United States Department of Labor
Employees' Compensation Appeals Board

K.Y., Appellant	)	
and	)	**Docket No. 22-0975**
	)	**Issued: June 28, 2023**
DEPARTMENT OF VETERANS AFFAIRS, TOGUS VA MEDICAL CENTER, Augusta, ME, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. McGINLEY, Alternate Judge

JURISDICTION

On June 7, 2022 appellant filed a timely appeal from February 14 and April 6, 2022 merit decisions of the Office of Workers' Compensation Programs (OWCP).[1] Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of this case.

[1] The Board notes that following the April 6, 2022 decision, OWCP received additional evidence. 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.*

[2] 5 U.S.C. § 8101 *et seq.*

ISSUES

The issues are: (1) whether appellant has met her burden of proof to establish entitlement to continuation of pay (COP); and (2) whether appellant has met her burden of proof to establish a diagnosis of COVID-19.

FACTUAL HISTORY

On February 8, 2022 appellant, then a 48-year-old medical instrument technician, filed a traumatic injury claim (Form CA-1) alleging that on January 5, 2022 she was exposed to COVID-19 by either patients or coworkers while in the performance of duty. She stopped work on January 6, 2022.

On January 10, 2022 Pamela Barter-Chessman, an employing establishment physician assistant, reported that appellant was disabled from work due to COVID-19 from January 10[3] through 18, 2022.

In notes dated January 24 and 26, 2022, Dr. Kendra Emery, an osteopath and a Board-certified family practitioner, reported that appellant had been off work from January 1 through 26, 2022 with COVID-19 and sequela from this illness.

On February 8, 2022 Maud Abess, a physician assistant, reported that appellant was disabled from work through February 11, 2022.

By decision dated February 14, 2022, OWCP denied appellant's claim for COP, finding that she did not report the injury on a form approved by OWCP within 30 days following the injury. It noted that the denial of COP did not affect her entitlement to other compensation benefits.

In a development letter dated February 23, 2022, OWCP informed appellant of the deficiencies of her claim. It advised her of the type of evidence needed and provided a questionnaire for her completion. OWCP afforded appellant 30 days to submit the necessary evidence.

On February 28, 2022 appellant asserted that she was exposed to COVID-19 during the first week of January 2022 by either a patient or a coworker. She noted that she reported for a polymerase chain reaction (PCR) test on January 10, 2022 and was notified later that day that she had COVID-19.

In notes dated January 11, 2022, Charlene K. Ome, a physician assistant, noted that appellant had a positive COVID-19 test result on January 10, 2022 due to workplace exposure. She indicated that appellant previously underwent antigen testing with negative results.

[3] The report noted the date as January 10, 2021; however, this appears to be a typographical error as the correct date is January 10, 2022.

Dr. Emery completed a January 26, 2022 treatment note and diagnosed anxiety following COVID-19. She recounted appellant's inability to drive. Dr. Emery completed duty status reports (Form CA-17) on February 16 and 19, 2022 and variously diagnosed fatigue, anxiety, and COVID-19 infection.

By decision dated April 6, 2022, OWCP denied appellant's claim for compensation, finding that the evidence of record was insufficient to establish a diagnosis of COVID-19. Therefore, the requirements had not been met to establish an injury as defined by FECA.

LEGAL PRECEDENT -- ISSUE 1

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.[4] This latter section provides that written notice of injury shall be given within 30 days.[5] The context of section 8122 makes clear that this means within 30 days of the injury.[6]

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.[7]

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."[8]

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[4] *Id*. at § 8118(a).

[5] *Id*. at § 8122(a)(2).

[6] *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).

[7] 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).

[8] 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.

ANALYSIS -- ISSUE 1

The Board finds that this case is not in posture for decision with regard to appellant's entitlement to COP.

As noted above, FECA Bulletin No. 21-09 at subsection II.2, 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."[9]

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 for COP.[10] Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.

LEGAL PRECEDENT -- ISSUE 2

An employee seeking benefits under FECA[11] has the burden of proof to establish the essential elements of his or her claim, including the fact that the individual is an employee of the United States within the meaning of FECA, that the claim was filed within the applicable time limitation of FECA,[12] that an injury was sustained while in the performance of duty as alleged; and that any disability or specific condition for which compensation is claimed is causally related to the employment injury.[13] These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.[14]

Under section 4016 of the ARPA of 2021[15] any claim made for COVID-19 by or on behalf of a "covered employee" for benefits under FECA will be deemed to have an injury proximately caused by exposure to COVID-19 arising out of the nature of the covered employee's employment.

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[9] *Id*.

[10] *See Order Remanding Case, K.C.,* Docket No. 22-1066 (issued December 23, 2022); *Order Remanding Case, T.S.,* Docket No. 22-0830 (issued December 19, 2022); *Order Remanding Case, G.C.,* Docket No. 21-1016 (issued September 27, 2022).

[11] *Id*.

[12] *C.B.*, Docket No. 21-1291 (issued April 28, 2022); *S.C.*, Docket No. 18-1242 (issued March 13, 2019); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

[13] *L.C.*, Docket No. 19-1301 (issued January 29, 2020); *T.H.*, Docket No. 18-1736 (issued March 13, 2019); *R.C.*, 59 ECAB 427 (2008).

[14] *P.A.*, Docket No. 18-0559 (issued January 29, 2020); *T.E.*, Docket No. 18-1595 (issued March 13, 2019); *Delores C. Ellyett*, 41 ECAB 992 (1990).

[15] *Supra* note 8.

A "covered employee" is defined by ARPA as an employee under 5 U.S.C. § 8101(a) and employed in the federal service at any time during the period beginning on January 27, 2020 and ending on January 27, 2023. A "covered employee" prior to a diagnosis of COVID-19 must have carried out duties that required a physical interaction with at least one other person (a patient, member of the public, or a coworker); or was otherwise subject to a risk of exposure to COVID-19.[16]

Exposure to COVID-19 alone is not sufficient to establish a work-related medical condition. Manifestation of COVID-19 must occur within 21 days of the covered exposure. To establish a diagnosis of COVID-19, a claimant must submit the following: (1) a positive PCR or Antigen COVID-19 test result; or (2) a positive Antibody test result, together with contemporaneous medical evidence that the claimant had documented symptoms of and/or was treated for COVID-19 by a physician (a notice to quarantine is not sufficient if there was no evidence of illness); or (3) if no positive laboratory test is available, a COVID-19 diagnosis from a physician together with rationalized medical opinion supporting the diagnosis and an explanation as to why a positive laboratory test result is not available. Self-administered COVID-19 tests, also called "home tests," "at-home tests," or "over-the-counter (OTC) tests" are insufficient to establish a diagnosis of COVID-19 under FECA unless the administration of the self-test is monitored by a medical professional and the results are verified through documentation submitted by such professional.[17]

ANALYSIS -- ISSUE 2

The Board finds that appellant has not met her burden of proof to establish a diagnosis of COVID-19.

Appellant filed a claim on February 8, 2022 alleging that she had developed COVID-19 within 21 days of her employment exposure.[18] However, appellant did not provide a positive COVID-19 test result.[19]

In support of her claim, appellant submitted medical reports dated January 24 and 26, and February 16, 2022, wherein Dr. Emery diagnosed COVID-19. As noted above, OWCP's guidance provides that if no positive laboratory test is available, appellant must submit a COVID-19 diagnosis from a physician together with rationalized medical opinion supporting the diagnosis and an explanation as to why a positive laboratory test result is not available.[20] However, Dr. Emery failed to provide a rationalized opinion supporting a diagnosis of COVID-19, and an

[16] *Id.*; FECA Bulletin No. 21-09 (issued April 28, 2021).

[17] FECA Bulletin Nos. 21-09 (issued April 28, 2021), 21-10 (issued August 17, 2021), and 22-06 (issued February 16, 2022). FECA Bulletin No. 21-10 amended FECA Bulletin No. 21-09 in part to allow for a positive Antigen COVID-19 test result. FECA Bulletin No. 22-06 amended FECA Bulletin Nos. 21-09 and 21-10 to update COVID-19 claims processing guidelines relating to reinfection and home tests.

[18] *Id.*

[19] *Id.*

[20] *Id.*

explanation as to why a positive laboratory test result was not available. Therefore, this evidence is insufficient to establish a diagnosis of COVID-19.

Appellant also provided reports dated January 10 and 11, and February 8, 2022 from physician assistants. As noted above, OWCP's guidance provides that if no positive laboratory test is available, appellant must submit a COVID-19 diagnosis from a physician together with rationalized medical opinion supporting the diagnosis and an explanation as to why a positive laboratory test result is not available.[21] The Board has long held that certain healthcare providers such as physician assistants are not considered qualified "physician[s]" as defined under FECA and, thus, their findings, reports and/or opinions, unless cosigned by a qualified physician, will not suffice for purposes of establishing entitlement to FECA benefits.[22] Accordingly, this evidence is insufficient to establish a diagnosis of COVID-19.

As the evidence of record is insufficient to establish a diagnosis of COVID-19, the Board finds that appellant has not met her burden of proof.

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.

CONCLUSION

The Board finds that the case is not in posture for decision regarding appellant's entitlement to COP. The Board further finds that she has not met her burden of proof to establish a diagnosis of COVID-19.

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[21] *Id*.

[22] Section 8101(2) of FECA provides that physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law. 5 U.S.C. § 8101(2); 20 C.F.R. § 10.5(t). *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3a(1) (January 2013); *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006) (lay individuals such as physician assistants, nurses, and physical therapists are not competent to render a medical opinion under FECA). *See also R.L.*, Docket No. 19-0440 (issued July 8, 2019) (a physician assistant is not considered a physician as defined under FECA).

ORDER

IT IS HEREBY ORDERED THAT the February 14, 2022 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board. The April 6, 2022 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 28, 2023
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