

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

CHARLES E. ZULAUF, Appellant)

and)

DEPARTMENT OF THE NAVY,)
Virginia Beach, VA, Employer)

Docket No. 02-1743
Issued: May 18, 2004

Appearances:
Peter M. Callegary, Esq., for the appellant
Thomas G. Giblin, Esq., for the Director

Oral Argument March 2, 2004

DECISION AND ORDER

Before:

DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On June 3, 2002 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decisions dated June 12, 2001 and March 4, 2002 which found that the Office properly calculated his pay rate for compensation benefits. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case. On appeal appellant argued that his overtime pay should have been included in the calculation of his pay rate.

ISSUE

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

FACTUAL HISTORY

On September 20, 1994 appellant, then a 40-year-old first officer, filed a traumatic injury claim alleging that he sustained head, neck and back injuries when he fell while getting up from

a chair. The Office accepted that he sustained a cervical strain, cervical radiculopathy, cerebral contusion and lumbar radiculopathy. Appellant stopped work on June 12, 1995 and did not return.

By decision dated June 21, 2001, the Office described the method it used to calculate appellant's pay rate for compensation benefits. It determined that appellant's pay rate should be calculated with reference to his pay at the time his work-related disability began, *i.e.*, June 13, 1995. The Office indicated that appellant earned \$65,007.00 in the year prior to June 13, 1995 and that he received \$12,839.00 for subsistence and quarters pay in the year prior to June 13, 1995. It found that it was appropriate to include these monies in the calculations of appellant's pay rate. The Office further determined that appellant was not entitled to have overtime pay included in his pay rate.

Appellant requested an oral hearing before an Office hearing representative which was held on January 16, 2002. At the hearing, appellant testified that he performed many hours of overtime work prior to June 13, 1995 and indicated that the overtime work was mandatory as he did not have the option to refuse to perform such work. He noted that the timing of these overtime work periods, which included refueling other ships at sea, was extremely unpredictable. By decision dated and finalized March 4, 2002, an Office hearing representative affirmed the Office's June 21, 2001 decision.

LEGAL PRECEDENT

Section 8105(a) of the Federal Employees' Compensation Act 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."¹ Section 8101(4) of the Act defines "monthly pay" for purposes of computing compensation benefits as follows: "[T]he 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...."²

With respect to the calculation of appellant's pay rate for compensation purposes, the Act provides for different methods of computation of average annual earnings depending on whether the employee worked in the employment in which he was injured substantially for the entire year

¹ 5 U.S.C. § 8105(a). 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. 5 U.S.C. § 8110(b).

² 5 U.S.C. § 8101(4).

immediately preceding the injury and would have been afforded employment for substantially a whole year, except for the injury.³ Section 8114(d) of the Act provides:

“Average annual earnings are determined as follows:

(1) If the employee worked in the employment in which he was employed at the time of injury during substantially the whole year immediately preceding the injury and the employment was in a position for which an annual rate of pay --

(A) was fixed, the average annual earnings are the rate of pay; or

(B) was not fixed, the average annual earnings are the product obtained by multiplying his daily wage for the particular employment, or the average thereof if the daily wage has fluctuated, by 300 if he was employed on the basis of a 6-day workweek, 280 if employed on the basis of a 5½-day week, and 260 if employed on the basis of a 5-day week.”⁴

Section 8114(e) of the Act provides that, in addition to annual base pay, certain items will be included in the computation of pay, such as the value of subsistence and quarters, and that certain other items will not be included in the computation of pay.⁵ Section 8114(e) specifically provides that, in computing an employee’s monthly pay for compensation purposes, account is not taken of overtime pay.⁶ The Office, in incorporating this statutory exclusion of overtime pay into its administrative procedures as set forth in its procedure manual, stated:

“Overtime pay. [The extra pay required by the Fair Labor Standards Act for hours worked in excess of the standard prescribed under that Act is not to be included in computing of pay for the purposes of continuation of pay or compensation. Such extra pay is earned only if the actual hours are worked and is considered to be overtime pay for the purposes of 5 U.S.C. § 8114(e)].”⁷

The Office has administratively determined, however, that “[p]remium pay for administratively uncontrollable overtime, including holiday pay” under 5 U.S.C. § 5545(c)(2) is to be included in pay rate calculations.⁸

³ 5 U.S.C. § 8114(d)(1), (2). See *Billy Douglas McClellan*, 46 ECAB 208, 212-13 (1994).

⁴ 5 U.S.C. § 8114(d).

⁵ 5 U.S.C. § 8114(e).

⁶ *Id.* Overtime pay is generally defined as pay for hours of service in excess of a statutory or other basic workweek or other basic unit of worktime, as observed by the employing establishment. 5 U.S.C. § 8114(a)(1).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.6(a)(1) (December 1995).

⁸ *Id.* at Chapter 2.900.7(b)(5).

The relevant part of 5 U.S.C. § 5545(c)(2) states:

“(c) The head of an agency, with the approval of the Office of Personnel Management may provide that --

“(2) an employee in a position in which the hours of duty cannot be controlled administratively, and which requires substantial amounts of irregular, unscheduled, overtime duty with the employee generally being responsible for recognizing, without supervision, circumstances which require the employee to remain on duty, shall receive premium pay for this duty on an annual basis instead of premium pay provided by other provisions of this subchapter, except for regularly scheduled overtime, night, and Sunday duty, and for holiday duty.”⁹

Premium pay under this paragraph is an appropriate percentage, not less than 10 percent nor more than 25 percent, of the rate of basic pay for the position, as determined by taking into consideration the frequency and duration of irregular, unscheduled overtime duty required in the position.¹⁰

ANALYSIS

In the present case, the Office properly determined that appellant’s pay rate should be calculated with reference to his pay at the time his work-related disability began, *i.e.*, June 13, 1995. As noted above, monthly pay is calculated with reference to the greater of the monthly pay at the time of injury, at the time disability begins, or at the time compensable disability recurs, if the recurrence begins more than six months after the employee resumes regular federal employment on a full-time basis.¹¹ Appellant did not sustain a recurrence of disability and his earnings were greater at the time disability began, June 13, 1995, than at the date of injury, August 25, 1994. The record contains records which show that appellant had an annual salary of \$65,007.00 on June 13, 1995 and that he received \$12,839.00 for subsistence and quarters pay in the year prior to June 13, 1995. Section 8114(e) of the Act specifically provides that, in addition to annual base pay, subsistence and quarters pay will be included in the calculations of an injured employee’s pay rate.¹² The Board finds that it was appropriate for the Office to include these monies in its calculation of appellant’s pay rate.

Appellant has alleged that the overtime work he performed was the type of duty described in section 5545(c)(2) of the Act, and, therefore, the overtime pay he received qualified

⁹ 5 U.S.C. § 5545(c)(2).

¹⁰ *Id.* See also FECA Program Memorandum No. 106 (provides for inclusion of premium pay under 5 U.S.C. § 5545(c)(2) to be included in pay rate for compensation purposes); FECA Bulletin No. 89-26 (issued September 29, 1989) (states that by administrative determination the Office, pursuant to 5 U.S.C. § 5545(c)(2), includes premium pay for administratively uncontrollable overtime in computing compensation).

¹¹ 5 U.S.C. § 8101(4).

¹² 5 U.S.C. § 8114(e). Appellant had been working for more than a year in his position for the employing establishment prior to June 13, 1995 and it was proper for the Office to use these annual figures for base pay, subsistence pay and quarters pay. See 5 U.S.C. § 8114(d).

as premium pay for administratively uncontrollable overtime and should have been added to his base pay to form the pay rate used by the Office to calculate his compensation benefits.¹³

The record contains documents which show that appellant worked, and was compensated for, a substantial amount of overtime in the year prior to June 13, 1995. At a hearing before an Office hearing representative, he testified that this overtime work was mandatory and that the timing of the overtime work periods was unpredictable. While this evidence may establish that appellant worked a large amount of overtime, and that periods of this overtime were likely to be administratively uncontrolled, this evidence does not establish that the Office improperly excluded appellant's overtime pay in determining his rate of pay for compensation purposes.

The record of appellant's pay history does not contain any evidence that he received premium pay, of the type described in section 5545(c)(2) of the Act, in addition to his base pay. In addition, appellant submitted no evidence, pursuant to section 5545(c)(2) of the Act, that the head of his agency, with the approval of the Office of Personnel Management, specifically provided for the payment of premium pay to its employees. More importantly, pay documents submitted by appellant for the applicable period, while documenting large amounts of overtime worked, also show that the amount of overtime pay appellant earned varied significantly from pay period to pay period, depending on the number of hours of overtime worked. Therefore, appellant's overtime, although substantial and encompassing periods of administratively uncontrollable overtime, nonetheless does not constitute the type of administratively uncontrollable overtime contemplated by section 5545(c)(2), which is compensated by premium pay paid on an annual basis as a percentage of the employee's base pay, regardless of the actual hours worked. Rather, appellant's extra pay earned for actual hours of overtime worked overtime is encompassed by the Office's definition of the type of overtime to be excluded from pay rate determinations.¹⁴

CONCLUSION

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

¹³ As noted above, under 5 U.S.C. § 8114(e), overtime pay is generally excluded from pay rate calculations. However, the Office has administratively determined that administratively uncontrollable overtime, as defined under 5 U.S.C. § 5545(c)(2), will be included in pay rate calculations. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.7(b)(5) (December 1995). See *supra* notes 6 through 10 and accompanying text.

¹⁴ See generally *George Martinez*, Docket No. 96-504 (issued December 29, 1997).

ORDER

IT IS HEREBY ORDERED THAT the March 4, 2002 and June 12, 2001 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: May 18, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member