

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of TERESA GUTIERREZ and DEPARTMENT OF THE AIR FORCE,
RANDOLPH AIR FORCE BASE, TX

*Docket No. 02-386; Submitted on the Record;
Issued June 12, 2002*

DECISION and ORDER

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

The issues are: (1) whether appellant is entitled to continuation of pay; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for an oral hearing as untimely.

On March 20, 2001 appellant, then a 38-year-old computer specialist, filed a notice of traumatic injury alleging that she sustained an injury to her neck and shoulder blade on February 16, 2001, when she was struck from behind by a coworker who was carrying a binder.¹ Appellant did not report the incident to her supervisor until March 19, 2001. She explained that she did not report the injury within 30 days of the injury because she developed Bell's palsy and was on sick leave until March 19, 2001. The Office accepted her claim for left shoulder sprain and strain and paid compensation for temporary total disability.

By decision dated May 2, 2001, the Office denied appellant's claim for continuation of pay. The Office found that appellant failed to give written notice of injury within 30 days of the date of injury.

By letter dated May 29, 2001, appellant requested an oral hearing. In a decision dated July 26, 2001, the hearing representative denied appellant's request for an oral hearing as untimely.

By letter dated October 22, 2001, appellant requested reconsideration. She stated in her letter that she did not disagree with the Office's denial of continuation of pay, but rather disagreed with the Office's acceptance of the left shoulder condition. Appellant requested that her claim be expanded to include neck, shoulder blade and lower back conditions, as well as left

¹ Appellant also filed a claim for recurrence on September 17, 2001 but the Office did not issue a decision on this matter.

shoulder surgery.² In support appellant submitted a March 23, 2001 attending physician's report from Dr. Matthew C. Poling, a Board-certified family practitioner, and reports from Dr. Frank J. Garcia, a Board-certified orthopedic surgeon.

The Board finds that appellant is not entitled to continuation of pay.

Section 8118 of the Federal Employees' Compensation Act provides for 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 the Act.³ This latter section, in conjunction with section 8119 of the Act, provides that "written notice of injury" shall be given within 30 days after the injury.⁴ Additionally, the implementing regulations provide that to be eligible for continuation of pay a person must file "Form CA-1 within 30 days of the date of the injury."⁵

In this case, appellant filed her Form CA-1 on March 20, 2001 for a traumatic injury that occurred on February 16, 2001. The record indicates that appellant notified her supervisor of the injury on March 19, 2001. Appellant explained that she did not give written notice of injury within 30 days because she developed Bell's palsy and was on sick leave until March 19, 2001. She explained that the Bell's palsy caused her to be in extreme pain with paralysis on the left side of her face, impaired vision and hearing, and impaired speech.

Appellant filed her claim 32 days after her accepted employment injury of February 16, 2001. The Act and implementing regulations are specific on the timeframe for filing a claim for continuation of pay. Inasmuch as appellant did not file her Form CA-1 within 30 days of her date of injury, she is not entitled to continuation of pay. However, the Office correctly explained in its May 2, 2001 decision, the denial of continuation of pay does not preclude appellant from receiving wage-loss compensation, as distinguished from continuation of pay, for any disability she may have sustained as a consequence of her February 16, 2001 employment injury.⁶

The Board further finds that the Office properly denied appellant's request for an oral hearing as untimely.

Section 8124(b) of the Act, concerning a claimant's entitlement to a hearing, states, "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of

² The Board acknowledges that appellant requested an oral hearing not on the issue of continuation of pay but on the acceptance of her claim. Appellant is not precluded from filing a new claim for those injuries.

³ 5 U.S.C. § 8188.

⁴ 5 U.S.C. §§ 8119(a), 8122(a)(2).

⁵ 20 C.F.R. § 10.205(a)(2) (1999). Although the regulation specifies the filing of a Form CA-1, it notes parenthetically that if, a Form CA-1 was not available, the use of another form would not alone preclude receipt of continuation of pay. *Id.*

⁶ *Joyce S. East-Palmer*, Docket No. 01-729 (issued October 11, 2001).

issuance of the decision, to a hearing on his claim before a representative of the Secretary.”⁷ As section 8124(b)(1) is unequivocal in setting forth the time limitation for requesting a hearing, a claimant is not entitled to a hearing as a matter of right unless the request is made within the requisite 30 days.⁸

Regulations implementing the Act provide that a claimant is not entitled to an oral hearing 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.⁹ In computing the time period, the date of the event from which the designated period of time begins to run shall not be included while the last day of the period so computed shall be included unless it is a Saturday, Sunday or a legal holiday.¹⁰ The Board has applied this rule to determine questions of timeliness arising under the Act.¹¹

In this case, the Office issued a decision denying appellant continuation of pay on May 2, 2001. The 30-day period for determining the timeliness of appellant’s hearing request commenced on the first day following the issuance of the Office’s May 2, 2001 decision, or May 3, 2001, and ended on June 1, 2001, since the last day of the period was not a Saturday, Sunday or a holiday. As appellant’s request was postmarked June 2, 2001 and her request was due by June 1, 2001, she is not entitled to a hearing as a matter of right. Moreover, the Office considered whether to grant her a discretionary review, and correctly advised appellant that the issue of whether she timely filed her claim for continuation of pay could equally well be addressed by requesting reconsideration. Accordingly, the Board finds that the Office properly exercised its discretion in denying appellant’s untimely request for an oral hearing.

⁷ 5 U.S.C. § 8124(b)(1).

⁸ *Frederick D. Richardson*, 45 ECAB 454 (1994).

⁹ 20 C.F.R. § 10.616(a).

¹⁰ *John B. Montoya*, 43 ECAB 1148 (1992).

¹¹ *Id.*

The decisions of the Office of Workers' Compensation Programs dated July 26 and May 2, 2001 are hereby affirmed.

Dated, Washington, DC
June 12, 2002

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member