

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

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| D.S., Appellant |) | |
| |) | |
| and |) | Docket No. 23-0017 |
| |) | Issued: May 17, 2023 |
| DEPARTMENT OF VETERANS AFFAIRS, |) | |
| BRUCE W. CARTER VA MEDICAL CENTER, |) | |
| Miami, FL, 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 October 6, 2022 appellant filed a timely appeal from August 11 and 22, 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

ISSUE

The issue is whether appellant has met her burden of proof to establish entitlement to continuation of pay (COP).

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the August 22, 2022 decision, OWCP received additional evidence. 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.*

FACTUAL HISTORY

On August 9, 2022 appellant, then a 55-year-old registered nurse, filed a traumatic injury claim (Form CA-1) alleging that on June 22, 2022 she contracted COVID-19 while in the performance of duty. She related that she tested positive for COVID-19 due to an outbreak in the hub/office cubicles where several other nurses were positive for the virus. Appellant further noted that she began experiencing symptoms on June 18, 2022, called the employee health nurse on June 21, 2022, and received a COVID-19 test on June 22, 2022. She stopped work on June 22, 2022, and returned to work on June 29, 2022. A polymerase chain reaction (PCR) test result, dated June 22, 2022, indicated that appellant tested positive for COVID-19.

In June 22, 2022 progress notes, James Lankford and Daymara Ahmed, registered nurses, related that appellant presented to the emergency room with headaches, weakness, and runny nose after having been exposed to a fellow employee with a known or suspected case of COVID-19. A COVID-19 PCR test was performed and sent to a laboratory, after which she was discharged home.

By decision dated August 11, 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 June 22, 2022 employment injury. It noted that the decision did not affect her entitlement to other compensation benefits.

By decision dated August 22, 2022, OWCP again 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 June 22, 2022 employment injury. It again noted that the decision did not affect her entitlement to other compensation benefits.

LEGAL PRECEDENT

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

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

³ *Supra* note 1 at § 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).

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).

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

The Board finds that appellant has not met her burden of proof to establish entitlement to COP.

The record reflects that appellant filed written notice of her traumatic injury on a Form CA-1 on August 9, 2022, alleging that on June 22, 2022 she contracted COVID-19 while in the performance of duty. Appellant stopped work on June 22, 2022 and returned to work on June 29, 2022. As previously noted, FECA Bulletin No. 21-09 defines date of injury as the date of last exposure, which in this case was June 22, 2022.⁸ As appellant filed her Form CA-1 on August 9, 2022, more than 30 days after the June 22, 2022 date of injury, the Board finds that she 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 appellant has not met her burden of proof to establish entitlement to COP.

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.*

ORDER

IT IS HEREBY ORDERED THAT the August 11 and 22, 2022 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: May 17, 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