

back and head injury when she tripped and fell over a wire hanging from a flats case, causing her to hit the case and land on the floor. She stated that she struck her head when she hit the floor. The back of the form was not completed. A separate Form CA-1 was completed and received from the employing establishment dated February 8, 2012. The form indicates that appellant notified her supervisor on December 12, 2011, the date of injury. The employing establishment controverted the claim stating that appellant was not a postal employee and was a Highway Contract Route (HCR) worker. It also submitted a U.S. Postal Service (USPS) accident investigation worksheet dated December 12, 2011.

By letter dated February 10, 2012, OWCP informed appellant that the evidence of record was insufficient to support her claim. Appellant was advised that the evidence was insufficient to support that she was a federal employee and that no medical evidence had been received containing a physician's diagnosis and opinion on the cause of her injury. She was asked to respond to the provided questions within 30 days.

By letter dated March 8, 2012, counsel provided arguments that appellant did qualify as a federal employee under FECA. He stated that the USPS exercised extensive control over the details of her work including preparing the mail, delivery of the mail and prescribing the exact route street-by-street for her delivery, as stated directly in her contract. Counsel also argued that appellant's compensation was based on the amount of time USPS calculated it should take her to complete the preassigned route. He noted that USPS recently lowered the amount she was paid based entirely upon a recalculation of the amount of time it should take her to complete the strictly-controlled route, taking into consideration a slight downward adjustment in the number of boxes in her route.

In a February 23, 2012 medical report, Dr. W. Kirk Harris, Board-certified in family medicine, reported that on December 12, 2011 appellant was performing her duties as a mail carrier and tripped and fell, hitting a case and landing on the floor where she hit her head and other parts of her body. Appellant complained of pain in the right leg, low back, head, ankle and hip. Dr. Harris noted that she had preexisting lumbar degenerative disc disease and opined that this fall aggravated her low back pain. He diagnosed strain of the lumbar spine and pain in the hip and ankle.

By decision dated March 15, 2012, OWCP denied appellant's claim finding that the evidence of record failed to establish that she was a federal employee under FECA. It found that an employee/employer relationship did not exist between appellant and USPS at the time of the alleged incident.

On March 22, 2012 appellant, through counsel, requested an oral hearing before the Branch of Hearings and Review.

By letter dated March 28, 2012, the employing establishment stated that appellant was not an employee of USPS.

By letter dated May 9, 2012, appellant and the employing establishment were informed of the scheduled date and time of the hearing. The employing establishment was provided with

information regarding attendance at hearings and submission of pertinent evidence.² OWCP enclosed a Form CA-1127V to determine if the employing establishment representative would attend the hearing and whether the employing establishment wished to receive a copy of the hearing transcript.

In a May 11, 2012 Form CA-1127V, the employing establishment stated that it would not be attending the scheduled hearing but wished to receive a copy of the transcript.

At the June 29, 2012 hearing, appellant testified that she had been working for the postal service for 15 years. She was required to report to work each day at the time specified by the postal service. Initially, appellant was to report at 7:30 a.m., as stipulated in her contract. This was later changed to 8:00 a.m. When reporting for service, USPS instructed appellant to first prepare her mail for delivery by casing it in the employing establishment and then transferring the sorted and arranged mail in containers to the delivery vehicle. Appellant had her own cubicle area in the employing establishment where she would case mail. She stated that, subsequently, her postmaster sent a letter instructing her to stop casing mail and to report to work at 8:00 a.m. Appellant stated that there were four other employees that performed the exact same duties as her and everyone received the same letter. She noted that two of the employees were federal employees who received their paychecks twice a month and were entitled to vacation and sick leave whereas she and the remaining two employees only got paid once a month. Appellant stated that she was unsure if taxes were being taken out of her pay because she had never seen a paycheck.

Appellant testified that she was given specific instructions from USPS on how to deliver mail. She was required to attend weekly stand-up meetings for all employees, where her supervisor would provide detailed instructions on how to perform their duties. Appellant stated that USPS recently provided them with scanners which they were required to use while delivering mail. She was instructed to scan her identity badge as well as specific mail and packages when picking up and delivering mail. Appellant stated that she was required to wear clothing with the official USPS logo. She stated that two or three employees wore the official USPS uniform and about five employees, including herself, wore USPS sweatshirts and t-shirts. Appellant stated that she was instructed on an exact route to take when delivering mail and was required to follow the route street-by-street, with the exact mileage noted, as mandated by USPS. She stated that her contract specified pay based upon the miles she was projected to travel, the time it would take her to deliver mail and the number of boxes she was given in her contract route. Appellant noted that, although she had four-year contracts, USPS recently amended her services contract because it took her less time to finish her route due to a slight decrease in the number of boxes serviced in her route. This caused a decrease in her pay.

Appellant also testified that USPS provided all of the equipment and supplies necessary for performance of her work. She was provided with a logo and identification badge, a scanner she was required to use while delivering mail, signs for the delivery vehicle and a cubicle where she prepared and cased her mail. Appellant stated that she used her own vehicle to deliver mail

² In its May 9, 2012 letter, OWCP informed the employing establishment that it would be allowed 20 days following release of the requested transcript to submit comments or additional material for inclusion in the record and study by OWCP's hearing representative in reaching a decision.

and was required to have her own automobile insurance. She also noted that she was required to have a cell phone on her at all times in the event her supervisor needed to contact her with questions or instructions.

Appellant stated that, when she fell on December 12, 2011, her postmaster provided her with a Form CA-1. She stated that she did not ask him for this form, that he offered it to her on his own volition. On January 9, 2012 USPS contacted appellant requesting that she fill out an accident form for a tort claim. Appellant was instructed that she was not an employee. She stated that she was shocked because she had always considered herself an employee and was never treated any differently from the other postal employees. Counsel submitted a number of exhibits which contained USPS documents and noted that many of the documents referenced “employees” and were provided to appellant during weekly stand-up meetings. He further noted that appellant’s employment contract never specified that she was an independent contractor and not an employee. Appellant stated that, when she was first hired by USPS, she was never given any information about workers’ compensation. The record was held open for 30 days.

By letter dated July 11, 2012, counsel presented arguments in support of appellant’s claim, referencing her testimony and attached exhibits. He argued that her contract never stated that she was an independent contractor, that USPS maintained all control she exerted over the details of her work, USPS provided her with equipment and supplies, she was required to wear USPS clothing when delivering mail, she was given an exact route to follow, her pay was determined primarily on the time involved in completing her work, that she had always considered herself an employee, was required to attend weekly meetings, was provided with documents which referred to her as an employee during these meetings and that her supervisor provided her with a Form CA-1 on the date of injury on his own initiative. As such, appellant should be considered an employee as opposed to an independent contractor under FECA.

By letter dated July 10, 2012, OWCP informed appellant that the employing establishment was provided with a copy of the transcript and had 20 calendar days from the date of the letter to submit comments or additional material.

On July 24, 2012 OWCP received a letter from Mr. Klinger, a postal service Highway Contract Route (HCR) Contractor Officer, responding to allegations made in the transcript. Mr. Klinger provided clarification on information in the transcript, stating that appellant was not a rural carrier but an HCR carrier. He further stated that there were two HCR carriers in the office and three rural route carriers, postal uniforms were worn by city letter carriers and that he was unaware of any other HCR contractors who had been compensated by OWCP for a work-related injury. With his letter, Mr. Klinger provided a copy of appellant’s contract route service order from August 5, 2008 noting that her contract required 233 boxes. No other information was submitted.

By decision dated September 20, 2012, OWCP’s hearing representative affirmed the March 15, 2012 decision, finding that the evidence of record failed to establish that appellant was an employee under FECA.

LEGAL PRECEDENT

FECA provides that the United States “shall pay compensation as specified by this subchapter for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty.”³ A claimant seeking compensation under FECA has the burden of proof to establish the essential elements of his or her claim by the weight of the reliable, probative and substantial evidence, including that the claimant was an “employee” within the meaning of FECA.⁴

For purposes of determining entitlement to compensation benefits under FECA, an “employee” is defined, in relevant part, as:

“(A) a civil officer or employee in any branch of the [g]overnment of the United States, including an officer or employee of an instrumentality wholly owned by the United States;

“(B) an individual rendering personal service to the United States similar to the service of a civil officer or employee of the United States, without pay or for nominal pay, when a statute authorizes the acceptance or use of the service or authorizes payment of travel or other expenses of the individual....”⁵

With regards to whether a claimant is a federal employee for purposes of FECA, the Board has noted that such a determination must be made considering the particular facts and circumstances surrounding his or her employment.⁶ Included among the many factors to be considered are the right of control of the work activities, the right to hire and fire, the nature of the work performed, the method of payment for the work, the length of time of the job and the intention of the parties.⁷ Other factors to be considered include whether the claimant has been rendering service similar to the service of a federal employee and whether the employing establishment was authorized by statute to accept such services.⁸ The statute does not require that any written form of agreement be entered into by the employing establishment and the individual providing services prior to acceptance of personal services by the employing establishment.⁹ With regards to the party who paid the wages, the implication that a claimant

³ 5 U.S.C. § 8102(a).

⁴ *Barbara L. Riggs*, 50 ECAB 133, 137 (1998).

⁵ 5 U.S.C. § 8101(1).

⁶ *Donald L. Dayment*, Docket No. 01-1846 (issued January 21, 2003).

⁷ *Larry E. Young*, 52 ECAB 264 (2001).

⁸ *Sandra Davis*, 50 ECAB 450 (1999).

⁹ *Jane Doe*, 49 ECAB 646, 649 (1998).

was a federal employee cannot be drawn solely from the fact that his or her salary was derived from a fund to which the Federal Government contributed.¹⁰

Of the aforementioned factors, the Board has held that the right to control the work activities of the person whose status is in dispute is the most important.¹¹

OWCP's procedure manual indicates that, when there is a question as to whether appellant is an employee or an independent contractor, the claims examiner should request statements from the worker and the reporting the employing establishment to indicate, *inter alia*, whether the worker is required to furnish any tools or equipment; the period of time the work relationship is to exist; whether the reporting employing establishment has the right to control or direct how the work is to be performed with full explanation; the manner in which payment for the workers' services is determined; and whether the activity in which the worker is engaged is a regular and continuing activity of the reporting employing establishment.¹²

The procedure manual also specifically addresses postal service mail messengers and indicates that determination of whether mail messengers are federal employees are made on a case-by-case basis by a senior claims examiner. The procedure manual indicates that the senior claims examiner should request a copy of the agreement form under which the worker was serving when injured. It should also request a statement from the employing establishment regarding the manner in which the worker qualified and was selected to act as mail messenger, the distance the mail was carried, the kind of equipment used and by whom it was furnished, whether the mail messenger was required to personally perform the service or whether assistants or substitutes were permitted, whether the mail messenger had any other employment or performed or offered like or similar services to the public as an independent business service, the manner and circumstances under which the relationship could be terminated, the manner in which the pay was determined, who determined how, when and in what manner the mail would be carried, what right, if any, the postmaster had to direct or supervisor the work performed by the mail messenger and to what extent the postmaster exercised that right.¹³

ANALYSIS

The Board finds that this case is not in posture as to whether appellant was an employee of the United States at the time of her December 12, 2011 injury.

The Board notes that numerous USPS documents and exhibits were submitted in support of appellant's claim. Some of these documents referenced appellant as an employee, some referenced her as a supplier and some referenced her as a contractor. Upon review of the hearing

¹⁰ *David Nivens*, 46 ECAB 926, 934 (1995); *Darlene Menke*, 43 ECAB 173, 178 (1991); *Carl R. Clover*, 41 ECAB 625, 632 (1990) and cases cited therein.

¹¹ *Nettie Jackson (Lee F. Jackson)*, Docket No. 01-498 (issued November 21, 2001); *Kenneth W. Grant*, 39 ECAB 208 (1987); *Wendy S. Warner*, 38 ECAB 103, 105 (1986); *Funnia F. Hightower*, 28 ECAB 83 (1976).

¹² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Civil Employee*, Chapter 2.802.6(a) (June 1995).

¹³ *Id.* at Chapter 2.802.7

transcript, Mr. Klinger, employing establishments HCR contractor, provided comments stating that appellant was an HCR carrier rather than a rural carrier and noted that he was unaware of any other HCR contractors receiving workers' compensation.

The response by the employing establishment was not sufficient to determine whether appellant was an employee of the employing establishment.

Under FECA, although it is the burden of an employee to establish his or her claim, OWCP also has a responsibility in the development of the factual evidence, particularly when such evidence is of the character normally obtained from the employing establishment or other government source.¹⁴ The employing establishment's response to OWCP's inquiry does not sufficiently address the right to or the exercise of control over appellant's work or whether the employing establishment had the right to fire appellant. Therefore, the case should be remanded to OWCP for further development of the factual evidence regarding the question of whether appellant was an employee within the meaning of FECA at the time of her injury on December 12, 2011. 20 C.F.R. § 10.118(a) provides that 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.¹⁵ After such development as it deems necessary, OWCP should issue an appropriate decision regarding appellant's employment status and the validity of her claim for benefits in accordance with the relevant standards for such determinations.¹⁶

CONCLUSION

The Board finds that the case is not in posture for decision regarding whether appellant was an employee of the United States under 5 U.S.C. § 8101(1) at the time of her injury on December 12, 2011. The case should be remanded to OWCP for further factual development to be followed by an appropriate decision.

¹⁴ *Willie A. Dean*, 40 ECAB 1208, 1212 (1989); *Willie James Clark*, 39 ECAB 1311, 1318-19 (1988).

¹⁵ 20 C.F.R. § 10.118(a) (2012).

¹⁶ *See Harry H. Holzem*, Docket No. 03-588 (issued June 19, 2003).

ORDER

IT IS HEREBY ORDERED THAT the September 20, 2012 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: August 22, 2013
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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