

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DAVID C. ENGLISH and U.S. POSTAL SERVICE,
POST OFFICE, Detroit, MI

*Docket No. 03-495; Submitted on the Record;
Issued May 12, 2003*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
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 he failed to give written notice of his injury within the time specified by the Federal Employees' Compensation Act.

On February 12, 2002 appellant, then a 49-year-old custodian, filed a Form CA-1, claim for continuation of pay/compensation, advising that he injured his back on January 11, 2002 while cleaning a toilet. He indicated that the date of the notice was February 12, 2002 and also provided that date by his signature. His supervisor, Alfred L. Lewis, indicated on page 2 of the claim form that notice of the injury had been received on February 15, 2002 and also provided that date beside his signature.

In support of his claim, appellant submitted a personal statement describing events subsequent to November 11, 2002 in which he stated, *inter alia*, that on January 14, 2002 he called in sick and informed "Janice" that his condition was not employment related. He stated that on February 7, 2002, while at work, he told Mr. Lewis that he wanted to file a workers' compensation claim and that Mr. Lewis informed him that he would start the paperwork. Appellant did not return to work until February 11, 2002. Appellant also submitted medical evidence which primarily consisted of disability slips. A report dated February 15, 2002 with an illegible signature indicated that appellant had a herniated lumbar disc.

By decision dated February 26, 2002, the Office denied appellant's claim for continuation of pay because the claim was not filed within 30 days of the date of injury as required by the Act. In letters also dated February 26, 2002, the Office accepted that appellant sustained an employment-related lumbar strain only. The Office advised appellant that his case would continue to be developed regarding his herniated disc condition.¹

¹ The record does not indicate that the Office has rendered a final decision regarding whether appellant's herniated disc condition is employment related.

By letter dated March 20, 2002, appellant, through counsel, requested a hearing and submitted additional medical evidence. Appellant's attorney stated that appellant "completed the [claim] form and returned it to Mr. Lewis on Thursday, February 7, 2002." In letters dated March 29 and June 6, 2002, counsel requested a review of the written record.

Mr. Lewis submitted an affidavit dated April 15, 2002 in which he stated that appellant had approached him on February 7, 2002 concerning filing a claim under the Act and that appellant completed his portion of the form on February 7, 2002. Mr. Lewis continued that he did not complete his portion of the claim form until the following week, on February 12, 2002. He concluded, "If I had known that [appellant's] [c]laim for [c]ontinuation of [p]ay/[c]ompensation was jeopardized due to the thirty-day (30) notice provisions, I would have completed the form on Thursday, February 7, 2002."

By decision dated September 25, 2002, an Office hearing representative affirmed the prior decision that appellant was not entitled to continuation of pay.² The hearing representative stated:

"I have reviewed the statement from the supervisor and the CA-1 form and I note the claimant dated the form February 12, 2002 as well as listed that date in the date of notice box. Thus, I find the supervisor's statement concerning the employee completing the form on [February] 7[, 2002] simply does not make sense. If the claimant had completed the CA-1 written notice on February 7, 2002, he would have used the February 7, 2002 date. Therefore, I can only conclude that the CA-1 form was not completed until February 12, 2002."

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

Section 8118(a) 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 immediate superior on a form approved by the Secretary of Labor within the time specified in section 8122(a)(2) of this title."⁴ Section 8122(a)(2) provides that written notice of the injury shall be given "within 30 days."⁵ The context of section 8122 makes clear that this means within 30 days of the date of the injury.⁶

² The Board notes that, on appeal, appellant's attorney contends that the Office hearing representative denied appellant's claim for compensation. The Office hearing representative, however, merely denied appellant's entitlement to continuation of pay. As discussed *infra*, appellant continues to be entitled to compensation benefits for his accepted lumbar strain.

³ 5 U.S.C. §§ 8101-8193.

⁴ 5 U.S.C. § 8118(a).

⁵ *Id.* at § 8122(a)(2).

⁶ *Thomas A. Faber*, 50 ECAB 566 (1999).

The document in the case record that serves as a claim for continuation of pay is a Form CA-1 filed by appellant on February 12, 2002. As this claim was filed more than 30 days after appellant's injury on January 11, 2002, appellant's claim for continuation of pay is barred by statute.

With respect to the circumstances that appellant maintains prevented him from filing his claim within 30 days of his injury, the Board has held that section 8122(d)(3) of the Act,⁷ which allows 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.⁸ Because the Act makes no provisions for the time limitation in section 8118(a), no exceptional or mitigating circumstance, including error by the employing establishment, can entitle a claimant to continuation of pay who has not filed a claim within 30 days of the injury.⁹

On appeal, appellant's attorney contends that appellant did not date the CA-1 claim form on February 12, 2002 and alleges that perhaps Mr. Lewis provided the date. The Board finds, however, that appellant signed the form and, therefore, it would be reasonable to assume that he also dated the form. Furthermore, in the statement provided by appellant with his claim form, he does not indicate that he submitted a signed CA-1 claim form on February 7, 2002. Lastly, the Board notes that Mr. Lewis' April 15, 2002 affidavit, in which he states that he completed his portion of the claim form on February 12, 2002, is directly contradicted by the claim form itself, in which the date provided by Mr. Lewis is February 15, 2002. The Board, therefore, finds Mr. Lewis' April 15, 2002 affidavit of decreased probative value and concludes that appellant is not entitled to continuation of pay.

This decision, however, does not preclude appellant from receiving compensation, as distinguished from continuation of pay, for any disability resulting from the January 11, 2002 employment injury. Continuation of pay is distinguished from compensation for disability. Continuation of pay, for the purposes of section 8118(a) of the Act, is the employee's "pay," while "compensation" is the money allowance or other benefit paid to an employee for a work-related disability under the Employees' Compensation Fund. Although appellant is barred from receiving continuation of pay, he may be entitled to compensation benefits under the Act provided appropriate medical documentation is provided to the Office. The Board notes that the Office, in attachments to a letter to appellant dated February 26, 2002, advised appellant regarding his entitlement to compensation and the requisite steps to be followed, including the filing of a Form CA-7, claim for compensation, regarding lost pay because of his injury.¹⁰

⁷ 5 U.S.C. § 8122(d)(3).

⁸ *Loretta R. Celi*, 51 ECAB 560 (2000).

⁹ *Laura L. Harrison*, 52 ECAB ____ (Docket No. 01-150, issued September 27, 2001).

¹⁰ The record does not indicate that appellant submitted a Form CA-7, claim for compensation.

The decision of the Office of Workers' Compensation Programs dated September 25, 2002 is hereby affirmed.

Dated, Washington, DC
May 12, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member