

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of LINDA K. NICKLE and U.S. POSTAL SERVICE,  
POST OFFICE, Catlin, IL

*Docket No. 98-820; Submitted on the Record;  
Issued October 13, 1999*

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DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,  
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly denied appellant's claim for continuation of pay on the grounds that she failed to give written notice of her injury within 30 days of its occurrence as specified by the Federal Employees' Compensation Act;<sup>1</sup> and (2) whether the Office properly denied appellant's request for a review of the written record pursuant to section 8124(b) of the Act.

On November 5, 1996 appellant, then a 55-year-old rural letter carrier, filed a notice of traumatic injury and claim for compensation alleging that on January 12, 1996 she injured her lower back, legs and hips in an employment-related automobile accident.<sup>2</sup> On June 25, 1997 the Office accepted appellant's claim for acute lumbar strain. The Office further notified appellant that her claim had been accepted as a claim for traumatic injury resulting from the January 12, 1996 automobile accident. Appellant lost intermittent time from work and returned to full duty.

By decision dated June 25, 1997, the Office determined that appellant was not entitled to continuation of pay during her absence from work due to her accepted condition because she did not file a written notice of injury within 30 days after the work incident which caused the injury.

In her response received July 18, 1997, appellant explained that she had filed a timely accident report but that the postmaster apparently put the report in a file where it was not found until nearly a year later. On July 28, 1997 the Office received a copy of an accident report containing the details of the January 12, 1996 automobile accident. This report is unsigned by appellant's supervisor, however and there is no indication when, if at all, it was received by the employing establishment.

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

<sup>2</sup> Appellant also filed a Form CA-2, "Notice of Occupational Injury," for the same condition on September 12, 1996.

By letter postmarked September 5, 1997, appellant submitted a copy of an earlier letter dated July 20, 1997, together with an envelope on which no postmark can be discerned, in which she requested that the Office perform a review of the written record. In her September 5, 1997 inquiry, appellant asked whether the Office had received this earlier letter, as she had not received any response.

In a decision dated November 20, 1997, the Office denied appellant's request for a review of the written record finding that her request was not timely filed and that the issue could be equally well addressed by requesting reconsideration.

The Board finds that the Office properly denied continuation of pay on the grounds that appellant failed to give written notice of her injury within 30 days.

Section 8118 of the Act<sup>3</sup> authorizes the continuation of pay of 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."<sup>4</sup> The context of section 8122 makes clear that this means within 30 days of the date of the injury.<sup>5</sup> Section 10.201(a) of the implementing federal regulations<sup>6</sup> provides in pertinent part:

"An employee is not entitled to continuation of pay unless:

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"(3) The employee files a claim for a period of wage loss, as required by 5 U.S.C. § 8118(a), within 30 days of the injury on a form approved by the Secretary. (Form CA-1 may be used for this purpose)."

Therefore, to be entitled to continuation of pay, an employee must file a claim on an appropriate form within 30 days after the injury.<sup>7</sup>

In her response to the Office's June 25, 1997 decision denying appellant's claim for continuation of pay, appellant emphasized that it was not her fault that notice of this injury was not filed within 30 days of the incident, as she had given an accident report to her supervisor, after which the form had been misplaced for nearly a year.

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<sup>3</sup> 5 U.S.C. § 8118.

<sup>4</sup> 5 U.S.C. § 8122(a)(2).

<sup>5</sup> *Myra Lenburg*, 36 ECAB 487 (1985); *George A. Harrell*, 29 ECAB 338 (1978); *see* 20 C.F.R. § 10.201(a)(3).

<sup>6</sup> 20 C.F.R. § 10.201(a).

<sup>7</sup> *Bobby W. Anderson*, 41 ECAB 833 (1990).

The Board has held that section 8122(d)(3)<sup>8</sup> of the Act, allowing 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.<sup>9</sup> Thus, there is no provision under the Act excusing an employee’s failure to file a claim for continuation of pay within 30 days of the employment injury.<sup>10</sup> In addition, it is a well-settled principle of workers’ compensation law that ignorance of statutory requirements will not be an excuse for noncompliance with those regulations.<sup>11</sup> Accordingly, as the accident report submitted by appellant in support of her claim is undated, does not contain the signature of her supervisor and does not contain any indication that it was timely filed, the Board finds that appellant failed to give written notice of her injury within 30 days of its occurrence and that, therefore, the Office properly denied continuation of pay. Pursuant to the record before the Board, appellant first gave the Office written notice of her January 12, 1996 employment injury on November 5, 1996 when she filed her notice of traumatic injury and claim for compensation (Form CA-1) for the injuries sustained in the motor vehicle accident. As appellant did not file her claim for continuation of pay until November 5, 1996, which is more than 30 days after January 12, 1996, such a claim is untimely.

The Board further finds that the Office properly denied appellant’s request for a review of the written record as untimely.

Section 8124(b)(1) of the Act provides that “a claimant for compensation not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on [her] claim before a representative of the Secretary.”<sup>12</sup> Section 10.131 of the federal regulations implementing this section of the Act provides that a claimant shall be afforded a choice of an oral hearing or a review of the written record by a representative of the Secretary.<sup>13</sup>

In the present case, the first indication that appellant had requested a review of the written record by an Office representative was received by the Office as an enclosure to a letter postmarked September 5, 1997. Section 10.131(b) of the federal regulations provides: “A claimant is not entitled to a review of the written record if the request is not made within 30 days of the date of issuance of the decision *as determined by the postmark of the request...*” (Emphasis added.) While appellant further enclosed a copy of the envelope which had purportedly contained the request for review dated July 20, 1997, no postmark can be discerned

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<sup>8</sup> 5 U.S.C. § 8122(d)(3).

<sup>9</sup> See *William E. Ostertag*, 33 ECAB 1925, 1926 (1989) (explaining why section 8122(d)(3) is inapplicable); see also *Robert E. Kimzey*, 40 ECAB 762, 765 (1989); *Patricia J. Kelsesky*, 35 ECAB 549, 551 (1984) *Sylvia P. Blackwell*, 33 ECAB 811, 813 n.7 (1984).

<sup>10</sup> *William E. Ostertag*, *supra* note 9; *Robert E. Kimzey*, *supra* note 9; *Patricia J. Kelsesky*, *supra* note 9.

<sup>11</sup> *Robert E. Kimzey*, *supra* note 9; *Peter J. Nevin*, 6 ECAB 839 (1954).

<sup>12</sup> 5 U.S.C. § 8124(b)(1).

<sup>13</sup> 20 C.F.R. § 10.131.

on that envelope and the record does not contain any other copies of either the July 20, 1997 letter or the envelope in which it was mailed. Thus, the letter postmarked September 5, 1997, which contained the copy of the July 20, 1997 letter requesting review, was in fact the first request for review of the written record received by the Office. As the postmark date of the request was more than 30 days after issuance of the June 25, 1997 Office decision, appellant's request for a review of the written record was untimely filed.

Although there is no right to a review of the written record if not requested within the 30-day time period, the Office may within its discretionary powers grant or deny appellant's request and must exercise its discretion.<sup>14</sup>

The Office's procedures concerning untimely requests for hearings and review of the written record are found in the Federal (FECA) Procedure Manual, which provides:

"If the claimant is not entitled to a hearing or review (*i.e.*, request untimely, prior reconsideration, etc.), BHR [Branch of Hearings and Review] will determine whether a discretionary hearing or review should be granted and, if not, will so advise the claimant, explaining the reasons."<sup>15</sup>

In the present case, the Office notified appellant that it had considered the matter in relation to the issue involved and indicated that additional argument and evidence could be submitted with a request for reconsideration. The Office has broad administrative discretion in choosing means to achieve its general objective of ensuring that an employee recovers from his or her injury to the fullest extent possible in the shortest amount of time. An abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from established facts.<sup>16</sup> There is no indication that the Office abused its discretion in this case.

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<sup>14</sup> *Herbert C. Holley*, 33 ECAB 140 (1981).

<sup>15</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4 (September 1988).

<sup>16</sup> *Daniel J. Perea*, 42 ECAB 214 (1990).

The decisions of the Office of Workers' Compensation Programs dated November 20 and June 25, 1997 are affirmed.

Dated, Washington, D.C.  
October 13, 1999

Michael J. Walsh  
Chairman

Willie T.C. Thomas  
Alternate Member

A. Peter Kanjorski  
Alternate Member