

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

_____)
K.M., Appellant)

and)

DEPARTMENT OF VETERANS AFFAIRS,)
ROSEBURG VA MEDICAL CENTER,)
Roseburg, OR, Employer)

Docket No. 23-1100
Issued: October 3, 2024

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
JANICE B. ASKIN, Judge

JURISDICTION

On August 4, 2023 appellant filed a timely appeal from a March 8, 2023 merit decision and a May 1, 2023 nonmerit 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

ISSUES

The issues are: (1) whether appellant has established manifestation of COVID-19 symptoms or a positive test result within 21 days of a covered exposure; and (2) whether OWCP

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the issuance of the March 8, 2023 decision, OWCP received additional evidence. 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.*

abused its discretion in denying appellant's request for an oral hearing, pursuant to 5 U.S.C. § 8124(b)(1).

FACTUAL HISTORY

On July 24, 2022 appellant, then a 57-year-old boiler plant operator, filed a traumatic injury claim (Form CA-1) alleging that on December 5, 2021 he was exposed to COVID-19 while in the performance of duty. His supervisor noted on the claim form that appellant stopped work on December 6, 2021.

OWCP received a note from Mary Curtiss, an employing establishment nurse practitioner, documenting that appellant was treated on January 5, 2022 for a COVID-19 viral infection. Ms. Curtiss indicated that his COVID-19 test was positive.

In a letter dated July 28, 2022, the employing establishment controverted the claim. OWCP received timesheets and leave analysis forms establishing that appellant worked on December 5, 2021 and then used annual leave from December 6, 2021 through January 2, 2022 and family and medical leave and/or sick leave from January 3 through 10, 2022.

In an August 23, 2022 development letter, OWCP informed appellant of the deficiencies of his claim. It advised him of the type of factual and medical evidence needed and afforded him 30 days to submit the necessary evidence.

In a September 1, 2022 letter, the employing establishment again challenged the claim, noting that appellant went on vacation on December 6, 2021, did not return until January 11, 2022, and allegedly tested positive for COVID-19 on January 5, 2022.

By decision dated October 3, 2022, OWCP denied appellant's traumatic injury claim, finding that the medical evidence of record was insufficient to establish a COVID-19 diagnosis because it did not receive a positive COVID-19 test result or other sufficient medical evidence to establish the diagnosis.

On January 27, 2023 appellant requested reconsideration. He argued that on September 19, 2022 he emailed B.L., an employing establishment Human Resources Specialist, a copy of his positive PCR test for COVID-19 taken on January 5, 2022.

In a development letter dated February 10, 2023, OWCP provided appellant with the employing establishment's challenge letter and requested that he provide a response. It again informed him of the deficiencies of his claim and provided a questionnaire for his completion. OWCP afforded appellant 30 days to respond.

On February 11, 2023 appellant responded that his claim was accepted on the factual component, that the employing establishment provided an untimely response, and that he was not required to test for COVID-19 on a daily basis. He also argued that he worked in the employing establishment hospital and may have been exposed to COVID-19 there. Appellant continued to allege that B.L. intentionally failed to upload his test result properly.

On February 14, 2023 OWCP received a response from B.L. explaining how she handled appellant's claim.

In a February 14, 2023 development letter, OWCP provided appellant with the employing establishment's response and requested that he respond.

In a February 16, 2023 response, appellant noted that the employing establishment did not inform employees of the procedures for filing a claim for COVID-19, that he only found out about it from another employee, and that he had another claim under OWCP File No. xxxxxx992 that was handled differently.³

By decision dated March 8, 2023, OWCP modified the October 3, 2022 decision to find that appellant had not established manifestation of COVID-19 symptoms or a positive test result within 21 days of a covered exposure on December 5, 2021.

Appellant continued to submit evidence in support of his claim. On April 12, 2023 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

By decision dated May 1, 2023, OWCP denied appellant's April 13, 2023 hearing request pursuant to 5 U.S.C. § 8124(b)(1), as he had previously requested reconsideration and the reconsideration decision was issued on March 8, 2023. It further exercised its discretion and determined that the issue in this case could equally well be addressed by another request for reconsideration before OWCP along with the submission of new evidence.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA⁴ has the burden of proof to establish the essential elements of his or her claim, including that the individual is an employee of the United States within the meaning of FECA, that the claim was timely filed within the applicable time limitation period of FECA,⁵ that an injury was sustained in the performance of duty as alleged, and that any disability or medical condition for which compensation is claimed is causally related to the employment injury.⁶ These are the essential elements of each and every compensation claim, regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.⁷

Under section 4016 of the American Rescue Plan Act of 2021 (ARPA)⁸ 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

³ On July 29, 2022 appellant filed a notice of traumatic injury (Form CA-1) alleging that on July 5, 2022 he contracted COVID-19 in the performance of duty. OWCP assigned that claim OWCP File No. xxxxxx992.

⁴ *Supra* note 1.

⁵ *See J.C.*, Docket No. 22-0017 (issued June 14, 2022); *F.H.*, Docket No. 18-0869 (issued January 29, 2020); *J.P.*, Docket No. 19-0129 (issued April 26, 2019); *Joe D. Cameron*, 41 ECAB 153 (1989).

⁶ *Id.*

⁷ *P.A.*, Docket No. 18-0559 (issued January 29, 2020); *K.M.*, Docket No. 15-1660 (issued September 16, 2016); *Delores C. Ellyett*, 41 ECAB 992 (1990).

⁸ Public Law 117-2 (March 11, 2021).

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-19.⁹

OWCP’s procedures provide that the employee is deemed to have had exposure if, during the covered exposure period, he or she carries out: (1) duties that require a physical interaction with at least one other person (a patient, a member of the public, or a coworker) in the course of employment duties, or (2) duties that otherwise include a risk of exposure to COVID-19. OWCP’s procedures further provide that the evidence should establish manifestation of COVID-19 symptoms (or positive test result) within 21 days of the covered exposure.¹⁰

ANALYSIS -- ISSUE 1

The Board finds that appellant has not established manifestation of COVID-19 symptoms or a positive test result within 21 days of a covered exposure.

The case record contains timesheets and leave analysis forms establishing that appellant worked on December 5, 2021, the alleged date of injury. However, timesheets and leave analysis forms establish that he then used annual leave from December 6, 2021 through January 2, 2022 and family and medical leave and/or sick leave from January 3 through 10, 2022. Appellant’s positive test for COVID-19 was not administered until January 5, 2022, which was more than 21 days after his last employment exposure. He has not submitted any medical evidence to establish manifestation of COVID-19 within 21 days of his December 5, 2021 employment exposure.¹¹

As the evidence of record is insufficient to establish manifestation of COVID-19 symptoms or a positive test result within 21 days of a covered exposure, 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.

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.”¹² Sections 10.617 and 10.618 of the federal regulations implementing FECA provide that a claimant

⁹ *ARPA, id.*; FECA Bulletin No. 21-09 (issued April 28, 2021).

¹⁰ FECA Bulletin No. 21-09 (issued April 27, 2021).

¹¹ *Id.*

¹² 5 U.S.C. § 8124(b)(1).

shall be afforded a choice of an oral hearing or a review of the written record by a representative of the Secretary.¹³

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.¹⁴ 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.¹⁵ The Board has held that it must exercise its discretion to grant or deny a hearing when the request is untimely or made after reconsideration under section 8128(a).¹⁶

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly denied appellant's request for an oral hearing, pursuant to 5 U.S.C. § 8124(b)(1).

Appellant had previously requested reconsideration on January 27, 2023 of the initial denial of his claim on October 3, 2022. OWCP issued its reconsideration decision on March 8, 2023.¹⁷ Appellant was, therefore, not entitled to an oral hearing as a matter of right.¹⁸

OWCP, however, has the discretionary authority to grant the request and it must exercise such discretion.¹⁹ The Board finds that, in the May 1, 2023 decision, OWCP properly exercised its discretion by determining that the issue in the case 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, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from established facts.²⁰ In this case, the evidence of record does not establish that OWCP abused its discretion by denying appellant's request for an oral hearing. Accordingly, the Board finds that OWCP properly denied his request for an oral hearing, pursuant to 5 U.S.C. § 8124(b)(1).

¹³ 20 C.F.R. §§ 10.616, 10.617.

¹⁴ *Id.* at § 10.616(a).

¹⁵ *See W.M.*, Docket No. 22-0521 (issued March 1, 2023); *D.S.*, Docket No. 21-1296 (issued March 23, 2022); *J.D.*, Docket No. 15-1679 (issued December 14, 2015); *D.M.*, Docket No. 08-1814 (issued January 16, 2009).

¹⁶ *J.T.*, Docket No. 18-0664 (issued August 12, 2019); *Eddie Franklin*, 51 ECAB 223 (1999); *Delmont L. Thompson*, 51 ECAB 155 (1999).

¹⁷ *See D.S.*, Docket No. 21-1296 (issued March 23, 2022); *J.D.*, *supra* note 15; *D.M.*, *supra* note 15.

¹⁸ *See supra* note 14.

¹⁹ *See supra* note 15.

²⁰ *R.S.*, Docket No. 10-672 (issued September 24, 2010).

CONCLUSION

The Board finds that appellant has not established manifestation of COVID-19 symptoms or a positive test result within 21 days of a covered exposure. The Board further finds that OWCP properly denied appellant's request for an oral hearing, pursuant to 5 U.S.C. § 8124(b)(1).

ORDER

IT IS HEREBY ORDERED THAT the March 8 and May 1, 2023 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: October 3, 2024
Washington, DC

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

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board