

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

D.S., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Louin, MS, Employer**

)
)
)
)
)
)
)
)
)
)
)
)

**Docket No. 10-2373
Issued: July 19, 2011**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On September 27, 2010 appellant filed a timely appeal from the July 16, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP), which denied continuation of pay. The Board also has jurisdiction to review OWCP's September 1, 2010 nonmerit decision denying appellant's request for a hearing. 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.

ISSUES

The issues are: (1) whether OWCP properly denied continuation of pay; and (2) whether OWCP properly denied appellant's request for a hearing.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On June 2, 2010 appellant, a 50-year-old rural carrier, filed a traumatic injury claim alleging that she tore tendons in her left index finger on March 25, 2010 when she hit her left hand on the door of a car. She claimed continuation of pay. Appellant stopped work on March 25, 2010 and did not return. OWCP accepted her claim for rupture of the extensor tendon of the left index finger.

In a July 16, 2010 decision, OWCP denied continuation of pay, finding that appellant did not report the injury on a form approved by OWCP within 30 days of the injury.

On August 18, 2010 appellant requested an oral hearing before an OWCP hearing representative. Her request was postmarked August 20, 2010.

In a decision dated September 1, 2010, OWCP denied appellant's request for a hearing. OWCP found that her request was untimely, so she was not entitled to a hearing as a matter of right. OWCP, in its discretion, considered appellant's request and determined that she could address the issue in her case equally well by requesting reconsideration.

On appeal, appellant explained that she notified her supervisor of the injury on the day that it happened. She submitted a September 17, 2010 statement from her supervisor, who explained that appellant notified him of the injury on the morning of March 25, 2010.

LEGAL PRECEDENT -- ISSUE 1

Section 8118(a) of FECA² provides continuation of pay, not to exceed 45 days, to an employee "who has filed a claim with his immediate superior on a form approved by the Secretary of Labor" within 30 days of the injury.³

The Board has held that section 8122(d)(3), 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. There is, accordingly, no provision in FECA for excusing an employee's failure to file a claim for continuation of pay within 30 days of the employment injury.⁴

ANALYSIS -- ISSUE 1

Appellant sustained a traumatic injury in the performance of duty on March 25, 2010. The record establishes that she did not file a claim for continuation of pay within 30 days, or by April 26, 2010. The record instead shows that she filed a claim for continuation of pay on June 2, 2010, more than a month after the 30-day period for filing such a claim had expired.

² 5 U.S.C. § 8118.

³ *George A. Harrell*, 29 ECAB 338 (1978).

⁴ *William E. Ostertag*, 33 ECAB 1925, 1932 (1982).

Because the record does not show that appellant filed a claim for continuation of pay within 30 days of her March 25, 2010 employment injury, she is not entitled to continuation of pay. This is so regardless of circumstance or whether she provided her supervisor with notice of injury on March 25 2010.⁵

Appellant may submit new evidence or argument with a written request for reconsideration to the Office 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.

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of FECA provides:

“Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary under subsection (a) of this section is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary.”⁶

The hearing request must be sent within 30 days (as determined by postmark or other carrier’s date marking) of the date of the decision for which a hearing is sought.⁷ OWCP has discretion, however, to grant or deny a request that is made after this 30-day period.⁸ In such a case, it will determine whether a discretionary hearing should be granted or, if not, will so advise the claimant with reasons.⁹

ANALYSIS -- ISSUE 2

Because appellant made her August 20, 2010 request for a hearing more than 30 days after OWCP’s July 16, 2010 decision denying continuation of pay, she is not entitled to a hearing as a matter of right. OWCP considered the matter and, exercising its discretion, correctly advised appellant that she could pursue the issue equally well through the reconsideration process, as detailed in the appeal rights attached to its July 16, 2010 decision. As appellant may address the continuation of pay issue by pursuing an alternative avenue of appeal, the Board finds that OWCP properly denied her untimely request for a hearing.¹⁰

⁵ OWCP misleadingly denied continuation of pay for failure to provide notice of injury within 30 days. It should have worded its decision to deny continuation of pay for failure to file a claim within 30 days. *Laura L. Harrison*, 52 ECAB 515 at n.3 (2001) (explaining that, when an injured employee makes no claim within 30 days, she is not entitled to continuation of pay, notwithstanding prompt notice of injury).

⁶ 5 U.S.C. § 8124(b)(1).

⁷ 20 C.F.R. § 10.616(a).

⁸ *Herbert C. Holley*, 33 ECAB 140 (1981).

⁹ *Rudolph Bermann*, 26 ECAB 354 (1975).

¹⁰ The Board has held that the denial of a hearing on these grounds is a proper exercise of the Office’s discretion. *E.g., Jeff Micono*, 39 ECAB 617 (1988).

CONCLUSION

The Board finds that OWCP properly denied continuation of pay. Appellant did not file a claim for continuation of pay within 30 days of her injury. The Board also finds that OWCP properly denied her request for a hearing. Appellant did not make her request within 30 days of OWCP's July 16, 2010 decision, and OWCP determined that she could pursue the issue in her case through reconsideration.

ORDER

IT IS HEREBY ORDERED THAT the September 1 and July 16, 2010 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: July 19, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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