

investigation, which revealed that at the time of death, he was participating in the employing establishment's annual survey of endangered species. The decedent was part of a group of four volunteers working alongside Daniel Fenner, a biologist, and Christopher "Chris" Tanner, another employee.³ The decedent and a female volunteer were sampling with a seine net in shallow water when they unexpectedly slipped into water over their heads.⁴ Neither of them was wearing a personal flotation device. She was able to swim to safety. Other group members, including Mr. Fenner, attempted to rescue the decedent, but to no avail.

A few weeks prior to his death, the decedent signed a volunteer services agreement that provided in relevant part: "I understand that I will not receive any compensation ... and that volunteers are NOT considered Federal employees for any purpose other than tort claims and injury compensation." The section of the agreement requiring the employing establishment to provide a brief description of "work to be performed" remained blank.⁵ The decedent's involvement with the FWS was college related.

On June 20, 2011 appellant, the decedent's mother, filed a claim for compensation by parent.

On June 29, 2011 OWCP accepted the decedent's claim for drowning. On July 8, 2011 it paid the maximum amount allowed under FECA for burial expenses and administrative fees (\$1,000.00).⁶

In a prior appeal, the Board issued a December 19, 2012 order dismissing the appeal as premature.⁷ OWCP had not issued a final decision on appellant's claim under FECA.

In a March 12, 2013 decision, OWCP determined that the decedent was a volunteer-employee covered under FECA.⁸ It denied appellant's June 20, 2011 claim for compensation by parent (Form CA-5b) because the decedent did not have any eligible surviving dependents.

³ The other employee was identified as a Student Temporary Employment Program (STEP) biologist.

⁴ The group was working in and along the Cimarron River approximately three miles north of Guthrie, OK. There was an ongoing dredging operation nearby, which OSHA later determined exposed Fish & Wildlife Service (FWS) employees to the hazards of unexpected deep pools and a shifting/unstable river bed.

⁵ The form (Optional Form 301A) also included instructions to "Attach the complete job description...." However, the two-page May 26, 2011 volunteer services agreement submitted to OWCP did not include attachments.

⁶ The decedent's family also received a death gratuity of \$8,900.19 directly from FWS.

⁷ Docket No. 13-37 (issued December 19, 2012).

⁸ According to appellant's counsel, she was not interested in pursuing FECA death benefits. Instead, appellant wished to pursue a cause of action against FWS for wrongful death under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671-2680. Federal civilian employees covered by FECA are prohibited from suing under FTCA for work-related injuries or death. 5 U.S.C. § 8116(c).

By decision dated July 23, 2013, the Branch of Hearings & Review affirmed the March 12, 2013 decision.

LEGAL PRECEDENT

As defined by FECA, the term “employee” includes “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.”⁹ Determining whether an unpaid or nominally paid individual is an employee is a two-step process.¹⁰ Initially, the issue is whether the department or agency is authorized by statute to accept or use the service of the individual.¹¹ The second step is to ascertain whether the services rendered were similar to the service of a U.S. civil officer or employee.¹² When both questions are answered in the affirmative, an individual is a covered “employee” under FECA.¹³

ANALYSIS

Appellant’s counsel has not challenged OWCP’s finding that the decedent had no surviving spouse or any other eligible dependents for purposes of entitlement to compensation.¹⁴ Instead, counsel argued that the decedent was not a volunteer-employee, and therefore, should not be covered under FECA. As noted, an “employee” under FECA includes “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.”¹⁵

Appellant conceded that the Department of the Interior, FWS was authorized by statute to accept “the services of individuals without compensation as volunteers...”¹⁶ There is no evidence of record that the decedent received any remuneration from FWS for the services he performed on June 15, 2011. As evidenced by the volunteer services agreement signed on May 26, 2011, he was aware he would not be paid for his services. Accordingly, the Board finds that the decedent was an unpaid worker, and the FWS was authorized by statute to accept his services without remuneration.

⁹ 5 U.S.C. § 8101(1)(B).

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Civil Employee*, Chapter 2.802.9 (June 1995).

¹¹ *Id.*

¹² *Id.*

¹³ *George Abraham (Anne Abraham)*, 36 ECAB 194, 196 (1984).

¹⁴ *See* 5 U.S.C. §§ 8102(a), 8133; 20 C.F.R. §§ 10.105, 10.410.

¹⁵ 5 U.S.C. § 8101(1)(B).

¹⁶ 16 U.S.C. § 742f(c)(1); *P.L.*, Docket No. 95-616 (November 8, 1978).

Appellant’s counsel advanced three arguments as to why the decedent should not be considered a volunteer-employee under FECA. He argued that FWS neither recruited nor trained the decedent, which purportedly was in violation of its statutory mandate. Second, counsel argued that the decedent did not freely volunteer his services, but instead was compelled to work for FWS as part of his undergraduate studies at Langston University.¹⁷ He also argued that the volunteer services agreement was defective because it did not include a description of the work to be performed.

As to counsel’s first argument, he noted that the statute authorizing FWS’ acceptance of volunteer services also provided for the recruitment and training of volunteers. Counsel claimed that FWS neither recruited nor trained the decedent. Because FWS allegedly did not recruit or train the decedent, counsel contends that the decedent does not meet the requirements of a volunteer. The relevant portion of the authorizing statute reads as follows: “The Secretary of the Interior and the Secretary of Commerce ‘may’ each recruit, train, and accept ... the services of individuals without compensation as volunteers for, or in aid of programs conducted by either Secretary through the United States FWS or the National Oceanic and Atmospheric Administration.”¹⁸ A plain reading of the statutory provision provides no support for counsel’s argument that recruitment and training are prerequisites to the acceptance of “the services of individuals without compensation as volunteers....”¹⁹ Moreover, the statute does not mandate recruitment, training, and acceptance of volunteers, but merely authorizes these activities. As noted, the Secretary “may ... recruit, train, and accept ... volunteers....”²⁰ Use of the word “may” imparts discretion and/or permission, as distinguished from a duty, requirement or obligation. Consequently, the Board finds that counsel’s first argument is without merit.

Counsel’s second argument pertained to the decedent’s motive for providing service to FWS without remuneration. He noted that the decedent participated because he needed to fulfil a college-related requirement.²¹ Counsel further argued that because the decedent’s participation was not out of the goodness of his heart, he did not truly volunteer his services to FWS. At oral argument, he compared the decedent’s involvement with FWS to that of a motorist convicted of driving while intoxicated (DWI) who must perform court-ordered community service. Counsel also cited an unpublished decision from the U.S. Court of Appeals for the Fourth Circuit which held that a state inmate, who was required to work as part of his sentence, was not a “volunteer

¹⁷ According to appellant’s counsel, the decedent was not altruistic and did not volunteer at FWS out of the goodness of his heart.

¹⁸ 16 U.S.C. § 742f(c)(1).

¹⁹ *Id.*

²⁰ *Id.* at § 742f(c)(1). The statute further provides that for the purpose of the tort claim provisions of FECA, a volunteer under this subsection shall be considered a federal employee. *Id.* at § 742f(c)(4). Additionally, the statute provides that for the purposes of FECA, relating compensation to federal employees for work injuries, volunteers under this subsection shall be deemed employees of the United States within the meaning of the term “employees” as defined in section 8101 of title 5, and the provisions of that subchapter shall apply. *Id.* at § 742f(c)(5).

²¹ The Board notes that apart from counsel’s representations, there is scant information in the record regarding the decedent’s involvement with Langston University or his required course work.

worker” as defined under the state’s general insurance policy.²² The absence of coercion was a determinative factor in addressing the inmate’s “volunteer” status. Based on the nature of his confinement, the court found that the inmate’s work in the kitchen was anything but voluntary.²³ Counsel cited this case for the legal proposition that the decedent must have elected to work of his own volition in order to be considered a volunteer.

The Board notes that, while Langston University may have required its undergraduates to participate in science/biology-related internships, there is no evidence that the decedent was compelled to volunteer at FWS. There is no evidence that FWS coerced the decedent into participating in the June 15, 2011 seine sampling activities or otherwise restricted his personal liberties that morning. The decedent was an unpaid worker, who may very well have had an ancillary motive for providing service to FWS. The Board need not analyze the decedent’s motives in order to resolve the issue on appeal. The possibility of receiving college credit for his involvement does not change the nature of the relationship between the decedent and FWS.

Counsel’s third argument regarding the adequacy of the volunteer services agreement is similarly unpersuasive. He correctly noted that the May 26, 2011 volunteer services agreement did not include a description of the work to be performed by the decedent. However, an apparent oversight such as this is not dispositive on the issue of whether an individual is an employee under FECA. The Board’s primary focus is not whether there was a properly executed volunteer services agreement; rather, the rights and responsibilities of both the decedent and FWS are statutorily based. An analysis of their relationship is not contingent on a properly executed contractual agreement. The question before the Board is whether the record on appeal establishes that the decedent rendered “personal service to the United States similar to the service of a civil officer or employee of the United States.” An ostensibly defective volunteer services agreement executed some three weeks prior to the incident in question does not preclude consideration of the activities the decedent performed just prior to his death.

The record before the Board establishes that on June 15, 2011 at approximately 11:30 a.m., the decedent was seine sampling in shallow water with another volunteer, both of whom were part of a six-member group that included at least two employee biologists. According to OSHA’s September 2011 investigation findings, Mr. Fenner, the team leader had conducted and participated in annual seining operations on the Cimarron River for the previous five years. As seining was part of Mr. Fenner’s duties as an FWS biologist, the record establishes that the decedent, who drowned while seine sampling, provided a “personal service ... similar to the service of [an] ... employee of the United States.”²⁴

The decedent was an unpaid worker who provided volunteer personal service similar to the service of a U.S. employee. Moreover, FWS was authorized by statute to accept his services

²² While working in the kitchen, the inmate injured a noninmate kitchen employee, who sued the jail, *et al.*, for her work-related injury. The issue before the court was whether the inmate was a “volunteer worker” for insurance coverage purposes. *National Union Fire Insurance Company v. Lambert*, 462 F. App’x 299 (4th Cir. 2012).

²³ *Id.* The decision itself noted that unpublished opinions are not binding precedent in the 4th Cir.

²⁴ 5 U.S.C. § 8101(1)(B).

without remuneration. Accordingly, OWCP properly determined that the decedent was an employee covered under FECA.

CONCLUSION

The Board finds that the decedent was an “employee” within the meaning of FECA.

ORDER

IT IS HEREBY ORDERED THAT the July 23, 2013 decision of the Office of Workers’ Compensation Programs is affirmed.

Issued: July 25, 2014
Washington, DC

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

Michael E. Groom, Alternate Judge
Employees’ Compensation Appeals Board

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