

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PATRICIA A. HEMKO and DEPARTMENT OF VETERANS AFFAIRS,
MONTROSE VETERANS ADMINISTRATION HOSPITAL, Montrose, N.Y.

*Docket No. 96-1495; Submitted on the Record;
Issued April 1, 1998*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's claim for continuation of pay because she failed to give written notice of her injury within the time specified by the Federal Employees' Compensation Act.

On September 29, 1994 appellant sustained a fractured left lateral malleolus when she slipped on a banana peel. She stopped work that date, traveled 90 miles from the employing establishment to her daughter's house in Connecticut where she became disabled and notified the employing establishment of her injury, by telephone the next day. At that time she requested that workers' compensation claim forms be sent to her for completion. The workers' compensation claim forms were not immediately sent and appellant continued to call the employing establishment reiterating her request. She never received the requested forms and when she could finally drive, she went to the employing establishment to pick up the forms. Appellant completed them and returned them in two days on December 1, 1994.

On February 21, 1995 the Office denied appellant's request for continuation of pay finding that her claim was not filed on a form approved by the Secretary of Labor within 30 days of the injury.

By letter dated January 17, 1996, appellant requested reconsideration and in support argued that she was unable to file a Form CA-1 due to her work injury and she related her attempts to obtain the form and to timely file it.

By decision dated February 8, 1996, the Office denied appellant's request for modification finding that she did not file written notice of her claim within 30 days as required by the Act and the Federal (FECA) Procedure Manual.

The Board finds that the Office properly denied appellant's request for continuation of pay. The Board finds that appellant's claim for continuation of pay is barred by the time limitation provision of 5 U.S.C. § 8118 of the Act.¹

Section 8118² of the Act provides for payment of continuation of pay, not to exceed 45 days, to an employee "who has filed a claim 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

Appellant filed a Form CA-1, notice of traumatic injury and claim for continuation of pay/compensation on December 1, 1994. As this was more than 30 days after the September 29, 1994 injury, the claim for continuation of pay is barred by the applicable time limitation provision. With respect to appellant's contention that the employing establishment did not send the appropriate forms for her to complete, the Board has held that the responsibility for timely filing a claim rests with the injured employee.⁵ The Board has also held that the excuses that appellant was physically incompetent to file her claim until December 1994 and that her supervisor had actual knowledge sufficient to toll a limitations period are insufficient to satisfy the requirements of section 8118.⁶ 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 limitations provision for filing a claim, for compensation because of "exceptional circumstances," is not applicable to section 8118(a)⁷ which sets forth the filing requirements for continuation of pay.⁸ 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.⁹ Thus, since appellant filed the Form CA-1, notice of traumatic injury and claim for continuation of pay/compensation, more than 30 days after the September 29, 1994 injury, her claim for continuation of pay is barred by the applicable time limitation provision.

¹ 5 U.S.C. §§ 8101-8193.

² 5 U.S.C. § 8118.

³ 5 U.S.C. § 8122(a)(2).

⁴ See *George A. Harrell*, 29 ECAB 338, 339-40 (1978).

⁵ *Catherine Budd*, 33 ECAB 1011, 1014 (1982).

⁶ See *Saundra N. Phillips*, 43 ECAB 311 (1991).

⁷ 5 U.S.C. § 8118(a).

⁸ 5 U.S.C. § 8122(d)(3); see also *Dodge Osborne*, 44 ECAB 849, 855 (1993); *Michael R. Hynchuk*, 35 ECAB 1094, 1097 (1984).

⁹ See *William E. Ostertag*, 33 ECAB 1925 (1982); *Patricia J. Kelesky*, 35 ECAB 549, 551 (1984).

Accordingly, the decision of the Office of Workers' Compensation Programs dated February 8, 1996 is hereby affirmed.

Dated, Washington, D.C.
April 1, 1998

George E. Rivers
Member

David S. Gerson
Member

Bradley T. Knott
Alternate Member