

**United States Department of Labor
Employees' Compensation Appeals Board**

JERRY W. WAGNER, Appellant

and

**DEPARTMENT OF THE ARMY,
EDGEWOOD CHEMICAL BIOLOGICAL
CENTER, Edgewood, MD, Employer**

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**Docket No. 05-67
Issued: March 4, 2005**

Appearances:
Jerry W. Wagner, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chairman
COLLEEN DUFFY KIKO, Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On October 4, 2004 appellant filed a timely appeal from the December 23, 2003 and August 2, 2004 merit decisions of the Office of Workers' Compensation Programs, which denied continuation of pay. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review these denials.

ISSUE

The issue is whether appellant is entitled to continuation of pay.

FACTUAL HISTORY

On November 12, 2003 appellant, then a 60-year-old industrial equipment mechanic leader, filed a claim alleging that he injured his right foot on October 8, 2003 while in the performance of his duties. He stopped work that day. On December 23, 2003 the Office accepted his claim for Achilles tendinitis but denied continuation of pay because he did not report the injury on a form approved by the Office within 30 days following the injury.

Appellant requested reconsideration. He explained the delay in filing:

“I reported the injury to my supervisor, Mr. Denny Beattie. He then contacted the Safety Office and reported it. On 3 Nov 03, I came back to work and provided the doctor’s diagnosis to Mr. Beattie so he could fill out the FECA paperwork. Mr. Beattie made arrangements with the local FECA at Aberdeen Proving Ground to meet with them on 10 Nov 03, which is a ‘walk-in’ day. I accompanied Mr. Beattie on 10 Nov 03 to the FECA Office and discovered the representative had called in and taken the day off. We were told to come back on 12 Nov 03 (which we did) since the 11th was a federal holiday. We met with the local FECA representative on 12 Nov 03. The local representative, Cheryl Adams, promised me she would date the COP form as 10 Nov 03 because we were inconvenienced when she took the day off.

“I discovered Ms. Adams had not dated the COP form as she promised me. The form is dated 12 Nov 03 and not 10 Nov 03.”

Appellant submitted a statement from Mr. Beattie to support his account of events.

In a decision dated August 2, 2004, the Office denied modification of its prior decision, finding that he was not entitled to continuation of pay even if he had succeeded in completing his injury form on November 10, 2003.¹

LEGAL PRECEDENT

Section 8118(a) of the Federal Employees’ Compensation Act provides for the 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) of this title.”² 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.³

The Board has held that section 8122(d)(3) of the Act,⁴ 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), which sets forth the filing requirements for continuation of pay. There is, therefore, no provision in the Act for excusing an

¹ Although the decision’s cover letter indicated that the Office did not review the merits of appellant’s case, the decision reviewed the merits of appellant’s argument and his entitlement to continuation of pay.

² 5 U.S.C. § 8118(a).

³ *George A. Harrell*, 29 ECAB 338 (1978).

⁴ 5 U.S.C. § 8122(d)(3).

employee's failure to file a claim for continuation of pay within 30 days of the employment injury.⁵

ANALYSIS

Appellant's employment injury occurred on October 8, 2003. He did not file a written claim for continuation of pay within 30 days. As there is no provision in the Act for excusing a late filing, appellant is not entitled to continuation of pay. This is so regardless of any failure on the part of his supervisor⁶ or any other individual.

CONCLUSION

Appellant is not entitled to continuation of pay.

ORDER

IT IS HEREBY ORDERED THAT the August 2, 2004 and December 23, 2003 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: March 4, 2005
Washington, DC

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

Michael E. Groom
Alternate Member

⁵ *William E. Ostertag*, 33 ECAB 1925, 1932 (1982).

⁶ *See* 20 C.F.R. § 10.211 (1999) (the employer's responsibilities in continuation of pay cases).