

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

M.W., Appellant)

and)

DEPARTMENT OF HOMELAND SECURITY,)
TRANSPORTATION SECURITY)
ADMINISTRATION, LOS ANGELES)
INTERNATIONAL AIRPORT, Los Angeles, CA,)
Employer)

**Docket No. 11-759
Issued: September 15, 2011**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 4, 2011 appellant filed an appeal from a January 6, 2011 decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act (FECA)¹ and 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 OWCP properly calculated appellant's pay rate for compensation purposes.

On appeal appellant asserts that he is entitled to overtime pay of two additional hours.

¹ 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

This case has previously been before the Board.² By decision dated July 15, 2010, the Board found that OWCP failed to forward an election form to appellant following its September 8, 2008 decision in which a December 27, 2007 OWCP decision terminating appellant's compensation benefits was vacated. The Board found that OWCP improperly placed the burden of proof on him to establish continuing disability after September 11, 2008.³ The facts of the previous Board decision are incorporated herein by reference.⁴

On August 30, 2010 OWCP informed appellant that he was entitled to monthly gross compensation of \$2,315.00 under FECA and forwarded him an election form so that he could elect either FECA benefits or retirement benefits provided by the Office of Personnel Management (OPM). By letter dated September 13, 2010, appellant stated that monthly compensation of \$2,315.00 did not reflect his true salary as he worked a regular schedule of 10 hours a day, five days a week. He stated that all compensation he had received in the past, beginning in 2003, was based on an eight-hour daily schedule and was incorrect since he regularly worked two hours overtime, including administratively uncontrollable overtime (AUO).⁵ Appellant forwarded a copy of OPM regulations regarding overtime pay. On September 22, 2010 he filed a claim for an additional two hours of compensation commencing January 24, 2004.

The employing establishment informed OWCP that it did not have any administratively required overtime positions and that all shifts were 40 hours. While employees could work overtime, it was voluntary and not required by the position or the employing establishment, and it had never had positions officially requiring a 50-hour tour of duty.

On November 8, 2010 OWCP informed appellant that the only time overtime was considered in addition to basic salary in computing a wage-loss compensation pay rate was when the position required AUO, and that the employing establishment had informed OWCP that his position did not require AUO. It asked that appellant provide evidence that his position was covered by AUO. On November 14, 2010 appellant asserted that he had not volunteered to work 10 hours a day, and that this schedule was required by management and was his regular

² On August 28, 2003 appellant, then a 33-year-old transportation security screener, sustained employment-related right shoulder trapezius and lumbar strains, and on January 23, 2004 a lumbosacral strain. He stopped work that day, and returned to limited duty for brief periods in 2004. On March 13, 2005 appellant returned to a modified transportation security screener position and again stopped work on December 17, 2007.

³ Docket No. 09-2130 (issued July 15, 2010).

⁴ Prior to the Board's July 15, 2010 decision, on June 22, 2010 appellant was granted a schedule award for a one percent impairment of the right lower extremity and a nine percent impairment on the left, for a period of 28.8 weeks, to run from September 12, 2008 to April 1, 2009. He filed an appeal with the Board of the June 22, 2010 schedule award decision. The appeal will be adjudicated separately, under Docket No. 11-676.

⁵ In a claim adjudicated under file number xxxxxx263, appellant sustained an employment-related right trapezius strain and lumbar strain on August 28, 2003. He received intermittent compensation from October 13, 2003 to January 7, 2004, based on a 40-hour workweek. The compensation received under the instant claim included night differential and Sunday premium pay but did not include overtime.

assignment. He attached a job offer, signed by him on August 6, 2007, stating that he would work “irregular hours and/or shifts, including split-shifts; holidays and weekends; overtime; and extended hours.”

By decision dated January 6, 2011, OWCP denied appellant’s claim that he was entitled to additional compensation based on a 10-hour day workweek. It noted that he was not entitled to an additional two hours of compensation daily because the evidence did not support that he was entitled to AUO, the only type overtime compensation utilized in determining pay rate for compensation purposes.⁶

LEGAL PRECEDENT

Section 8101(4) of FECA defines “monthly pay” for purposes of computing compensation benefits as follows: 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.⁷ In an occupational disease claim, the date of injury is the date of last exposure to the employment factors which caused or aggravated the claimed condition.⁸ In computing pay rate, section 8114(e) provides for the inclusion of certain “premium pay” received, and where the evidence indicates additional amounts received in Sunday or night differential pay fluctuated or may have fluctuated, OWCP determines the amount of additional pay received during the one-year period prior to injury.⁹ Section 8114(e)(1) provides that, in computing an employee’s monthly pay for compensation purposes, overtime pay is not included.¹⁰ OWCP 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.¹¹

The relevant part of section 5545(c)(2) states:

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

⁶ On January 13, 2011 appellant submitted an election form, retroactively to April 2, 2009. OWCP continued to develop his claim for compensation.

⁷ 5 U.S.C. § 8101(4); *see Dale Mackelprang*, 57 ECAB 168 (2005).

⁸ *R.S.*, 58 ECAB 362 (2007).

⁹ 5 U.S.C. § 8114(e); *Lottie M. Williams*, 56 ECAB 302 (2005).

¹⁰ 5 U.S.C. § 8114(e)(1); *Calvin E. King*, 51 ECAB 394 (2000).

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.7(b)(5) (December 1995).

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. 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.”¹²

ANALYSIS

The Board finds that OWCP properly determined appellant’s pay rate for compensation purposes.¹³ On appeal appellant is asserting that he is entitled to an additional two hours compensation because he worked a regular 10-hour shift beginning in 2003. The record supports that appellant worked and was compensated for overtime during his employment. This evidence, however, does not establish that OWCP improperly excluded his overtime pay in determining his pay rate for compensation purposes because the record does not contain evidence that he received additional pay for AUO of the type described in 5 U.S.C. § 5545(c)(2). Appellant submitted no evidence that the head of his agency, with the approval of OPM, specifically provided for the payment of premium pay to its employees. The type of AUO contemplated by section 5545(c)(2) is premium pay that is paid on an annual basis as a percentage of an employee’s base pay, regardless of the actual hours worked. The employing establishment indicated that it did not have any AUO positions and that, while appellant could work overtime, this was not a requirement, and he was not guaranteed specific overtime work. The Board finds that appellant’s pay was earned for actual hours of overtime worked. The wages he received for working overtime are to be excluded from OWCP’s pay rate for compensation purposes determination.¹⁴

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that OWCP properly excluded appellant’s overtime pay from his pay rate for compensation purposes.

¹² 5 U.S.C. § 5545(c)(2); *see also* FECA Program Memorandum No. 106 (issued October 30, 1969) (provides for inclusion of premium pay in pay rate for compensation purposes under section 5545(c)(2)); FECA Bulletin No. 89-26 (issued September 29, 1989) (by administrative determination, pursuant to section 5545(c)(2), OWCP includes premium pay for AUO in computing compensation).

¹³ As provided by section 8114(c), OWCP properly included night differential and Sunday premium pay in the calculation of appellant’s pay rate for compensation purposes.

¹⁴ *A.D.*, Docket No. 10-93 (issued July 8, 2010).

ORDER

IT IS HEREBY ORDERED THAT the January 6, 2011 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: September 15, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

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

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