

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

Y.M., Appellant)	
)	
and)	Docket No. 08-2320
)	Issued: June 22, 2009
U.S. POSTAL SERVICE, POST OFFICE,)	
Atlanta, GA, Employer)	
)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 25, 2008 appellant filed a timely appeal from a merit decision of the Office of Workers' Compensation Programs dated February 12, 2008 and a May 28, 2008 decision denying her request for a review of the written record. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over these issues.

ISSUES

The issues are: (1) whether appellant is entitled to continuation of pay for any lost time from work due to the June 1, 2007 employment injury; (2) whether appellant met her burden of proof in establishing that she sustained a traumatic injury in the performance of duty on June 1, 2007; and (3) whether the Office properly denied appellant's request for an examination of the written record.

FACTUAL HISTORY

On December 22, 2007 appellant, then a 45-year-old clerk, filed a traumatic injury claim alleging that, on June 1, 2007, she sustained pain in her left arm from the shoulder to the elbow as a result of reaching above her head and lifting at work. She stopped work on December 28, 2007. The employing establishment controverted the claim on December 22, 2007 for continuation of pay and indicated that the alleged "incident is over six months and was not reported to management." In a separate statement accompanying the claim, Patsy Banks, an

employing establishment health and resource management specialist, controverted the claim. She stated that the alleged incident occurred over six months earlier and appellant never reported the claim to management.

By letter dated January 7, 2008, the Office advised appellant that additional factual and medical evidence was needed. Appellant was specifically requested to explain why written notice of her injury was not reported to her supervisor within 30 days. The Office allotted appellant 30 days within which to submit the requested information.

On February 12, 2008 the Office received several reports from Dr. John P. Kelly, Board-certified in nuclear medicine and a treating physician. They included several treatment notes dated November 19 and December 20, 2007 and January 3, 2008 and provided a history of injury and findings. They also included his December 28, 2007 operative report, in which Dr. Kelly performed diagnostic arthroscopy, debridement of labrum and subacromial decompression with release for impingement of the left shoulder with degeneration of anterior labrum.

By decision also dated February 12, 2008, the Office determined that appellant was not entitled to continuation of pay during her absence from work because the injury was not reported on a form approved by the Office within 30 days following the injury.

In a separate February 12, 2008 decision, the Office denied appellant's claim on the grounds that she did not submit any medical evidence that provided a diagnosis that could be connected to the claimed work-related event or condition. It stated that it advised appellant in a January 7, 2008 letter of the type of evidence needed to establish her claim but advised that it did not receive any further evidence from appellant.

On April 15, 2008 the Office received appellant's request for a review of the written record. The postmark was stamped April 9, 2008.

By decision dated May 28, 2008, the Office denied her request for a review of the written record. It determined that appellant's request was untimely and, therefore, she was not entitled to a review as a matter of right. The Office further exercised its discretion by considering appellant's request and determined that the issue could equally be addressed by requesting reconsideration.

LEGAL PRECEDENT -- ISSUE 1

Section 8118¹ of the Federal Employees' Compensation Act² 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 his 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)³ provides that written notice of injury must be given as specified

¹ 5 U.S.C. § 8118.

² *Id.* at §§ 8101-8193.

³ *Id.* at § 8122(a)(2).

in section 8119. The latter section provides in part that notice of injury shall be given in writing within 30 days after the injury.⁴

Section 10.205 of the Office's regulations provides in pertinent part that to be eligible for continuation of pay, a person must: "(1) [h]ave 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) [f]ile Form CA-1 within 30 days of the date of the injury; and (3) [b]egin losing time from work due to the traumatic injury within 45 days of the injury."⁵

ANALYSIS -- ISSUE 1

In this case, appellant's traumatic injury claim, Form CA-1, was filed on December 22, 2007, over six months after her claimed June 1, 2007 work injury. The statutory requirement for establishing entitlement to continuation of pay is that the notice of the injury must be provided on the appropriate form within 30 days of the date of injury. Thus, appellant's filing of the CA-1 form is not timely regarding her entitlement to continuation of pay. The record does not contain any evidence showing that appellant gave the requisite notice to the employing establishment within 30 days of the injury.⁶ Additionally, the employing establishment controverted the claim and confirmed that it was not reported to management for over six months. Regardless of whether the Office ultimately accepts that appellant sustained an employment injury on June 1, 2007, she is not entitled to continuation of pay as she did not file her claim within 30 days of the claimed injury. This statutory requirement cannot be waived by the Board.

As appellant did not file a Form CA-1 or otherwise make a written claim for wage loss within 30 days of the date of the injury, appellant is not eligible for continuation of pay.

LEGAL PRECEDENT -- ISSUE 2

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it must first be determined whether a "fact of injury" has been established. First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time, place and in the manner alleged.⁷ Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury.⁸

ANALYSIS -- ISSUE 2

The Board notes that the Office's February 12, 2008 decision denied appellant's claim because she did not submit any medical evidence providing a diagnosis which could be

⁴ *Id.* at § 8119(a), (c); see *Gwen Cohen-Wise*, 54 ECAB 732 (2003).

⁵ 20 C.F.R. § 10.205(a)(1)-(3).

⁶ See *Laura L. Harrison*, 52 ECAB 515 (2001).

⁷ *John J. Carlone*, 41 ECAB 354 (1989).

⁸ *Id.*

connected to the claimed work-related event or condition. The Office stated that it advised appellant in a letter dated January 7, 2008 of the type of factual and medical evidence needed to establish her claim but that it did not receive any further evidence from appellant. The Board notes, however, that appellant submitted additional medical evidence from her treating physician, Dr. John P. Kelly, Board-certified in nuclear medicine, which was received by the Office on February 12, 2008. Dr. Kelly's treatment notes were dated November 19, December 20, 2007 and January 3, 2008 and provided a history of injury and findings.

The Board has duly considered the matter and finds that the case is not in posture for a decision and must be remanded to the Office. The Board's jurisdiction is limited to reviewing the evidence that was before the Office at the time of its final decision.⁹ In the case of *William A. Couch*,¹⁰ the Board held that, when adjudicating a claim, the Office is obligated to consider all evidence properly submitted by appellant and received by the Office before the final decision is issued. In this case, the Office did not consider the medical evidence received on February 12, 2008. Accordingly, the case will be remanded to the Office to enable it to properly consider all of the evidence submitted at the time of the February 12, 2008 decision. Following this and any other development deemed necessary, the Office shall issue a *de novo* decision on appellant's claim.

LEGAL PRECEDENT -- ISSUE 3

Section 8124(b)(1) of the Act provides that a claimant for compensation not satisfied with a decision of the Secretary is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on her claim before a representative of the Secretary.¹¹ Sections 10.617 and 10.618 of the federal regulations implementing this section of the Act provide that a claimant shall be afforded a choice of an oral hearing or a review of the written record by a representative of the Secretary.¹² The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when the request is untimely or made after reconsideration, are a proper interpretation of the Act and Board precedent.¹³

ANALYSIS -- ISSUE 3

By decision dated February 12, 2008, the Office denied appellant's request for continuation of pay. Appellant's letter requesting a review of the written record was postmarked April 9, 2008, more than 30 days after the February 12, 2008 decision. Thus, the Office properly found that her request for a review of the written record was not timely filed under section 8124(b)(1) of the Act and that appellant was not entitled to such a review as a matter of right.

⁹ 20 C.F.R. § 501.2(c).

¹⁰ 41 ECAB 548 (1990). *See also Linda Johnson*, 45 ECAB 439 (1994) (applying *Couch* in a situation where the Office did not consider evidence received on the date of its decision).

¹¹ 5 U.S.C. § 8124(b)(1).

¹² 20 C.F.R. §§ 10.616, 10.617.

¹³ *Claudio Vasquez*, 52 ECAB 496 (2002).

The Office then exercised its discretion and determined that the issue in the case could equally well be addressed in a request for reconsideration. As the only limitation on its authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deductions from known facts.¹⁴ The Board finds that there is no evidence of record that the Office abused its discretion in denying appellant's request. Thus, the Board finds that the Office's denial of appellant's request for an examination of the written record was proper under the law and the facts of this case.

CONCLUSION

The Board finds that appellant has not established that she is eligible for continuation of pay and that the Office properly denied her request for a review of the written record. The Board further finds that this case is not in posture for decision regarding whether appellant sustained an injury in the performance of duty on June 1, 2007.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated May 28 and February 12, 2008, regarding continuation of pay, are affirmed. The February 12, 2008 decision denying appellant's traumatic injury claim is set aside and the case remanded for further action consistent with this decision.

Issued: June 22, 2009
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

¹⁴ *Daniel J. Perea*, 42 ECAB 214 (1990).