



an injury as a result of being sexually assaulted at work. She stopped work on October 24, 2017 and returned to work on October 30, 2017. Appellant did not submit additional evidence.

On the reverse side of the claim form, the employing establishment indicated that appellant's regular tour of duty was 8:00 a.m. to 4:30 p.m., Monday through Friday. It controverted her claim, noting that she had not submitted medical evidence to support a work-related injury.

By development letter dated November 9, 2017, OWCP informed appellant of the deficiencies in her claim and afforded her 30 days to submit medical evidence and respond to its inquiries. It also requested that the employing establishment respond to her allegations and provide medical evidence, if she had been treated at its medical facility.

Appellant submitted a November 24, 2017 factual statement in response to OWCP's development letter. She indicated that on October 23, 2017 she was standing at the front desk speaking to S.F., a coworker, when another employee approached them at the front desk. Within seconds he was within appellant's personal space and whispered in her ear while he was conversing with S.F. Then, as he was standing behind appellant, she felt his genitals on her buttocks. The alleged assailant still continued a conversation with S.F. as he slowly walked to an elevator. When his telephone rang, he stated "I thought there was a fire," "I thought it was appellant, but it was my phone." He then got on the elevator and, as appellant walked away from the desk, S.F. asked her if she was okay. Appellant walked back to the front desk, midway through the hallway, and asked S.F. for the alleged assailant's name. After she gathered herself she began to cry hysterically. Appellant notified her supervisor, who then called the police. A police officer arrived and appellant reported what happened. He took her telephone number and name, but told appellant that the incident was not a true crime because such things happened to subway riders during the many years he was a police officer with the New York City Police Department (NYPD). She cried as N.R., a coworker, left to notify their supervisor about the police officer's comments. Appellant referenced a police statement that was taken on October 23, 2017 and included witness statements. She indicated that she left work early during the afternoon on October 24, 2017 because she did not feel safe at work. Appellant could not sleep and constantly got up to look out her bedroom windows. She did not leave home and her family had to help out with her children because she did not feel that they were safe at their bus stops. Also, appellant constantly cried and felt afraid. She maintained that she was on employing establishment premises working her regular tour during the claimed October 23, 2017 incident. Appellant further maintained that she did not know the alleged assailant, although she had seen him around the facility and had said hello to him. She related that the incident was being investigated by the employing establishment police.

An unsigned letter dated November 28, 2017 indicated that appellant was seen and treated for anxiety at the Life Center Counseling and Health Services on November 24 and 26, 2017 by Karen Kieser, a licensed mental health counselor.

By decision dated December 21, 2017, OWCP denied appellant's emotional condition claim, finding that the weight of the evidence had not established that the October 23, 2017 employment incident occurred as alleged. It further found that she had not submitted rationalized medical evidence to establish a medical diagnosis in connection with the claimed employment

incident. OWCP noted that a mental health counselor was not a qualified physician as defined under FECA.

### **LEGAL PRECEDENT**

A claimant has the burden of proof to establish by the weight of the reliable, probative, and substantial evidence that the condition for which he or she claims compensation was caused or adversely affected by factors of his or her federal employment.<sup>2</sup> To establish that he or she sustained an emotional condition in the performance of duty, a claimant must submit: (1) factual evidence identifying employment factors or incidents alleged to have caused or contributed to his or her condition; (2) medical evidence establishing that he or she has an emotional or psychiatric disorder; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to his or her emotional condition.<sup>3</sup>

FECA provides for the payment of compensation for the disability or death of an employee resulting from a personal injury sustained while in the performance of duty.<sup>4</sup> The phrase “sustained while in the performance of duty” has been interpreted by the Board to be the equivalent of the commonly found requisite in workers’ compensation law of arising out of and in the course of employment. In the course of employment deals with the work setting, locale, and time of injury whereas, arising out of the employment encompasses not only the work setting, but also the requirement that an employment factor caused the injury.<sup>5</sup>

In the compensation field, to occur in the course of employment, an injury must occur: (1) at a time when the employee may be reasonably said to be engaged in the master’s business; (2) at a place where he or she may reasonably be expected to be in connection with the employment; and (3) while he or she was reasonably fulfilling the duties of the employment or engaged in doing something incidental thereto.<sup>6</sup>

Assaults arise out of the employment either if the risk of assault is increased because of the nature or setting of the work or if the reason for the assault was a quarrel having its origin in the work. Assaults for private reasons do not arise out of the employment unless, by facilitating an assault that would not otherwise be made, the employment becomes a contributing factor.<sup>7</sup>

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<sup>2</sup> See *E.K.*, Docket No. 17-0246 (issued April 23, 2018).

<sup>3</sup> See *Donna Faye Cardwell*, 41 ECAB 730 (1990).

<sup>4</sup> 5 U.S.C. § 8102(a). See also *P.S.*, Docket No. 08-2216 (issued September 25, 2009).

<sup>5</sup> *A.K.*, Docket No. 09-2032 (issued August 3, 2010); *C.O.*, Docket No. 09-0217 (issued October 21, 2009).

<sup>6</sup> See *R.A.*, 59 ECAB 581 (2008).

<sup>7</sup> *Id.*

In assault cases, to determine whether the assault arose from the employment OWCP procedures provide:

“Where the injury or death is caused by the assault of another person, it is necessary to establish to the extent possible whether the assault was accidental, arose out of an activity directly related to the work or work environment, or arose out of a personal matter having no connection with the employment. In the case of a personal matter, the evidence must show whether it was materially and substantially aggravated by the work association.

a. *It is the responsibility of the claims examiner (CE) to obtain copies of any police reports which may have been made. Statements should also be obtained from the official superior and coworkers or other witnesses showing:*

(1) *Whether there was any animosity between the injured or deceased employee and the assailant by reason of a personal association away from work and, if so, this should be explained fully; and*

(2) *A full description of the events and circumstances which immediately preceded, led up to, and resulted in the assault.*

b. *A similar statement should be obtained from the assailant, if possible, and in disability cases, from the injured employee.”<sup>8</sup> (Emphasis in the original.)*

### ANALYSIS

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

Appellant filed a traumatic injury claim alleging that she sustained an emotional condition when she was sexually assaulted by another employee at work on October 23, 2017. She maintained that, while she was talking to her coworker, S.F., at the front desk, the alleged assailant whispered in her ear. He then stood behind her and she felt his genitals on her buttocks. The alleged assailant also made an unwanted sexual comment about appellant to S.F. as he walked away towards an elevator. After he left the area, appellant cried hysterically and notified her supervisor about the claimed employment incident. Appellant’s supervisor called the employing establishment police. A police officer arrived and appellant told him about the claimed employment incident. She contended that he dismissed the incident as not a true crime when he related to her that subway riders were subjected to such incidents during the many years he worked as a NYPD police officer. Appellant referenced a police statement that was taken on October 23, 2017 and included witness statements. In addition, she noted that the claimed employment incident was currently being investigated by the employing establishment police.

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<sup>8</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.10(a)(August 1992).

The Board finds that OWCP did not sufficiently develop the evidence regarding whether appellant was sexually assaulted at work in the performance of duty on October 23, 2017. It did not obtain a copy of the police report regarding the claimed October 23, 2017 incident, which included witness statements. Further, OWCP did not request statements from appellant's supervisor and the alleged assailant. As discussed, OWCP's procedures provide that the claims examiner should obtain copies of any police reports which may have been made and statements from the official superior, coworkers, other witnesses, and assailant regarding the details of the matter.<sup>9</sup>

Proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter. While appellant has the burden of proof 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 governmental source.<sup>10</sup>

Accordingly, the Board will remand the case for OWCP to obtain the necessary information from the employing establishment regarding the claimed October 23, 2017 employment incident. Following such 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.

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<sup>9</sup> *Id.*

<sup>10</sup> See *L.L.*, Docket No. 12-0194 (issued June 5, 2012); *N.S.*, 59 ECAB 422 (2008).

**ORDER**

**IT IS HEREBY ORDERED THAT** the December 21, 2017 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further action consistent with this decision.

Issued: December 10, 2018  
Washington, DC

Christopher J. Godfrey, Chief Judge  
Employees' Compensation Appeals Board

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

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board