

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JIMMIE D. BREWER and DEPARTMENT OF THE AIR FORCE,
TINKER AIR FORCE BASE, OK

*Docket No. 98-695; Submitted on the Record;
Issued June 27, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs used the proper rate of pay for appellant's compensation beginning March 18, 1977.

This case has been before the Board on several occasions. In a decision dated October 19, 1983, the Board found that "the proper rate of pay was used by the Office in calculating appellant's compensation for the period of March 18, 1977 to May 19, 1982."¹ The Board stated, "[T]he Office properly selected the pay rate in effect on March 8, 1977 (\$7.47 per hour) when appellant had a recurrence of disability for work. There is no evidence that appellant's pay rate should have been higher for the period in question."²

In its decision on the most recent prior appeal, the Board, by decision dated August 5, 1997, found that a March 23, 1994 decision of an administrative judge of the Merit Systems Protection Board (MSPB) finding that the Office of Personnel Management (OPM) incorrectly computed the amount of appellant's monthly annuity constituted relevant and pertinent evidence not previously considered by the Office. The Board set aside the Office's January 9, 1995 decision that refused to review the merits of appellant's claim and remanded the case to the Office "for issuance of a decision on the merits of appellant's claim that his pay rate was incorrectly computed."³

By decision dated October 22, 1997, the Office found that it used a proper rate of pay of \$7.47 per hour for appellant's compensation payments beginning March 18, 1977. By letter dated October 25, 1997, he requested reconsideration. By decision dated December 23, 1997,

¹ By this decision the Board also found that the Office failed to meet its burden of proof in terminating appellant's compensation on May 20, 1982.

² 35 ECAB 197 (1983).

³ Docket No. 95-1112 (issued August 5, 1997).

the Office found that it properly used the rate of pay at the time of appellant's recurrence of disability on March 18, 1977.

The Board finds that the Office used the proper rate of pay for appellant's compensation beginning March 18, 1977.

Section 8101(4) of the Federal Employees' Compensation Act,⁴ under which the Office determines an employee's rate of pay for the purpose of calculating compensation, states in pertinent part:

“‘[M]onthly pay’ means the monthly pay at the time of injury, or the monthly pay at the time disability begins or the monthly pay at the time compensable disability recurs, if the recurrence begins more than six months after the injured employee resumes regular full-time employment with the United States, whichever is greater.”

In the present case, appellant sustained an employment injury to his right knee on December 13, 1966. The Office accepted that he sustained a recurrence of disability due to this injury beginning November 21, 1975 and that, following his return to work on February 28, 1977, he sustained another recurrence of disability due to this injury on March 18, 1977. On appeal appellant contends, as he previously had before the Office, that he did not return to work on February 28, 1977 or at any time after November 21, 1975. In any event, as pointed out by the Office in an October 31, 1979 letter to appellant and in a May 18, 1982 decision, appellant's rate of pay was greater on March 18, 1977 than on November 21, 1975. Therefore the Office's selection of March 18, 1977 as the date from which to compute appellant's monthly pay under section 8101(4) of the Act cannot adversely affect appellant's rate of pay. In addition, evidence from the employing establishment indicates appellant was on duty from March 1 to 3, 1977 before using paid leave until March 18, 1977.

Appellant also contends that the rate of pay used by the Office should have included a shift differential. He acknowledges that he worked days from April 5 to November 21, 1975, but contends that he was still assigned to the swing shift and only loaned to the day shift. Appellant is correct that shift differential is included in rate of pay for compensation paid by the Office⁵ and the employing establishment confirmed that an employee regularly assigned to the night shift is entitled to night shift differential when temporarily assigned to the day shift, but not when reassigned to the day shift. The Board finds that the evidence in the case record does not establish that appellant was entitled to a shift differential at the time of his recurrence of disability on March 18, 1977.

In support of his contentions, appellant cites the March 23, 1994 decision of an administrative judge of the MSPB finding that OPM incorrectly computed the amount of appellant's monthly annuity. In this decision, an administrative judge found that “it is more

⁴ 5 U.S.C. § 8101(4).

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.7b(1) (December 1995); see *Dempsey Jackson, Jr.*, 40 ECAB 942 (1989).

likely to be true than untrue that the [employing establishment] permanently assigned appellant to a swing shift prior to 1973; that the [employing establishment] subsequently did not assign him to the day shift on a permanent basis.” This decision, however, was applicable only to appellant’s benefits under the Civil Service Retirement Act, not to those under the Act.

A decision of the comptroller general of the United States dated March 15, 1982 made a finding directly contrary to that of the administrative judge for the MSPB: that appellant was permanently reassigned to the day shift on April 6, 1975. The Board finds that the evidence in the case record supports this finding. In a letter dated August 14, 1979, the employing establishment reported that appellant received swing shift pay from December 15, 1974 to April 5, 1975 and day shift pay from April 6 to November 21, 1975, the date he stopped work due to a recurrence of disability. In a letter dated August 10, 1979, the employing establishment reported that appellant was subject to shift change while assigned to the final prep unit, which is the unit to which he was reassigned on April 6, 1975. This is consistent with the position description for the position to which appellant was reassigned, as it states the incumbent is “subject to change of duty hours.” In its August 10, 1979 letter, the employing establishment also reported that the final prep unit did not have any positions permanently assigned to the swing shift. In a letter dated June 26, 1980, the employing establishment stated that appellant was assigned to the day shift when his absence from work began and when he returned to work.

This evidence from the employing establishment, especially its payment of wages not including a shift differential from April 6 to November 21, 1975, convinces the Board that appellant was reassigned, as opposed to temporarily assigned, to the day shift on April 6, 1975. Aside from the decision of the administrative judge of the MSPB, appellant has not produced any evidence corroborating his claim that he was permanently assigned to the swing shift. The Board finds that the Office used the proper rate of pay in computing appellant’s compensation under sections 8101(4) and 8114(d)⁶ of the Act.

⁶ 5 U.S.C. § 8114(d).

The decisions of the Office of Workers' Compensation Programs dated December 23 and October 22, 1997 are affirmed.

Dated, Washington, D.C.
June 27, 2000

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member