United States Department of Labor Employees' Compensation Appeals Board

B.C., Appellant)
and) Docket No. 22-1018) Issued: November 2, 2022
DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION,)
New Orleans, LA, Employer))
Appearances: Appellant, pro se	Case Submitted on the Record

ORDER REMANDING CASE

Office of Solicitor, for the Director

PATRICIA H. FITZGERALD, Deputy Chief Judge JANICE B. ASKIN, Judge JAMES D. MCGINLEY, Alternate Judge

On June 24, 2022 appellant filed a timely appeal from a January 31, 2022 merit decision and an April 5, 2022 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). The Clerk of the Appellate Boards assigned Docket No. 22-1018.

On January 18, 2022 appellant, then a 39-year-old air traffic controller, filed a traumatic injury claim (Form CA-1) alleging that he was exposed to COVID-19 at work on December 18, 2021 and tested positive for COVID-19 on December 24, 2021. On the reverse side of the claim form, appellant's supervisor indicated that the date of the alleged injury was December 18, 2021 and acknowledged that appellant was injured in the performance of duty.

In support of his claim, appellant submitted an RDRP Gene test result dated December 24, 2021, authorized by Dr. Frederick Risener, a Board-certified family medicine physician. The result indicated that appellant's test was positive for COVID-19.

In a January 28, 2022 work status report (Form CA-3), the employing establishment indicated that the date of the alleged injury was December 18, 2021, that appellant stopped work on December 19, 2021, and that he was allowed to return to work on January 4, 2022.

By decision dated January 31, 2022, 1, 2022, OWCP denied his claim for COP, finding that he had not reported his injury on an OWCP-approved form within 30 days of his alleged December 18, 2021 employment injury.

On March 25, 2022 appellant requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review regarding the January 31, 2022 denial of COP.

By decision dated April 5, 2022, the Branch of Hearings and Review denied appellant's hearing request, finding that it was untimely filed as it was not postmarked until March 25, 2022, more than 30 days after its January 31, 2022 merit decision. After exercising its discretion, OWCP further found that the issue in the case could equally be addressed through the reconsideration process.

The Board, having duly considered this matter, finds that this case is not in posture for decision.

Section 8118(a) of FECA authorizes COP, 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.¹ This latter section provides that written notice of injury shall be given within 30 days.² The context of section 8122 makes clear that this means within 30 days of the injury.³

OWCP's regulations provide, in pertinent part, that to be eligible for COP, an employee must: (1) have a traumatic injury which is job related and the cause of the disability and/or the cause of lost time due to the need for medical examination and treatment; (2) file Form CA-1 within 30 days of the date of the injury; and (3) begin losing time from work due to the traumatic injury within 45 days of the injury.⁴

FECA Bulletin No. 21-09 at subsection II.2., however, provides that, "The FECA program considers COVID-19 to be a traumatic injury since it is contracted during a single workday or shift (see 20 C.F.R. § 10.5(ee)), and considers the date of last exposure prior to the medical evidence establishing the COVID-19 diagnosis as the Date of Injury since the precise time of transmission may not always be known due to the nature of the virus."

In denying appellant's claim for COP, OWCP failed to consider the date of last exposure as the date of injury in accordance with the guidance in FECA Bulletin No. 21-09.6 This case will

¹ *Id.* at § 8118(a).

² *Id.* at § 8122(a)(2).

³ E.M., Docket No. 20-0837 (issued January 27, 2021); J.S., Docket No. 18-1086 (issued January 17, 2019); Robert M. Kimzey, 40 ECAB 762-64 (1989); Myra Lenburg, 36 ECAB 487, 489 (1985).

⁴ 20 C.F.R. § 10.205(a)(1-3); *see also T.S.*, Docket No. 19-1228 (issued December 9, 2019); *J.M.*, Docket No. 09-1563 (issued February 26, 2010); *Dodge Osborne*, 44 ECAB 849 (1993).; *William E. Ostertag*, 33 ECAB 1925 (1982).

⁵ FECA Bulletin No. 21-09.II.2 (issued April 29, 2021). On March 11, 2021 the American Rescue Plan Act of 2021 (ARPA) was signed into law. Pub. L. No. 117–2. OWCP issued FECA Bulletin No. 21-09 to provide guidance regarding the processing of COVID-19 FECA claims as set forth in the ARPA. Previously, COVID-19 claims under FECA were processed under the guidelines provided by FECA Bulletin No. 20-05 (issued March 31, 2020) and FECA Bulletin No. 21-01 (issued October 21, 2020). FECA Bulletin No. 21-09 supersedes FECA Bulletin Nos. 20-05 and 21-01.

⁶ The Board notes that 30 days from December 18, 2021 was Monday, January 17, 2022, which was a Federal holiday; and 30 days from December 19, 2021 was Tuesday, January 18, 2022.

therefore be remanded for application of FECA Bulletin No. 21-09 with regard to appellant's claim for COP.⁷ Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.⁸ Accordingly,

IT IS HEREBY ORDERED THAT the February 1 and April 5, 2022 decisions of the Office of Workers' Compensation Programs are set aside and the case is remanded for further proceedings consistent with this order of the Board.

Issued: November 2, 2022 Washington, DC

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

Janice B. Askin, Judge Employees' Compensation Appeals Board

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

⁷ See e.g., Order Remanding Case, W.G., Docket No. 18-0451 (issued February 21, 2019) (The Board found that OWCP failed to properly develop the medical evidence by requesting the DMA to provide an impairment rating in accordance with the new guidance in FECA Bulletin No. 17-06 for consistently rating upper extremity impairments. The Board remanded the case for further development consistent with OWCP procedures in FECA Bulletin No. 17-06); Order Remanding Case, H.W., Docket No. 10-404 (issued September 28, 2011) (The Board remanded the case to OWCP for selection of another impartial medical specialist in accordance with its procedures).

⁸ In light of the Board's disposition of the issue regarding entitlement to COP, the issue concerning the denial of hearing is rendered moot.