U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ERNEST M. SCHWERTFEGER and DEPARTMENT OF THE NAVY, NAVAL MEDICAL CENTER, San Diego, Calif

Docket No. 96-2074; Submitted on the Record;
Issued June 26, 1998

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly denied appellant's claim for continuation of pay because he failed to give written notice of his injury within the time specified by the Federal Employees' Compensation Act; and (2) whether the Office abused its discretion by refusing to reopen appellant's case for further review on the merits of her claim under 5 U.S.C. § 8128(a).

On March 19, 1992, appellant, a sales clerk, experienced a sharp pain in his lower back while scanning a sales item. Appellant filed a Form CA-1 claim for benefits on March 26, 1992, and the claim was ultimately accepted by the Office for back strain

Appellant's treating physician, Dr. Hugh K. Hodsman, a specialist in family practice stated that appellant had low back strain with sciatica and released him to return to light duty on April 23, 1992.

On August 10, 1993, appellant submitted a Form CA-2 claim for recurrence of disability and continuation of pay, stating that his back "froze up" after pulling and filing in a bending and crouching position. Appellant alleged that the recurrence took place on June 14, 1993. Appellant alleged that these pains were attributable to the work injury of March 19, 1992.

Appellant's supervisor submitted a statement on appellant's recurrence form in which he alleged that:

> "On June 14 [appellant] did not notify me of any back injury that occurred at work. He called in sick 3 times during the 9 days he was off, but never spoke to me. On July 2, I counseled him about several issues. When questioned about how the injury occurred; when and why he did not notify me, [appellant] would neither confirm nor deny that he hurt his back at work, nor disclose the details. He just sat and stared at me."

On June 30, 1994 the Office created a new tramatic injury claim from the CA-2 filed by appellant.

By letter dated July 5, 1994, the Office accepted appellant's claim for temporary aggravation of degenerative disc disease and approved medical treatment from June 14, 1993 through June 29, 1993.

By decision dated July 7, 1994, the Office denied continuation of pay claimed for the period from June 14 through June 29, 1993 on the basis that appellant failed to give written notice of a traumatic injury within 30 days of the date of injury. The Office advised appellant, however, that the instant decision only affected benefits for continuation of pay, that it would not affect his entitlement to other compensation benefits, and that he could claim compensation for other wage loss during the period claimed by filing the appropriate CA-7 claim form.

In a letter dated August 1, 1994, appellant requested a hearing, which the Office scheduled for September 11, 1995 by letter dated July 17, 1995.

At the hearing, appellant alleged that he had provided his supervisor with a written return to work form from his treating physician upon his return to work in June 1993, in addition to other forms of written notification. Appellant testified that he had followed the proper procedures for providing notice of injury to his supervisors, and alleged that they had failed to provide him with the proper paperwork for filing a claim.

In a decision dated November 30, 1995, an Office hearing representative affirmed the Office's July 7, 1994 decision denying continuation of pay on the ground that he failed to give written notice to his supervisor of a traumatic injury within 30 days of the date of injury.

By letter dated March 25, 1996, appellant requested reconsideration of the Office's November 30, 1995 decision.

By decision dated May 20, 1996, the Office denied appellant's application for review on the ground that it neither raised substantive legal questions nor included new and relevant evidence such that it was sufficient to require the Office to review its prior decision.

The Board finds that appellant is not entitled to continuation of pay because he failed to file a written claim within the time specified by the Act.

Section 8118 of the Act[1] authorizes the continuation of pay of 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."[2] The context of section 8122 makes clear that this means within 30 days of the date of the injury.[3]

In the present case, appellant filed his claim for continuation of pay on August 10, 1993. As appellant filed his claim more than 30 days after his June 14, 1993 injury, he is not entitled to receive continuation of pay.

[1] 5 U.S.C. §§ 8101-8193.

[2] *Id.*, 5 U.S.C. § 8122(a)(2).

[3] *E.g., Myra Lenburg*, 36 ECAB 487 (1985); *see* 20 C.F.R. § 10.201(a)(3); *George A. Harrell*, 29 ECAB 338 (1978).

With respect to the circumstances that appellant maintains prevented him from filing his claim within 30 days of his injury, 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 provisions 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.[4] 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.

It is irrelevant, therefore, whether appellant's supervisors allegedly failed to provide him with the proper forms, or that his supervisor, manager, and personnel department allegedly failed to inform him of the proper procedures.

The Board notes that although appellant is barred from receiving continuation of pay, he is entitled to compensation benefits under the Act. The Office accepted appellant's claim on July 7, 1994 and explained that the decision denying her continuation of pay did not affect his entitlement to compensation benefits. Appellant may still claim compensation for the wage loss he sustained from June 14 to June 29, 1993 by filing a Form CA-7, Claim for Compensation Due to Traumatic Injury or Disease.

Accordingly, the Board's November 30, 1995 decision is affirmed.

The Board finds that the Office of Workers' Compensation Programs did not abuse its discretion by refusing to reopen appellant's case for further review on the merits of his claim under 5 U.S.C. § 8128(a).

Under 20 C.F.R. § 10.138(b)(1), a claimant may obtain review of the merits of his or her claim by showing that the Office erroneously applied or interpreted a point of law; by advancing a point of law or fact not previously considered by the Office; or by submitting relevant and pertinent evidence not previously considered by the Office.[5] Section 10.138(b)(2) provides that when an application for review of the merits of a claim does not meet at least one of these three requirements, the Office will deny the application for review without reviewing the merits of the claim.[6] Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.[7]

In the present case, appellant failed to show in his March 25, 1996 letter that the Office erroneously applied or interpreted a point of law or fact not previously considered by the Office; nor did he advance a point of law not previously considered by the Office. Neither has he submitted relevant and pertinent evidence not previously considered by the Office. Although appellant contended that he had provided his supervisor with a physician's return to work form upon his return to work and that he was not provided with the proper form to file a claim, this contention is irrelevant because, as stated above, he failed to comply with the requirements of

[4] *See Dodge Osborne,* 44 ECAB 849 (1993); *see Teresa Samilton,* 40 ECAB 955 (1989); *see William E. Ostertag,* 33 ECAB 1925 (1982).

[5] 20 C.F.R. § 10.138(b)(1); *see generally* 5 U.S.C. § 8128(a).

[6] 20 C.F.R. § 10.138(b)(2).

[7] *See Eugene F. Butler,* 36 ECAB 393, 398 (1984).

section 8118(a)(2). Therefore, the Office properly refused to reopen appellant's claim for a review on the merits.

The November 20, 1995 and May 20, 1996 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, D.C.
June 26, 1998

Michael J. Walsh
Chairman

George E. Rivers
Member

Michael E. Groom
Alternate Member