

employing establishment about his condition on September 28, 2007. Appellant claimed continuation of pay. The employing establishment contended that he did not provide notice until October 15, 2007, did not incur time loss due to disability and was ineligible for continuation of pay as he voluntarily resigned effective October 16, 2007 “in lieu of being terminated.”

An October 17, 2007 correspondence from the employing establishment notified appellant of his dismissal during the probationary period. It specified:

“On July 5, 2007 you were given and acknowledged advance notice that you must achieve a minimum passing grade average in each of the major study areas ... in order to satisfactorily complete the Border Patrol Basic Training. You were advised that failure to achieve a passing grade would result in termination of your appointment....

“On August 30, 2007 you were counseled by your physical techniques instructor regarding *your unsatisfactory progress in the physical techniques program*. In addition, you were counseled on October 3, 2007 [and] ... were advised that your physical techniques grade average was below the minimum requirement.

“On September 28, 2007 you failed to successfully complete the physical techniques program. Accordingly, your separation from the [employing establishment] will be effective at close of business today.”

The letter included a certificate of service and resignation form, both of which were signed and dated October 16, 2007 by appellant.²

Records from the employing establishment’s health unit dated October 2, 2007 assessed that appellant sustained a right groin muscle strain on September 28, 2007 that since worsened and restricted any lower body physical activity for two days. Appellant was cleared on October 3, 2007 as “able to participate fully in all training programs” but was placed on restrictive status and prohibited from engaging in weight-bearing activity for three days on October 9, 2007. Subsequent October 12 and 15, 2007 notes prohibited upper and lower body activity for eight weeks.

An October 15, 2007 attending physician’s report signed by a physician’s assistant advised that appellant was able to resume light work but should not attempt physical training “until healed.”

In a December 13, 2007 statement, appellant detailed that he first felt a strain in the inner groin and thigh area approximately one week before September 28, 2007. Exercise aggravated the injury, which worsened to the point that he needed crutches to walk. Because medical staff placed him on restrictive status, appellant could not complete the physical training course and was terminated on October 17, 2007. Thereafter, his physician limited him to sedentary work.

² The certificate of service was also signed and dated October 16, 2007 by the serving official and a witness.

An October 15, 2007 report signed by Dr. Roger Hill, a family practitioner, advised that appellant “probably should avoid his final physical training test until he is healed.”

The Office accepted appellant’s claim for right closed fracture of the pubic ramus on November 24, 2009, but by December 8, 2009 denied continuation of pay, finding that he reported the work incident after his federal employment ended.

On December 11, 2009 appellant filed a claim for disability compensation for the period September 29, 2007 to July 15, 2008, which was granted.³

Appellant requested a telephonic hearing, which was scheduled for March 18, 2010. At the hearing, he testified that his training was supposed to span five months and he was one to two weeks away from completion at the time of the September 28, 2007 incident. Appellant related that the employing establishment required him to finish his final running test, notwithstanding his pelvic fracture. As he could not perform, he was told by the chief patrol agent that he must resign or “I have to kick you out because you couldn’t ... complete the exercises to become a border patrol agent.”

In an April 6, 2010 letter to an Office hearing representative, the employing establishment maintained that appellant was terminated on October 16, 2007. It attached an October 17, 2007 notification of departure memorandum stating that appellant was terminated “effective close of business today.”

On June 9, 2010 the Office hearing representative affirmed the December 8, 2009 decision.

LEGAL PRECEDENT

Section 8118 of the Act authorizes the continuance of regular pay, for a period not to exceed 45-calendar days of disability, of an employee who has timely filed a claim for wage loss due to a traumatic injury with his immediate superior on a form approved by the Secretary of Labor.⁴ To be eligible for continuation of pay, Office regulations specify that 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 the injury; and (3) begin losing time from work due to the traumatic injury within 45 days of the injury.⁵

³ Appellant argues that he was entitled to the augmented compensation rate as he claimed a dependent. This issue is not presently before the Board.

⁴ See 5 U.S.C. § 8118; 20 C.F.R. § 10.200(a).

⁵ *Id.* at § 10.205. See also *W.W.*, 59 ECAB 533 (2008).

Office regulations provide that an employer shall continue the regular pay of an eligible employee without break for up to 45-calendar days, except when the injury was not reported until after the employment has been terminated.⁶

ANALYSIS

Appellant sustained a right closed fracture of the pubic ramus on September 28, 2007 and filed a Form CA-1 application for traumatic injury on October 16, 2007, well within 30 days. The Office's decisions denied continuation of pay on the grounds that he did not report his injury until after his dismissal. The record shows that appellant voluntarily resigned or was terminated effective October 17, 2007.⁷ Appellant filed his claim on October 16, 2007.⁸ The fact that he may have been aware that his employment was about to end does not negate the fact that the injury was reported before he was resigned.

The record also reflects that the Office accepted that appellant's condition was employment related and granted disability compensation commencing September 28, 2007.⁹ Medical records for the period October 2 to 15, 2007 demonstrated that appellant was placed on restrictive status and advised to steer clear of weight-bearing and physical training activities for up to eight weeks due to the severity of the injury. Since all the regulatory requirements were satisfied, appellant was eligible for continuation of pay up to a maximum of 45-calendar days.¹⁰ Upon return of the record, the Office shall authorize appropriate continuation of pay.

CONCLUSION

The Board finds that appellant was entitled to continuation of pay for his accepted September 28, 2007 employment injury.

⁶ *Id.* at § 10.220(d). See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Continuation of Pay and Initial Payments*, Chapter 2.807.5(f) (March 2004).

⁷ The Board notes that the employing establishment vacillated between October 16 and 17, 2007 as the date of termination. However, personnel documents dated October 17, 2007 and drafted by the employing establishment, namely the termination notice and the notification of departure memorandum, expressly stated that appellant's dismissal was effective at the close of business "today." Hence, the Board is persuaded that October 17, 2007 is the proper date.

⁸ Even if appellant's resignation or termination occurred on October 16, 2007, this would not preclude a claim for continuation of pay under 20 C.F.R. § 10.220(d) as this was the same day that he filed his claim and would not constitute reporting the injury after the employment was terminated.

⁹ The first continuation of pay day is the first day disability begins following the date of injury. 20 C.F.R. § 10.215.

¹⁰ See *supra* note 5.

ORDER

IT IS HEREBY ORDERED THAT the June 9, 2010 decision of the Office of Workers' Compensation Programs is reversed. The case is remanded for further action consistent with this decision.

Issued: May 4, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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