United States Department of Labor
Employees' Compensation Appeals Board

R.E., Appellant	)	
and	)	**Docket No. 08-1728**
	)	**Issued: April 10, 2009**
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
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On June 4, 2008 appellant, through his attorney, filed a timely appeal from an April 2, 2008 merit decision of the Office of Workers' Compensation Programs affirming its determination of his pay rate. 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

This case is before the Board for the second time. By decision dated January 17, 2008, the Board set aside a March 1, 2007 Office decision finding that appellant's earnings for military service during the year prior to his employment injury did not occur due to a "presidential 'call'"

and thus were not included in his pay rate for compensation purposes.[1] The Board remanded the case for the Office to obtain information from the employing establishment regarding whether the orders he received pursuant to Title 10 § 12301(d) of the United States Code (U.S.C.) for the year preceding his employment injury resulted from a "presidential 'call.'" The Board instructed the Office to obtain clarification of the designations Operation Resolve and Operation Enduring Freedom cited as the purpose of these orders. The findings of fact and conclusions of law from the prior decision are hereby incorporated by reference.

By letter dated February 12, 2008, Lieutenant Colonel (Lt. Col.) Timothy A. Mullen, an attorney adviser with the employing establishment, related:

> "At present, there are three major statutory provisions by which reservists can be *involuntarily ordered to active duty* by the federal government for an extended period of time (emphasis supplied). These provisions differ from each other in terms of the statutory requirements for utilization, the number and type of reservists called up, and the duration of the call up. Depending on which of these provisions is utilized, a reserve mobilization is commonly referred to as either a Presidential Reserve Call-up (PRC), a Partial Mobilization, or a Full Mobilization."

Lt. Col. Mullen related that a PRC takes place when the president involuntarily activates "members of the Selected Reserve and the Individual Ready Reserve for a period not to exceed 270 days" pursuant to 10 U.S.C. § 12304. A partial mobilization occurs when the president involuntarily activates members of the Ready Reserve under 10 U.S.C. § 12302 for not more than 24 consecutive months to deal with a national emergency or when otherwise authorized. A full mobilization occurs with the president involuntarily activates any member of the reserve for the duration of the war or emergency plus six months pursuant to the authority granted under 10 U.S.C. § 12301(a). Lt. Col. Mullen explained that a member of the Air National Guard could also "volunteer and be placed on Title 10 active duty military orders" pursuant to 10 U.S.C. § 12301(d). He stated:

> "The 10 U.S.C. 12301(d) volunteerism authority is usually used as a bridge to expand Active Force capabilities while awaiting legal authority for [non-volunteerism, *i.e.*, ordered] Presidential Reserve Call-up (10 USC 12304), Partial Mobilization (10 USC 12302), or Full Mobilization (10 USC 12301(a)). Under 19 USC 12301(d) Military Personnel Appropriation (MPA) Man-Days are used to support short-term needs of the active force by authorizing mandays annually to non-Extended Active Duty (EAD) officers and enlisted airmen. These days are offered at the convenience of the government and when there is a temporary need

[1] 59 ECAB ___ (Docket No. 07-1604, issued January 17, 2008). The Office accepted that appellant ruptured his left biceps on March 12, 2002. The employing establishment separated him from employment on May 2, 2004 because he was no longer able to be a member of the Air National Guard. On February 10, 2005 appellant requested compensation beginning September 16, 2004. The Office paid him compensation which included night differential, hazard pay and drill pay in calculating his pay rate. It did not include military earnings other than drill pay in his pay rate.

for Air National Guard and Air Force Reserve personnel with unique skills or resources that cannot be economically met in the active force…."

Lt. Col. Mullen noted that after the terrorists attacks on September 11, 2001, President George W. Bush used his authority under 10 U.S.C. § 12302 to activate the Ready Reserve, including the Air National Guard, to active duty. Regarding the question of whether appellant received earnings for active service under a "presidential 'call,'" he noted that the Office's procedure manual did not define the term "presidential 'call.'" Lt. Col. Mullen reviewed the orders appellant received during the relevant period and determined that the authority cited for the orders was 10 U.S.C. § 12301(d), "the 'volunteerism' statute by which a member is not ordered to active duty by Presidential call-up or other means, but rather, volunteers and is accepted." Lt. Col. Mullen noted that the operational designations on orders of Operation Resolve and Operation Enduring Freedom included reservists "involuntarily called to active duty under federal orders. These reservists were called to active duty under a mobilization authority known as Partial Mobilization, 10 USC 12302. However, other National Guard reservists such as [appellant] were not involuntarily called up, rather, they volunteered to be placed on Title orders under 10 USC 12301(d)." He concluded that appellant did not receive orders as part of a presidential call but rather volunteered for active duty.

By decision dated April 2, 2008, the Office found that appellant was not entitled to receive an increased pay rate based on his earnings from active military for the year prior to his employment injury as he was not part of a "presidential 'call.'"

LEGAL PRECEDENT

Section 8105(a) of the Federal Employees' Compensation Act[2] 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."[3] 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.[4] 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.[5]

The Office 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 Guard. Such wages include those paid for attending

[2] 5 U.S.C. §§ 8101-8193.

[3] *Id*. at § 8105(a).

[4] *Id*. at § 8110(b).

[5] *Id*. at §§ 8101(4), 8114; *see also* 20 C.F.R. § 10.5(s).

drills and field training.[6] The procedure manual further provides that earnings received by an employee under a presidential "call" are included in pay rate calculations.[7]

10 U.S.C. § 12301(d) provides:

> "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. However, a member of the Army National Guard of the United States or the Air National Guard of the United States may not be ordered to active duty under this subsection without the consent of the governor or other appropriate authority of the State concerned."

ANALYSIS

At the time that appellant sustained a ruptured left biceps on March 12, 2002, he worked in federal employment as a civilian and as a member of the National Guard. The Office included his drill pay but not his earnings from active military service in calculating his pay rate for compensation purposes. The Board remanded the case for the Office to determine whether he was entitled to have his military earnings included in his pay rate because he was under a "presidential 'call.'" The Board noted that he received orders with the cited authority Title 10 § 12301(d) of the U.S.C., which is applicable to active military service, and that the orders cited as their purpose Operation Resolve and Operation Enduring Freedom.

On February 12, 2008 Lt. Col. Mullen described the authority by which a president could involuntarily activate members of the reserve under 10 U.S.C. §§ 12304, 12302 and 12301(a). He noted that a PRC occurs when the president involuntarily activates reserve members. Lt. Col. Mullen indicated that an Air National Guard member could volunteer to receive orders for active military duty under 10 U.S.C. § 12301(d). He noted that the authority cited for appellant's orders was section 12301(d), and that consequently he volunteered to be placed on active duty. Lt. Col. Mullen concluded that as he volunteered for active duty, he was not part of a "presidential 'call.'" He explained that the designations on appellant's orders of Operation Resolve and Operation Enduring Freedom included reservists who were involuntarily ordered to active duty and those who volunteered under section 12301(d). As appellant volunteered to receive orders for active military service, he was not part of a "presidential 'call.'" Consequently, the Office properly determined that his earnings for active military service for the year prior to his work injury are not included in determining his pay rate for compensation purposes.

On appeal appellant's attorney argues that it is the Office rather than the employing establishment who is responsible for defining the term "presidential 'call'" as used in its procedure manual. He contended that appellant's supervisors told him that his "extra service was mandatory" and noted that his unit was called up by the president. The attorney asserted

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

[7] *Id*.

that to "construe the phrase '[p]residential call' narrowly is a disservice to the men and women valiantly defending our country in its time of dire need." Appellant, however, has not submitted any evidence that his supervisor told him that he had to volunteer for active military service. The employing establishment has explained that a "presidential 'call'" is an involuntary call to active duty. Appellant volunteered for active military service and thus was not part of a "presidential 'call.'"

CONCLUSION

The Board finds that the Office properly calculated appellant's pay rate for compensation purposes.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 2, 2008 is affirmed.

Issued: April 10, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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