

and stress conditions were aggravated while in the performance of duty. He explained that when he was standing in line in the second floor cafeteria, the logistics chief, D.R., walked up behind him and assaulted him by punching his back and slapping the left side of his abdomen. On the reverse side of the claim form, the employing establishment contended that appellant was not injured in the performance of duty because he was on his lunch break in the cafeteria when the incident allegedly occurred. It indicated that appellant stopped work on March 27, 2019.

In a March 19, 2019 voluntary witness statement, appellant noted that on March 18, 2019 between 11:00 a.m. and 1:30 p.m. the logistics chief, D.R., walked up behind him and began punching his back and side and slapped his stomach with an open fist. He indicated that he turned around to see who was responsible, and upon seeing that it was D.R. his anxiety, anger, and stress were triggered. D.R. then said something, but appellant did not recall what it was. Appellant noted that this was a violation of his workplace's assault policy, and at the time of the incident there was a lot of tension between him and D.R. He postulated that D.R. may have tried to intimidate him or could have been retaliating against him for whistleblower activity.

In a form signed on March 27, 2019, appellant indicated that he sustained a stress-related injury at work on March 18, 2019. He stated that he was a veteran and was currently receiving benefits for a service-connected disability. Appellant noted that his military claim included post-traumatic stress disorder.

March 27, 2019 medical records signed by Victoria L. Carroll, a mental health nurse practitioner, noted that she had provided appellant psychological, cognitive, and solution-based therapy. A May 27, 2019 work status letter signed by Ms. Carroll indicated that appellant had a psychiatric disability and therefore was unable to work from March 27 to April 26, 2019. She concluded that appellant would be able to return to work without restriction on April 27, 2019.

In an April 4, 2019 controversion letter, the employing establishment related that appellant failed to provide any statements from witnesses to substantiate that the alleged incident occurred. It noted that appellant's medical evidence was insufficient to establish his claim for compensation benefits and indicated that it disputed appellant's claim on the basis of fact of injury, performance of duty, and causal relationship.

In an April 15, 2019 development letter, OWCP informed appellant that additional evidence was required in support of his claim. It advised him of the type of factual and medical evidence necessary to establish his claim and attached a questionnaire for his completion. OWCP afforded appellant 30 days to submit the requested evidence. By letter of even date, OWCP requested additional information from the employing establishment regarding the circumstances of the alleged March 18, 2019 assault. The employing establishment was asked to describe the events and circumstances which immediately preceded and led up to the assault, and whether there was any animosity between appellant and the alleged assailant. Further, it was asked if any investigation subsequent to the incident was conducted.

March 21, 2019 progress notes from Dr. Anne Ayres, a clinical psychologist, indicated that appellant related that he was still having difficulties with work-related stress. She noted appellant's provisional diagnoses as adjustment disorder with depressed and anxious features (work stressors), alcohol use disorder, unspecified depression, and post-traumatic stress disorder

(PTSD). Dr. Ayres recounted that he filed charges against a coworker and expressed concerns regarding how he is regarded by the employing establishment.

May 2, 2019 progress notes signed by Dr. Tammie Tucker, Board-certified in internal medicine, indicated that appellant complained of left-sided pain in his head, neck, and chest, shortness of breath, diaphoresis, and lightheadedness. Appellant's medical history was listed as including depression, sleep apnea, and alcohol abuse, and a physical examination revealed reproducible chest wall tenderness upon palpation. Dr. Tucker diagnosed chest pain and musculoskeletal pain, and she additionally provided a differential diagnosis of angina and anxiety. A May 2, 2019 emergency department discharge instruction report signed by Dr. Joel Raja, a resident physician, noted that appellant was treated for nonanginal chest pain and recommended follow-up appointments.

A May 14, 2019 e-mail from the employing establishment responding to OWCP's development letter indicated it was unaware of any animosity between appellant and D.R., and that the employing establishment's police conducted the only investigation of the alleged assault. It further indicated that it had no knowledge of any witnesses to the alleged assault or if appellant had similar preexisting injuries or conditions prior to the alleged assault. The employing establishment also noted it that had no knowledge about whether appellant sustained any other injuries between the date of his alleged injury and the date he reported the alleged injury.

May 6, 2019 medical records signed by Dr. Uzma Shirwany, Board-certified in internal medicine, indicated that appellant presented paperwork for retirement disability, and he noted that the nature of his disability was PTSD and stress. He also indicated that he was experiencing chest pain, and an electrocardiogram revealed no acute ST-segment changes.

A May 15, 2019 letter from the employing establishment provided additional information in response to OWCP's development letter. The employing establishment related that it could not provide a full description of the events and circumstances leading to the assault because appellant's supervisor was not present at the time of the alleged incident. It also related that appellant's supervisor had no knowledge of any animosity between appellant and the alleged assailant. In response to OWCP's request for the employing establishment to forward a copy of the investigative report of the alleged assault, it noted that the employing establishment police took a statement from appellant and had provided the voluntary witness statement to OWCP. The employing establishment also noted that while appellant's medical documentation indicated that he experienced work-related stress, it did not identify specific work factors contributing to his stress or provide a medical opinion that his symptoms were a direct result of specific work factors. It indicated that appellant had therefore failed to establish causal relationship.

By decision dated May 16, 2019, OWCP denied appellant's emotional condition claim, finding that the evidence of record failed to establish that the claimed incident occurred, as alleged.

On June 11, 2019 appellant requested reconsideration and submitted a March 19, 2019 incident report from the employing establishment police department which related appellant's report that, between the hours of 11:00 a.m. and 1:30 p.m. on March 18, 2019, D.R. approached him from behind and physically assaulted him by punching him in the back and on the side and

slapping his stomach. Appellant recounted that he could not understand why his supervisor was playing in the manner that he did due to the recent tension that had arisen.

OWCP subsequently received an April 10, 2019 voluntary employing establishment police witness statement by D.R. who noted that on March 18, 2019 he and two colleagues went to lunch at the employing establishment's canteen. D.R. parted ways with his colleagues and as he was walking towards the soda cooler he saw appellant standing in the fast food line in front of the condiment section and they made eye contact. As he approached appellant, appellant stopped stooping, which he noted in the report was a bad posture look, straightened his back, and nodded his head. D.R. further noted that he walked up to appellant and touched his stomach with an open hand while patting his back. He indicated that he asked appellant "what was good for lunch" and appellant replied that he was having a hamburger and French fries. D.R. related that he chatted with appellant until appellant and the three people in front of him received their meals. He then met up with his two colleagues and walked back to the office. D.R. recounted that when he received appellant's claim a week later his coworkers and appellant's supervisor were not aware of any injury sustained by appellant.

By decision dated August 22, 2019, OWCP denied modification of its May 16, 2019 decision.

LEGAL PRECEDENT

To establish an emotional condition in the performance of duty, appellant must submit the following: (1) factualevidence identifying employment factors or incidents alleged to have caused or contributed to the condition; (2) rationalized medical evidence establishing that he or she has an emotional condition or psychiatric disorder; and (3) rationalized medical opinion evidence establishing that the emotional condition is causally related to the identified compensable employment factors.²

It is well established as a general rule of workers' compensation law that, as to employees having fixed hours and places of work, injuries occurring on the premises of the employing establishment, while the employees are going to or from work, before or after working hours, or at lunch time, are compensable.³

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 employment unless, by facilitating an assault that would not otherwise be made, the employment becomes a contributing factor.⁴

² See *W.F.*, Docket No. 18-1526 (issued November 26, 2019); *C.M.*, Docket No. 17-1076 (issued November 14, 2018); *C.V.*, Docket No. 18-0580 (issued September 17, 2018); *Kathleen D. Walker*, 42 ECAB 603 (1991).

³ *Eileen R. Gibbons*, 52 ECAB 209 (2001); *Narbik A. Karamian*, 40 ECAB 617, 618 (1989).

⁴ *J.G.*, Docket No. 17-0747 (issued May 14, 2018).

In this regard, Federal (FECA) Procedure Manual, Chapter 2.0804⁵ provides the following as to the development of assault cases:

“10. *Assault Cases.* 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. An assault occurring off the [employing establishment’s] premises and outside of work hours may be compensable if it arose for reasons related to the employment.

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.”*

ANALYSIS

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

Physical contact by a coworker or supervisor may give rise to a compensable work factor, if the incident is established factually to have occurred as alleged.⁶ In his April 20, 2019 voluntary witness statement, logistics chief D.R. related that on March 18, 2019 while in the employing establishment’s canteen he walked up to appellant and touched his stomach with an open hand while patting his back. The Board therefore finds that the record establishes that on March 18, 2019 D.R. touched appellant’s back and stomach in the employing establishment’s cafeteria at lunch time and that this incident occurred in the performance of duty.⁷ Whether this touching

⁵ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.10 (August 1992).

⁶ *D.B.*, Docket No. 19-1543 (issued March 6, 2020).

⁷ *Supra* note 3.

incident constituted an assault sufficient to cause an emotional condition, is however, a separate inquiry.⁸

The Board finds that OWCP did not sufficiently develop the evidence to determine whether this touching constituted an egregious physical assault, sufficient to cause an aggravation of appellant's emotional condition. In his March 19, 2019 voluntary witness statement, appellant alleged that there recently was tension between him and D.R., and he noted that D.R.'s assault may have been retaliation for engaging in whistleblowing activity. He also noted that there was tension between him and D.R. in the March 19, 2019 employing establishment's police incident report. In his statement as a part of the police report, D.R. reported that he approached the appellant patted his stomach and patted his pack and asked him what was for lunch. He further noted that he spoke with appellant while three people in front of them were served, then left without issue.

OWCP requested that the employing establishment describe the events that led up to the alleged incident and whether there was animosity between appellant and the alleged assailant; however, appellant's supervisor responded that he could not answer these questions as he was not present at the incident.

As previously noted, OWCP's procedures provide that a statement should be obtained from the assailant, if possible, detailing whether there was any animosity between the injured employee and the assailant by reason of a personal association away from work and, if so, this should be explained fully, and should additionally provide a full description of the events and circumstances which immediately preceded, led up to, and resulted in the injury.⁹ OWCP, however, did not request that the employing establishment obtain the statement from the alleged assailant.

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.¹⁰

Accordingly, the Board will remand the case for OWCP to obtain the necessary information from D.R. regarding the claimed March 18, 2019 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 a decision.

⁸ See *Edward L. Gerwe*, Docket No. 06-0181 (issued April 11, 2006); *Rem Vescosi*, Docket No. 01-1712 (issued June 5, 2003).

⁹ See *supra* note 5.

¹⁰ *A.M.*, Docket No. 18-0630 (issued December 10, 2018).

ORDER

IT IS HEREBY ORDERED THAT the August 22, 2019 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further development consistent with this decision of the Board.

Issued: April 24, 2020
Washington, DC

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

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

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