

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

D.M., Appellant

and

**DEPARTMENT OF VETERANS AFFAIRS,
ATLANTA VA MEDICAL CENTER,
Decatur, GA, Employer**

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**Docket No. 22-0329
Issued: July 1, 2022**

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

Case Submitted on the Record

ORDER REMANDING CASE

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

On December 27, 2021 appellant filed a timely appeal from a July 19, 2021 merit decision and a November 22, 2021 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). The Clerk of the Appellate Boards docketed the appeal as No. 22-0329.¹

On December 18, 2020 appellant, then a 47-year-old nurse, filed a traumatic injury claim (Form CA-1) alleging that on that day, while undergoing a COVID-19 test after being exposed to COVID-19 while in the performance of duty, she felt ear pain and nasal bleeding that would not stop for which she had to be taken to an emergency room. She stopped work on that date.

OWCP received December 18, 2020 discharge instructions, which indicated that she was seen for a nosebleed.

¹ The Board notes that appellant submitted new evidence on appeal. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

In December 22, 2020, January 25 and March 16, 2021 development letters, OWCP explained that appellant's job was designated high risk and that to accept her claim, it only needed a copy of the laboratory test result confirming the diagnosis of COVID-19. It explained that appellant must submit the actual laboratory test with her name and the date of the test, and that if she did not have a laboratory test, she could establish her claim through submission of a statement from a doctor indicating that she tested positive for COVID-19, together with any supporting evidence the doctor used to make that determination. OWCP afforded appellant 30 days to submit the necessary evidence.

A December 18, 2020 emergency room report from Dr. Kathleen M. Gunchick, Board-certified in emergency medicine, noted that appellant's chief complaint was "nosebleed from Covid test." She explained that while appellant was getting a COVID-19 test in her left nostril, she felt severe pain in her left ear and her left nostril started bleeding. Dr. Gunchick related that appellant had no previous history of nosebleeds, the bleeding was easily controlled by pressure, and the patient was stable and discharged. She diagnosed left anterior nosebleed, traumatic, resolved COVID-19 symptoms.

OWCP received a December 18, 2020 employee health record, which indicated that appellant underwent drive through COVID-19 testing and thereafter reported intense pain in the left ear, a bloody nose, muffled hearing on the left, and an abrasion of her nasal tissue. The report revealed that appellant's COVID-19 test result was negative.

In a January 7, 2021 report, Dr. Lisa Perry-Gilkes, a Board-certified otolaryngologist, noted that appellant reported a left earache, loss of hearing in the left ear, and ringing in the left ear. She noted that appellant had shooting pain, throbbing pain, deep pain, and distorted sounds, and that the symptoms were so severe they limited her daily activities, interfered with work, required television and radio at high volume, and interfered with sleep. Dr. Perry-Gilkes diagnosed: otalgia of left ear; tinnitus of left ear; hearing loss in left ear; dizziness and giddiness; other specified disorders of external ear, unspecified ear; dysfunction of eustachian tube on the left; and environmental allergy. She noted that "[a]ll symptoms started after her Covid test on the left."

In a January 26, 2021 report, Dr. Perry-Gilkes noted appellant's nose bleeds had stopped, but she was still having slight ear pain and occasional ringing. She diagnosed: otalgia of left ear; tinnitus of left ear, improved with cerumen removal; hearing loss in left ear, improved with cerumen removal; dizziness and giddiness, small ear canal, cerumen removed; other specified disorders of external ear, unspecified ear; dysfunction of eustachian tube on the left; and environmental allergy.

In a February 26, 2021 report, Dr. Perry-Gilkes noted the otalgia of the left ear was improved, the left ear tinnitus and hearing loss had resolved, dizziness and giddiness had controlled, the small ear canal and left eustachian tube had other unspecified disorders, and appellant had an environmental allergy.

In a development letter dated June 17, 2021, OWCP again requested that appellant submit a positive COVID-19 test result. It also informed appellant that additional evidence was needed to support that she was injured while performing any duty of her employment. OWCP noted that

she indicated that the date of injury was December 18, 2020 and inquired whether she was directed by the employing establishment to be tested on that date. It afforded her 30 days to submit the necessary evidence.

By decision dated July 19, 2021, OWCP denied appellant's traumatic injury claim, finding that the medical evidence was insufficient to establish a diagnosis of COVID-19 in connection with the accepted employment exposure. It concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

In a July 27, 2021 memorandum of telephone call (Form CA-110), appellant informed OWCP that she was not claiming COVID-19 and she was claiming a nasal injury.

On July 27, 2021 appellant requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

On September 24, 2021 OWCP's hearing representative informed appellant that her hearing was scheduled for November 10, 2021 at 9:30 a.m. Eastern Standard Time (EST), mailed the notice to appellant's last known address of record, and provided instructions on how to participate. Appellant did not appear at the hearing or request postponement.

By decision dated November 22, 2021, OWCP found that appellant failed to attend the scheduled hearing, failed to request postponement of the hearing and, therefore, abandoned her hearing request.

The Board finds that this case is not in posture for decision.

FECA at 5 U.S.C. § 8124(a) provides that OWCP shall determine and make findings of fact and make an award for or against payment of compensation. OWCP's regulations at 20 C.F.R. § 10.126 provide that the decision of the Director of OWCP shall contain findings of fact and a statement of reasons. As well, OWCP's procedures provide that the reasoning behind OWCP's decision should be clear enough for the reader to understand the precise defect of the claim and the kind of evidence, which would overcome it.²

In the July 19, 2021 decision, OWCP denied the claim because the medical evidence was insufficient to establish a diagnosis of COVID-19. However, appellant also alleged that she sustained nasal and ear injuries as a result of taking a COVID-19 test and submitted medical evidence. The July 19, 2021 decision did not discuss the medical evidence, which addresses that appellant sustained nasal and ear injuries when taking a COVID-19 test for work and summarily denied the claim solely because appellant's COVID-19 test result was negative.

The Board therefore finds that OWCP did not discharge its responsibility to set forth findings of fact and a clear statement of reasons explaining the disposition so that appellant could

² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.5 (February 2013).

understand the basis for the decision. This case must, therefore, be remanded to OWCP to provide detailed reasons for accepting or rejecting the claim.³

Accordingly, the Board will set aside the July 19, 2021 decision and remand the case for OWCP to review the evidence and argument in support of appellant's reconsideration request, make findings of fact, and provide a statement of reasons for its decision, pursuant to the standards set forth in section 5 U.S.C. § 8124(a) and 20 C.F.R. § 10.126.⁴ After such further development as OWCP deems necessary, it shall issue a *de novo* decision.

IT IS HEREBY ORDERED THAT the July 19, 2021 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further proceedings consistent with this order of the Board. The November 22, 2021 decision of the Office of Workers' Compensation Programs is set aside as moot.

Issued: July 1, 2022
Washington, DC

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board

³ See *A.J.*, Docket No. 21-0944 (issued March 23, 2022); *S.S.*, Docket No. 20-1351 (issued February 15, 2022).

⁴ In light of the Board's finding regarding the issue of whether appellant has established a diagnosed medical condition, the issue of whether OWCP properly denied appellant's hearing request is moot.