

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

L.L., Appellant)	
)	
and)	Docket No. 22-1020
)	Issued: June 28, 2023
DEPARTMENT OF VETERANS AFFAIRS, VA)	
NORTHERN CALIFORNIA HEALTH CARE)	
SYSTEM, Martinez, CA, 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
PATRICIA H. FITZGERALD, Deputy Chief Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On June 24, 2022 appellant filed a timely appeal from March 21 and May 23, 2022 merit decisions of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (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 The Board notes that, following the May 23, 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.*

ISSUES

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

FACTUAL HISTORY

On March 15, 2022 appellant, then a 47-year-old nurse, filed a traumatic injury claim (Form CA-1) alleging that he developed COVID-19 on January 8, 2022, and tested positive for COVID-19 on January 9, 2022. On the reverse side of the claim form, appellant's supervisor acknowledged that appellant was injured on January 8, 2022 in the performance of duty. Appellant stopped work on January 10, 2022.

In support of his claim, appellant submitted a form report signed by Dr. Austin Saavedra, Board-certified in family medicine. Dr. Saavedra noted that appellant tested positive for COVID-19 on January 10, 2022 and was required to isolate himself from January 10 to 16, 2022.

By decision dated March 21, 2022, OWCP denied appellant's claim for COP, finding that he had not reported his injury on an OWCP-approved form within 30 days of his alleged January 8, 2022 employment injury. It noted that the denial of COP did not preclude appellant from filing a claim for disability due to the effects of his claimed injury.

In a development letter dated March 25, 2022, OWCP informed appellant of the deficiencies of his claim. It advised him of the type of evidence needed and provided a questionnaire for his completion. OWCP afforded appellant 30 days to submit the necessary evidence. No additional evidence was received.

By decision dated May 23, 2022, OWCP denied appellant's claim, finding that he had not submitted the necessary medical evidence to establish a diagnosis of COVID-19. Consequently, it found that he had not met the requirements 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.³ This latter section provides that written notice of injury shall be given within 30 days.⁴ The context of section 8122 makes clear that this means within 30 days of the injury.⁵

³ 5 U.S.C. § 8118(a).

⁴ *Id.* at § 8122(a)(2).

⁵ *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).

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.⁶

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."⁷

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."⁸

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.⁹ Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.

⁶ 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).

⁷ 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.

⁸ *Id.*

⁹ *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).

LEGAL PRECEDENT -- ISSUE 2

An employee seeking benefits under FECA¹⁰ 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,¹¹ 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.¹² 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.¹³

Under section 4016 of ARPA of 2021¹⁴ 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. 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-19.¹⁵

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 Polymerase Chain Reaction (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

¹⁰ *Supra* note 1.

¹¹ *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).

¹² *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).

¹³ *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).

¹⁴ *Supra* note 7.

¹⁵ ARPA, *id.*; FECA Bulletin No. 21-09 (issued April 28, 2021).

administration of the self-test is monitored by a medical professional and the results are verified through documentation submitted by such professional.¹⁶

ANALYSIS -- ISSUE 2

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

Appellant filed a claim on June 24, 2022 alleging that he had developed COVID-19 within 21 days of exposure while in the performance of duty.¹⁷ However, appellant did not provide a positive PCR or Antigen COVID-19 test result, or positive antibody test result with supporting medical documentation.¹⁸

In support of his claim, appellant submitted a signed form report, wherein Dr. Saavedra indicated that appellant required isolation from January 10 to 16, 2022 as he was positive for COVID-19 on January 10, 2022. 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.¹⁹ Dr. Saavedra failed to provide a rationalized opinion supporting a diagnosis, and explain why a positive laboratory test was not available. Therefore, 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 his 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 with regard to appellant's entitlement to COP. The Board further finds that appellant has not met his burden of proof to establish a diagnosis of COVID-19.

¹⁶ 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.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the March 21, 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 May 23, 2022 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 28, 2023
Washington, DC

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

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

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