

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

_____)	
L.H., Appellant)	
)	
and)	Docket No. 23-0247
)	Issued: September 8, 2023
U.S. POSTAL SERVICE, POST OFFICE,)	
Nashville, TN, Employer)	
_____)	

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

Case Submitted on the Record

ORDER REMANDING CASE

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge
JAMES D. MCGINLEY, Alternate Judge

On December 2, 2022 appellant filed a timely appeal from an October 24, 2022 merit decision and a November 14, 2022 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). The Clerk of the Appellate Boards assigned Docket No. 23-0247.¹

On October 2, 2022 appellant, then a 56-year-old parcel post distribution machine operator, filed a traumatic injury claim (Form CA-1) alleging that on August 30, 2022 she contracted COVID-19 while in the performance of duty. She related that her work site is a hot, unsanitary environment which lacks airflow and has newly installed Plexi-glass dividers on consoles that are never cleaned, which contributes to the transmission of germs. Appellant stopped work on August 31, 2022 and returned to work on October 1, 2022.

By decision dated October 24, 2022, OWCP denied appellant's claim for continuation of pay (COP), finding that she did not report the injury on a form approved by OWCP within 30 days

¹ The Board notes that following the November 14, 2022 decision, a appellant submitted additional evidence to OWCP. 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.*

following the injury. It noted that the denial of COP did not preclude her from claiming wage loss due to the claimed August 30, 2022 employment injury.

On November 2, 2022 appellant requested reconsideration of the October 24, 2022 decision and submitted additional evidence. Along with her request, she submitted an October 31, 2022 statement asserting that although she indicated an August 30, 2022 date of injury in her Form CA-1, her actual date of injury may be different because she was on preapproved vacation leave on September 5, 2022, which is the date she was tested for and received a positive COVID-19 diagnosis.

By decision dated November 14, 2022, OWCP denied appellant's request for reconsideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a).

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

² 5 U.S.C. § 8118(a).

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 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.

In its October 24, 2022 merit decision 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.⁷ Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.⁸ Accordingly,

IT IS HEREBY ORDERED THAT the October 24, 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. The November 14, 2022 decision of the Office of Workers' Compensation Programs is set aside as moot.

Issued: September 8, 2023
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

⁷ 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).

⁸ In light of the Board's disposition of the merit issue, the nonmerit issue is moot.