United States Department of Labor
Employees' Compensation Appeals Board

W.R., Appellant	)	
and	)	**Docket No. 10-147**
	)	**Issued: July 22, 2010**
DEPARTMENT OF THE NAVY, NAVAL MEDICAL COMMAND, San Diego, CA, Employer	)	

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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 20, 2009 appellant filed a timely appeal from a September 15, 2009 merit decision of the Office of Workers' Compensation Programs denying his request for premium pay. 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 appellant's pay rate should include premium pay for work performed on holidays.

FACTUAL HISTORY

On February 24, 1984, appellant, then a 51-year-old ambulance driver, filed a claim for an injury occurring on February 8, 1984 in the performance of duty. He stopped work in February 1984.

The Office accepted the claim for a low back strain and a disc protrusion at L3-4. It paid appellant compensation based on his pay rate at the time the injury occurred.[1] Appellant submitted earnings and leave statements from 1983 for the pay periods ending March 28 and August 6, 1983 and March 3, 1984 showing that he received night differential and Sunday premium pay. In 2005, the Office adjusted appellant's compensation because it failed to include night differential and Sunday premium pay in calculating his pay rate. It noted that he worked from 1:00 a.m. to 8:00 a.m. Saturday through Wednesday. The Office paid appellant compensation retroactively for night differential and Sunday premium pay from May 18, 1984 through August 6, 2005.

By letter dated July 20, 2006, appellant asserted that he should receive holiday pay as part of his compensation. On July 28, 2006 the Office advised him that the records failed to indicate that he was entitled to holiday pay.

By letter dated March 16, 2007, the Office noted that appellant had again asked for premium pay for working holidays to be included in his pay rate. It requested that the employing establishment provide the number of hours that he worked on holidays for the year prior to February 8, 1984.

By letter dated May 14, 2007, the employing establishment indicated that appellant's file did not contain information regarding whether he worked holidays. On July 31, 2008 appellant submitted six earnings and leave statements from 1983. Earnings and leave statements dated March and December 1983 indicated that he earned night differential, Sunday premium pay and also additional pay under Code 31. On August 26, 2008 the Office requested that the employing establishment advise whether his pay rate should include holiday pay. It also asked the employing establishment to explain the meaning of Code 31 on his earnings and leave statements.

In a report of telephone call dated September 2, 2008, the Office notified appellant that the information that he submitted was insufficient to establish that he was entitled to premium pay for work performed on holidays. It informed him that the employing establishment was going to retrieve his file.

In a letter dated November 20, 2008, the employing establishment related:

> "I did respond to your request for additional information regarding holiday pay in my letter dated May 14, 2007. In this letter, I indicated that the pay records that [appellant] provided do not support evidence that he actually worked holidays. In the federal service, employees are automatically off work with pay on holidays. Only, if and when an employee actually works a holiday would they be entitled to holiday pay. In most cases, only emergency personnel (police and fire) and/or employees that are called in to respond to emergencies actually work holidays. On holidays the federal buildings are usually closed."

[1] By decision dated March 27, 2000, the Office reduced appellant's compensation based on its finding that he had the capacity to earn wages as a security guard.

The employing establishment reviewed the holidays for 1983, the year prior to appellant's work injury and noted that several holidays occurred on a day that he was scheduled to work, but that there was no documentation showing that he worked on those dates.

In a letter dated December 19, 2008, the employing establishment notified the Office that appellant's pay records for 1983 and 1984 were "no longer available."

By decision dated January 9, 2009, the Office denied appellant's request to include holiday pay in his pay rate for compensation purposes. It noted that there was no evidence that he actually received holiday pay for the year prior to his work injury.

On January 30, 2009 appellant requested an oral hearing. At the telephonic hearing, held on June 16, 2009, he related that he worked Saturday until Thursday morning even if there was a holiday. The hearing representative advised appellant that he needed to submit supporting evidence. Appellant noted that he had submitted pay records, but that the Office found the records insufficient.

By decision dated September 15, 2009, the hearing representative affirmed the January 9, 2009 decision. She found that there was no evidence that appellant received premium pay for working holidays. The hearing representative indicated that the copies of his pay slips did not include compensation for working holidays.

On appeal appellant asserted that he worked holidays as an ambulance driver from 1974 to 1984. He also related that the Office erred in finding that he had the capacity to earn wages as a security guard.

LEGAL PRECEDENT

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

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, premium

[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).

pay and any form of remuneration in kind for services.[6] When the job held at the time of injury includes elements of pay such as night or shift differential, extra compensation for work on Sundays and holidays or pay for administratively uncontrollable overtime, the Office must include the additional pay in the base pay.[7]

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.[8] It shares responsibility to see that justice is done.[9]

ANALYSIS

The Office accepted that appellant sustained low back strain due to a February 8, 1984 employment injury. It paid him compensation based on his date-of-injury pay rate. In 2005, the Office retroactively adjusted appellant's compensation to include night differential and Sunday premium pay. In 2006, appellant argued that the Office should include premium pay for work performed on holidays in his pay rate. 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, premium pay and any form of remuneration in kind for services.[10] Consequently, when the job held at the time of injury includes elements of pay such as night or shift differential, extra compensation for work on Sundays and holidays or pay for administratively uncontrollable overtime, the Office must include the additional pay in the base pay.[11]

On July 31, 2008 appellant submitted six earnings and leave statements from 1983. Earnings and leave statements dated March and December 1983 indicated that he earned night differential and Sunday premium pay as well as additional pay under Code 31. In a letter dated August 26, 2008, the Office requested that the employing establishment address whether appellant's pay rate should include premium pay for work performed on holidays. It additionally asked the employing establishment to explain the meaning of Code 31 on his earnings and leave statements. On November 20, 2008 the employing establishment responded that generally federal employees were paid for holidays but did not work. It advised that it did not have any documentation showing that appellant worked any holidays in 1983. On December 19, 2008 the employing establishment informed the Office that his 1983 and 1984 pay records were no longer available. The employing establishment did not, however, as requested by the Office, explain

[6] *Id*. at § 8114(e).

[7] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.8(b) (December 1995).

[8] *See R.E.* 59 ECAB ___ (Docket No. 07-1604, issued January 17, 2008); *Claudia A. Dixon*, 47 ECAB 168 (1995).

[9] *Id*.

[10] 5 U.S.C. § 8114(e).

[11] *See supra* note 7.

the significance of the extra money earned by appellant during two pay periods in 1983 under, Code 31.

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.[12] It should, on remand, further develop the factual evidence of record by requesting that the employing establishment explain whether Code 31 on the earnings and leave statements established that appellant was entitled to premium pay for holiday work. After further development of the evidence, the Office should issue a *de novo* decision.[13]

CONCLUSION

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

[12] *See R.E., supra* note 8.

[13] On appeal appellant asserts that the Office erred in reducing his compensation in 2000 based on its finding that he could work as a security guard. The Board's jurisdiction, however, is limited to reviewing final decisions of the Office issued within one year of the date of the appeal for decisions issued prior to November 19, 2008 or within 180 days of the date of the appeal for decisions issued on or after November 19, 2008. *See* 20 C.F.R. § 501.3(d) (1999); 20 C.F.R. § 501.3.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 15, 2009 is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: July 22, 2010
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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