

FACTUAL HISTORY

On August 19, 2010 appellant, then a 55-year-old fabric worker, filed a traumatic injury claim alleging that on March 17, 2010 he sustained increased low back and leg pain on the right side due to his employment duties.²

In an August 18, 2010 report, Dr. Leonard E. Forrest, a treating Board-certified physiatrist, noted that appellant had a flare-up of his back condition in March 2010. He advised that appellant was capable of returning to his job providing he used a back brace for lifting and bending activities. Dr. Forrest found that no further medical treatment was required at that time.

In an August 18, 2011 report, Dr. Mark D. Netherton, a treating Board-certified anesthesiologist, noted that appellant sustained an initial employment injury in 2001 which was aggravated on March 17, 2010 due to his work activities. He stated that appellant's preexisting conditions had been exacerbated by his workers' compensation case and that he should be compensated for the time he missed at work. Dr. Netherton related that appellant sustained another employment injury on March 9, 2011.³

By letter dated October 2, 2013, OWCP informed appellant that at the time his claim had been received, it was handled as a minor injury. Appellant's claim was reopened for adjudication as he had filed a claim for wage-loss compensation. He was advised as to the medical and factual evidence required to support his claim and given 30 days to provide this information.

In a December 26, 2012 report, Dr. Netherton noted an initial employment injury was sustained on July 24, 2001. He related that appellant sustained aggravations of his condition at work on March 17, 2010 and early September 2012.

On October 23, 2013 Dr. Netherton noted that appellant sustained an employment injury on March 17, 2010 which aggravated his preexisting condition. He related that the aggravation led to a progressive worsening of appellant's lumbar spine degeneration.

By decision dated November 7, 2013, OWCP accepted that appellant sustained a temporary aggravation of lumbar or lumbosacral intervertebral disc degeneration which resolved by August 18, 2010. It denied appellant's claim for continuation of pay as he had not filed the claim within 30 days of the March 17, 2010 injury.

LEGAL PRECEDENT -- ISSUE 1

Section 8118(a) of FECA authorizes continuation of pay, not to exceed 45 days, for 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

² On April 26, 2010 appellant had filed a claim for a recurrence of disability beginning March 23, 2010 due to an accepted July 24, 2001 employment injury under File No. xxxxxx483. OWCP denied the recurrence claim by decision dated October 18, 2010.

³ OWCP file number for the March 9, 2011 employment injury was noted as xxxxxx623 by Dr. Netherton.

section 8122(a)(2) of this title.⁴ The latter section provides that written notice of injury shall be given within 30 days. The context of section 8122 makes clear that this means within 30 days of the injury.⁵

The Board has held that section 8122(d)(3) of FECA,⁶ 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.⁷

ANALYSIS -- ISSUE 1

For employees who sustain a traumatic injury, FECA provides that the employing establishment must continue the employee's regular pay during any periods of resulting disability, up to a maximum of 45-calendar days. This is called continuation of pay (COP). The employing establishment, not OWCP, pays continuation of pay.⁸ For receipt of COP, the employee must file his or her claim within 30 days of injury.

One purpose of continuation of pay is to eliminate the interruption to the injured employee's salary due to delay between the notice of injury and payment of compensation benefits.⁹ The late filing of a claim for a period of wage loss defeats that purpose.

Appellant's alleged employment injury occurred on March 17, 2010; but, he did not file a written claim for a period of wage loss due to the traumatic injury within 30 days. Rather, he filed his claim on August 18, 2010. There is no provision in FECA for excusing a late filing. Appellant is not entitled to continuation of pay.

LEGAL PRECEDENT -- ISSUE 2

Once OWCP accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits.¹⁰ After it has determined that an employee has disability causally related to his or her federal employment, it may not terminate compensation without establishing that the disability has ceased or that it is no longer related to

⁴ 5 U.S.C. § 8118(a). See *Gwen Cohen-Wise*, 54 ECAB 732 (2003).

⁵ *P.R.*, Docket No. 08-2239 (issued June 2, 2009); *George A. Harrell*, 29 ECAB 338 (1978).

⁶ 5 U.S.C. § 8122(d)(3).

⁷ *Laura L. Harrison*, 52 ECAB 515 (2001); *William E. Ostertag*, 33 ECAB 1925, 1932 (1982).

⁸ 20 C.F.R. § 10.200(a).

⁹ *Supra* note 4.

¹⁰ *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

the employment.¹¹ OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.¹²

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.¹³ To terminate authorization for medical treatment, OWCP must establish that appellant no longer has residuals of an employment-related condition, which would require further medical treatment.¹⁴

ANALYSIS -- ISSUE 2

OWCP accepted appellant's claim for temporary aggravation of lumbar and lumbosacral intervertebral disc degeneration which resolved by August 18, 2010. As noted, its acceptance of a claim for a specified period does not shift the burden of proof to the claimant to terminate benefits. It is OWCP's burden to establish that appellant had no residuals from the accepted injury. The Board finds that OWCP properly terminated benefits.

The medical evidence consists of an August 18, 2010 report from appellant's treating physician, Dr. Forrest, who noted that appellant had a flare up of his back condition in March 2010. He found that appellant was capable of returning to work full time provided he wore a back brace. No further medical treatment was required.

OWCP found, based on Dr. Forrest's opinion, that the accepted temporary aggravation had resolved. Dr. Forrest examined appellant and determined that he could return to his usual work provided he had a back brace. The record also contains reports from Dr. Netherton diagnosing an aggravation of appellant's back condition as a result of the March 17, 2010 employment injury. He made no mention of disability in the reports other than noting in an October 23, 2013 report that the March 17, 2010 injury led to a worsening of appellant's lumbar degenerative spine condition. He made no mention of any disability after August 18, 2010 and noted additional employment injuries in his August 18, 2011 and December 26, 2012 reports. There is no other medical evidence of record from a physician to support that appellant's work-related condition continued after August 18, 2010. The Board finds that the medical evidence of record is sufficient to establish that appellant's accepted temporary aggravation of lumbar or lumbosacral intervertebral disc degeneration had resolved as of August 18, 2010.

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.

¹¹ *I.J.*, 59 ECAB 524 (2008); *Elsie L. Price*, 54 ECAB 734 (2003).

¹² *See J.M.*, 58 ECAB 478 (2007); *Del K. Rykert*, 40 ECAB 284 (1988).

¹³ *T.P.*, 58 ECAB 524 (2007); *Kathryn E. Demarsh*, 56 ECAB 677 (2005).

¹⁴ *Kathryn E. Demarsh, id.*; *James F. Weikel*, 54 ECAB 660 (2003).

CONCLUSION

The Board finds that appellant is not entitled to continuation of pay and that it met its burden to establish that appellant's accepted condition of temporary aggravation of lumbar or lumbosacral intervertebral disc degeneration resolved as of August 18, 2010.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 7, 2013 is affirmed.

Issued: July 10, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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