

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

D.M., Appellant)	
)	
and)	Docket No. 22-0602
)	Issued: August 18, 2023
DEPARTMENT OF VETERANS AFFAIRS,)	
JOHN H. BRADLEY COMMUNITY BASED)	
OUTPATIENT CLINIC, Milwaukee, WI,)	
Employer)	
)	

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 March 19, 2022 appellant filed a timely appeal from a March 2, 2022 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.

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.*

FACTUAL HISTORY

On March 31, 2021 appellant, then a 53-year-old nurse, filed a traumatic injury claim (Form CA-1) alleging that on January 15, 2021 she had an adverse reaction to the COVID-19 vaccine administered on that date and developed bilateral pneumonia, moderate persistent asthma, persistent palpitations, worsening gastroesophageal reflux disease symptoms, and ongoing fatigue while in the performance of duty. She stopped work on the date of injury and returned to work on March 1, 2021. On the reverse side of the claim form, appellant's supervisor, D.P., controverted her request for COP because notice of the injury had not been reported within 30 days, noting that the claim form was not received until March 31, 2021. Additionally, she contended that there was no medical evidence to establish appellant's claimed employment-related injury.

OWCP subsequently received medical evidence. In a report dated January 21, 2021, Dr. Vera Martonito, a family medicine specialist indicated that appellant tested negative for COVID-19.

On January 20, 2021 Dr. Jayzon P. Martonito, Board-certified in family practice, related that appellant could return to work on January 28, 2021 without restrictions.

In a progress report dated January 23, 2021, Dr. Joseph Longo, an osteopath Board-certified in family practice, noted that appellant had Sjogren's syndrome, which may have been activated by her coronavirus vaccine. He noted that she would remain off work until the next week.

On January 26, 2021 Dr. Daniel S. Gale, Board-certified in emergency medicine, diagnosed pneumonia, viral syndrome, and suspected COVID-19.

In a progress report dated January 29, 2021, Dr. Longo noted diagnoses of viral pneumonia, coughing, myalgia, and adverse effect of vaccine. He related that appellant would remain off work for one week.

On February 2, 2021 Dr. Srinivas Bhadriraju, Board-certified in pulmonary disease and critical care medicine, related that appellant had persistent cough and shortness of breath. He recommended that she remain off work for two weeks.

In a progress report dated February 6, 2021, Dr. Longo related diagnoses of gastroesophageal reflux disease with esophagitis, viral pneumonia, Sjogren's syndrome, anxiety, supraventricular tachycardia, and adverse effect of vaccine. He noted that appellant's Sjogren's syndrome was stable and that her viral pneumonia appeared to be resolving. On February 10, 2021 Dr. Longo related that overall she was better, but that she should remain off work for two weeks until she followed up with a cardiology specialist. In a progress report dated February 16, 2021, he related an assessments of gastroesophageal reflux disease with esophagitis, adverse effect of vaccine, activity intolerance, and chest congestion. Dr. Longo noted that appellant was concerned that she would not be able to return to work until she received her second COVID-19 vaccine, however, he related that he did not believe that she required a second vaccine as she was already immune. On February 23, 2021 he reported that she was doing a "little better," with less shortness of breath and less coughing, but that she still reported weakness and loss of stamina. Dr. Longo

noted that appellant's asthma and reflux disease continued to be issues. He concluded that she was almost ready to return to work. On February 23, 2021 Dr. Longo related that appellant could return to work without restrictions on March 1, 2021. He also completed a Family and Medical Leave Act (FMLA) certification on February 23, 2021 wherein he indicated that she was incapacitated from work during the period January 18 until February 18, 2021. In a progress report dated March 24, 2021, Dr. Longo related that appellant was back at work, but continued to have anxiety, malaise, and fatigue.

By decision dated April 21, 2021, OWCP accepted appellant's claim for adverse effect of other viral vaccine. By separate decision of even date, it denied her claim for COP, finding that she had failed to report her injury on an OWCP-approved form within 30 days following the injury. OWCP advised appellant that the denial of COP did not affect her entitlement to compensation, and that she could, therefore, file a claim for compensation (Form CA-7) for lost wages due to her accepted employment injury.

In a report dated April 20, 2021, Dr. Sabu George, a Board-certified interventional cardiologist, related appellant's history of multiple symptoms following a COVID-19 vaccine on January 15, 2021. He noted that she had persistent symptoms, however, she had undergone multiple diagnostic tests which were all negative. Dr. George noted appellant's continued complaints of shortness of breath and noted that her bilateral ventricular functions were normal. He related that he had reassured her that her shortness of breath had improved mainly because she was able to come off of steroid medication.

On May 11, 2021 appellant requested a review of the written record by a representative of OWCP's Branch of Hearings and Review. She submitted a letter of even date in which she explained that the filing of her request for COP was delayed because she was totally incapacitated from work for 45 continuous days from January 15 through February 28, 2021. Appellant further explained that neither she nor her supervisor had any knowledge that her traumatic injury qualified for COP or was a covered claim. She related that it was not until March 23, 2021 when a human resources specialist advised D.P. to tell her to file an injury claim with OWCP, which she filed on March 31, 2021.

Appellant submitted e-mails from the employing establishment, including a March 23, 2021 e-mail in which a human resources specialist advised D.P. to inform appellant to file an injury claim with OWCP.

By letter dated July 2, 2021, OWCP noted appellant's request for review of the written record and requested that the employing establishment review the additional evidence submitted by her and submit any comments within 20 days.

In a response letter dated July 14, 2021, the employing establishment disagreed with appellant's contention that she was incapacitated beginning January 15, 2021. It noted that there was no medical documentation indicating that she was totally incapacitated and unable to timely complete the required paperwork.

OWCP continued to receive medical evidence.

By decision dated September 17, 2021, an OWCP hearing representative affirmed the April 21, 2021 decision, finding that appellant had not filed her Form CA-1 within 30 days following her January 15, 2021 employment injury.² The hearing representative further found that FECA did not recognize any mitigating factors or exceptional circumstances that would excuse appellant's failure to satisfy the 30-day filing requirement under 5 U.S.C. § 8118(a).

On October 5, 2021 appellant requested reconsideration. In support of her request, she submitted an October 4, 2021 letter in which she again contended that her incapacitation for work and her supervisor's failure to inform her that she could file a claim for COP constituted exceptional circumstances, which excused her untimely filing of a COP claim. Appellant further contended that her claim for an adverse reaction to a COVID-19 vaccine should be reviewed under the American Rescue Plan Act of 2021.

Appellant also submitted a February 24, 2021 e-mail indicating her request for approval of 80 hours of advanced sick leave to be applied retroactively to pay period 4 in 2021 and used intermittently during the next six months.

OWCP, by letter dated October 12, 2021, requested that the employing establishment review appellant's request for reconsideration and submit any comments within 20 days.

In a response letter dated October 14, 2021, the employing establishment cited Board precedent and OWCP's procedures and contended that no exceptional or mitigating circumstances could excuse appellant's failure to timely file her COP claim.

Appellant, in letters dated January 25 and February 3, 2022, replied to the employing establishment's October 14, 2021 letter, essentially reiterating her prior contentions regarding her delay in filing her COP claim which she believed warranted waiver of the 30-day filing requirement.

OWCP, by decision dated March 2, 2022, denied modification of the September 17, 2021 decision.

LEGAL PRECEDENT

Section 8118 of FECA³ provides for payment of continuation of pay, not to exceed 45 days, to an employee who has filed a claim for a period of wage loss due to traumatic injury with his or her immediate supervisor on a form approved by the Secretary of Labor within the time specified in section 8122(a)(2) of this title. This latter section provides in part that notice of injury shall be

² Appellant filed claims for compensation (Form CA-7) due to intermittent disability from work beginning January 31, 2021. OWCP paid her wage-loss compensation on the supplemental rolls for disability from work for the periods January 31 through February 27, 2021 and May 4 through 5, 2021, and April 20, 2021. By decision dated September 16, 2021, it denied appellant's claim for disability from work on July 13, 2021.

³ *Supra* note 1 at § 8118.

given in writing within 30 days after the injury.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

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."⁷

ANALYSIS

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

On March 31, 2021 appellant filed a claim for a January 15, 2021 traumatic injury. Because she did not file a written claim within 30 days from the date of injury, the time specified in sections 8118(a) and 8122(a)(2) of FECA,⁸ she is not entitled to COP. When an injured employee makes no written claim for a period of wage loss within 30 days, appellant is not entitled to COP, notwithstanding prompt notice of injury.⁹

Moreover, appellant's contention that her delay in filing her claim for COP within 30 days was a result of her total incapacitation from work for 45 continuous days following the January 15, 2021 employment injury, is insufficient to satisfy the requirements of sections 8118(a) and

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).

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 5 U.S.C. §§ 8118(a), 8122(a)(2).

⁹ *Supra* note 6.

8122(a)(2) of FECA.¹⁰ The evidence of record indicates that she was seen by a number of physicians, Drs. Martonito, Longo, Gale, Bhadrireju, and George following January 15, 2021. While these physicians indicated that appellant could not return to work as a nurse for limited periods of time following January 15, 2021, none of these physicians related that appellant was hospitalized or otherwise so incapacitated that she could not file a claim for benefits during the 30-day period following January 15, 2021. The Board finds that the evidence of record does not establish that she could not file the CA-1 form within 30 days of January 15, 2021.

Appellant did not submit written notice of injury on an approved form until March 31, 2021, more than 30 days after the January 15, 2021 employment injury, when she submitted a Form CA-1.¹¹ Therefore, the Board finds that she is not entitled to COP.

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.

¹⁰ *E.M.*, Docket No. 20-0837 (issued January 27, 2021); *S.K.*, Docket No. 14-509 (issued June 3, 2014).

¹¹ *See E.M.*, Docket No. 18-0454 (issued February 20, 2020); *Robert E. Kimzey*, 40 ECAB 762 (1989).

ORDER

IT IS HEREBY ORDERED THAT the March 2, 2022 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 18, 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