United States Department of Labor Employees' Compensation Appeals Board

I.E. Appellant)
J.E., Appellant)
and) Docket No. 23-0273) Issued: August 2, 2023
DEPARTMENT OF JUSTICE, BUREAU OF PRISONS, FEDERAL CORRECTIONAL)
INSTITUTION BUTNER, Butner, NC, Employer)
Appearances:	Case Submitted on the Record
Appellant, pro se Office of Solicitor, for the Director	

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge PATRICIA H. FITZGERALD, Deputy Chief Judge JAMES D. McGINLEY, Alternate Judge

JURISDICTION

On December 14, 2022 appellant filed a timely appeal from an October 3, 2022 merit decision of the Office of Workers' Compensation Programs (OWCP).¹ Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

¹ By decision dated December 8, 2022, OWCP accepted appellant's traumatic injury claim for novel coronavirus. The Board and OWCP may not exercise simultaneous jurisdiction over the same issues in a case on appeal. 20 C.F.R. § 501.2(c)(3). Following the docketing of an appeal before the Board, OWCP does not retain jurisdiction to render a further decision regarding the issue(s) on appeal until after the Board relinquishes jurisdiction. *Id.* As this appeal involves a different issue than that adjudicated by OWCP, the subsequent OWCP decision dated December 8, 2022 is valid. *See* 20 C.F.R. § 10.626; *see also A.C.*, Docket No. 18-1730 (issued July 23, 2019); *M.C.*, Docket No. 18-1278, n.1 (issued March 7, 2019); *Russell E. Lerman*, 43 ECAB 770 (1992); *Douglas E. Billings*, 41 ECAB 880 (1990).

² 5 U.S.C. § 8101 et seq.

ISSUE

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

FACTUAL HISTORY

On September 26, 2022 appellant, then a 39-year-correctional officer, filed a traumatic injury claim (Form CA-1) alleging that on August 25, 2022 he contracted COVID-19 when supervising inmates while in the performance of duty. On the reverse side of the claim form, the employing establishment acknowledged that he was in the performance of duty when he contracted COVID-19. Appellant stopped work on August 25, 2022 and returned to work on September 4, 2022.

In support of his claim, appellant submitted a polymerase chain reaction (PCR) test result, collected on August 25, 2022 which revealed that he tested positive for COVID-19.

By decision dated October 3, 2022, OWCP denied appellant's claim for COP, finding that he had not reported his injury on an OWCP-approved form within 30 days of the accepted employment injury. It noted that the denial of COP did not affect his 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

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

³ *Id.* 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).

(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 his burden of proof to establish entitlement to COP.

The record reflects that appellant filed a written notice of traumatic injury (Form CA-1) on September 26, 2022 alleging that he was exposed to COVID-19 while supervising inmates on August 25, 2022. He noted that he stopped work on the alleged date of injury. As previously noted, FECA Bulletin No. 21-09 defines date of injury as the date of last exposure, which in this case was August 25, 2022. As appellant filed his Form CA-1 on September 26, 2022, more than 30 days after the August 25, 2022 date of injury, the Board finds that he has not met his 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 his 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*.

<u>ORDER</u>

IT IS HEREBY ORDERED THAT the October 3, 2022 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 2, 2023 Washington, DC

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

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

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