

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

D.M., Appellant

and

**U.S. POSTAL SERVICE, GENERAL MAIL
FACILITY, Phoenix, AZ, Employer**

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**Docket No. 08-1600
Issued: July 13, 2009**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On April 13, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated March 7, 2008. 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 determined appellant's entitlement to compensation for wage loss from February 25, 2001 to January 16, 2007.

FACTUAL HISTORY

The case has previously been before the Board. In a December 16, 2003 decision, the Board found that appellant was at fault in creating a \$8,049.00 overpayment of compensation.¹ The Board also found that appellant was not entitled to wage-loss compensation from February 25 to March 8, 2001, as he received a schedule award covering this period. In a

¹ Docket No. 03-1614 (issued December 16, 2003).

decision dated January 6, 2006, the Board found that the record required further development regarding wage-loss compensation from December 30, 2001 to February 6, 2002.² The Board indicated that the issue of whether appellant had sustained an employment-related sleep disorder was still under development and that issue must be resolved before the wage-loss compensation issue could be adjudicated. The history of the case as contained in the Board's prior decisions is incorporated herein by reference.

The Office further developed the medical evidence and accepted a sleep disorder as a consequential injury. By decision dated January 9, 2007, the Office denied appellant's claim for compensation from December 30, 2001 to February 6, 2002.

On January 4, 2007 appellant submitted a claim for compensation (Form CA-7) from March 14, 2005 to December 7, 2006. The time analysis forms (CA-7a) showed appellant had worked generally between six to seven hours per day, with one to two hours of leave without pay. There were several dates that the employing establishment indicated appellant had worked more than eight hours.

By decision dated April 2, 2007, an Office hearing representative reversed the January 9, 2007 decision.

On April 12, 2007 appellant submitted a CA-7 for the period December 9, 2006 to January 18, 2007. In an April 10, 2007 letter, appellant argued that the employing establishment had improperly included overtime hours as hours "worked" on the CA-7a forms.

By decision dated August 1, 2007, the Office found appellant was entitled to wage-loss compensation for the hours claimed on the CA-7 and CA-7a forms. It noted that appellant had already received compensation pursuant to schedule awards from February 23 to December 24, 2001 and April 18 to October 31, 2005. According to the Office, appellant was entitled to 1,215.91 hours from February 24, 2002 to November 25, 2004, 1.98 hours on January 27, 2005, 12 hours from March 6 to 13, 2005, 31.75 hours from March 14 to April 17, 2005 and 410.92 hours from November 1 to January 16, 2007. The total number of hours for the period was therefore 1,672.56. In addition, for the period December 30, 2001 to February 6, 2002, the Office determined that appellant was entitled to an additional \$208.12. This represented an adjustment in the pay rate based on 3 days of Sunday premium pay and 13 days of night differential. The Office also found there were 23 days where appellant had worked prior to his 11:00 p.m. shift and was paid overtime for these hours. Appellant was found not to be entitled to compensation on those days he worked eight or more hours.

Appellant requested a review of the written record by an Office hearing representative. In a decision dated March 7, 2008, the hearing representative modified the prior decision. The hearing representative found appellant was entitled to an additional 66.70 hours for the period May 31 to July 11, 2003, .07 hours on August 24, 2003, 22.5 hours from November 13 to 25, 2004, 65.81 hours from November 26, 2004 to January 26, 2005 and 15.26 hours from March 14 to 31, 2005. The hearing representative affirmed the finding that appellant would not be entitled to compensation for those days he worked eight or more hours.

² Docket No. 05-278 (issued January 6, 2006).

LEGAL PRECEDENT

The Federal Employees' Compensation Act provides that a claimant is entitled to compensation for disability resulting from a personal injury sustained while in the performance of duty.³ The term "disability" as used under the Act means the incapacity, because of injury in employment, to earn the wages which the employee was receiving at the time of injury.⁴

ANALYSIS

The March 7, 2008 Office decision made detailed findings with respect to appellant's entitlement to compensation. The Office found that appellant was entitled to compensation for the periods claimed. On appeal, appellant's primary argument is that he should be entitled to the claimed hours of compensation on those dates in which he worked less than eight hours in his regular shift, but worked additional hours at another location. The employing establishment indicated that for approximately 23 days during the claimed period appellant had worked additional hours and was paid as "overtime." On those days in which appellant's combined work hours totaled eight or more hours, the Office found he was not entitled to compensation.

Appellant argues that, since overtime pay is not included in determining pay rate,⁵ the Office should not include his overtime hours as time "worked" in determining entitlement to wage-loss compensation. But the issue here is not a pay rate issue. Compensation for wage loss is paid for disability, which is defined as the inability to earn the wages earned at the time of injury. The actual earnings, whether classified as overtime or other type of pay, are relevant factors in determining the amount of compensation owed. The Office offsets compensation based on the actual earnings in accord with its implementing regulations and Board precedent.⁶ If appellant had earnings equal to or greater than his current pay for the date-of-injury position, he is not entitled to wage-loss compensation for that period. The Board finds that appellant is not entitled to compensation on those dates he worked eight or more hours.

Appellant also briefly argued that his night differential and Sunday pay were incorrect, without providing additional detail. To the extent he is referring to the period December 30, 2001 to February 6, 2002, the Sunday premium pay and night differential pay were based on the CA-7a that appellant signed on February 21, 2002. Appellant did not offer any probative evidence of error by the Office on this issue.

³ 5 U.S.C. § 8102(a).

⁴ *Donald Johnson*, 44 ECAB 540, 548 (1993); 20 C.F.R. § 10.5(17).

⁵ 5 U.S.C. § 8114(e) provides that overtime pay is not included in determining monthly pay.

⁶ See *Donna M. Rowan*, 54 ECAB 698 (2003); *Albert C. Shadrick*, 5 ECAB 376 (1953); 20 C.F.R. § 10.403; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7 (July 1997).

CONCLUSION

The Board finds that, based on the evidence, the Office properly paid appellant compensation for the period February 25, 2001 to January 16, 2007.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 7, 2008 is affirmed.

Issued: July 13, 2009
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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