

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

N.S., Appellant)	
)	
and)	Docket No. 21-0949
)	Issued: August 18, 2023
U.S. POSTAL SERVICE, PLYMOUTH POST)	
OFFICE, Plymouth, MI, 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
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 29, 2021 appellant filed a timely appeal from a January 7, 2021 merit decision and March 5 and April 8, 2021 nonmerit 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.

ISSUES

The issues are: (1) whether appellant has met her burden of proof to establish entitlement to continuation of pay (COP); (2) whether OWCP properly denied appellant's request for an oral hearing as untimely filed, pursuant to 5 U.S.C. § 8124(b); and (3) whether OWCP properly denied appellant's request for reconsideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a).

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On May 27, 2020 appellant, then a 57-year-old rural delivery specialist, filed a traumatic injury claim (Form CA-1) alleging that on April 6, 2020 she contracted COVID-19 while in the performance of duty. She stopped work on April 6, 2020.

In support of her claim, appellant submitted a laboratory test result, dated April 6, 2020, which revealed that she tested positive for COVID-19.

In a development letter dated June 1, 2020, 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. 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 received additional evidence. The employing establishment submitted an e-mail from, Postmaster, F.H., dated June 16, 2020, who indicated that appellant was a rural carrier who served the public for six to seven hours a day mostly on a mounted route. She had no reason to believe that appellant's statement regarding her COVID-19 exposure was untrue and she was the only employee in the office to test positive for COVID-19.

In a June 20, 2020 statement, appellant noted that the first case of COVID-19 in Michigan was detected in March 2020. She indicated that at that time nothing was done in her office to protect the employees and they were still gathering for daily meetings. Appellant inquired about the protocols for people working with symptoms or coming back to the office after being out sick specifically noting that a supervisor was out sick after returning from a trip to New Orleans for Mardi Gras. The supervisor responded that there were no protocols at that time. Appellant left work on April 3, 2020 with a headache and developed other symptoms over that weekend. She was tested on April 6, 2020 and informed that she was positive for COVID-19 on April 8, 2020. Appellant noted living with her elderly parents and sister and her parents began exhibiting symptoms on April 12, 2020. Her father and mother passed away of COVID-19 on April 16 and 20, 2020 respectively. Appellant's sister was treated and recovered after six weeks. She reported not having contact with anyone outside her home or work.

On June 22, 2020 appellant was treated by Dr. Jagdish K. Sachdeva, a Board-certified internist, for COVID-19 and mental health counseling. He noted that appellant tested positive for COVID-19 in April 2020 and both of her parents contracted COVID-19 in April 2020 and died one week apart from each other. Dr. Sachdeva diagnosed grieving, COVID-19, and major depression. In an undated statement, he diagnosed COVID-19 and opined that this illness could have been contracted from appellant's environment, which included her workplace.

Appellant was treated by Dr. Gerald A. Shiener, a Board-certified psychiatrist, on August 5, 2020, for major depression with features of post-traumatic stress disorder (PTSD), complicated bereavement, and status postcoronavirus infectious disease.

In an August 14, 2020 letter, L.S., an employing establishment injury compensation specialist, could not confirm appellant's allegations, noting that her position did not require frequent or prolonged contact with any person and she did not have public contact at the employing establishment. L.S. indicated that, to limit appellant's exposure, the employing establishment followed the Center for Disease Control's guidelines for personal protective equipment and social distancing; gave mandatory stand-up talks regarding COVID-19 precautions; and provided gloves, masks, and hand sanitizer for all employees.

In an undated statement, appellant disputed the August 15, 2020 statement from L.S. noting that social distancing was not adhered to on the workroom floor as she interacted with other clerks, supervisors, and a postmaster on a daily basis and often touched or rubbed against each other in the staging area. She reported attending group meetings until late March. Appellant further reported close contact with Supervisor S.F. in mid-to-late March. She noted that S.F. was out sick after a vacation to New Orleans at Mardi Gras and would not confirm whether she had been tested for COVID-19.

An anonymous witness statement dated September 7, 2020 indicated that the employing establishment learned of COVID-19 in late February and was not prepared for the safety of its workers. The author of the statement reported that the employing establishment continued to hold open floor meetings and masks and gloves were not available. The author went on to report that in March a supervisor was observed drinking juice through an open facemask. Gloves and facemasks became available in March and open floor meetings were discontinued at this time.

On September 17, 2020 OWCP received appellant's three positive COVID-19 tests dated April 6 and May 8 and 18, 2020.

An OWCP memorandum dated October 27, 2020 found that appellant established the claimed exposure through the weight of the factual evidence submitted. Appellant reported close interaction with Supervisor S.F. in mid-March after S.F. came back to work following sick leave taken as a result of a similar COVID-19 illness contracted while vacationing at Mardis Gras. Although S.F. never confirmed that she was tested for COVID-19 she went out of work again in late March or early April. Appellant reported that S.F. brought employees together for group meetings without regard to social distancing and once masks were required she would walk around the facility with a mouth hole cut in the mask so that she could drink liquids.

On November 13, 2020 Dr. Shiener opined within a reasonable degree of medical certainty that based on the interactions appellant described at work her COVID-19 infection was contracted in the course of her employment. Similarly, a November 25, 2020 report from a counselor noted treating appellant for depression and anxiety as a result of her COVID-19 diagnoses.

By decision dated January 7, 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 within 30 days of the accepted April 6, 2020 employment injury.

OWCP received additional evidence. An e-mail from Postmaster F.H. dated February 11, 2021 recounted that on April 3, 2020 appellant left work and went straight home and felt fine, but

the next day she woke up ill with fever, chest pains, and body aches. Her condition progressed throughout the weekend and she went to the emergency room on April 6, 2020 where she was tested for COVID-19 and received positive results on April 8, 2020. F.H. indicated that the "DOI was recorded as April 6, 2020 and not entered into EHS until May 28, 2020 at which time we received notification the [sic] that COVID-19 could be entered as an on-the-job-injury. It was not known earlier that, contracting the virus could be considered an [on-the-job-injury], therefore, it was not entered on the day it was reported. The CA1 was filed on May 27, 2020 and entered into EHS on May 28, 2020."

In an appeal request form postmarked February 11, 2021, appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

In a separate undated statement, appellant indicated that she did not receive the January 7, 2021 decision by mail. She reported moving in November 2020 and provided a valid forwarding address to a post office box. Appellant contacted OWCP on January 26, 2021 and was informed that a decision had been issued and mailed to her. She requested and received a facsimile of OWCP's decision. Appellant advised that the filing of the claim was the responsibility of Postmaster F.H., whom she contacted numerous times during the first couple of weeks of her illness and asked her to file the claim and she was told that her condition was not a workers' compensation claim. She received confirmation from the union that her illness could be filed as a workers' compensation claim and repeatedly called, texted, and e-mailed her postmaster inquiring as to why her claim was not timely filed. Appellant indicated that her postmaster stated that COVID-19 was new and she was unsure what to do in the beginning and did not realize the claim had to be filed within 30 days.

On February 19, 2021 Dr. Shiener diagnosed major depression with features of PTSD, complicated bereavement, and Coronavirus. He opined within a reasonable degree of medical certainty that appellant contracted COVID-19 in the course of her employment. Similarly, a February 19, 2021 report from a counselor noted treating appellant for depression as a result of her COVID-19 diagnoses.

By decision dated March 5, 2021, OWCP denied appellant's request for an oral hearing as untimely filed, finding that her request was not made within 30 days of the January 7, 2021 OWCP decision. It further exercised discretion and determined that the issue in this case could equally well be addressed by requesting reconsideration and submitting evidence not previously considered.

OWCP received additional evidence. A notice of personnel action (PS Form 50) dated February 4, 2021 indicated that appellant retired effective January 15, 2021.

In letters dated March 24 and 26, 2021, appellant, through counsel, requested reconsideration. She referenced the February 11, 2021 e-mail from Postmaster F.H. which established that appellant did not delay in reporting her injury, rather it was the postmaster who delayed in inputting the reported injury into the system. The postmaster reported receiving notice of an on-the-job injury on April 8, 2020; however, she did not report the injury until May 28, 2020 because she did not realize that COVID-19 was considered an on-the-job-injury.

By decision dated April 8, 2021, OWCP denied appellant's request for reconsideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a).

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.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 [d]ate of [i]njury since the precise time of transmission may not always be known due to the nature of the virus."⁶

ANALYSIS -- ISSUE 1

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

Appellant filed written notice of her traumatic injury (Form CA-1) on May 27, 2020. By decision dated January 7, 2021, OWCP denied her request for COP, as her claim was not filed within 30 days of the accepted April 6, 2020 employment injury. It noted that the denial of COP

² *Id.* at § 8118(a).

³ *Id.* at § 8122(a)(2).

⁴ *L.S.*, Docket No. 21-1064 (issued April 14, 2022); *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.

did not preclude appellant's from filing a claim for disability due to the effects of the accepted employment injury.

Because appellant filed written notice of her traumatic injury claim (Form CA-1) on May 27, 2020, the Board finds that it was not filed within 30 days of the accepted April 6, 2020 employment injury, as specified in sections 8118(a) and 8122(a)(2) of FECA. Accordingly, she is not entitled to COP.

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of FECA provides that "a claimant for compensation not satisfied with a decision of the Secretary is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his [or her] claim before a representative of the Secretary."⁷ Sections 10.617 and 10.618 of the federal regulations implementing this section of FECA provide that a claimant shall be afforded a choice of an oral hearing or a review of the written record by a representative of the Secretary.⁸ A claimant is entitled to a hearing or review of the written record as a matter of right only if the request is filed within the requisite 30 days as determined by postmark or other carrier's date marking and before the claimant has requested reconsideration.⁹ Although there is no right to a review of the written record or an oral hearing, if not requested within the 30-day time period, OWCP may within its discretionary powers grant or deny appellant's request and must exercise its discretion.

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly denied appellant's request for an oral hearing as untimely filed, pursuant to 5 U.S.C. § 8124.

OWCP's regulations provide that the request for an oral hearing must be made within 30 days of the date of the decision for which a review is sought. Because appellant's hearing request was dated and postmarked February 11, 2021, it postdated OWCP's January 7, 2021 decision by more than 30 days and, therefore, is untimely. Appellant was, therefore, not entitled to an oral hearing as a matter of right.¹⁰

OWCP, however, has the discretionary authority to grant the request and it must exercise such discretion.¹¹ The Board finds that, in the March 5, 2021 decision, OWCP's Branch of Hearings and Review properly exercised its discretion by determining that the issue in the case

⁷ 5 U.S.C. § 8124(b)(1).

⁸ 20 C.F.R. §§ 10.616, 10.617.

⁹ *Id.* at § 10.616(a).

¹⁰ *See P.C.*, Docket No. 19-1003 (issued December 4, 2019).

¹¹ *Id.*

could be equally well addressed through a request for reconsideration before OWCP, along with the submission of additional evidence.

The Board has held that the only limitation on OWCP's authority is reasonableness. An abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deductions from established facts.¹² In this case, the evidence of record does not indicate that OWCP abused its discretion by denying appellant's request for an oral hearing. Accordingly, the Board finds that OWCP properly denied her request for an oral hearing pursuant to 5 U.S.C. § 8124(b).

LEGAL PRECEDENT -- ISSUE 3

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.¹³ OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.¹⁴ One such limitation is that the request for reconsideration must be received by OWCP within one year of the date of the decision for which review is sought.¹⁵

A timely request for reconsideration, including all supporting documents, must set forth arguments, and contain evidence that either: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.¹⁶ When a timely request for reconsideration does not meet at least one of the above-noted requirements, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.¹⁷

ANALYSIS -- ISSUE 3

The Board finds that OWCP improperly denied appellant's request for reconsideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a).

Appellant did not show that OWCP erroneously applied or interpreted a specific point or law, nor did she advance a new and relevant legal argument not previously considered in her March 24, 2021 reconsideration request. In her statement, she merely reiterated her previous

¹² *Id.*

¹³ 5 U.S.C. § 8128(a).

¹⁴ 20 C.F.R. § 10.607.

¹⁵ *Id.* at § 10.607(a). For merit decisions issued on or after August 29, 2011, a request for reconsideration must be received by OWCP within one year of OWCP's decision for which review is sought. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (September 2020). Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the received date in the Integrated Federal Employees' Compensation System (iFECS). *Id.* at Chapter 2.1602.4b.

¹⁶ *Id.* at § 10.606(b)(3); *see B.R.*, Docket No. 19-0372 (issued February 20, 2020).

¹⁷ *Id.* at § 10.608.

argument that the filing of the claim was the responsibility of her Postmaster, F.H., who stated that COVID-19 was new and she was unsure what to do in the beginning and did not realize that the claim had to be filed within 30 days. Consequently, appellant was not entitled to a review of the merits based on the first or second above-noted requirements.¹⁸

The underlying issue on reconsideration is whether appellant has met her burden of proof to establish that she had reported her injury on an OWCP-approved form within 30 days of the accepted April 6, 2020 employment injury. She submitted a February 11, 2021 e-mail from Postmaster F.H. who specifically addressed whether appellant reported her injury on an OWCP-approved form within 30 days of the accepted April 6, 2020 employment injury. F.H. stated: “DOI was recorded as April 6, 2020 and not entered into EHS until May 28, 2020 at which time we received notification that COVID-19 could be entered as an on-the-job injury. It was not known earlier that, contracting the virus could be considered an [on-the-job-injury], therefore, it was not entered on the day it was reported.” The Board finds that the February 11, 2021 e-mail from Postmaster F.H., was new and relevant to the underlying issue of whether appellant timely reported her injury on an OWCP-approved form. This e-mail addressed the deficiencies noted in OWCP’s denial of appellant’s claim and provided further explanation to cure the deficiencies. F.H. stated that appellant’s claim “was not entered on the day it was reported.” As such, the e-mail constitutes relevant and pertinent new evidence in support of appellant’s claim for COP. Therefore, the submission of this evidence requires reopening of her claim for merit review pursuant to the third prong of section 10.606(b).¹⁹

As appellant has submitted relevant and pertinent new evidence not previously considered by OWCP, she is entitled to a review of the merits of the claim under section 10.606(b)(3) of OWCP’s regulations.²⁰ Following any further development as deemed necessary, OWCP shall issue an appropriate merit decision on appellant’s claim.

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish entitlement to COP. The Board further finds that OWCP properly denied her request for an oral hearing as untimely filed, pursuant to 5 U.S.C. § 8124(b). The Board also finds that OWCP improperly denied appellant’s request for reconsideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a).

¹⁸ *Id.* at § 10.606(b)(3); *see J.W.*, Docket No. 19-1795 (issued March 13, 2020).

¹⁹ *See C.H.*, Docket No. 17-1065 (issued December 14, 2017); *J.W.*, Docket No. 18-0822 (issued July 1, 2020); *D.M.*, Docket No. 10-1844 (issued May 10, 2011); *Kenneth R. Mroczkowski*, 40 ECAB 855 (1989).

²⁰ *M.L. (E.L.)*, Docket No. 20-0605 (issued January 27, 2021).

ORDER

IT IS HEREBY ORDERED THAT the March 5 and January 7, 2021 decisions of the Office of Workers' Compensation Programs are affirmed. The April 8, 2021 decision is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: August 18, 2023
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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