

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

_____)
P.L., Appellant)
)
and)
)
DEPARTMENT OF VETERANS AFFAIRS,)
VETERANS HEALTH ADMINISTRATION,)
PUGET SOUND HEALTHCARE SYSTEM,)
Seattle, WA, Employer)
 _____)

Docket No. 11-493
Issued: September 22, 2011

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

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
 COLLEEN DUFFY KIKO, Judge
 JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 21, 2010 appellant filed a timely appeal from a December 13, 2010 decision of the Office of Workers' Compensation Programs (OWCP) denying his claim for continuation of pay as untimely filed. Pursuant to the Federal Employees' Compensation Act (FECA)¹ and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.²

ISSUE

The issue is whether appellant's claim for continuation of pay for his November 5, 2007 employment injury was timely filed.

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the issuance of the December 13, 2010 OWCP decision and on appeal, appellant submitted new evidence. The Board is precluded from reviewing evidence which was not before OWCP at the time it issued its final decision. *See* 20 C.F.R. § 501.2(c)(1).

On appeal, appellant contends that OWCP erred in its decision in violation of 20 C.F.R. §§ 10.7 and 10.100 as he filed his claim on a form approved by OWCP and did not file it within 30 days following the injury due to his status as a new employee without knowledge of the process and the uncooperative nature of his employing establishment. He further contends that the Doctrine of Equitable Tolling would apply in this case because the employing establishment has created a *de facto* situation wherein they have full knowledge that OWCP will deny all claims that are not filed within 30 days.

FACTUAL HISTORY

On July 8, 2010 appellant, then a 51-year-old housekeeping aid, filed a traumatic injury claim (Form CA-1) alleging that he was exposed to and contracted tuberculosis (TB) in the performance of duty on November 5, 2007. The employing establishment indicated that it was notified of the injury on October 22, 2010.

Appellant submitted a November 2007 tuberculin skin test form from the employing establishment's health clinic which indicated that he was on an elevator with a coughing patient. A November 6, 2007 check-in sheet reported that he visited the clinic for a TB shot due to exposure by a patient.

On December 13, 2010 OWCP accepted appellant's claim for nonspecific reaction to tuberculin test without active tuberculosis.

By decision dated December 13, 2010, OWCP denied appellant's claim for continuation of pay on the grounds that he failed to submit a written claim within 30 days of his November 5, 2007 employment injury.

LEGAL PRECEDENT

Section 8118 of FECA³ 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 latter section provides in part that notice of injury shall be given in writing within 30 days after the injury.⁴

Claims that are timely under section 8122 are not necessarily timely under section 8118(a). FECA authorizes continuation of pay for an employee who has filed a valid claim for traumatic injury.⁵ 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

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

⁴ *Id.* at § 8119(a), (c).

⁵ *Id.* at § 8118(a).

for a period of wage loss within 30 days, he or she is not entitled to continuation of pay, notwithstanding prompt notice of injury.⁶

ANALYSIS

On July 8, 2010 appellant filed a claim for a November 5, 2007 traumatic injury. Because he did not file a claim within 30 days from the date of injury, the time specified in sections 8118(a) and 8122(a)(2) of FECA,⁷ 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. A November 2007 tuberculin skin test form and a November 6, 2007 check-in sheet reporting that appellant visited the clinic for a TB shot due to exposure by a patient shows that he provided oral notice of injury to his employing establishment, but oral notice is not determinative of whether he is entitled to continuation of pay under 5 U.S.C. § 8118(a).⁸

On appeal, appellant contends that his untimely filing was due to his lack of knowledge of the process as a new employee and the uncooperative nature of the employing establishment. He noted that the only way to file a claim was through his supervisor on a computer system which was not made available for his use. In the case of *William E. Ostertag*,⁹ 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 FECA makes no provision for an exception to the time limitation in section 8118(a), no exceptional or mitigating circumstance, including error by the 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.¹⁰ Appellant did not submit written notice of injury on an approved form until July 8, 2010, more than 30 days after the November 5, 2007 employment injury, when he submitted a CA-1 form.¹¹ Therefore, he is not entitled to continuation of pay.

⁶ See *W.W.*, 59 ECAB 533 (2008). See also *P.R.*, Docket No. 08-2239 (issued June 2, 2009).

⁷ 5 U.S.C. §§ 8118(a), 8122(a)(2).

⁸ See *J.M.*, Docket No. 09-1563 (issued February 26, 2010).

⁹ 33 ECAB 1925 (1982).

¹⁰ See *Laura L. Harrison*, 52 ECAB 515 (2001). See also *S.C.*, Docket No. 10-460 (issued January 26, 2011).

¹¹ See *Robert E. Kimzey*, 40 ECAB 762 (1989) where the Board found that, despite appellant's contentions, *inter alia*, 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 OWCP'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).

On appeal, appellant contends that OWCP erred in its decision in violation of 20 C.F.R. §§ 10.7 and 10.100 and that the Doctrine of Equitable Tolling would apply in this case. For reasons stated above, the Board finds that his argument is not substantiated.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant's claim for continuation of pay for his November 5, 2007 employment injury was not timely filed.

ORDER

IT IS HEREBY ORDERED THAT the December 13, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 22, 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