United States Department of Labor Employees' Compensation Appeals Board

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J.G., Appellant

and

DEPARTMENT OF THE AIR FORCE, AIR NATIONAL GUARD, Salem, OR, Employer

Docket No. 22-0724 Issued: September 28, 2022

Case Submitted on the Record

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

ORDER REMANDING CASE

<u>Before:</u> JANICE B. ASKIN, Judge VALERIE D. EVANS-HARRELL, Alternate Judge JAMES D. MCGINLEY, Alternate Judge

On April 10, 2022 appellant filed a timely appeal from a March 7, 2022 merit decision of the Office of Workers' Compensation Programs (OWCP). The Clerk of the Appellate Boards assigned Docket No. 22-0724.

On February 17, 2022 appellant, then a 50-year-old air traffic controller, filed a traumatic injury claim (Form CA-1) alleging that on January 14, 2022 he contracted COVID-19 when working in the radar tower while in the performance of duty. He related that another employee contracted COVID-19 within three days of his infection and acknowledged that he was unable to prove where he contracted COVID-19. On the reverse side of the claim form, D.C., an employing establishment supervisor, controverted the claim and asserted that appellant's wife tested positive for COVID-19 on January 14, 2022, and more than likely passed the virus to him.¹ Appellant stopped work on January 18, 2022 and returned on January 26, 2022.

By decision dated March 7, 2022, OWCP denied appellant's claim for COP, finding that he had not reported the January 14, 2022 injury within 30 days of the date of injury. It noted that

¹ Appellant subsequently filed another Form CA-1 on March 1, 2022 again alleging that he contracted COVID-19 on January 14, 2022 while in the performance of duty. On the reverse side of the claim form, D.C. continued to controvert the claim and further noted that the original February 17, 2022 Form CA-1 had been returned due to technical difficulties.

the denial of COP did not preclude him from claiming disability due to the alleged January 14, 2022 employment incident.

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.² This latter section provides that written notice of injury shall be given within 30 days.³ The context of section 8122 makes clear that this means within 30 days of the injury.⁴

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.⁵

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."⁶

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. This case will therefore be remanded for application of FECA Bulletin No. 21-09 with regard to appellant's claim

³ *Id*. at § 8122(a)(2).

⁴ 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).

⁵ 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).

⁶ FECA Bulletin No. 21-09.II.2 (issued April 29, 2021). On March 11, 2021 the American Rescue Plan Act (ARPA) of 2021 was signed into law. <u>Pub. L. No. 117–2</u>. 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.

² *Id*. at § 8118(a).

for COP.⁷ Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision. Accordingly,

IT IS HEREBY ORDERED THAT the March 7, 2022 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.

Issued: September 28, 2022 Washington, DC

> Janice B. Askin, Judge Employees' Compensation Appeals Board

> Valerie D. Evans-Harrell, Alternate 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).