

delivery truck on December 12, 2013, which involved continuous lifting of numerous boxes weighing from 40 to 75 pounds.²

In support of his claim, appellant submitted a February 6, 2015 medical report wherein Dr. Z. Mark Hongs, a physiatrist, noted that appellant sustained an employment-related low back injury on November 11, 1993,³ and that he had recurrent low back, right mid back, and right hip pain after he unloaded a truck for three days lifting 40 to 70 multiple pound boxes on December 12, 2013. Dr. Hongs diagnosed lumbar back sprain and noted that he also suspected lumbar spondylosis secondary to multiple recurrent lumbar strain.

On August 19, 2015 OWCP accepted appellant's traumatic injury claim for a sprain of the lumbar region of the back.

In a separate decision dated August 19, 2015, OWCP determined that appellant was not entitled to continuation of pay for any absence from work for the period December 13, 2013 to January 26, 2014. It determined that, based on Dr. Hongs' report, appellant's injury occurred over a period of three days and not during one work shift, and therefore his claim was for an occupational disease or illness, not for a traumatic injury.

On August 19, 2015 appellant requested reconsideration. He argued that he was injured during one work shift on the day of December 12, 2013.

By decision dated September 18, 2015, OWCP denied reconsideration without considering the merits of the claim.

LEGAL PRECEDENT -- ISSUE 1

Section 8118(a) of FECA authorizes continuation of pay, not to exceed 45 days, to an employee who has filed a claim for a period of wage loss due to a traumatic injury with his or her immediate superior on a form approved by the Secretary of Labor within the time specified in section 8122(a)(2) of this title.⁴ This latter section provides that written notice of injury shall be given within 30 days.⁵ The context of section 8122 makes clear that this means within 30 days of the injury.⁶

OWCP 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

² On August 8, 2014 appellant had filed a recurrence of his accepted November 11, 1997 injury, as of December 12, 2013. In an internal e-mail dated August 11, 2014, a representative from the Injury Compensation Department at the employing establishment noted that appellant's claim should be filed as a traumatic injury claim as he was describing a new injury.

³ The record indicates that appellant's previous employment injury occurred in November 1997, not 1993.

⁴ *Id.* at § 8118(a).

⁵ *Id.* at § 8122(a)(2).

⁶ *Robert M. Kimzey*, 40 ECAB 762, 763-64 (1989); *Myra Lenburg*, 36 ECAB 487, 489 (1985).

and/or the cause of lost time is due to the need for medical examination and treatment; (2) file a Form CA-1 within 30 days of the date of the injury (but if that form is not available, using another form would not alone preclude receipt); and (3) begin losing time from work due to the traumatic injury within 45 days of the injury.⁷

The employee must provide a written report on a Form CA-1 to the employing establishment within 30 days of the injury.⁸ OWCP's procedures provide that another OWCP-approved form, such as a CA-2, CA-2a, or CA-7, which contain words of claim, can be used to satisfy timely filing requirements.⁹

The Board has held that section 8122(d)(3) of FECA,¹⁰ which allows OWCP 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. Thus, there is no provision in the law for excusing an employee's failure to file a claim within 30 days of the employment injury.¹¹

ANALYSIS -- ISSUE 1

OWCP denied appellant's claim for continuation of pay as it found that appellant's claim was actually for an occupational disease claim and not for a traumatic injury. A traumatic injury refers to injury caused by a specific event or incident or series of incidents occurring within a single workday or work shift, whereas an occupational disease refers to an injury produced by employment over a period longer than a single workday or shift.¹²

OWCP based its conclusion that appellant's claim was an occupational disease claim on a single statement in Dr. Hongs' report of February 6, 2015 wherein Dr. Hongs noted that on December 12, 2013 appellant came into his office with recurrent pain after he unloaded a truck for three days, lifting multiple boxes weighing 40 to 70 pounds. However, appellant has repeatedly stated that the injury occurred on one day, *i.e.*, December 12, 2013. On August 8, 2014 appellant filed a claim for a recurrence wherein he alleged that on December 12, 2013, after returning to work from another injury, he was loading boxes when he felt a sharp pain in his back. In an internal memorandum of August 11, 2014, a representative of the employing establishment noted that appellant was actually describing a new injury, and asked that appellant's supervisor be advised that appellant should file a Form CA-1 for a traumatic injury. On April 16, 2015 appellant filed a traumatic injury claim and again alleged that he felt a sharp

⁷ 20 C.F.R. § 10.205(a)(1-3). *See also J.M.*, Docket No. 09-1563 (issued February 26, 2010).

⁸ *Id.* at § 10.210(a).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Continuation of Pay and Initial Payments*, Chapter 2.807.5(b) (June 2012).

¹⁰ 5 U.S.C. § 8122(d)(3).

¹¹ *Dodge Osborne*, 44 ECAB 849, 855 (1993).

¹² 20 C.F.R. §§ 10.5(q), ee; *Brady L. Fowler*, 44 ECAB 343 351 (1992).

pain in his back on December 12, 2013 while continuously lifting numerous boxes weighing from 40 to 75 pounds. On August 19, 2015 OWCP accepted appellant's claim for a traumatic injury that occurred on December 12, 2013.

An employee's statement that an injury occurred at a given time and in a given manner is of great probative value and will stand unless refuted by strong or persuasive evidence.¹³ Appellant has consistently alleged that he was injured during one work shift on December 12, 2013. Appellant's statement that he sustained a traumatic injury is consistent with the employing establishment's statement in its August 11, 2014 internal memorandum that appellant experienced a traumatic injury. It is also consistent with OWCP's August 19, 2015 decision accepting appellant's claim for a traumatic injury. Appellant's statements are not refuted by the brief and vague account in Dr. Hongs' report. Dr. Hongs was not at the site of the employment incident; he was reporting as to what he recalled appellant told him occurred over one year prior to his report. Appellant has routinely described an employment incident that occurred over the course of one day. Accordingly, OWCP improperly determined that appellant's claim was a claim for an occupational disease.

However, the Board finds that appellant's claim for continuation of pay must be denied. Appellant filed his traumatic injury claim on April 16, 2015, more than 30 days after his stated injury date of December 12, 2013. Accordingly, the claim was not filed within 30 days of the injury. Although appellant previously filed a claim for recurrence on August 8, 2014, this claim was also not filed within 30 days of the December 12, 2013 injury. Accordingly, the Board finds that no claim with regard to the December 12, 2013 alleged injury was filed within 30 days of the injury, as required in sections 8118(a) and 8122(a)(2) of FECA. There is no provision in FECA for excusing a late filing for continuation of pay.¹⁴ Accordingly, the Board finds that appellant is not entitled to continuation of pay because he failed to timely file his claim within 30 days, as required by FECA.¹⁵ The Board hereby modifies OWCP's decision to reflect that continuation of pay is properly denied under the timeliness standard.

LEGAL PRECEDENT -- ISSUE 2

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,¹⁶ OWCP's regulations provide that the evidence or argument submitted by a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.¹⁷ To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant also must file his or her

¹³ *M.L.*, Docket No. 1600187 (issued March 3, 2016); *see also Gregory J. Reser*, 57 ECAB 277 (2005).

¹⁴ *E.S.*, Docket No. 15-1800 (issued December 10, 2015).

¹⁵ *L.E.*, Docket No. 15-1761 (issued December 2, 2015).

¹⁶ *Supra* note 1. Under section 8128 of FECA, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application." 5 U.S.C. § 8128(a).

¹⁷ 20 C.F.R. § 10.606(b)(2).

application for review within one year of the date of that decision.¹⁸ When a claimant fails to meet one of the above standards, OWCP will deny the application for reconsideration without reopening the case for review on the merits.¹⁹

ANALYSIS -- ISSUE 2

Appellant's request for continuation of pay was denied on statutory grounds. The only evidence submitted on reconsideration was a statement by appellant that he was injured as a result of his work activities on December 12, 2013, not over three days.

Appellant did not submit relevant and pertinent new evidence with his request for reconsideration. Furthermore, he did not show that OWCP erroneously applied or interpreted a specific point of law, nor did he advance a relevant legal argument not previously considered by OWCP. As previously noted, appellant's request for continuation of pay was untimely filed and did not meet the statutory requirement for continuation of pay. His own belief that he was entitled to continuation of pay did not require reopening of the claim.

Because appellant failed to meet one of the standards enumerated under section 8128(a) of FECA, he was not entitled to further merit review of the claim.

Appellant may submit new evidence or argument as part of a formal 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 has not established eligibility for continuation of pay. The Board further finds that OWCP properly refused to reopen appellant's case for further review of the merits under 5 U.S.C. § 8128(a).

¹⁸ *Id.* at § 10.607(a).

¹⁹ *Id.* at § 10.608(b).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 18, 2015 is affirmed. The decision of OWCP dated August 19, 2015 is affirmed, as modified.

Issued: June 10, 2016
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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