

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

S.M., Appellant

and

U.S. POSTAL SERVICE, ELIZABETHTOWN
POST OFFICE, Elizabethtown, KY, Employer

)
)
)
)
)
)
)
)
)
)
)

**Docket No. 21-1202
Issued: May 5, 2022**

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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On August 3, 2021 appellant filed a timely appeal from a June 23, 2021 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.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 June 23, 2021 decision, a appellant submitted additional evidence on appeal. 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.*

FACTUAL HISTORY

On February 17, 2021 appellant, then a 61-year-old rural carrier, filed a traumatic injury claim (Form CA-1) alleging that on January 13, 2021 she contracted COVID-19 while in the performance of duty. On the reverse side of the claim form, appellant's supervisor, E.D., indicated that the employing establishment received notice of the injury on February 17, 2021.

On February 18, 2021 the employing establishment controverted appellant's claim because there was no information as to where appellant contracted COVID-19.

In a development letter dated February 22, 2021, OWCP informed appellant that the evidence of record was insufficient to establish her claim. It advised her of the type of factual and medical evidence needed and provided a questionnaire for her completion. In a separate development letter of even date, OWCP requested that the employing establishment provide additional information, including comments from a knowledgeable supervisor and details regarding appellant's alleged COVID-19 exposure. It afforded both parties 30 days to submit the necessary evidence.

OWCP subsequently received a January 13, 2021 laboratory test result indicating that appellant tested positive for COVID-19.

A February 25, 2021 letter from M.L., the postmaster, described the employing establishment's COVID-19 precautions and related that appellant was on leave several times around her alleged date of exposure. She stated that it was highly unlikely that appellant contracted COVID-19 while at work.

On March 2, 2021 M.L. responded to OWCP's development questionnaire, describing appellant's employment activities in greater detail and maintaining that appellant was unlikely to have contracted COVID-19 while in the performance of duty. She also noted that appellant filed her Form CA-1 on February 12, 2021.

Appellant responded to OWCP's development questionnaire on March 3, 2021. She described her employment duties, including contact with customers, and reported that there were several COVID-19 cases and/or exposures in her office in the weeks before her diagnosis.

A March 11, 2021 letter from L.S., an employing establishment compensation specialist and registered nurse, noted that appellant did not work on the reported date of injury and that appellant's position did not require any tasks that would have resulted in the alleged exposure.

In a letter dated March 16, 2021, OWCP informed appellant of the passage of the American Rescue Plan Act of 2021 (ARPA) and explained that her claim would be reviewed under this new legislation. It advised that this legislation created a presumption that a federal employee diagnosed with COVID-19 after performing duties that required contact with coworkers or the public has an injury proximately caused by employment.

By decision dated June 23, 2021, OWCP accepted appellant's claim for COVID-19. By separate decision of even date, it denied her claim for COP, finding that she had not reported her injury on an OWCP-approved form "30 days following the injury." OWCP noted that the denial of COP neither affected appellant's entitlement to other compensation benefits, nor precluded her from filing a claim for disability due to the effects of the accepted employment injury.

LEGAL PRECEDENT

Section 8118(a) of FECA authorizes continuation of pay, 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 a Form CA-1 within 30 days of the date of the injury (but if that form is unavailable, using another form would not alone preclude receipt); and (3) begin losing time from work due to the traumatic injury within 45 days of the injury.⁶

ANALYSIS

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

OWCP found that appellant's claim for COP was untimely as she filed her Form CA-1 more than "30 days following the employment injury." The Board notes that appellant's postmaster, M.L., indicated in a March 2, 2021 letter that appellant filed her Form CA-1 with the employing establishment on February 12, 2021, which would render appellant's claim for COP timely filed. However, OWCP did not explain in its June 23, 2021 decision why it solely based its denial of appellant's COP claim on the Form CA-1 filed on February 17, 2021 as opposed to the Form CA-1 that M.L. indicated appellant filed on February 12, 2021. Moreover, there is no indication that OWCP requested the February 12, 2021 Form CA-1 from the employing establishment.

It is well established that proceedings under FECA are not adversarial in nature and, while appellant has the burden to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence, particularly when such evidence is of the character normally obtained from the employing establishment or other government source.⁷ As M.L., the postmaster, referenced a Form CA-1 that appellant filed on February 12, 2021, OWCP should have requested that the employing establishment produce the February 12, 2021 Form CA-1 before determining that appellant's claim for COP is untimely filed solely based on the Form CA-1 filed on

³ 5 U.S.C. § 8118.

⁴ *Id.* at § 8122(a)(2).

⁵ *E.M.*, Docket No. 20-0837 (issued January 27 2021); *Robert M. Kimzey*, 40 ECAB 762, 763-64 (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).

⁷ *See S.W.*, Docket No. 20-1402 (issued March 28, 2022); *M.A.*, Docket No. 20-1590 (issued May 12, 2021); *D.O.*, Docket No. 20-0006 (issued September 9, 2020); *Walter A. Fundinger, Jr.*, 37 ECAB 200, 204 (1985); *Michael Gallo*, 29 ECAB 159, 161 (1978).

February 17, 2021. The Board is, therefore, unable to render an informed decision regarding the issue of whether appellant timely filed her claim for COP. Accordingly, the case shall be remanded for further development.

On remand OWCP shall request that the employing establishment either provide a copy of the February 12, 2021 Form CA-1 that M.L. indicated that appellant filed, or explain why it is unable to provide that Form CA-1. Following this and other such further development as deemed necessary, it shall issue a *de novo* decision regarding appellant's entitlement to COP.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the June 23, 2021 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.

Issued: May 5, 2022
Washington, DC

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

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

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