

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

S.J., Appellant	)	
	)	
and	)	<b>Docket No. 22-1321</b>
	)	<b>Issued: November 20, 2023</b>
<b>DEPARTMENT OF VETERANS AFFAIRS,</b>	)	
<b>SEATTLE VA MEDICAL CENTER,</b>	)	
<b>Seattle, WA, Employer</b>	)	
	)	

*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 2, 2022 appellant filed a timely appeal from merit decisions of the Office of Workers' Compensation Programs (OWCP) dated June 21 and August 12, 2022.<sup>1</sup> Pursuant to the

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<sup>1</sup> Appellant submitted a timely request for oral argument before the Board. 20 C.F.R. § 501.5(b). Pursuant to the Board's *Rules of Procedure*, oral argument may be held in the discretion of the Board. 20 C.F.R. § 501.5(a). In support of appellant's oral argument request, she asserted that oral argument should be granted because she did timely submit her claim for workers' compensation benefits and did not receive the assistance necessary for her to be successful in filing her claim. The Board, in exercising its discretion, denies appellant's request for oral argument because the arguments on appeal can adequately be addressed in a decision based on a review of the case record. Oral argument in this appeal would further delay issuance of a Board decision and not serve a useful purpose. As such, the oral argument request is denied, and this decision is based on the case record as submitted to the Board.

Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>3</sup>

### **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 June 13, 2022 appellant, then a 42-year-old medical technician, filed a traumatic injury claim (Form CA-1) alleging that on or about May 11, 2022 she was exposed to and contracted COVID-19 while in the performance of duty. On the reverse side of the claim form, appellant's supervisor acknowledged that appellant was injured in the performance of duty. Appellant stopped work on May 17, 2022.

In support of her claim, appellant submitted a poor-quality photograph of a self-administered COVID-19 test.

On June 17, 2022 the employing establishment challenged appellant's claim asserting that she submitted a self-administered COVID-19 test, which was insufficient to establish her COVID-19 claim.

By decision dated June 21, 2022, OWCP denied appellant's claim for COP, finding that she had not reported her injury on an OWCP-approved form within 30 days of her alleged May 11, 2022 employment injury. It noted that the decision only affected her entitlement to COP and did not affect her entitlement to other compensation benefits.

On June 7, 2022 M.C., an employing establishment registered nurse, noted that appellant was medically cleared to return to work on June 8, 2022. She indicated that appellant was excused from work from May 17 through June 7, 2022. M.C. further recommended that appellant not be retested for COVID-19 for 90 days. In a letter dated June 23, 2022, the employing establishment noted that appellant originally submitted her Form CA-1 on June 9, 2022, but had to return the Form CA-1 because appellant did not submit any medical evidence, or a positive COVID-19 test with the original submission. It noted that they were not controverting COP.

On June 23, 2022 appellant requested a review of the written record by a representative of OWCP's Branch of Hearings and Review.

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<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

<sup>3</sup> The Board notes that, following the August 12, 2022 decision, appellant submitted additional evidence to OWCP. However, the Board's *Rules of Procedures* 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.*

In a development letter dated July 1, 2022, OWCP informed appellant of the deficiencies of her claim. It advised her of the type of factual and medical evidence needed and provided a questionnaire for her completion. OWCP afforded appellant 30 days to submit the necessary evidence.

OWCP received a July 15, 2022 after-visit summary from Dr. David S. Cobb, a Board-certified family practitioner, who treated appellant for a history of COVID-19, asthma, shortness of breath, and elevated blood pressure. In a July 15, 2022 form, he diagnosed a history of COVID-19 infection and shortness of breath. Dr. Cobb noted a date of illness of May 14, 2022. On physical examination, he reported normal findings and released appellant to work without restrictions on July 15, 2022. In an attending physician's report (Form CA-20) dated July 15, 2022, Dr. Cobb indicated that appellant experienced COVID-19 symptoms on May 14, 2022, which consisted of a headache, cough, change in taste, fever, and shortness of breath. He advised that appellant had a positive self-administered COVID-19 home test. Dr. Cobb diagnosed history of COVID-19 and shortness of breath and checked a box marked "Yes" indicating that appellant's condition had been caused or aggravated by an employment activity noting that she works in direct patient care. He noted that appellant was partially disabled from May 14 through July 15, 2022.

OWCP received an antibody test result, collected on August 9, 2022, which revealed that she tested positive for detecting the presence of antibodies against SARS-CoV-2.

By decision dated August 12, 2022, OWCP denied appellant's claim, finding that she had not submitted the necessary medical evidence to establish a diagnosis of COVID-19. Consequently, it found that she 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.<sup>4</sup> This latter section provides that written notice of injury shall be given within 30 days.<sup>5</sup> The context of section 8122 makes clear that this means within 30 days of the injury.<sup>6</sup>

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

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<sup>4</sup> *Id.* at § 8118(a).

<sup>5</sup> *Id.* at § 8122(a)(2).

<sup>6</sup> *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, 763-64 (1989); *Myra Lenburg*, 36 ECAB 487, 489 (1985).

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.<sup>7</sup>

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.”<sup>8</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that appellant has met her burden of proof to establish entitlement to COP.

The record reflects that OWCP found that appellant’s claim for COP was untimely filed as she filed her claim more than 30 days after her May 11, 2022 employment injury. The Board finds, however, that she signed and submitted a Form CA-1 on June 9, 2022, within 30 days of May 11, 2022, the accepted date of injury. Appellant indicated on the June 9, 2022 claim form that she was claiming COP. Appellant’s supervisor signed the Form CA-1. In a letter dated June 23, 2022, the employing establishment noted that appellant originally submitted her Form CA-1 on June 9, 2022, but had to return the Form CA-1 because she did not submit any medical evidence or a positive COVID-19 test with the original submission. It noted that they were not controverting COP. As appellant’s Form CA-1 and claim for COP were filed within 30 days of injury, the Board finds that OWCP erred in denying her request for COP as untimely filed.<sup>9</sup>

The Board therefore will reverse the June 21, 2022 OWCP decision, which denied appellant’s entitlement to COP.

### **LEGAL PRECEDENT -- ISSUE 2**

An employee seeking benefits under FECA<sup>10</sup> 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

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<sup>7</sup> 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).

<sup>8</sup> 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.

<sup>9</sup> *A.C.*, Docket No. 18-1176 (issued December 4, 2018); *see Bossy W. Anderson*, 41 ECAB 833 (issued June 20, 1990).

<sup>10</sup> *Id.*

limitation period of FECA,<sup>11</sup> 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.<sup>12</sup> 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.<sup>13</sup>

Under section 4016 of ARPA of 2021<sup>14</sup> 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.<sup>15</sup>

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.<sup>16</sup> 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 test result is not available.<sup>17</sup> Self-administered COVID-19 test, 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.<sup>18</sup>

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<sup>11</sup> *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).

<sup>12</sup> *L.C.*, Docket No. 19-1301 (issued January 29, 2020); *J.H.*, Docket No. 18-1637 (issued January 29, 2020); *James E. Chidden, Sr.*, 40 ECAB 312 (1988).

<sup>13</sup> *P.A.*, Docket No. 18-0559 (issued January 29, 2020); *K.M.*, Docket No. 15-1660 (issued September 16, 2016); *Delores C. Elliott*, 41 ECAB 992 (1990).

<sup>14</sup> Public Law No. 117-2 (March 11, 2021).

<sup>15</sup> FECA Bulletin No. 21-09 (issued April 28, 2021).

<sup>16</sup> *Id.*

<sup>17</sup> FECA Bulletin No. 21-10 (issued August 17, 2021).

<sup>18</sup> *Supra* note 8.

## ANALYSIS -- ISSUE 2

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

The Board notes that, in the case of *William A. Couch*,<sup>19</sup> the Board held that when adjudicating a claim, OWCP is obligated to consider and address all evidence properly submitted by a claimant and received by OWCP before the final decision is issued. As noted above, appellant submitted additional evidence from Dr. Cobb dated July 15, 2022. OWCP, however, did not review this additional evidence in its August 12, 2022 decision. It, thus, failed to follow its procedures by not considering and addressing all of the relevant evidence of record.<sup>20</sup>

As Board decisions are final with regard to the subject matter appealed, it is crucial that OWCP consider and address all relevant evidence received prior to the issuance of its final decision.<sup>21</sup> For this reason, the case will be remanded to OWCP to address the above-noted evidence submitted at the time of its August 12, 2022 decision.<sup>22</sup> Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.

## CONCLUSION

The Board finds that appellant has met her burden of proof to establish entitlement to COP. The Board further finds that the case is not in posture for decision with regard to whether she has met her burden of proof to establish that she contracted COVID-19 in the performance of duty.

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<sup>19</sup> 41 ECAB 548 (1990); *see K.B.*, Docket No. 20-1320 (issued February 8, 2021); *see also R.D.*, Docket No. 17-1818 (issued April 3, 2018).

<sup>20</sup> OWCP's procedures provide that all evidence submitted should be reviewed and discussed in the decision. Evidence received following development that lacks probative value also should be acknowledged. Whenever possible, the evidence should be referenced by author and date. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Initial Denials*, Chapter 2.1401.5b2) (November 2012).

<sup>21</sup> *E.D.*, Docket No. 20-0620 (issued November 18, 2020); *see C.S.*, Docket No. 18-1760 (issued November 25, 2019); *Yvette N. Davis*, 55 ECAB 475 (2004); *see also William A. Couch*, *supra* note 7.

<sup>22</sup> *D.S.*, Docket No. 20-0589 (issued November 10, 2020); *see V.C.*, Docket No. 16-0694 (issued August 19, 2016).

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 21, 2022 decision of the Office of Workers' Compensation Programs is reversed and the August 12, 2022 decision is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: November 20, 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