

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

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**P.E., Appellant**

**and**

**DEPARTMENT OF VETERANS AFFAIRS,  
VETERANS ADMINISTRATION MEDICAL  
CENTER, Los Angeles, CA, Employer**

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**Docket No. 09-1760  
Issued: February 26, 2010**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

DAVID S. GERSON, Judge  
COLLEEN DUFFY KIKO, Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On June 26, 2009 appellant filed a timely appeal from a merit decision of the Office of Workers' Compensation Programs dated April 1, 2009. Under 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 was entitled to continuation of pay.

**FACTUAL HISTORY**

Appellant, a 56-year-old nursing assistant, filed a Form CA-1 claim for traumatic injury on March 13, 2009, alleging that she sustained an injury to her buttocks, upper back and lower back while trying to move a patient on February 9, 2009.

By decision dated April 1, 2009, the Office found that appellant was not entitled to continuation of pay, as her notice of traumatic injury was not timely filed on an approved form

within the 30-day period following the employment injury. On the same date, it accepted her claim for back sprain of the lumbar region and thoracic or lumbosacral radiculitis.

### **LEGAL PRECEDENT**

Section 8118 of the Federal Employees' Compensation Act<sup>1</sup> authorizes the continuation of pay of an employee "who has filed a claim for a period of wage loss due to a traumatic injury with her immediate superior on a form approved by the Secretary of Labor within the time specified in section 8122(a)(2) of this Title."<sup>2</sup> Section 8122(a)(2) states specifically that written notice of injury or death must be given within 30 days of the date of the injury.<sup>3</sup> Payments under this section are not considered compensation under the Employees' Compensation Fund."<sup>4</sup>

The Board has held that the responsibility for filing a claim rests with the injured employee.<sup>5</sup> The Board has also held that section 8122(d)(3) of the Act, 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.<sup>6</sup> There is no provision in the Act for excusing an employee's failure to file a claim for continuation of pay within 30 days of the employment injury.<sup>7</sup>

### **ANALYSIS**

Appellant's traumatic injury occurred on February 9, 2009; however, the claim for compensation and continuation of pay was dated March 13, 2009, more than 30 days after the date of injury.<sup>8</sup> The Act provides for continuation of pay for an eligible employee who has filed a claim for compensation.<sup>9</sup>

Office regulations provide, in pertinent part, that to be eligible for continuation of pay, an employee must: (1) have a traumatic injury which is job related and the cause of the disability,

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<sup>1</sup> 5 U.S.C. §§ 8101 *et seq.*

<sup>2</sup> *Id.* at § 8122(a)(2).

<sup>3</sup> *E.g., Myra Lenburg*, 36 ECAB 487 (1985). *See* 20 C.F.R. § 10.201(a)(3); *George A. Harrell*, 29 ECAB 338 (1978).

<sup>4</sup> 5 U.S.C. § 8118(e)

<sup>5</sup> *See Catherine Budd*, 33 ECAB 1011 (1982).

<sup>6</sup> 5 U.S.C. § 8118(a). *See Dodge Osborne*, 44 ECAB 849 (1993); *see Teresa Samilton*, 40 ECAB 955 (1989); *see William E. Ostertag*, 33 ECAB 1925 (1982).

<sup>7</sup> *Id.*

<sup>8</sup> The Office carries the date of injury as February 3, 2009 but appellant alleges that her claims have always maintained the date of injury as February 9, 2009.

<sup>9</sup> *Supra* note 2.

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 the injury; and (3) begin losing time from work due to the traumatic injury within 45 days of the injury.<sup>10</sup>

Continuation of pay requires the employing establishment to continue the employee's regular pay during any periods of disability, up to a maximum of 45-calendar days. This is paid by the employing establishment not the Office. The ultimate decision as to whether appellant is eligible for continuation of pay rests with the Office.<sup>11</sup> As noted, the time limitation provisions for filing a claim for continuation of pay are different from those for filing a claim for compensation.

Appellant maintains that her claim was delayed in processing by computer error or paperwork mistakes, and believes her supervisor allegedly failed to provide her with the proper forms or inform her of the proper procedures. Nonetheless, there is no provision under the Act for extensions of time based on exceptional circumstances when filing for continuation of pay.<sup>12</sup>

The Board notes that, although appellant is barred from receiving continuation of pay, she is entitled to compensation benefits under the Act. In fact, the Office has accepted appellant's claim by decision dated April 1, 2009 and explained that the decision denying her continuation of pay did not affect her entitlement to compensation benefits.<sup>13</sup> Accordingly, its April 1, 2009 decision denying appellant's claim for continuation of pay is affirmed.<sup>14</sup>

### CONCLUSION

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

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<sup>10</sup> 20 C.F.R. § 10.205(a)(1-3).

<sup>11</sup> *Id.* at § 10.200.

<sup>12</sup> *Supra* note 6.

<sup>13</sup> Appellant may still claim compensation for the wage loss she sustained beginning February 3, 2009 by filing a claim.

<sup>14</sup> Subsequent to the April 1, 2009 Office decision, appellant submitted additional evidence. The Board's jurisdiction is limited to the evidence that was before the Office at the time it issued its final decision. *See* 20 C.F.R. § 501.2(c). The Board may not consider this evidence for the first time on appeal.

**ORDER**

**IT IS HEREBY ORDERED THAT** the April 1, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 26, 2010  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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