

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

L.S., Appellant	)	
	)	
and	)	<b>Docket No. 18-1208</b>
	)	<b>Issued: April 30, 2020</b>
<b>DEPARTMENT OF VETERANS AFFAIRS,</b>	)	
<b>VETERANS HEALTH ADMINISTRATION,</b>	)	
<b>North Chicago, IL, Employer</b>	)	
	)	

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**ORDER REMANDING CASE**

Before:  
ALEC J. KOROMILAS, Chief Judge  
CHRISTOPHER J. GODFREY, Deputy Chief Judge  
PATRICIA H. FITZGERALD, Alternate Judge

On May 29, 2018 appellant filed a timely appeal from December 29, 2017 and May 11, 2018 decisions of the Office of Workers' Compensation Programs (OWCP).<sup>1</sup> The Clerk of the Appellate Boards docketed the appeal as No. 18-1208.

On November 15, 2017 appellant, then a 32-year-old temporary assistant, filed a traumatic injury claim (Form CA-1) alleging that on November 13, 2017 she was sexually assaulted while in the performance of duty. She notified her supervisor of the incident that same date. On the reverse side of the claim form her supervisor reported that he was not present when the incident occurred and, as such, could not agree or disagree with the allegations she had made.

In an accompanying November 15, 2017 narrative statement, appellant reported that on November 13, 2017 she was stocking supplies in the central supply room when T.T. sexually assaulted her. She immediately returned to the breakroom and had to transfer another cart to the

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<sup>1</sup> Appellant's AB-1 form indicates that she is requesting an appeal of an April 20, 2018 decision. However, there is no such decision of that date found in the case record. The December 29, 2017 and May 11, 2018 decisions are the only OWCP decisions within the Board's jurisdiction.

supply room. When she left the supply room, T.T. approached her again and kissed her right cheek. Appellant reported that both incidents were unwanted.

In support of her claim, appellant also submitted a Department of Veterans' Affairs voluntary witness statement dated November 14, 2017 in which she detailed the events surrounding the November 13, 2017 employment incident.

By decision dated December 29, 2017, OWCP denied appellant's claim, finding that the evidence of record was insufficient to establish that she sustained an emotional condition in the performance of duty, as alleged. It noted that she had not alleged compensable employment factors that caused her injury.

In an appeal request form dated January 8, 2018, appellant sought an oral hearing before an OWCP hearing representative. By decision dated May 11, 2018, OWCP's hearing representative found that appellant had abandoned her hearing request.

The Board, having duly considered the matter, concludes that this case is not in posture for decision and must be remanded for further development.<sup>2</sup>

FECA provides that OWCP shall determine and make findings of fact in making an award for or against payment of compensation after considering the claim presented by the employee and after completing such investigation as it considers necessary with respect to the claim.<sup>3</sup> The reasoning behind OWCP's evaluation should be clear enough for the reader to understand the precise defect of the claim and the kind of evidence which would overcome it.<sup>4</sup>

In its December 29, 2017 decision, OWCP did not discharge its responsibility to set forth findings of fact and a clear statement of reasons explaining the disposition so that appellant could understand the basis for the decision, as well as the precise defect and the evidence needed to overcome the denial of her emotional condition claim.<sup>5</sup> The decision did not discuss the customary criteria for an assault case or address the allegations made by appellant to determine whether she had established a compensable factor of employment.<sup>6</sup>

The Board further finds that OWCP failed to sufficiently develop the evidence regarding whether appellant was sexually assaulted at work while in the performance of duty on November 13, 2017. OWCP's procedures provide that, in cases involving assault, OWCP should obtain copies of police reports which may have been made, as well as statements from the official

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<sup>2</sup> *N.M.*, Docket No. 17-0262 (issued July 3, 2017).

<sup>3</sup> 5 U.S.C. § 8124(a)(2); 20 C.F.R. § 10.125.

<sup>4</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.5(c) (February 2013). *See also G.S.*, Docket No. 14-1933 (issued November 7, 2014).

<sup>5</sup> *K.J.*, Docket No. 14-1874 (issued February 26, 2015). *See also J.J.*, Docket No. 11-1958 (issued June 27, 2012).

<sup>6</sup> FECA Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.10 (August 1992).

superior, coworkers, the assailant, or other witnesses.<sup>7</sup> In this instance, appellant detailed the circumstances surrounding the November 13, 2017 incident and reported T.T. as the assailant. She further identified employing establishment employees who had knowledge of the circumstances surrounding the claim. The record reflects that a police report had been filed. OWCP, however, failed to properly develop the evidence by requesting information from the employing establishment addressing her allegations of the sexual assault.<sup>8</sup>

Proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter.<sup>9</sup> While the claimant 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> The Board finds that OWCP has not properly discharged its responsibilities in developing the case record or in issuing a proper decision.

As such, this case will be remanded to OWCP for further development. OWCP shall request additional evidence from the employing establishment addressing the November 13, 2017 employment incident.<sup>11</sup> Following this and any other such further development deemed necessary, OWCP shall issue a *de novo* merit decision, which includes findings of fact and a clear and precise statement regarding whether appellant has met her burden of proof under the customary standards to establish an assault claim.<sup>12</sup> Accordingly,

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<sup>7</sup> *Supra* note 3.

<sup>8</sup> *Lillian E. Lesniak*, Docket No. 00-1021 (issued February 22, 2001).

<sup>9</sup> *See Phillip L. Barnes*, 55 ECAB 426 (2004).

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

<sup>11</sup> *A.R.*, Docket No. 11-1949 (issued April 16, 2012). The employing establishment is responsible for submitting to OWCP all relevant and probative factual and medical evidence in its possession, or which it may acquire through investigation or other means. Such evidence may be submitted at any time. 20 C.F.R. § 10.118(a).

<sup>12</sup> In light of this disposition, the issue of whether OWCP properly determined that appellant abandoned her request for hearing is rendered moot.

**IT IS HEREBY ORDERED THAT** the May 11, 2018 and December 29, 2017 decisions of the Office of Workers' Compensation Programs are set aside and the case is remanded for further proceedings consistent with this order of the Board.

Issued: April 30, 2020  
Washington, DC

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

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

Patricia H. Fitzgerald, Alternate Judge  
Employees' Compensation Appeals Board