

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

D.H., Appellant

and

**DEPARTMENT OF DEFENSE, NATIONAL
SECURITY AGENCY, Fort Meade, MD,
Employer**

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**Docket No. 09-405
Issued: August 18, 2009**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On November 25, 2008 appellant filed a timely appeal from an August 14, 2008 merit decision of the Office of Workers' Compensation Programs denying continuation of pay. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

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

FACTUAL HISTORY

On June 23, 2008 appellant, a 58-year-old problem management team leader, filed a traumatic injury claim for an injury she sustained on April 25, 2008. She attributed her injury to an April 25, 2008 incident when she fell into a hole in the floor. On her Form CA-1 appellant noted that she did not stop work as result of this incident because as of the date of injury, she had used all of her sick and annual leave. In a subsequent letter, dated October 31, 2008, she

explained that, rather than taking time off, she took additional medication so that she could keep working.

Other than her CA-1 form and an incident tracking form, dated April 25, 2008, appellant submitted no other evidence in support of her claim, and by letter dated June 30, 2008 the Office notified appellant that the evidence she submitted in support of her claim was insufficient to support her claim.

Appellant submitted a treatment report dated April 25, 2008 and an undated hand-written note describing how the incident of April 25, 2008 occurred. In a separate, undated statement, she responded to the issues raised in the Office's June 30, 2008 letter. Appellant asserted that her injury was reported within the 30-day reporting period and that the supervisor, who was on leave on the date of injury, learned of the incident the week following her fall.

In a report dated May 21, 2008, Dr. James W. Reinig, Board-certified in nuclear medicine, reported that a computerized tomography scan of appellant's lumbar spine revealed mild generalized bulging at the L2-3 level and interbody spaces were observed at the L3-4, L4-5 and L5-6 levels. He also reported observing no herniation or evidence of spinal stenosis.

By decision dated August 14, 2008, the Office accepted appellant's claim for right wrist sprain and sprain of the lumbosacral joint ligament. By separate decision, also dated August 14, 2008, it denied appellant's claim for continuation of pay because the evidence of record did not establish that she lost any time from work during the continuation of pay period and the injury was not reported on an Office-approved form within 30 days of the alleged injury. The Office noted that, despite this denial, appellant remained eligible for wage-loss benefits resulting from this decision and could claim them by filing a Form CA-7 with her employer.¹

LEGAL PRECEDENT

Section 8118² of the Federal Employees' Compensation 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 traumatic injury with her immediate supervisor on a form approved by the Secretary of Labor within the time specified in section 8122(a)(2) of this title. Section 8122(a)(2)⁴ provides that written notice of injury must be given as specified in section 8119. The latter section provides in part that notice of injury shall be given in writing within 30 days after the injury.⁵

¹ On appeal, appellant submitted additional evidence. The Board may not consider evidence for the first time on appeal which was not before the Office at the time it issued the final decision in the case. 20 C.F.R. § 501.2(c). *See J.T.*, 59 ECAB ___ (Docket No. 07-1898, issued January 7, 2008) (holding the Board's jurisdiction is limited to reviewing the evidence that was before the Office at the time of its final decision.)

² 5 U.S.C. § 8118.

³ *Id.* at §§ 8101-8193.

⁴ *Id.* at § 8122(a)(2).

⁵ *Id.* at § 8119(a), (c). *See also Gwen Cohen-Wise*, 54 ECAB 732 (2003).

Claims that are timely under section 8122 are not necessarily timely under section 8118(a). Section 8118(a) makes continuation of pay contingent on the filing of a written claim within 30 days of the injury.⁶ When an injured employee makes no written claim for a period of wage loss within 30 days, she is not entitled to continuation of pay, notwithstanding prompt notice of injury.⁷

The Act's implementing regulations provide, in pertinent part, that to be eligible for continuation of pay, a claimant must: (1) have a traumatic injury which is job related and the cause of the disability and/or the cause of lost time due to the need for medical examination and treatment; (2) file Form CA-1 within 30 days of the date of injury; and (3) begin losing time from work due to the traumatic injury within 45 days of the injury.⁸

ANALYSIS

On June 23, 2008 appellant filed a traumatic injury claim for an April 25, 2008 injury. Because she filed the claim on June 23, 2008, the Board finds that it was not filed within 30 days of the injury, as specified in the Act. Therefore, appellant is not entitled to continuation of pay.⁹

On appeal, appellant alleged that her supervisor was on leave on the date of injury but learned of the incident upon return to work. She also alleged that she did not know there were particular forms that she was required to complete to properly file a claim. Appellant also notes that in lieu of taking time off from work, she took additional medication. There are no exceptions to the requirement that a claim for continuation of pay be filed within 30 days of the date of injury¹⁰ and that the responsibility for filing a claim rests exclusively with the injured employee.¹¹

The Board notes that, although appellant is barred from receiving continuation of pay, she may be entitled to other compensation benefits under the Act. As appellant's claim was accepted, a decision denying continuation of pay does not affect appellant's entitlement to compensation benefits as she may still claim wage-loss compensation for disability or claim compensation for medical treatment rendered due to the effects of the accepted employment injury.¹²

⁶ *Id.* at § 8118(a).

⁷ *Laura L. Harrison*, 52 ECAB 515 (2001).

⁸ 20 C.F.R. § 10.205(a)(1-3). *See also Carol A. Lyles*, 57 ECAB 265 (2005).

⁹ *See Dodge Osborne*, 44 ECAB 849 (1993).

¹⁰ *See id.*; *Theresa Samilton*, 40 ECAB 955 (1989) and *William E. Ostertag*, 33 ECAB 1925 (1982).

¹¹ *See Catherine Budd*, 33 ECAB 1011 (1982) (continuation of pay denied where employee did not timely file her claim because the employing establishment erroneously told her that her medical records and accident report were sufficient).

¹² *Dodge Osborne*, *supra* note 9 (noting that, although the employee was not entitled to continuation of pay, his claim was timely so as to make him eligible for consideration of other compensation benefits under other provisions of the Act).

CONCLUSION

The Board finds that appellant is not entitled to continuation of pay for her April 25, 2008 employment injury because she failed to timely file a claim within 30 days of the injury.

ORDER

IT IS HEREBY ORDERED THAT the August 14, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 18, 2009
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board