

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

_____)	
W.G., Appellant)	
)	
and)	Docket No. 10-998
)	Issued: November 30, 2010
DEPARTMENT OF VETERANS AFFAIRS,)	
VETERANS HEALTH ADMINISTRATION,)	
Dayton, OH, Employer)	
_____)	

<i>Appearances:</i>	<i>Case Submitted on the Record</i>
<i>Alan J. Shapiro, Esq., for the appellant</i>	
<i>Office of Solicitor, for the Director</i>	

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 1, 2010 appellant, through his attorney, filed a timely appeal from September 2, 2009 and February 1, 2010 decisions of the Office of Workers' Compensation Programs denying his claim for 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 for his October 22, 2007 employment injury.

On appeal, appellant contends that the Office decisions are contrary to fact and law.

FACTUAL HISTORY

On March 11, 2008 appellant, then a 46-year-old materials handler, filed a traumatic injury claim (Form CA-1) alleging that he injured his right shoulder while moving and flipping a table right-side up at work on October 22, 2007. The claim form had a note from the employing establishment that stated, "Do not count as late; CA-1 [form] was originally filed in employee

health file.” The employing establishment controverted appellant’s claim for continuation of pay on the grounds that he failed to submit a CA-1 form claim within 30 days of the October 22, 2007 injury, as required. On March 19, 2009 the Office accepted his claim for a right shoulder and upper arm sprain. On August 27, 2009 it expanded the acceptance of his claim to include a right shoulder rotator cuff tear.

By decision dated September 2, 2009, the Office denied appellant’s claim for continuation of pay, finding that he failed to submit a written claim within 30 days of his October 22, 2007 employment injury.

Appellant requested a hearing before an Office hearing representative that was held on December 10, 2009. He testified that he did not complete a CA-1 form. Appellant stated that, after his work injury, he was sent to the occupational health clinic by Pearl Hawkins, his fill-in supervisor. The clinic had him fill out some paperwork that “might have been a CA-1” form. Appellant’s union representative, Ray Delawder, Jr., testified that the CA-1 form claim had to be generated by employee health and forwarded to the supervisor. Appellant understood that the injury form was to be forwarded and completed by his supervisor. Appellant’s attorney advised that appellant did not know whether the clinic initiated the claim form process at the time of the injury. Appellant later learned that the employing establishment did not forward the paperwork to his supervisor, Elaine Aniton. Initially, Ms. Aniton refused to fill out the injury form because he was on vacation at the time, but completed it after the chief of service intervened. Appellant testified that the reason for his untimely filing was the uncooperative nature of the employing establishment.

In a letter to the Office dated January 8, 2010, the employing establishment contended that appellant “could have been assisted, if he wanted to file a claim” at the time of the employment injury on October 22, 2007. After appellant contacted the employing establishment in January 2008 concerning the October 22, 2007 work injury, it reviewed the incomplete CA-1 form in its Automated Safety Information Surveillance Tracking System (ASISTS) and the injury report that was initiated by the clinic. The employing establishment noted that it gave him a copy of the CA-1 form for completion and it was signed by appellant and his supervisor on March 11, 2008.

By decision dated February 1, 2010, an Office hearing representative affirmed the September 2, 2009 decision denying continuation of pay for appellant’s October 22, 2007 employing injury as untimely filed.

LEGAL PRECEDENT

Section 8118 of the Federal Employees’ Compensation Act¹ 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) provides that written notice of injury must be given as specified in section 8119. The

¹ 5 U.S.C. §§ 8101-8193, 5 U.S.C. § 8118.

latter section provides in part that notice of injury shall be given in writing within 30 days after the injury.²

Claims that are timely under section 8122 are not necessarily timely under section 8118(a). The Act authorizes continuation of pay for an employee who has filed a valid claim for traumatic injury.³ Section 8118(a) makes continuation of pay contingent on the filing of a written claim within 30 days of the injury. When an injured employee makes no written claim for a period of wage loss within 30 days, he or she is not entitled to continuation of pay, notwithstanding prompt notice of injury.⁴

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 and/or the cause of lost time due to the need for medical examination and treatment; (2) file a CA-1 form 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.⁵

ANALYSIS

On March 11, 2008 appellant filed a claim for an October 22, 2007 traumatic injury. Because he did not file a claim within 30 days from the date of injury, the time specified in section 8118(a) and 8122(a)(2) of the Act,⁶ he is not entitled to continuation of pay.

When an injured employee makes no written claim for a period of wage loss within 30 days, he is not entitled to continuation of pay, notwithstanding prompt notice of injury. The record shows that appellant provided notice of injury to his acting supervisor on October 22, 2007, but this oral notice is not determinative of whether he is entitled to continuation of pay under section 8118(a).⁷

Appellant argued that his untimely filing was due to the uncooperative nature of the employing establishment, as it did not forward a CA-1 claim form to his supervisor. He noted that he filled out paperwork at the employer's health unit that might have been a CA-1 form. In the case of *William E. Ostertag*,⁸ the Board explained that the exceptional circumstances provision of section 8122(d)(3), which may excuse the untimely filing of an original claim for compensation under section 8122(a) and (b), is not applicable to section 8118(a) which concerns a claim for continuation of pay. Because the Act makes no provision for an exception to the time limitation in section 8118(a), no exceptional or mitigating circumstance, including error by the

² *Id.* at § 8119(a), (c).

³ *Id.* at § 8118(a).

⁴ *P.R.*, 60 ECAB ____ (Docket No. 08-2239, issued June 2, 2009); *W.W.*, 59 ECAB 533 (2008).

⁵ 20 C.F.R. § 10.205(a)(1-3).

⁶ 5 U.S.C. §§ 8118(a), 8122(a)(2).

⁷ *J.M.*, 61 ECAB ____ (Docket No. 09-1563, issued February 26, 2010).

⁸ 33 ECAB 1925, 1932 (1982).

employing establishment, can entitle a claimant to continuation of pay who has not filed a written claim within 30 days of the date of injury.⁹ Appellant did not submit written notice of injury on an approved form until March 11, 2008, more than 30 days after the October 22, 2007 employment injury, when he submitted a CA-1 form.¹⁰ Therefore, he is not entitled to continuation of pay.

CONCLUSION

The Board finds that appellant is not entitled to continuation of pay for his October 22, 2007 employment injury.

ORDER

IT IS HEREBY ORDERED THAT the February 1, 2010 and September 2, 2009 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: November 30, 2010
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

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

⁹ *J.M.*, *supra* note 7; *Laura L. Harrison*, 52 ECAB 515 (2001); *see also Loretta R. Celi*, 51 ECAB 560 (2000).

¹⁰ *See Robert E. Kimzey*, 40 ECAB 762 (1989) where the Board found that, despite appellant's contentions that he attempted to notify the proper employing establishment officials to file a compensation claim and they were unaware of the correct filing procedures, as no exceptional circumstances excuse timely filing for continuation of pay, he did not file his claim within the applicable time frames. The Board noted that appellant's narrative notification did not comport with the Office's regulations setting forth the requirements for filing. *Id.* at 764 n.4. *See also* 20 C.F.R. §§ 10.205(a) and 10.210(a).