Office properly denied appellant's claim for continuation of pay as untimely. The Board further finds that the Office properly denied appellant's request for an oral hearing as untimely filed.

¹⁵ *D.E.*, 59 ECAB ____ (Docket No. 07-2334, issued April 11, 2008).

¹⁶ *Ella M. Garner*, 36 ECAB 238 (1984); *Charles E. Varrick*, 33 ECAB 1746 (1982).

¹⁷ *See André Thyratron*, 54 ECAB 257 (2002).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decisions dated August 1, 2008 and August 17, 2007 are affirmed.

Issued: May 14, 2009
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