

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PAULA READ and U.S.POSTAL SERVICE,
POST OFFICE, Memphis, TN

*Docket No. 97-2500; Submitted on the Record;
Issued October 27, 1999*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issues are: (1) whether appellant's claim for continuation of pay is barred by the time limitation provisions of 5 U.S.C. § 8118 of the Federal Employees' Compensation Act; and (2) whether the Office of Workers' Compensation Programs properly applied the three-day waiting period under section 8117(1) of the Act.¹

On March 3, 1997 appellant, then a 42-year-old flat sorting machine (FSM) operator filed a notice of traumatic injury and claim for pay/compensation, Form CA-1, alleging that on January 20, 1997 she sustained an employment-related lumbosacral strain. Appellant stated that she strained the left side of her body while trying to line up two containers of mail in an all purpose container (APC), which caused a lumbosacral strain. Thereafter, on August 1, 1997 appellant filed a claim for compensation, Form CA-7, for the period from February 19 through 26, 1997, or for 48 hours. The record shows that appellant stopped worked on January 20, 1997 and returned to a modified or limited-duty status on March 24, 1997.

In a decision dated April 14, 1997, the Office accepted appellant's claim for lumbosacral strain (846.0). In a separate decision also dated April 14, 1997, the Office denied appellant's entitlement to a continuation of pay for her absence from work during January 20, 1997 and continuing, because her March 3, 1997, notice of traumatic injury claim was not filed within 30 days of the January 20, 1997 injury.

By letter dated May 11, 1997, appellant requested reconsideration and submitted additional evidence. Appellant alleges that her rights had been violated under the Act because neither her supervisor, nor the workers' compensation person mentioned anything about filing a notice of traumatic injury claim until after the 30 day time period had expired. Therefore, she was unaware of the requirement to file a written notice within 30 days. Appellant also requested that her annual and sick leave be restored and that she be paid for the leave without pay used in connection with the injury.

¹ 5 U.S.C. §§ 8101-8193.

In a merit decision on reconsideration dated May 21, 1997, the Office denied appellant's request for continuation of pay because the evidence submitted in support of the request for reconsideration was insufficient to warrant modification of the prior decision. The Office also noted that appellant had lost time from work due to the work injury and advised her to file a Form CA-7 through her employing establishment to claim compensation for the time lost from work due to this injury.

In a July 31, 1997, time analysis form CA-7a, appellant responded to the Office's May 21, 1997 decision, by indicating that she was placed on annual leave from February 5 through 18, 1997, leave without pay from February 19 through 26, 1997 and sick leave from March 1 through 8, 1997. Appellant also submitted various other documentation showing that she continues to be on a modified work status and has requested a special chair with back support, with only 2 hours of lifting over the head, 1 hour of standing and no lifting over 15 pounds.

In a decision dated August 14, 1997, the Office denied appellant's claim for compensation. The Office found that appellant's claim was not payable in its entirety at that time because her disability did not exceed 14 days. Therefore, appellant's leave without pay days dated February 19, 22 and 23, 1997, were considered mandatory waiting days under section 10.301 of the Code of Federal Regulations. The Office further informed appellant that if her disability period eventually exceeded the 14 day requirement, even if they were not continuous, then the three-day waiting period would be waived and compensation would be paid. In a check dated August 22, 1997, appellant was awarded compensation in the amount of \$308.08 for wage loss suffered by reason of her accepted employment-related injury during her period of leave without pay from February 19 through 26, 1997, less the three-day waiting period required by section 5 U.S.C. § 8117(1).²

The Board finds that appellant's claim for continuation of pay is barred by the applicable time limitation provisions of the Act.

Section 8118 of the Act³ 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 a traumatic injury, with his or her immediate superior on a form approved by the Secretary of labor within the time period specified in section 8122(a)(2),⁴ 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.⁵ While a specific form is not required for filing of written notice, it is necessary that a filing contain words which could be so construed. As appellant's notice of traumatic injury claim was filed more than 30 days after the claimed January 20, 1997 injury, the claim for continuation of pay is bared by statute.

² The first three-day waiting period for leave without pay used were for February 19, 22 and 23, 1997. 5 U.S.C. § 8117(1).

³ 5 U.S.C. § 8118.

⁴ 5 U.S.C. § 8122(a)(2).

⁵ *George A. Harrell*, 29 ECAB 338 (1978).

The responsibility for filing a claim rests with the injured employee.⁶ In addition, the Board held, that 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)⁷ which sets for the filing requirements for continuation of pay.⁸ There is 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 Therefore, since appellant filed her notice of traumatic injury claim, Form CA-1, more than 30 days after the January 20, 1997 employment-related injury, her claim for a continuation of pay is barred by the applicable time limitation provision.

The Board further finds that the Office properly applied the three-day waiting period under section 5 U.S.C. § 8117(1).

Section 8117 of the Act, entitled “Time of accrual of right,” states as follows: “An employee is not entitled to compensation for the first three days of temporary disability except -- (1) when the disability exceeds 14 days; (2) when the disability is followed by permanent disability; or (3) as provided by sections 8103 and 8104 of this title.”¹⁰ In addition, the Board has consistently construed section 8117(1) to require the three waiting days when a period of work-related disability does not exceed the statutory period, in this case, 14 days.¹¹ The Federal (FECA) Procedure Manual explains that the statutory period of 14 days does not begin to run until the use of any sick or annual leave has ended or continuation of pay has ceased. The manual states as follows:

“An employee may use sick or annual leave to cover all or part of an absence due to injury but the employee’s compensation for disability does not begin and the waiting period specified by 5 U.S.C. [§] 8117(1) does not begin to run, until COP [continuation of pay] terminates and any use of leave ends.

‘If an employee elects sick or annual leave, entitlement to COP is not preserved. Each full or partial day for which the employee is absent from work due to a disability will be counted as one day against entitlement to COP, regardless of whether sick or annual leave is used. Therefore,

⁶ *Robert E. Kimzey*, 40 ECAB 762; *Catherine Budd*, 33 ECAB 1011 (1982).

⁷ 5 U.S.C. § 8118(a).

⁸ 5 U.S.C. § 8122(d)(3); *see also Michael R. Hrynychuk*, 35 ECAB 1094 (1984).

⁹ *William E. Ostertag*, 33 ECAB 1925 (1982) (continuation of pay is designed to eliminate interruptions in an employee’s cash flow by continuing payment of an employee’s pay during a period of disability. Such payments are not from the Employees’ Compensation Fund administered by the Office; *see also George J. Heinsohn*, 43 ECAB 1125 (1992); *Charles Howell*, 38 ECAB 421 (1987); *Paul L. Dion*, 36 ECAB 656 (1983); *Donald W. Almquist*, 33 ECAB 1850 (1982).

¹⁰ *See supra* note 2.

¹¹ *Kathy P. Roberts*, 45 ECAB 548 (1994).

while an employee may use COP intermittently along with sick or annual leave, entitlement is not extended beyond 45 days of combined absences.”¹² (Emphasis in the original.)

In order to determine the three-day waiting period under section 8117(1) of the Act applies to appellant’s claim for leave buy back for January 21, 1997 intermittently through March 24, 1997,¹³ it must first be determined, under section 8118(a) of the Act, whether appellant’s continuation of pay and use of leave had ceased as of those dates.

Section 10.202(4)(b) of the Office’s regulations provides, in pertinent part:¹⁴

“[T]he 45-day [continuation of pay] period starts with the first day or shift following the date or shift of injury.... If the employee’s job-related disability continues after entitlement to continuation of pay ceases, the employee shall be entitled to receive compensation subject to the provisions of 5 U.S.C. [§] 8117.”

In this case, appellant sustained an accepted lumbosacral strain on January 20, 1997. Under section 10.202 of the regulations, appellant’s entitlement to continuation of pay began on January 21, 1997, the day following the accepted injury.

At the beginning of her period of disability for work, appellant elected to use annual or sick leave, which is permitted under section 8118(c) of the Act. Section 8118(c) provides that an employee may use annual or sick leave “to his [her] credit at the time disability begins, but his [her] compensation for disability does not begin and the time periods specified by section 8117... do not begin to run, until termination of pay as set forth in subsections (a) and (b) or the use of annual or sick leave ends.”¹⁵ The Act’s implementing regulations provide that, “the time provisions of 5 U.S.C. § 8117, governing the date upon which an employee’s entitlement to compensation begins, do not begin to run until the use of annual or sick leave ends.”¹⁶

Appellant elected to use a total of 72 hours of annual leave from February 5 through 18, 1997; a total of 48 hours of leave without pay from February 19 through 26, 1997 and a total of 48 hours of sick leave from March 1 through 8, 1997. On March 24, 1997 appellant returned to work in a modified duty position, thus ending the period of work-related disability. However, the three-day waiting period under section 8117(1) does not begin to run until after the use of sick and annual leave or entitlement to continuation of pay ended.

¹² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Continuation of Pay and Initial payments*, Chapter 2.807.15(a), (b) (July 1993).

¹³ There is no claim of record for leave buy back for annual and/or sick leave used intermittently from January 21 through March 24, 1997. 20 C.F.R. § 10.310.

¹⁴ 20 C.F.R. § 10.202.

¹⁵ 5 U.S.C. § 8118(c).

¹⁶ See *supra* note 14.

The Board notes that continuation of pay is different from compensation for disability.¹⁷ Continuation of pay, for the purposes of section 8118(a) of the Act, is the employee's "pay," while compensation is the money allowance to an employee or other benefit paid from the Employees' Compensation Fund. Therefore, under section 8118(a), the three-day waiting period under section 8117(1) does not begin to run until "termination of pay," which is the termination of continuation of pay. Appellant received continuation of pay from January 21, 1997 intermittently to March 24, 1997, but was placed on leave without pay from February 19 through 26, 1997, during which time her entitlement to continuation of pay ceased.

As the Office explained in the August 14, 1997 letter, "Your [appellant's] claim [was] not payable in its entirety.... Under section 10.301 of the Federal Regulations (CFR), 'compensation begins when the employee starts to lose pay if the injury causes permanent disability or if there is pay loss for more than 14 days, otherwise compensation begins on the fourth day after pay stops.' Your disability did not exceed 14 days, therefore, the following days are considered mandatory waiting days: February 19, 22 and 23, 1997." The three-day waiting period under section 8117 was, therefore, invoked because the 45 days has not ended. The Office also stated that "If your [appellant's] disability period eventually exceeded 14 days (even if they are not continuous), compensation for the three waiting days will be paid."

The Board finds that the Office was correct as the record indicated that February 19, 22 and 23, 1997 were the first three days of leave without pay from work following the end of appellant's annual or sick leave and appellant's leave without pay did not exceed 14 days, a leave buy back option is not payable for those days at this time. Because appellant's disability did not exceed 14 days, she is not entitled to compensation for the period of February 19, 22 and 23, 1997. The Office properly applied the three-day waiting period for temporary disability under section 8117(1) of the Act.

The decisions of the Office of Workers' Compensation Programs dated August 14, May 21 and April 14, 1997 are hereby affirmed.

Dated, Washington, D.C.
October 27, 1999

George E. Rivers
Member

David S. Gerson
Member

¹⁷ *William E. Ostertag, supra* note 9.

Willie T.C. Thomas
Alternate Member