United States Department of Labor
Employees' Compensation Appeals Board

R.E., Appellant	)	
and	)	**Docket No. 07-1604**
	)	**Issued: January 17, 2008**
DEPARTMENT OF THE AIR FORCE, AIR NATIONAL GUARD, Westfield, MA, Employer	)	

Appearances:
William E. Shanahan, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 30, 2007 appellant, through his attorney, filed a timely appeal from a March 1, 2007 merit decision of a hearing representative of the Office of Workers' Compensation Programs affirming a pay rate determination.[1] Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office properly calculated appellant's pay rate for compensation purposes.

FACTUAL HISTORY

On March 12, 2002 appellant, then a 50-year-old weapons supervisor, filed a claim alleging that he sustained a torn left biceps muscle on that date in the performance of duty. The

[1] The hearing representative set aside a December 28, 2005 decision finding that appellant was entitled to a schedule award for a 13 percent left upper extremity impairment.

Office accepted appellant's claim for a ruptured left biceps. On May 2, 2004 the employing establishment separated appellant from employment because he was no longer able to be a member of the National Guard.

On September 16, 2004 appellant underwent cervical decompression and laminoplasty at C3 to 7 and a posterolateral fusion. He requested compensation from the Office beginning that date. On October 4, 2004 appellant informed the Office that because of his March 12, 2002 injury he was "only able to perform limited military duty" which negatively affected his earning compared with the year before his injury. He further noted that he was medically discharged from his military position. Appellant submitted a June 15, 2004 letter from the employing establishment indicating that he earned $28,888.31 for active military duty from March 2001 to March 2002 and $6,353.10 from May 2003 to May 2004.

On January 19, 2005 the Office accepted that appellant sustained a recurrence of disability beginning September 16, 2004. On February 10, 2005 appellant submitted a claim for compensation on account of disability, requesting compensation beginning September 16, 2004. The employing establishment indicated that he retired on disability because he was unable to keep his military membership due to his employment injury.

The Office calculated appellant's compensation based on a pay rate at the time disability began on September 16, 2004. The Office included night differential, hazard pay and drill pay in its calculations to find a total weekly pay rate of $1,645.39. The Office, however, paid appellant compensation retroactive to September 16, 2004 using a pay rate of $1,083.23.

On April 5, 2005 appellant's attorney requested pay rate information. He also contended that appellant did not resume his usual employment following his work injury.

On May 12, 2005 the Office informed appellant's attorney that it had not included drill pay of $555.45 per week in paying compensation. The Office noted that his pay rate was $1,645.39 per week including drill pay and that it would make an adjusted payment.

In a May 13, 2005 electronic message, the employing establishment notified the Office that appellant "was deployed during the period March 2001 to March 2002 so his military pay was overstated at $28,888.31 [per year]. [Appellant] returned to his technician job in 2003 and his drill pay for [the] period May 2003 to May 2004 was $6,353.10. This is the amount that should be used. This amount is the 'average' amount for a technician at his grade."

On June 7, 2005 the Office advised appellant's attorney that he was not entitled to an additional $555.45 per week according to the employing establishment. Appellant's additional drill pay was $122.59 per week, "which was the average weekly drill pay for the year prior to the date of his recurrence of September 16, 2004."

By letter dated June 8, 2005, appellant's attorney contended that the applicable pay rate date was May 12, 2002, the date of injury, rather than September 16, 2004, the date disability began. On October 13, 2005 the attorney noted that military pay would be included regardless of whether the pay rate was the date of injury or the date of recurrence as appellant was under a presidential "call." In an October 25, 2005 telephone call, the employing establishment informed

the Office that appellant's pay rate on March 12, 2002 was higher than on September 16, 2004. By letter dated November 1, 2005, the Office notified his attorney that it used the date of recurrence pay rate of $1,1212.10 in determining his wage-earning capacity.

In a decision dated November 8, 2005, the Office reduced appellant's compensation effective May 15, 2005 on the grounds that his actual earnings as a counter/parts/service salesman fairly and reasonably represented his wage-earning capacity. The Office determined his wage-earning capacity using a weekly pay rate of $1,212.53.

On November 21, 2005 appellant requested an oral hearing. By letter dated December 5, 2005, counsel stated:

> "[Appellant's] pay should include his regular pay, night differential pay for the year prior, as well as his National Guard pay for the year prior, since membership in the National Guard was a condition of his federal civilian employment. Moreover, his National Guard pay should include wages paid for attending drills and field training plus earnings received for active [f]ederal service under a presidential 'call.' The Office should then choose the higher pay rate date of injury or date of recurrence."

The attorney contended that the Office failed to consider appellant's earnings for active military duty in determining that the date of recurrence was the effective pay rate date. He asserted:

> "[Appellant's] unit was called to active [f]ederal service by the President and participated in Operations Enduring Freedom and Iraqi Freedom (copy of 'Short History of the 104th Fighter Wing' enclosed). In addition to his earnings for this active [f]ederal service under the presidential 'call,' [he] also received his full civilian pay during this time, which is why it is only fair to include his earnings received for active [f]ederal service under a presidential 'call' in his pay rate."

By decision dated December 28, 2005, the Office granted appellant a schedule award for a 13 percent permanent impairment of the left upper extremity. The period of the award ran for 40.56 weeks from November 27, 2005 to August 16, 2006. The Office paid him based on a pay rate of $1,212.10. On January 9, 2006 appellant requested an oral hearing on the schedule award determination.

In a decision dated January 17, 2006, an Office hearing representative determined that the case was not in posture for an oral hearing. He vacated the November 8, 2005 decision after finding that it was unclear whether the Office used the proper pay rate for compensation purposes in determining appellant's wage-earning capacity. The hearing representative found that the Office did not consider appellant's earnings for military service under a presidential "call" in determining the pay rate date.

By letter dated February 6, 2006, the National Guard noted that the Office included earnings for active military service performed under a presidential call in calculating an employee's pay rate and stated:

> "What is not clear is what constitutes a 'presidential call.' Currently, the National Guard is operating under Presidential Executive Order 13223 dated 14 September 2001 with amendments. The orders of personnel activated for the war on terror generally contain or reference this information.
>
> "A review of orders submitted by [appellant's] unit indicates that he performed a variety of active duty during the period in question. However, the majority of the time was for annual training days with duty under Title 32. One order (RU-7) is for Title 10 Military Personnel Appropriation day active duty.[2] Finally, his DD214 indicates one month and three days of active duty with no other explanation. None of the documentation indicates that he was activated due to the Presidential Call up as a result of Executive Order 13223 dated 14 September 2001."

The National Guard questioned whether appellant would receive his salary for drills and training with the National Guard when his status changed from a Title 32 to a Title 10 employee and asserted that paying appellant a "salary and full military wages for the same period does not seem 'fair and reasonable.'"

The National Guard submitted orders for appellant dated December 13, 2000 to June 6, 2001. The orders do not indicate that he performed active military duty under Title 10.

By decision dated April 4, 2006, the Office found that a review of appellant's orders for the year did not establish that he was activated due to a presidential call. The Office thus concluded that it had properly calculated his pay rate for compensation purposes.

On April 24, 2006 appellant requested an oral hearing on the April 4, 2006 decision. His attorney submitted copies of his active-duty military orders issued under Title 10 of the U.S.C. and orders from the National Guard issued under Title 32 of the U.S.C. Appellant also submitted a copy of Executive Order 13223 dated September 14, 2001 granting authority under Title 10 of the U.S.C. to the Department of Defense and the Department of Transportation to order any member of the reserve to active duty. Appellant received an undated order instructing him to perform duty on October 1, 2001 for the purpose of Operation Resolve. The authority cited for the order was 10 U.S.C. § 12301(d).[3] Appellant also received orders under Title 10 for the purpose of Operation Resolve for the periods October 15, 20 to 22 and 27 to 29, 2001. He received an order dated October 19, 2001 citing Title 10 as its authority and listing as the

[2] Title 10 of the United States Code (U.S.C.) is relevant to the Armed Forces and Title 32 of the U.S.C. is relevant to the National Guard.

[3] 10 U.S.C. § 12301(d) provides in part, "At any time, an authority designated by the Secretary concerned may order a member of a reserve component under his jurisdiction to active duty or retain him on active duty, with the consent of that member."

purpose Operation Enduring Freedom. On January 9, 2002 appellant received instructions to work during portions of January, February and March 2002 with the cited authority Title 10 § 12301(d).

In a letter dated June 20, 2006, the employing establishment indicated that appellant's request for active-duty orders "were interpreted to relate to only [f]ederal active duty under Title 10 of the United States Code, in that there is no 'active duty' under Title 32 of the Code."

By letter dated June 29, 2006, appellant's attorney argued that the case was not in posture for an oral hearing on either the schedule award determination or pay rate issue. He argued that the employing establishment's assertion that appellant was not on active duty due to a presidential call was inconsistent with the facts. The attorney stated: "For example, Special Order #RU-5, issued 19 October 2001, recites as the purpose of the order as 'Operation Enduring Freedom,' which was part of Presidential Executive Order 13223 of September 14, 2001."

By decision dated March 1, 2007, the hearing representative affirmed the April 4, 2006 decision regarding the Office's calculation of appellant's pay rate and set aside the decision on the issue of his entitlement to a schedule award. He remanded the case for further development on the issue of whether appellant had more than a 13 percent left upper extremity impairment. The hearing representative found that appellant had not submitted probative evidence supporting that he was entitled to augmented compensation because he was subject to a presidential "call."

LEGAL PRECEDENT

Section 8105(a) of the Federal Employees' Compensation Act[4] provides: "If the disability is total, the United States shall pay the employee during the disability monthly monetary compensation equal to 66 2/3 percent of his monthly pay, which is known as his basic compensation for total disability."[5] Section 8110(b) of the Act provides that total disability compensation will equal three fourths of an employee's monthly pay when the employee has one or more dependents.[6] Pay rate for compensation purposes is defined in section 8101(4) as the monthly pay at the time of injury, the time disability begins or the time disability recurs, if the recurrence is more than six months after returning to full-time work, whichever is greater.[7]

The Office's procedure manual provides that wages paid for National Guard service are included in pay rate calculations when membership in the National Guard is a condition of an employee's civilian employment with the National Guard. Such wages include those paid for

[4] 5 U.S.C. §§ 8101-8193.

[5] 5 U .S.C. § 8105(a).

[6] 5 U.S.C. § 8110(b).

[7] 5 U.S.C. §§ 8101(4); 8114; *see also* 20 C.F.R. § 10.5(s).

attending drills and field training.[8] The procedure manual further provides that earnings received by an employee under a presidential "call" are included in pay rate calculations.[9]

Although it is appellant's burden to establish his claim, the Office is not a disinterested arbiter but, rather, shares responsibility in the development of the evidence, particularly when such evidence is of the character normally obtained from the employing establishment or other government source.[10] The Office shares responsibility to see that justice is done.[11]

ANALYSIS

The Office accepted that appellant sustained a ruptured left biceps due to a March 12, 2002 employment injury. The Office further authorized a September 16, 2004 cervical decompression and fusion at C3-7 and paid him compensation beginning that date. At the time of appellant's employment injury, he worked in federal employment as a civilian and as a member of the National Guard. The Office did not include appellant's pay for active military service in determining his pay rate for compensation purposes. The Office calculated his pay rate on the date disability began rather than the date of injury because it found that this was the higher amount. Appellant's attorney contended that he was entitled to military pay earned the year prior to his employment injury for active duty because he was under a presidential "call." On February 6, 2006 the National Guard acknowledged that earnings for active military service were included if performed under a presidential "call" but stated that the meaning of a presidential "call" was unclear. It noted that the National Guard currently operated under Presidential Executive Order 13223, dated September 14, 2001. The National Guard indicated that the majority of appellant's orders were for training days under Title 32 of the U.S.C., relevant to the National Guard. One order was for active military duty under Title 10 of the U.S.C. but did not specifically indicate that it was the result of the presidential call up pursuant to Executive Order 13223.

Appellant's attorney submitted a copy of the Presidential Executive Order 13223 granting authority under Title 10 of the U.S.C. to the Department of Defense and the Department of Transportation to order any member of the reserve to active duty. He also submitted orders appellant received to perform duty in October 2001 issued under Title 10 of the U.S.C. and stating as the orders' purpose Operation Resolve. Appellant also received an order dated October 19, 2001 issued pursuant to Title 10 which listed as its purpose Operation Enduring Freedom. On January 9, 2002 appellant received instructions to work during portions of January, February and March 2002 with the cited authority Title 10 of the U.S.C. The employing establishment confirmed that any work performed under Title 10 was for active military service. The question remains whether appellant's active military service was the result of a presidential "call."

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining: Pay Rates*, Chapter 2.900.7(13) (December 1995).

[9] *Id*.

[10] *See Claudia A. Dixon*, 47 ECAB 168 (1995).

[11] *Jimmy A. Hammons*, 51 ECAB 219 (1999).

The Board finds that further development of the record is required. In order to properly adjudicate the claim, it is important to secure evidence regarding appellant's status on active military duty during the period in question. It is currently unclear from the record whether any of the orders he received under Title 10 for the year preceding March 12, 2002 resulted from a presidential call. On February 6, 2006 the National Guard indicated that it reviewed one Title 10 order issued to appellant and it did not indicate that he was on military service due to a call from the President. Appellant's attorney, however, submitted multiple Title 10 orders he received after September 2001 citing as their purpose Operation Resolve and Operation Enduring Freedom. On remand, the employing establishment should address the significance of the operational designations and clarify whether appellant performed active military service as a result of a presidential "call." Following such further development as the Office deems necessary, it should issue a *de novo* decision.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 1, 2007 is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: January 17, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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