

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

A.M., Appellant	)	
	)	
and	)	<b>Docket No. 16-1038</b>
	)	<b>Issued: December 23, 2016</b>
<b>DEPARTMENT OF THE INTERIOR,</b>	)	
<b>GEOLOGICAL SURVEY, JEAN LAFITTE</b>	)	
<b>NATIONAL HISTORICAL PARK &amp;</b>	)	
<b>PRESERVE, Marrero, LA, Employer</b>	)	
	)	

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
COLLEEN DUFFY KIKO, Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On April 20, 2016 appellant filed a timely appeal from a March 15, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP).<sup>1</sup> Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

**ISSUE**

The issue is whether appellant was an employee of the United States under 5 U.S.C. § 8101(1) at the time of the alleged July 30, 2015 incident.

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<sup>1</sup> The Board notes that appellant submitted additional evidence for the first time on appeal. The Board's jurisdiction is limited to reviewing the evidence that was before OWCP at the time of its final decision, and therefore this additional evidence cannot be considered on appeal. 20 C.F.R. § 501.2(c)(1). *Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35, 36 n.2 (1952).

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

On February 2, 2016 appellant, then a 22-year-old student contractor, filed a traumatic injury claim (Form CA-1). He stated that on July 30, 2015 he was walking to a sample site and a big black wasp stung him multiple times.

By letter dated February 5, 2016, OWCP informed appellant that he needed to submit evidence in support of his claim and provided him 30 days to submit this evidence. On the same date, it asked the employing establishment to provide information addressing whether he was a contractor or an employee. OWCP noted in the request to the employing establishment that not every contractor rendering service to the Federal Government was necessarily an "employee." Therefore, it specifically requested that the employing establishment address questions about appellant's status as a contractor: whether the employing establishment had any right to control or direct how his work was to be performed; whether the employing establishment was required to furnish tools or equipment; the period of time the work relationship was to exist; the manner in which payment for the employing establishment's services was determined; and whether the activity in which the employing establishment was engaged was a regular and continuing activity of the employing establishment.

On February 23, 2016 appellant provided a statement and a partial response to OWCP's queries. He indicated that on July 30, 2015 he was working in the national park with two employees of the employing establishment's Wetland and Aquatic Research Center, collecting leaf litter traps. Appellant stated that, as he neared the traps, he was stung by a black wasp. He indicated that he felt a hot stabbing sensation on his right triceps, and then his left triceps, and that the wasp stung him a third and final time on his upper lip. Appellant noted that his arms and lips began to swell. He explained the delay in filing his claim by noting that he did not have a registered profile or access to government computer. Appellant noted that he was treated at the medical center approximately 30 minutes after the sting. He indicated that he was a student contractor, that he started the assignment on July 7, 2015, and reported to his supervisor for all of his tasks. Appellant noted that all his tools and equipment were provided by the employing establishment. He stated that the length of his contract was two years, but noted that the employing establishment had the right to discharge him at any time despite the length of his contract. Appellant indicated that his supervisor explained how all the work he did was to be performed, where all the samples must be placed, and how all the data was to be recorded. He noted that his salary was determined by the government and his timesheets had to be submitted every two weeks. Appellant noted that he worked five days a week from 8:00 a.m. to 4:00 p.m. He stated that he was not required to take an oath of office. Appellant submitted bills from his treatment on July 30, 2015.

The employing establishment also responded to OWCP's queries on February 23, 2016. It submitted the procurement order for services (Form 347), which noted that appellant was a student service contractor with a period of performance from July 7 to September 30, 2015, and listed his technical liaison. Appellant's estimated hours of work were not to exceed 40 hours per week. He was paid \$14.71 per hour, and he was to submit biweekly invoices. The order indicated that as appellant was a self-employed contractor, he was exempt from Fair Labor Standards Act and Service Contract Act. Accordingly, appellant was to be paid a basic hourly rate with no overtime premium. He was to be paid only for hours worked and would not be paid for any nonwork days. Appellant's job assignment included assisting in acquiring biological and

environmental data, in maintaining seed bank experiments, in establishing and maintaining field experiments, in processing field samples, providing monthly progress reports, and in operating, and maintaining government equipment. The order indicated that appellant was responsible for transportation to and from his principal duty station, however, for travel to and from the duty station to field sites, including overnight travel, he would be reimbursed at the appropriate government per diem rate.

By decision dated March 15, 2016, OWCP denied appellant's claim for compensation as he had not established that he was an employee for the purpose of coverage 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.<sup>3</sup> 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.<sup>4</sup>

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....<sup>5</sup>”

With regard 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.<sup>6</sup> 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.<sup>7</sup> 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.<sup>8</sup> The statute does not require

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<sup>3</sup> 5 U.S.C. § 8102(a).

<sup>4</sup> *Barbara L. Riggs*, 50 ECAB 133, 137 (1998).

<sup>5</sup> 5 U.S.C. § 8101(1).

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

<sup>7</sup> *Larry E. Young*, 52 ECAB 264 (2001).

<sup>8</sup> *Sandra Davis*, 50 ECAB 450 (1999).

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.<sup>9</sup> With regards to the party who paid the wages, the implication that a claimant 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.<sup>10</sup>

OWCP's procedures 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 employee and the reporting employing establishment to indicate, *inter alia*, whether the employing establishment 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 employing establishment services is determined; and whether the activity in which the employing establishment is engaged is a regular and continuing activity of the reporting employing establishment.<sup>11</sup>

### ANALYSIS

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

Appellant has alleged he was a student contractor, but that his status should be considered that of a federal employee. He noted that he did not furnish his own tools, that the employing establishment had the right to discharge him at any time, and that the employing establishment controlled how his work was performed.

In response to very specific questions regarding appellant's status as a federal employee the employing establishment submitted only the procurement order for services (Form 347), which noted that he was only paid for hours worked, he was not paid for any nonwork days such as holidays, and was not paid annual leave or sick leave. Appellant did not receive a regular paycheck. Rather, he was to submit biweekly invoices in order to receive payment for his services. The order for services also indicated that appellant had a limited period for which he was hired, *i.e.*, from July 7 to September 30, 2015.

The Board finds that the response by the employing establishment does not address all of the factors necessary to determine whether appellant was an independent contractor or 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

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<sup>9</sup> *Jane Doe*, 49 ECAB 646, 649 (1998).

<sup>10</sup> *S.D.*, Docket No. 13-0090 (issued August 22, 2013); *David Nivens*, 46 ECAB 926, 934 (1995); *Darlene Menke*, 43 ECAB 173, 178 (1991); *Carl R. Clover*, 41 ECB 624, 632 (1990) and cases cited therein.

<sup>11</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Civil Employee*, Chapter 2.802.6(a) (June 1995).

government source.<sup>12</sup> Therefore, this 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 his injury. 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.<sup>13</sup>

After such development as it deems necessary, OWCP should issue a *de novo* decision regarding appellant's employment status and the validity of his claim for benefits in accordance with the relevant standards for such determinations.

### **CONCLUSION**

The Board finds that the case is not in posture for decision as to whether appellant was an employee of the United States under 5 U.S.C. § 8101(1) at the time of the alleged July 30, 2015 incident.

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<sup>12</sup> *Willie A. Dean*, 40 ECAB 1208, 1212 (1989); *Willie James Clark*, 39 ECAB 1311, 1318-19 (1988). *See S.D.*, Docket No. 13-0090 (issued August 22, 2013).

<sup>13</sup> 20 C.F.R. § 10.118(a) (2012).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated March 15, 2016 is set aside and the case is remanded for further proceedings consistent with this opinion.

Issued: December 23, 2016  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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