

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DIANN GIBSON-SHANKLE and DEPARTMENT OF THE NAVY,
HOUSING OFFICE, Corpus Christi, TX

*Docket No. 98-2274; Submitted on the Record;
Issued April 11, 2000*

DECISION and ORDER

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

The issue is 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 the time specified by the Federal Employees' Compensation Act.

On January 8, 1998 appellant, then a 56-year-old housing director, filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1), alleging that on August 27, 1997, in attempting to open the stuck door in a restroom at the employing establishment, she sustained injuries to her right and left shoulders. Appellant submitted with her claim her statement as to how the incident occurred and statements from coworkers corroborating her contention that the door in the ladies room frequently stuck. In letters dated February 11, 1998, the employing establishment controverted the claim and further noted that it was terminating continuation of pay. The employing establishment noted that there were no witnesses, although the employing establishment conceded that the stall door in the ladies room did stick.

On April 14, 1998 the Office accepted the claim for bilateral shoulder impingement syndrome with internal derangement of acromioclavicular joint and rotator tendinosis. However, in a decision issued on the same date, the Office denied appellant's request for continuation of pay, finding that as the date of injury was August 27, 1997 and written notice of injury was not given until December 10, 1997, appellant failed to give written notice to the employing establishment within the required 30 days.

The Board finds that the Office properly denied appellant's claim for continuation of pay on the grounds that she failed to give written notice of her injury within the time specified by the Act.

Section 8118(a) of the Act¹ 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 immediate superior on a form approved by the Secretary of Labor within the time specified in section 8122(a)(2)² of this title.” This latter section provides that “written notice of injury” shall be given within 30 days.³ While a specific form is not required for filing of written notice, it is necessary that a filing contain words of claim or words which could be so construed.⁴ The context of section 8122 makes clear that this means within 30 days of the date of injury.⁵

Appellant contends on appeal that as her doctors originally misdiagnosed her condition, she should be entitled to continuation of pay. 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 provision for filing a claim for compensation because of exceptional circumstances,⁶ is not applicable to section 8118(a) which sets forth the filing requirements for continuation of pay. The rationale for this finding is set forth fully in the Board’s decision in *William E. Ostertag*.⁶ There is, therefore, no provision under the Act for excusing an employee’s failure to file a claim for continuation of pay within 30 days of the employment injury.⁷ Accordingly, appellant’s assertion that her claim for continuation of pay should be accepted because the doctors originally misdiagnosed her condition is without merit.

¹ 5 U.S.C. § 8118.

² 5 U.S.C. § 8122(a)(2).

³ 20 C.F.R. § 10.203(b) of the implementing regulations provides that with respect to continuation of pay under 5 U.S.C. § 8118, the employing establishment shall controvert a claim if a written claim required by 5 U.S.C. § 8118(a) was not filed within 30 days after the date of injury.

⁴ *Karen A. Mueller*, 48 ECAB 138 (1996); *Myra Lenburg*, 36 ECAB 487 (1985).

⁵ *Thomas A. Faber*, 50 ECAB ____ (Docket No. 97-2212, issued September 28, 1999).

⁶ 33 ECAB 1925 (1982).

⁷ *Dodge Osborne*, 44 ECAB 849, 855 (1993).

The decision of the Office of Workers' Compensation Programs dated April 14, 1998 is affirmed.

Dated, Washington, D.C.
April 11, 2000

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member