

FACTUAL HISTORY

On June 2, 2009 appellant, then a 49-year-old housekeeper, filed a traumatic injury claim (Form CA-1) alleging that he sustained a back muscle strain while pushing chairs to vacuum in the performance of duty on January 30, 2008. He submitted an April 20, 2009 narrative statement and a January 30, 2008 report of employee's emergency treatment from his supervisor Paul Thierry who did not sign the form. In a June 4, 2009 narrative statement, Mr. Thierry indicated that appellant did not notify him of his injury and noted that the emergency treatment form was unsigned.

By letter dated June 10, 2009, OWCP requested additional evidence from appellant in support of his claim and allotted 30 days for submission.

Subsequently, appellant submitted a June 9, 2009 narrative statement and a January 31, 2008 medical report by Dr. Kirkwood A. Johnston, a rheumatologist, who diagnosed low back muscle strain causing spasm and discharged appellant from the emergency department that same day.

On June 25, 2009 OWCP accepted appellant's claim for lumbar sprain.

Appellant submitted narrative statements dated June 26 to 28 and July 1 and 20, 2009, which alleged that he notified his supervisor of the injury and indicated that the employing establishment did not make OWCP claim forms available to him.

By decision dated February 19, 2010, OWCP denied appellant's claim for continuation of pay on the grounds that he failed to report the January 30, 2008 employment injury on a form approved by OWCP within 30 days.

On March 8, 2010 appellant requested an oral hearing.

By letter dated May 1, 2010, appellant requested subpoenas for his supervisor Mr. Thierry, for failing to initiate appellant's CA-1 form and Barbara Ball, the employing establishment's OWCP coordinator, to discuss the contents of a memorandum and the ASISTS computer program. On June 4, 2010 OWCP's hearing representative denied appellant's request on the grounds that Ms. Ball's and Mr. Thierry's testimonies could be obtained through written statements or affidavits.

Appellant submitted a June 7, 2010 narrative statement, a 19-page hearing brief and an April 20, 2009 memorandum for record indicating that Ms. Ball told appellant that his claim form had to be filed by Mr. Thierry on the ASISTS computer program.

On June 24, 2010 an oral hearing was held. Appellant argued that the 30 days to file the continuation of pay claim should be tolled on the grounds that he did not have the resources or knowledge required to file the claim.

A time and attendance sheet received by OWCP on July 19, 2010 indicated that eight hours of sick leave on January 31, 2008 was approved for appellant due to injury sustained on January 30, 2008. In a July 14, 2010 narrative statement, appellant reported that Mr. Thierry

approved his sick leave on January 31, 2008 and argued that this supports the argument that he notified his supervisor of his injury.

By decision dated September 8, 2010, OWCP's hearing representative denied appellant's request to subpoena Ms. Ball and Mr. Thierry and affirmed the February 19, 2010 decision denying continuation of pay.

LEGAL PRECEDENT -- ISSUE 1

Section 8118 of FECA² 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 or her 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. The latter section provides in part that notice of injury shall be given in writing within 30 days after the injury.³ Claims that are timely under section 8122 are not necessarily timely under section 8118(a). FECA authorizes continuation of pay for an employee who has filed a valid claim for traumatic injury.⁴ Section 8118(a) makes continuation of pay contingent on the filing of a written claim within 30 days of the injury. When an injured employee makes no written claim for a period of wage loss within 30 days, he or she is not entitled to continuation of pay, notwithstanding prompt notice of injury.⁵

In order to establish entitlement to continuation of pay, an employee must establish, on the basis of reliable, probative and substantial evidence, that he was disabled as a result of a traumatic employment injury. As part of this burden, he must furnish medical evidence from a qualified physician who, based on a complete and accurate history, concludes that the employee's disability for specific periods was causally related to such injury.⁶ As used in FECA, the term disability means incapacity because of an injury in employment to earn wages the employee was receiving at the time of the injury.⁷ In other words, if an employee is unable to perform the required duties of the job in which he was employed when injured, the employee is disabled.⁸

² 5 U.S.C. §§ 8101-8193, 5 U.S.C. § 8118.

³ *Id.* at § 8119(a), (c). *See also Gwen Cohen-Wise*, 54 ECAB 732 (2003).

⁴ *Id.* at § 8118(a).

⁵ *See also W.W.*, 59 ECAB 533 (2008). *P.R.*, Docket No. 08-2239 (issued June 2, 2009).

⁶ *Carol A. Dixon*, 43 ECAB 1065 (1992); *Virginia Mary Dunkle*, 34 ECAB 1310 (1983). *See Carol A. Lyles*, 57 ECAB 265 (2005); 20 C.F.R. § 10.205(a) (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).

⁷ *See also Marvin T. Schwartz*, 48 ECAB 521 (1997). *K.H.*, Docket No. 10-965 (issued January 10, 2011).

⁸ *Id.*

ANALYSIS -- ISSUE 1

On June 2, 2009 appellant filed a claim for a January 30, 2008 traumatic injury. Because he did not file a claim within 30 days from the date of injury, the time specified in section 8118(a) and 8122(a)(2) of FECA,⁹ he is not entitled to continuation of pay.

When an injured employee makes no written claim for a period of wage loss within 30 days, he is not entitled to continuation of pay, notwithstanding prompt notice of injury. A time and attendance sheet of record shows that appellant provided notice of injury to his supervisor on January 31, 2008 as he requested sick leave due to the January 30, 2008 employment injury, but this oral notice is not determinative of whether he is entitled to continuation of pay under section 8118(a).¹⁰

Appellant argued that his untimely filing was due to the uncooperative nature of the employing establishment. He noted that the employing establishment did not make OWCP claim forms available to him and informed him that the only way to file a claim was through his supervisor on a computer system. In the case of *William E. Ostertag*,¹¹ the Board explained that the exceptional circumstances provision of section 8122(d)(3), which may excuse the untimely filing of an original claim for compensation under section 8122(a) and (b), is not applicable to section 8118(a) which concerns a claim for continuation of pay. Because FECA makes no provision for an exception to the time limitation in section 8118(a), no exceptional or mitigating circumstance, including error by the employing establishment, can entitle a claimant to continuation of pay who has not filed a written claim within 30 days of the date of injury.¹² Appellant did not submit written notice of injury on an approved form until June 2, 2009, more than 30 days after the January 30, 2008 employment injury, when he submitted a CA-1 form.¹³ Therefore, he is not entitled to continuation of pay.

On appeal, appellant contends that OWCP erred in its decision as it violated 20 C.F.R. § 10.7(a) and failed to base its decision on the evidence submitted. For reasons stated above, the Board finds his argument to be without merit.

LEGAL PRECEDENT -- ISSUE 2

Section 8126 of FECA provides that the Secretary of Labor, on any matter within her jurisdiction, may issue subpoenas for and compel attendance of witnesses within a radius of 100

⁹ 5 U.S.C. §§ 8118(a), 8122(a)(2).

¹⁰ See *J.M.*, Docket No. 09-1563 (issued February 26, 2010).

¹¹ 33 ECAB 1925 (1982).

¹² See *Laura L. Harrison*, 52 ECAB 515 (2001); *S.C.*, Docket No. 10-460 (issued January 26, 2011).

¹³ See *Robert E. Kimzey*, 40 ECAB 762 (1989) where the Board found that, despite appellant's contentions, *inter alia*, that he attempted to notify the proper employing establishment officials to file a compensation claim and they were unaware of the correct filing procedures, as no exceptional circumstances excuse timely filing for continuation of pay, he did not file his claim within the applicable time frames. The Board noted that appellant's narrative notification did not comport with OWCP's regulations setting forth the requirements for filing. *Id.* at 764 n.4. See also 20 C.F.R. §§ 10.205(a) and 10.210(a).

miles.¹⁴ This provision gives OWCP discretion to grant or reject requests for subpoenas. Its regulations state that subpoenas for witnesses will be issued only where oral testimony is the best way to ascertain the facts.¹⁵ In requesting a subpoena, a claimant must explain why the testimony is relevant to the issues in the case and why a subpoena is the best method or opportunity to obtain such evidence because there is no other means by which, the testimony could have been obtained.¹⁶ OWCP's hearing representative retains discretion on whether to issue a subpoena. The function of the Board on appeal is to determine whether there has been an abuse of discretion.¹⁷ Abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment or actions taken which are clearly contrary to logic and probable deductions from established facts.¹⁸ It is not enough to merely show that the evidence could be construed so as to produce a contrary factual conclusion.¹⁹

ANALYSIS -- ISSUE 2

By letter dated May 1, 2010, appellant requested that OWCP's hearing representative issue two subpoenas: (1) to compel Mr. Thierry to testify as to why he failed to initiate his CA-1 claim form; and (2) to compel Ms. Ball to discuss the contents of a memorandum and the ASISTS computer program. On June 4, 2010 OWCP's hearing representative denied his request on the grounds that their testimonies could be obtained through written statements or affidavits.

The Board finds that OWCP's hearing representative did not abuse her discretion in denying appellant's subpoena requests. In requesting a subpoena, a claimant must explain why the testimony is relevant to the issues in the case and why a subpoena is the best method or opportunity to obtain such evidence because there is no other means by which the testimony could have been obtained.²⁰ Here appellant did not show why information could not be obtained other than through the subpoena process.²¹ Thus, OWCP's hearing representative acted within her discretion in not issuing subpoenas as requested by appellant.²²

The Board finds no abuse of discretion in OWCP's hearing representative's denial of appellant's request for subpoenas. The Board will affirm the hearing representative's June 4, 2010 decision on this issue.

¹⁴ 5 U.S.C. § 8126.

¹⁵ 20 C.F.R. § 10.619.

¹⁶ *Id.*

¹⁷ *Gregorio E. Conde*, 52 ECAB 410 (2001).

¹⁸ *V.T.*, 58 ECAB 133 (2006); *Martha A. McConnell*, 50 ECAB 128 (1998); *Daniel J. Perea*, 42 ECAB 214 (1990).

¹⁹ *Dorothy Bernard*, 37 ECAB 124 (1985).

²⁰ *See Claudio Vazquez*, 52 ECAB 496 (2001).

²¹ *See Janet L. Terry*, 53 ECAB 570 (2002).

²² *See L.W.*, 59 ECAB 471 (2008); *J.C.*, 58 ECAB 594 (2007); *Jon Louis Van Alstine*, 56 ECAB 136 (2004); *Albert F. Ranieri*, 55 ECAB 598 (2004).

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant's claim for continuation of pay for his January 30, 2008 employment injury was not timely filed. The Board further finds that OWCP did not abuse its discretion in denying his request for subpoenas.

ORDER

IT IS HEREBY ORDERED THAT the September 8 and June 4, 2010 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: August 18, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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