United States Department of Labor
Employees' Compensation Appeals Board

C.V., Appellant	)	
and	)	**Docket No. 22-0125**
	)	**Issued: September 13, 2022**
DEPARTMENT OF HOMELAND SECURITY, U.S. CUSTOMS AND BORDER PROTECTION, U.S. BORDER PATROL, Santa Teresa, NM, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
JAMES D. McGINLEY, Alternate Judge

JURISDICTION

On November 3, 2021 appellant filed a timely appeal from a September 16, 2021 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[2]

[1] 5 U.S.C. § 8101 *et seq*.

[2] OWCP received additional evidence following the September 16, 2021 decision. 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*.

ISSUE

The issue is whether appellant has met his burden of proof to establish that he developed a diagnosed COVID-19 condition causally related to his accepted exposure.

FACTUAL HISTORY

On June 17, 2021 appellant, then a 32-year-old customs and border patrol (CBP) agent, filed a traumatic injury claim (Form CA-1) alleging that on June 16, 2021 he tested positive for the COVID-19 virus, which he contracted on June 13, 2021 while in the performance of duty. He indicated that he had body aches, slight cough, lower back pain, and lost his sense of taste and smell. On the reverse side of the claim form an employing establishment supervisor acknowledged that appellant was injured in the performance of duty. Appellant stopped work on June 14, 2021.

Accompanying the claim, appellant submitted a June 16, 2021 treatment note from an urgent care provider. A nurse practitioner diagnosed COVID-19. He was advised that his in-office COVID-19 test was positive and was advised to quarantine for 10 to 14 days.

A June 22, 2021 triage nurse activity log indicated that appellant was treated by Dr. Ramsey R. Hazboun, a Board-certified internist, and that appellant was off work following a positive COVID-19 test. The notes also reflected that appellant had been hospitalized and was now stable and recovering at home. Dr. Hazboun recommended that appellant remain off work from July 1 to 15, 2021, until free of COVID-19 symptoms.

OWCP received a July 1, 2021 disability certificate from Dr. Hazboun who noted that appellant was unable to return to work until he was COVID-19 symptom free.

OWCP received a July 6, 2021 triage nurse report, indicating that appellant was off work and was under COVID-19 management.

In July 9 and August 3, 2021 development letters, OWCP explained that appellant's claim was reviewed under the provisions of the American Rescue Plan Act (ARPA) of 2021. It requested that he provide a copy of the Polymerase Chain Reaction (PCR) laboratory test result confirming the diagnosis of COVID-19. OWCP noted that, if appellant was unable to obtain a PCR test at the time of his illness or was advised that one was not needed, he could submit a COVID-19 antibody or antigen test. It explained that it would consider an antibody or antigen test sufficient, if the test contained his name and the date of the test and was accompanied by additional medical evidence. OWCP explained that the required companion medical evidence must be contemporaneous from the time of the illness and indicate that appellant had documented symptoms of and/or was treated for COVID-19 by a physician (or a nurse practitioner or physician assistant, if their treatment notes/reports were cosigned by a physician). It requested that he submit additional factual and medical evidence and afforded him 30 days to submit the necessary evidence.

The record reflects that the July 9, 2021 development letter was returned as undeliverable on July 29, 2021. The record also reflects that appellant's address was incomplete on the letter, as the city name was missing.

OWCP received a July 14, 2021 return-to-work note from Dr. Hazboun, indicating that appellant could return to work on July 18, 2021, without restrictions.

By decision dated September 16, 2021, OWCP denied appellant's traumatic injury claim. It explained that he failed to submit sufficient evidence to establish a diagnosis of COVID-19. The decision was mailed to the address of record. The decision was subsequently returned to OWCP as undeliverable and unable to forward on October 6, 2021.

LEGAL PRECEDENT

An employee seeking benefits under FECA[3] has the burden of proof to establish the essential elements of his or her claim, including that the individual is an employee of the United States within the meaning of FECA, that the claim was timely filed within the applicable time limitation of FECA,[4] that an injury was sustained in the performance of duty as alleged, and that any disability or medical condition for which compensation is claimed is causally related to the employment injury.[5] These are the essential elements of each and every compensation claim, regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[6]

OWCP regulations provide that a copy of a decision shall be mailed to the employee's last known address.[7] In the absence of evidence to the contrary, it is presumed that a notice mailed in the ordinary course of business was received in due course by the intended recipient.[8] This presumption is commonly referred to as the "mailbox rule."[9] It arises when the record reflects that the notice was properly addressed and duly mailed.[10] However, as a rebuttable presumption, receipt will not be assumed when there is evidence of nondelivery.[11] Also, it is axiomatic that the presumption of receipt does not apply where a notice is sent to an incorrect address.[12]

[3] *Supra* note 1.

[4] *See D.B.*, Docket No. 20-0797 (issued August 5, 2021); *F.H.*, Docket No. 18-0869 (issued January 29, 2020); *J.P.*, Docket No. 19-0129 (issued April 26, 2019); *Joe D. Cameron*, 41 ECAB 153 (1989).

[5] *L.C.*, Docket No. 19-1301 (issued January 29, 2020); *J.H.*, Docket No. 18-1637 (issued January 29, 2020); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

[6] *P.A.*, Docket No. 18-0559 (issued January 29, 2020); *K.M.*, Docket No. 15-1660 (issued September 16, 2016); *Delores C. Ellyett*, 41 ECAB 992 (1990).

[7] *See E.W.*, Docket No. 20-0357 (issued December 8, 2020); *D.C.*, Docket No. 13-1503 (issued December 17, 2013); *J.R.*, Docket No. 13-0313 (issued August 15, 2013).

[8] *G.A.*, Docket No. 18-0266 (issued February 25, 2019); *Kenneth E. Harris*, 54 ECAB 502, 505 (2003).

[9] *See J.F.*, Docket No. 19-1893 (issued April 17, 2020); *D.R.*, Docket No. 19-1899 (issued April 15, 2020); *Kenneth E. Harris, id.*; *Newton D. Lashmett*, 45 ECAB 181 (1993) (mailbox rule).

[10] *See J.F., id.*; *D.R., id.*; *Kenneth E. Harris, id.*

[11] *M.C.*, Docket No. 12-1778 (issued April 12, 2013); *see C.O.*, Docket No. 10-1796 (issued March 23, 2011).

[12] *M.C., id.*

ANALYSIS

The Board has considered the matter and finds that the September 16, 2021 merit decision must be set aside.

The Board notes that the OWCP July 9, 2021 development letter was returned as undeliverable on July 29, 2021 and that the September 16, 2021 OWCP decision also was retumed to OWCP as undeliverable and unable to forward on October 6, 2021. Despite OWCP receiving notice that the September 16, 2021 decision was undeliverable, there is no indication in the record that OWCP attempted to reissue the decision to the correct mailing address.

As the September 16, 2021 decision was returned to OWCP as undeliverable, there is evidence of record of nondelivery.[13] The Board finds that the rebuttable presumption known as the "mailbox rule" does not apply in this case and that OWCP improperly issued its September16, 2021 decision.[14] For this reason, the case will be remanded to OWCP for proper issuance of a *de novo* decision.

CONCLUSION

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

[13] *Supra* note 11.

[14] *See D.C.*, Docket No. 13-1503 (issued December 17, 2013); *Tammy J. Kenow*, 44 ECAB 619 (1993).

ORDER

IT IS HEREBY ORDERED THAT the September 16, 2021 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further action consistent with this decision of the Board.

Issued: September 13, 2022
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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