

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of ROSALIE A. ALSANTE and DEPARTMENT OF HEALTH & HUMAN SERVICES, SOCIAL SECURITY ADMINISTRATION, OFFICE OF REGIONAL COMMISSIONER, New York, NY

*Docket No. 98-2268; Submitted on the Record;  
Issued August 21, 2000*

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DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,  
VALERIE D. EVANS-HARRELL

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 refusal of the Office, by its April 22, 1998 decision, to reopen appellant's case for further review of the merits of the claim, constituted an abuse of discretion.

The Board has duly reviewed the case record in the present appeal and 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 30 days of its occurrence.

On March 18, 1997 appellant, then a 54-year-old claims representative, filed a claim for neck and head pain alleging that on February 3, 1997 the following occurred:

“During taking four claims on computer morning at work. A gentleman was leaning to my left computer was at my right. This gentleman was hard of hearing and required each question repeated several times, therefore, I was constantly turning my head back and forth between him and my computer -- pain immediately began in right neck gradually radiating to my head a face pain resembling a sinus headache.”

By decision dated February 17, 1998, the Office accepted appellant's claim. The Office also found that appellant was not entitled to continuation of pay (COP) as the claim was not filed within 30 days of the injury, February 3, 1997.

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

By letter dated March 8, 1998, appellant requested reconsideration of the portion of the February 17, 1998 decision pertaining to continuation of pay. In support of the request, appellant submitted some documents which were already part of the record. Also submitted was a statement from appellant, with a note stating that the original date on the form was February 18, 1998 but was changed to March 18, 1998 when she was told she could not submit the claim without a medical statement. By decision dated April 22, 1998, the Office found that the evidence submitted was immaterial in nature and insufficient to warrant review of the prior decision.

The Board notes that section 8118 of the Act<sup>2</sup> 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)<sup>3</sup> 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.<sup>4</sup>

The Board has held that the responsibility for filing a claim rests with the injured employee.<sup>5</sup> 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 limitation provision for filing a claim for compensation because of “exceptional circumstances,” is not applicable to section 8118(a)<sup>6</sup> which sets forth the filing requirements for continuation of pay.<sup>7</sup> 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.<sup>8</sup> Thus, since appellant filed her claim more than 30 days after the February 3, 1997 employment-related injury, her claim for continuation of pay is barred by the applicable time limitation provision.

The Board further finds that the Office did not abuse its discretion by its refusal to reopen appellant’s case for further merit review.

On reconsideration, appellant submitted a statement alleging that the delay in filing a claim was due to the employing establishment telling her that she could not submit her claim without a doctor’s statement and a delay in getting a definite diagnosis from her doctor.<sup>9</sup> The Board finds that appellant’s evidence is relevant to the issue of continuation of pay (COP).

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<sup>2</sup> 5 U.S.C. § 8118.

<sup>3</sup> 5 U.S.C. § 8122(a)(2).

<sup>4</sup> See *George A. Harrell*, 29 ECAB 338 (1978).

<sup>5</sup> See *Catherine Budd*, 33 ECAB 1011 (1982).

<sup>6</sup> 5 U.S.C. § 8118(a).

<sup>7</sup> 5 U.S.C. § 8122(d)(3); see also *Michael R. Hrynchuk*, 35 ECAB 1094 (1984).

<sup>8</sup> *William E. Ostertag*, 33 ECAB 1925 (1982).

<sup>9</sup> There is no evidence in the record to support that the employing establishment refused to accept appellant’s claim other than appellant’s allegation.

However, as previously explained in this decision, 5 U.S.C. § 8122(d)(3) which provides that failure to file a claim in a timely fashion may be excused for exceptional circumstances, does not apply to claims for continuation of pay.<sup>10</sup> Thus, appellant's contention has no reasonable color of validity<sup>11</sup> and the Office properly declined a merit review.

The decisions of the Office of Workers' Compensation Programs dated April 22 and February 17, 1998 are affirmed.

Dated, Washington, D.C.  
August 21, 2000

David S. Gerson  
Member

Michael E. Groom  
Alternate Member

Valerie D. Evans-Harrell  
Alternate Member

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<sup>10</sup> *William E. Ostertag, supra* note 8.

<sup>11</sup> *See Norman W. Hanson, 40 ECAB 1160 (1989).*