

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

R.B., Appellant

and

**DEPARTMENT OF JUSTICE, BUREAU OF
PRISONS, Adelanto, CA, Employer**

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**Docket No. 14-1663
Issued: September 29, 2015**

Appearances:
Joe Mansour, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

ORDER REMANDING CASE

Before:

COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

On July 29, 2014 appellant, through her representative filed a timely appeal of an April 9, 2014 Office of Workers' Compensation Programs' (OWCP) decision. The Board docketed the appeal as No. 14-1663.¹

In the April 9, 2014 OWCP decision on appeal, an OWCP hearing representative affirmed a July 25, 2013 decision finding that appellant did not sustain an emotional condition in the performance of duty. 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.

Appellant, a 49-year-old disciplinary hearing officer, filed a (Form CA-1) traumatic injury claim on May 31, 2013, alleging an emotional condition sustained in the performance of duty. She asserted that she was subjected to intimidation and profane, vulgar language by a coworker after reporting misconduct on his part, and that on May 23, 2013 the coworker held a door to prevent her from leaving. In a statement received by OWCP on July 16, 2013, appellant alleged that she was subjected to intimidation and harassment by a coworker, R.A., a fellow

¹ Appellant had requested oral argument before the Board. By order dated June 10, 2015 the Board denied appellant's request for oral argument as appellant's contentions on appeal could be addressed on the record.

² 5 U.S.C. § 8101 *et seq.*

disciplinary hearing officer (DHO). She alleged that she spoke to her warden and management about having the office staff move to another location. Appellant also told him about an August 2009 incident between herself and R.A. in which he initiated a loud verbal confrontation about her use of office space in an office formerly occupied by a former employee. She asserted that, in August 2010, she followed up with the warden and management and was told that they were not moving because “someone had to watch the wolf in the hen house.” Appellant alleged that on February 7, 2013 R.A. engaged in disorderly, disruptive behavior which included making derogatory, profane, joking remarks about murdered police officers. She asserted that she was not comfortable with the way R.A. conducted himself in the worksite and that he presented himself in an overbearing, harassing manner toward the younger female secretaries in the office. In addition, appellant alleged that he received preferential treatment from management which encouraged him to develop an aggressive demeanor. She asserted that he openly used profanity in the office setting. Appellant alleged that these actions on the part of R.A. were condoned by management and that, taken together, they constituted a hostile environment. She reported R.A.’s misconduct to her superiors; however, management did not take any disciplinary action against him. Management denied her request to be transferred to another facility.

By decision dated July 25, 2013, OWCP denied appellant’s claim on the basis that she failed to establish fact of injury. In an April 30, 2013 memorandum, appellant asserted that R.A. was guilty of waste, fraud, and abuse because he was being paid for work despite the fact that he did not seem to have much work to do. She described several incidents in which R.A. engaged in inappropriate behavior toward office secretaries and engaged in inappropriate personal conversations. In a June 2013 memorandum, appellant reiterated her previous allegations and made several additional allegations. In a June 18, 2013 statement, she reiterated that R.A. engaged in inappropriate office behavior and made inappropriate personal remarks and comments about salaries. By letter dated September 3, 2013, appellant requested an oral hearing. By decision dated April 9, 2014, an OWCP hearing representative affirmed the July 25, 2013 decision. She modified the previous decision to the extent that she found appellant’s allegations were factual. Appellant, however, found that the incidents alleged by appellant did not constitute compensable acts of employment.

Section 20 C.F.R. § 10.126 requires OWCP to issue a decision containing findings of fact and a statement of reasons.³ The Board notes that, despite the fact that appellant made numerous factual allegations in this case, OWCP made only one attempt to obtain information from the employing establishment, a letter dated March 4, 2014. OWCP procedures state:

“If an employing agency fails to respond to a request for comments on the claimant’s allegations, the [claims examiner] may usually accept the claimant’s statements as factual. However, acceptance of the claimant’s statements as factual is not automatic in the absence of a reply from the agency, especially in instances where performance of duty is questionable. The Board has consistently held that allegations unsupported by probative evidence are not established. *James E. Norris*, 52 ECAB 93 (1999), *Michael Ewanichak*, (1997). The [claims examiner]

³ 20 C.F.R. § 10.126.

should consider the totality of the evidence and evaluate any inconsistencies prior to making a determination.”⁴

OWCP’s hearing representative nonetheless summarily found that the incidents alleged by appellant did not constitute compensable acts of employment. The Board concludes that these allegations were accepted as factual by OWCP’s hearing representative simply because the employing establishment did not respond to OWCP’s development letter. In a voluminous case with such vague and unsubstantiated allegations, it was incumbent upon OWCP’s hearing representative to ascertain all the facts prior to making her finding. Therefore, as OWCP’s hearing representative did not make the required findings in her April 9, 2014 decision, her decision was issued in error.

Accordingly, the case will be remanded to OWCP to obtain the requisite information from the employing establishment and determine whether her allegations were factually substantiated. OWCP is directed to make findings of fact where appropriate and provide reasons for its decision, pursuant to the standards set forth in section 8128(a) and section 20 C.F.R. § 10.126.⁵ After such further development as OWCP deems necessary, it should issue an appropriate decision to protect appellant’s appeal rights.

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Initial Development of Claims*, Chapter 2.800.5(d) (June 2011).

⁵ The Board further notes that this case was filed as a traumatic injury case based on one incident. Appellant alleged that R.A. held a door closed on her, preventing her from entering the building. Nevertheless, the hearing representative adjudicated this case as one based on an occupational disease claim. On remand, therefore, OWCP is directed to further clarify the issue(s) presented in the claim.

IT IS HEREBY ORDERED THAT the April 9, 2014 decision of the Office of Workers Compensation Programs is set aside; the case record is remanded to OWCP for further proceedings consistent with this order of the Board.

Issued: September 29, 2015
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board