

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

A.J., Appellant	)	
	)	
and	)	Docket No. 23-0883
	)	Issued: May 23, 2024
DEPARTMENT OF HOMELAND SECURITY,	)	
CUSTOMS AND BORDER PROTECTION, ABU	)	
DHABI INTERNATIONAL PRECLEARANCE	)	
AIRPORT, United Arab Emirates, 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 June 8, 2023 appellant filed a timely appeal from a March 22, 2023 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>2</sup>

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

<sup>2</sup> The Board notes that 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.*

## **ISSUES**

The issues are: (1) whether appellant's traumatic injury claim was untimely filed, with regard to continuation of pay (COP); and (2) whether appellant has met his burden of proof to establish a diagnosis of COVID-19.

## **FACTUAL HISTORY**

On March 22, 2022 appellant, then a 52-year-old customs and border protection employee, filed a traumatic injury claim (Form CA-1) alleging that on December 26, 2021 he contracted COVID-19 after he interacted with, processed, and inspected travelers with COVID-19 symptoms while in the performance of duty. He related that he experienced symptoms on December 26, 2021, including cough, body aches, and chills, and was tested the following day. Appellant stopped work on December 26, 2021, and returned to work on January 6, 2022.

In support of his claim, appellant submitted a December 27, 2021 emergency department after-visit summary by an unidentified healthcare provider, which indicated that he related complaints of cough, generalized body aches, and chills. Laboratory tests, including a COVID-19 naso/oropharynx swab and rapid strep throat swab, were administered and noted to be "in progress." The report listed diagnoses of unspecified fever and upper respiratory tract infection and sore throat.

An unsigned July 1, 2022 form report indicated that, according to laboratory reports, appellant was diagnosed with COVID-19 on December 27, 2021. It further noted that he completed home isolation and tested negative for COVID-19 on January 5, 2022.

By decision dated April 4, 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 his alleged December 26, 2021 employment injury. It advised him that the denial of COP did not affect his entitlement to compensation.

On January 26, 2023 appellant requested reconsideration of OWCP's April 4, 2022 decision. In support thereof, he submitted e-mail correspondence between himself and D.W., an employing establishment workforce manager and mission support specialist, regarding his claim for COVID-19. In correspondence dated November 2, 2022, D.W. indicated that appellant had filed his claim in a timely manner and that the employing establishment had also received a Form CA-1 dated January 12, 2022. She further noted that he did not enter a state on the January 12, 2022 Form CA-1, an error that caused him to be unable to edit the document and necessitated the filing of a second CA-1.<sup>3</sup>

OWCP thereafter received a December 27, 2021 e-mail from an international healthcare facility, which related that on December 26, 2021 appellant and several other employees were in close contact with a COVID-19 positive individual. The correspondence provided quarantine instructions and indicated that appellant's date of last exposure was December 26, 2021.

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<sup>3</sup> The January 12, 2022 Form CA-1 is not found in the case record.

A January 7, 2022 COVID-19 Recovery Certificate by the Ministry of Health and Prevention of the United Arab Emirates noted a positive polymerase chain reaction (PCR) test on December 28, 2021 and a recovery date of January 7, 2022.

By decision dated March 22, 2023, OWCP denied modification of its April 4, 2022 decision, finding that appellant had not reported his injury on an OWCP-approved form within 30 days of his alleged December 26, 2021 employment injury. It also denied his claim, finding that the evidence of record was insufficient to establish a diagnosis of COVID-19, as the record did not contain a positive COVID-19 laboratory test result to confirm the COVID-19 diagnosis or a rationalized medical opinion with a COVID-19 diagnosis by a physician.

### **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.<sup>4</sup> This latter section provides that written notice of injury shall be given within 30 days.<sup>5</sup> The context of section 8122 makes clear that this means within 30 days of the injury.<sup>6</sup>

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.<sup>7</sup>

FECA Bulletin No. 21-09 at subsection II.2 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."<sup>8</sup>

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<sup>4</sup> *Supra* note 1 at § 8118(a).

<sup>5</sup> *Id.* at § 8122(a)(2).

<sup>6</sup> *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).

<sup>7</sup> 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. 09-563 (issued February 26, 2010); *Dodge Osborne*, 44 ECAB 849 (1993); *William E. Ostertag*, 33 ECAB 1925 (1982).

<sup>8</sup> 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.

## **ANALYSIS -- ISSUE 1**

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

In its March 22, 2023 decision, OWCP found that the date of appellant's injury was December 26, 2021. In a November 2, 2022 e-mail, D.W., an employing establishment manager acknowledged that appellant had originally filed a Form CA-1 for the instant claim on January 12, 2022. The January 12, 2022 Form CA-1, however, is not found in the case record. Thus, the case record is incomplete and would not permit an informed adjudication of the case by the Board.<sup>9</sup>

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.<sup>10</sup> OWCP has an obligation to see that justice is done.<sup>11</sup>

For these reasons, the case shall be remanded for OWCP to obtain the original January 12, 2022 Form CA-1 as confirmed by appellant's supervisor. After this and other such further development as deemed necessary, it shall issue a *de novo* decision.

## **LEGAL PRECEDENT -- ISSUE 2**

An employee seeking benefits under FECA<sup>12</sup> has the burden of proof to establish the essential elements of his or her claim, including the fact that the individual is an employee of the United States within the meaning of FECA, that the claim was filed within the applicable time limitation of FECA,<sup>13</sup> that an injury was sustained while in the performance of duty as alleged; and that any disability or specific condition for which compensation is claimed is causally related to the employment injury.<sup>14</sup> These are the essential elements of each and every compensation

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<sup>9</sup> See *Order Remanding Case, B.H.*, Docket No. 24-0163 (issued February 29, 2024); *Order Remanding Case, D.H.*, Docket No. 14-0244 (issued July 10, 2014).

<sup>10</sup> *R.A.*, Docket No. 17-1030 (issued April 16, 2018); *K.W.*, Docket No. 15-1535 (issued September 23, 2013). See e.g., *M.G.*, Docket No. 18-1310 (issued April 16, 2019); *Walter A. Fundinger, Jr.*, 37 ECAB 200, 204 (1985); *Dorothy L. Sidwell*, 36 ECAB 699, 707 (1985); *Michael Gallo*, 29 ECAB 159, 161 (1978); *William N. Saathoff*, 8 ECAB 769-71.

<sup>11</sup> See *A.J.*, Docket No. 18-0905 (issued December 10, 2018); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983); *Gertrude E. Evans*, 26 ECAB 195 (1974).

<sup>12</sup> *Id.*

<sup>13</sup> *C.B.*, Docket No. 21-1291 (issued April 28, 2022); *S.C.*, Docket No. 18-1242 (issued March 13, 2019); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

<sup>14</sup> *L.C.*, Docket No. 19-1301 (issued January 29, 2020); *T.H.*, Docket No. 18-1736 (issued March 13, 2019); *R.C.*, 59 ECAB 427 (2008).

claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.<sup>15</sup>

Under section 4016 of the ARPA of 2021<sup>16</sup> any claim made for COVID-19 by or on behalf of a “covered employee” for benefits under FECA will be deemed to have an injury proximately caused by exposure to COVID-19 arising out of the nature of the covered employee’s employment. A “covered employee” is defined by ARPA as an employee under 5 U.S.C. § 8101(a) and employed in the federal service at any time during the period beginning on January 27, 2020 and ending on January 27, 2023. A “covered employee” prior to a diagnosis of COVID-19 must have carried out duties that required a physical interaction with at least one other person (a patient, member of the public, or a coworker); or was otherwise subject to a risk of exposure to COVID-19.<sup>17</sup>

Exposure to COVID-19 alone is not sufficient to establish a work-related medical condition. Manifestation of COVID-19 must occur within 21 days of the covered exposure. To establish a diagnosis of COVID-19, a claimant must submit the following: (1) a positive PCR or Antigen COVID-19 test result; or (2) a positive Antibody test result, together with contemporaneous medical evidence that the claimant had documented symptoms of and/or was treated for COVID-19 by a physician (a notice to quarantine is not sufficient if there was no evidence of illness); or (3) if no positive laboratory test is available, a COVID-19 diagnosis from a physician together with rationalized medical opinion supporting the diagnosis and an explanation as to why a positive test result is not available. Self-administered COVID-19 tests, also called “home tests,” “at-home tests,” or “over-the-counter (OTC) tests” are insufficient to establish a diagnosis of COVID-19 under FECA unless the administration of the self-test is monitored by a medical professional and the results are verified through documentation submitted by such professional.<sup>18</sup>

### **ANALYSIS -- ISSUE 2**

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

Appellant alleged that he contracted COVID-19 due to an exposure in the performance of duty on December 26, 2021. OWCP, however failed to inform appellant of the type of evidence needed to establish a diagnosis of COVID-19 prior to denying the claim.

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

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<sup>15</sup> *P.A.*, Docket No. 18-0559 (issued January 29, 2020); *T.E.*, Docket No. 18-1595 (issued March 13, 2019); *Delores C. Ellyett*, 41 ECAB 992 (1990).

<sup>16</sup> Public Law 117-2 (March 11, 2021).

<sup>17</sup> ARPA, *id.*; FECA Bulletin No. 21-09 (issued April 28, 2021).

<sup>18</sup> FECA Bulletin Nos. 21-09 (issued April 28, 2021), 21-10 (issued August 17, 2021), and 22-06 (issued February 16, 2022). FECA Bulletin No. 21-10 amended FECA Bulletin No. 21-09 in part to allow for a positive Antigen COVID-19 test result. FECA Bulletin No. 22-06 amended FECA Bulletin Nos. 21-09 and 21-10 to update COVID-19 claims processing guidelines relating to reinfection and home tests.

the development of the evidence. OWCP's procedures provide that OWCP is responsible for requesting evidence.<sup>19</sup> Its procedures further provide that the claims examiner should contact the claimant in writing to obtain evidence and should inform the claimant of and specifically request the information needed, tailored to the specifics of the individual case.<sup>20</sup> Herein, OWCP improperly developed appellant's claim as it did not contact appellant in writing to inform him of and specifically request the evidence needed. The Board thus finds that this case must be remanded for further development. Following any further development as deemed necessary, OWCP shall issue a *de novo* decision.

### **CONCLUSION**

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

### **ORDER**

**IT IS HEREBY ORDERED THAT** the March 22, 2023 decision of the Office of Workers' Compensation Programs is set aside. The case is remanded for further proceedings consistent with this decision of the Board.

Issued: May 23, 2024  
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

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<sup>19</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Initial Development of Claims*, Chapter 2.800.4 (May 2023).

<sup>20</sup> *Id.* at Chapter 2.800.4c(2) (May 2023).