

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

H.E., Appellant

and

**DEPARTMENT OF COMMERCE,
NATIONAL OCEANIC ATMOSPHERIC
ADMINISTRATION, Seattle, WA, Employer**

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**Docket No. 13-522
Issued: August 14, 2013**

Appearances:
*John Eiler Goodwin, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On January 3, 2013 appellant, through his representative, filed a timely appeal from the July 11, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP), which determined his pay rate for compensation purposes. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of this pay rate decision.

ISSUE

The issue is whether OWCP properly determined appellant's pay rate for compensation purposes.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case was previously before the Board.² Following oral argument on March 1, 2011, the Board found that it was not disputed that appellant received subsistence and quarters while at sea.³ OWCP had a statutory obligation to include the value of that remuneration in kind if its value could be estimated in money.⁴ The Board remanded the case for further development of the value of subsistence and quarters provided to appellant while aboard the McArthur II for the period in question:

“[OWCP] shall follow up on the employing establishment’s offer to estimate, as best it can from meals cost data, the value of subsistence provided to appellant while aboard ship if the cash allowance for onshore meals is not an acceptable reflection of that value. If the employing establishment is unable to provide further useful information, [it] must estimate a value for subsistence from other [employing establishment] and sources as appears reasonable under the circumstances and for quarters if there is a reasonable way to estimate its value in money.”⁵

OWCP followed up on the employing establishment’s offer to estimate the value of subsistence using meals cost data from appellant’s ship. It received the following response from Dale C. North, a program analyst:

“[The employing establishment] has always maintained that base pay is the only consideration when determining compensation for an OWCP claim. I had requested below that [Department of Labor] check with our lead [employing establishment] for pay purposes, the Military Sealift Command as they also maintain that wage marine employees in the organization are paid by OWCP based on the base salary of the mariner. [Appellant’s] claim is erroneous but understandable from his point of view. Perhaps a discussion on this issue can be arranged that can result in a standard practice for this organization with regards to OWCP claims.”

² Docket No. 10-1124 (issued April 8, 2011).

³ Appellant stated that he averaged 280 sea days a year.

⁴ When the ship was ashore and meals were not provided onboard, appellant received a subsistence allowance of \$6.00 for breakfast, \$12.00 for lunch and \$20.00 for dinner, according to the employing establishment’s Dale C. North, a program analyst. Mr. North did not believe \$38.00 a day should be used for appellant’s time at sea. He offered to estimate the value of subsistence at sea from meals cost data, if that was what OWCP required.

The employing establishment’s Cecilia Collins was at a loss to calculate the value of appellant’s quarters at sea. Ms. Collins advised that the employing establishment owned the research vessel, so there was no cost to the employing establishment if an employee bunked aboard or not. She allowed, however, that it might be possible to make a rough estimate of the value of subsistence based on meals cost data.

⁵ OWCP accepted that appellant, an engineer aboard the McArthur II, developed an aggravation of chronic obstructive pulmonary disease in the performance of duty. The facts of this case as set forth in the Board’s prior order are hereby incorporated by reference.

OWCP's claims examiner held a conference with Mr. North on August 12, 2011. Mr. North disagreed that subsistence and quarters should be included in appellant's pay rate for compensation purposes because he had spoken with the Military Sealift Command multiple times about the issue over the years "and [Military Sealift Command] adamantly maintains that only base pay should be included for compensation purposes." The claims examiner explained the law and offered an example from the Military Sealift Command where subsistence and quarters was specifically included on a Form CA-7 claim for compensation.

Mr. North stated that he was frustrated because he believed that claimants had been paid inconsistently, and he thought it should all be the same. The claims examiner agreed and explained that the following regulations and procedures should make it so.

"I explained that in the example I had, [Military Sealift Command] listed S&Q at \$6.75 a day for a Wage Marine 9952-1500 in 2008. I asked if that was a fair approximation of S&Q in Dec[ember] 2004. [Mr. North] [stated that] he thought it was. He noted that he thought it was somewhere around \$7.00. I asked if a person's salary would influence the value of S&Q. [Mr. North] [stated that] it would not. The meals and lodging were available for everyone on ship."

Mr. North confirmed that while appellant probably was not at sea for 280 days a year, he probably was on ship that number of days. The claims examiner noted the parties' agreement that appellant's pay rate would include the daily estimated value of \$6.75 for subsistence and quarters multiplied by appellant's 280 days at sea, or days aboard ship.

In a decision dated August 12, 2011, OWCP determined a pay rate for compensation purposes that included a value of subsistence and quarters.

On July 11, 2012 OWCP's hearing representative affirmed. The hearing representative found that OWCP properly applied section 8114(d)(2) of FECA to determine appellant's pay rate on the date disability began. Further, the hearing representative found that OWCP correctly determined the value of subsistence and quarters to be \$6.75 multiplied by the 280 days appellant was aboard ship during the year prior to the date disability began.

On appeal, appellant's representative objects that OWCP simply took Mr. North's word that \$6.75 a day was a fair approximation of the value of subsistence and quarters. This was the value of subsistence and quarters given for a Military Sealift Command able-bodied sailor in Florida, and counsel provided OWCP with this information to demonstrate that the Military Sealift Command could provide a figure for subsistence and quarters in workers' compensation cases. Counsel contends that OWCP's use of this figure in appellant's case is arbitrary and capricious and set aside the July 11, 2012 decision on the grounds that it did not accurately determine appellant's pay rate. He believes OWCP should review the official payroll record from the National Finance Center, a copy of which he provided to the Board, to determine the pay rate when disability began.

LEGAL PRECEDENT

In computing monetary compensation for disability, the value of subsistence and quarters, and of any other form of remuneration in kind for services if its value can be estimated in money, is included as part of the pay.⁶

ANALYSIS

OWCP followed up on the employing establishment's offer to estimate, as best it could from meals cost data, the value of subsistence provided to appellant while aboard ship, if the cash allowance for onshore meals was not an acceptable reflection of that value. When Mr. North, the program analyst, declined at making that estimate, OWCP shared some information provided by counsel. In another case, the Military Sealift Command estimated the value of subsistence and quarters for an able-bodied sailor in Florida in 2008 to be \$6.75 a day. Mr. North confirmed that this was a fair approximation of appellant's subsistence and quarters in December 2004, when disability began.

This is not, as counsel argues, an arbitrary and capricious figure. This comes from the Military Sealift Command, the lead employing establishment for pay purposes, according to Mr. North. It reflects the value of subsistence and quarters of an employee who was, if not exactly in appellant's position, at least similarly situated. The figure is not perfect, but it does offer a reasonable basis for increasing appellant's pay rate under section 8114(e). The Board finds that OWCP complied with the Board's direction and has reasonably determined, under the circumstances, appellant's pay rate for compensation purposes.⁷

Counsel makes assumptions that are not based on established facts. It is not established, for instance, that the value of subsistence and quarters for an officer is materially greater than that for an able-bodied sailor. As Mr. North confirmed, an employee's salary would not influence that value. As the employing establishment's Cecilia Collins explained, the employing establishment owned the research vessel, so there was no cost to the government if an employee bunked aboard or not. It would thus appear that there is no monetary value for the onboard quarters the employing establishment provided, and that the \$6.75 figure reflects the approximate cost to the government of providing a day's subsistence aboard ship. This is not to be confused with the \$38.00 cash allowance the government paid for obtaining subsistence away from the ship in the private sector. Such a cash allowance is not remuneration in kind under section 8114(e).

⁶ 5 U.S.C. § 8114(e). See *Robert J. Lima*, 55 ECAB 546 (2004) (finding that living quarters provided to the employee, rather than a direct payment of money, was the type of "in kind" remuneration Congress intended to include in the pay rate for compensation purposes); see also *Helen S. Forman (Lawrence T. Forman)*, 39 ECAB 212, 216 (1987) (finding that the payment of school fees in money, as opposed to free tuition at a school operated by the employing establishment, did not constitute remuneration "in kind.") Consistent with *Lima* and *Forman*, a cash allowance for food or lodging, such as appellant received when unable to eat or sleep aboard ship, is not remuneration in kind under Section 8114(e).

⁷ The Board concurs with the hearing representative's finding that appellant's pay rate is determined under 5 U.S.C. § 8114(d)(2), and is therefore defined by the average annual earnings of an employee of the same class working substantially the whole immediately preceding year in the same or similar employment.

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 determined appellant's pay rate for compensation purposes.

ORDER

IT IS HEREBY ORDERED THAT the July 11, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 14, 2013
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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