

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

_____)	
D.I., Appellant)	
)	
and)	Docket No. 22-1366
)	Issued: June 28, 2023
DEPARTMENT OF VETERANS AFFAIRS,)	
EDWARD P. BOLAND VA MEDICAL)	
CENTER, Leeds, MA, 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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On September 28, 2022 appellant filed a timely appeal from an August 16, 2022 merit decision 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.

ISSUE

The issue is whether appellant has met his burden of proof to establish a diagnosis of COVID-19.

FACTUAL HISTORY

On May 26, 2022 appellant, then a 60-year-old nursing assistant, filed a traumatic injury claim (Form CA-1) alleging that, on May 21, 2022, despite following personal protective

¹ 5 U.S.C. § 8101 *et seq.*

equipment protocol, he was exposed to COVID-19 when he assisted an infected patient while in the performance of duty. He stopped work on May 23, 2022. On the reverse side of the claim form, an employing establishment supervisor acknowledged that appellant was injured in the performance of duty.

OWCP received a May 25, 2022 hospital report from Joshua Rosenblum, a physician assistant, who noted the reason for appellant's visit was throat pain and complicated COVID-19. Mr. Rosenblum prescribed medication and recommended a follow up with a treating physician. The physician assistant also provided an undated work excuse through May 30, 2022.

In a June 2, 2022 report, Dr. Peter Park, a family medicine specialist, noted that appellant began to experience symptoms of COVID-19 on May 21, 2022 and tested positive on May 22, 2022. He further noted that appellant continued to feel poorly until June 2, 2022, and was currently beginning to improve. Dr. Park recommended a return to work without restriction on Monday, June 6, 2022 and noted that his recommendation may need to be amended, if appellant did not continue to improve.

In a development letter dated June 28, 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.

In an undated statement received on July 25, 2022, appellant related that he was a nursing assistant working on the acute psychiatric unit at the employing establishment and was assigned to care for two patients with COVID-19. He noted that he was one of five employees who contracted the virus and was given "2 boxes of Binax home Test kits and instructions to stay home if we tested positive." Appellant explained that he tested positive and followed up the next morning with another test with another positive result. He concluded that he contracted COVID-19 while caring for patients in the performance of duty.

On July 25, 2022 OWCP also received an undated work excuse from Dr. Ewa Arnold, a Board-certified family practitioner.

By decision dated August 16, 2022, OWCP denied appellant's traumatic injury claim, finding that the medical evidence of record was insufficient to establish a COVID-19 diagnosis. Therefore, the requirements had not been met to establish an injury as defined by FECA.

LEGAL PRECEDENT

An employee seeking benefits under FECA² 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,³ that an injury was sustained while in the performance of duty as alleged; and

² *Id.*

³ *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).

that any disability or specific condition for which compensation is claimed is causally related to the employment injury.⁴ 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.⁵

Under section 401.6 of the American Rescue Plan Act (ARPA) of 2021⁶ 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-19.⁷

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 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 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.⁸

ANALYSIS

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

⁴ *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).

⁵ *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).

⁶ Public Law 117-2 (March 11, 2021).

⁷ ARPA, *id.*; FECA Bulletin No. 21-09 (issued April 28, 2021).

⁸ FECA Bulletin Nos. 22-06 (issued February 16, 2022); 21-10 (issued August 17, 2021), and 21-09 (issued April 28, 2021). 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.

Appellant filed a claim on May 26, 2022 alleging that he had developed COVID-19 within 21 days of his exposure while in the performance of duty.⁹ However, he did not provide a positive COVID-19 result.¹⁰

In support of his claim, appellant submitted a May 25, 2022 hospital report from a physician assistant, who noted that the reason for appellant's visit was throat pain and complicated COVID-19. As noted above, OWCP requires 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.¹¹ However, certain healthcare providers such as nurses and physician assistants are not considered "physician[s]" as defined under FECA.¹² This evidence is, therefore, insufficient to establish a diagnosis of COVID-19.

OWCP also received a June 2, 2022 report from Dr. Park, who noted that appellant began to experience symptoms of COVID-19 on May 21, 2022 and tested positive on May 22, 2022 and an undated work excuse from Dr. Arnold. As noted above, OWCP requires 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. However, these physicians did not provide a rationalized medical opinion supporting the diagnosis and an explanation as to why a positive laboratory test result was not available.¹³ This evidence is, therefore, insufficient to establish a diagnosis of COVID-19.

As the medical 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.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² Section 8101(2) of FECA provides that medical opinions can only be given by a qualified physician. This section defines a physician as 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).

¹³ *Supra* note 8.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the August 16, 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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board