United States Department of Labor
Employees' Compensation Appeals Board

R.W., Appellant	)	
and	)	**Docket No. 17-0202**
	)	**Issued: August 24, 2017**
DEPARTMENT OF THE ARMY, Fort Polk, LA, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On November 8, 2016 appellant, through counsel, filed a timely appeal from a September 21, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

[1] In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.; see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

[2] 5 U.S.C. § 8101 *et seq.*

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount of $56,461.27 for the period January 27, 2013 to April 14, 2015; and (2) whether OWCP properly denied waiver of the overpayment.

On appeal counsel asserts that the September 21, 2016 decision is "contrary to law and fact."

FACTUAL HISTORY

On August 9, 2012 appellant, then a 44-year-old heavy mobile equipment repairer, was injured when he fell approximately eight feet at work. He stopped work that day and was released to limited duty on August 20, 2012. OWCP had authorized medical treatment as it had originally appeared to be a minor injury with minimal time lost from work. As the medical expenses exceeded $1,500.00, it formally adjudicated the claim. On December 10, 2012 OWCP accepted concussion, contusion of left buttock, and left hip region enthesopathy. On December 28, 2012 it expanded the accepted conditions to include other joint derangement of the left pelvic region and thigh,[3] and on July 18, 2013 lumbar disc protrusion at L5-S1 was also accepted. Appellant filed claims for compensation (Forms CA-7) for wage loss beginning January 27, 2013. OWCP paid him intermittent wage-loss compensation on the supplemental rolls until he was placed on the periodic rolls in April 2013.

Appellant had resumed federal civilian employment following his March 8, 2012 discharge from active duty military service. The employing establishment advised that his heavy mobile equipment repairer position was a dual status position. Thus, appellant was required to maintain membership in the Army Reserve as a condition of his employment. The employing establishment reported that appellant's military pay for the year prior to his date of injury was $59,220.34. Accordingly, appellant's weekly military pay rate was determined to be $1,138.85 ($59,220.34 divided by 52 weeks) and his weekly civilian base pay rate was $1,090.86, his pay rate on the date of injury. OWCP calculated his weekly pay rate for compensation purposes by adding the two salaries for a gross weekly pay rate of $2,229.71. Appellant's weekly pay rate on the periodic rolls was $2,229.71.

In an October 31, 2013 memorandum, the employing establishment informed OWCP that the previously reported military pay rate of $59,220.34 was incorrect. The correct amount of the military pay received by appellant in the year prior to the date of injury, which had been verified by the Reserve Pay Office, was $40,895.00.[4] In January 30, 2014 correspondence, the

[3] On February 13, 2013 a left hip acetabular labral tear was surgically repaired. OWCP authorized the procedure.

[4] The employing establishment also advised OWCP that, although appellant was out on total disability, he had attended his monthly Army Reserve duty on June 1 to 2, July 13 to 28, 2013 (annual training), August 4 to 5 and September 7 to 8, 2013. In later correspondence, additional dates of Reserve duty which appellant had attended were listed as November 1 to 3 and December 7 to 8, 2013. The employing establishment noted that, as appellant's military pay had already been included in his FECA compensation, this additional remuneration to appellant should be considered a prohibited dual benefit to which appellant should not be entitled. It requested OWCP to include that as an additional overpayment. The employing establishment also requested a second opinion evaluation to determine appellant's work capacity.

employing establishment again advised that, based upon another recent case review, the correct amount of military pay that appellant had received in the previous year was $11,138.30.[5]

On July 2, 2014 OWCP issued a preliminary finding of an overpayment of compensation in the amount of $47,450.54 for the period January 27, 2013 to May 31, 2014. The overpayment had been created because the employing establishment had provided an incorrect pay rate for appellant's military pay. Appellant was found to be without fault. An attached memorandum noted that appellant's base weekly pay rate for the date-of-injury position was $1,090.86 with a corrected additional weekly pay for military service of $214.20, based on his prior year annual military pay of $11,138.30. OWCP noted that the earlier listed annual military pay rates of $59,220.34 and $40,895.52 were incorrect. Appellant's compensation was adjusted to reflect a corrected weekly military pay rate of $214.20 ($11,138.30 divided by 52 weeks). That amount of $214.20, plus the weekly base pay for his date-of-injury position of $1,090.86, provided a new weekly pay rate of $1,305.06.

OWCP provided appellant with an overpayment action request form and an overpayment recovery questionnaire (Form OWCP-20). It afforded him 30 days to respond.

Appellant timely requested a prerecoupment hearing with OWCP's Branch of Hearings and Review. He submitted a completed overpayment recovery questionnaire indicating income of $7,600.00 and expenses of $7,358.00.

On July 22, 2014 the employing establishment disputed the finding of no fault. It noted that appellant had been notified on October 29, and November 1 and 13, 2013 that an error had been discovered in reporting his military pay to OWCP, that he should not spend the additional money, and that he would be required to return it. The employing establishment indicated that appellant had also been informed that he was not entitled to receive any additional military training pay while receiving FECA compensation for the same period.

On July 25, 2014 appellant's treating physician Dr. Clark A. Gunderson, an attending Board-certified orthopedic surgeon, advised that appellant could return to modified duty with lifting restricted to 10 pounds. Appellant accepted a full-time light-duty position on July 29, 2014 and returned to work that day. He thereafter continued to receive intermittent compensation for medical and therapy appointments.

At the hearing, held on February 10, 2015, counsel and appellant questioned the amount of the overpayment. Appellant testified that he had been on active military duty from July 2008 to March 2012 and, after his return to civilian work in March 2012, he received both military reserve pay and civilian pay. His monthly expenses were discussed, and the hearing representative requested additional financial information.

On March 9, 2015 the employing establishment verified that appellant's military reserve membership was a condition of his civilian employment and that he had performed active duty

[5] The employing establishment reiterated that appellant continued to receive military pay for his reserve duty for the same period he was receiving FECA compensation, which already incorporated his military pay into his weekly pay rate.

service until being discharged on March 8, 2012. It confirmed that his active duty status was performed with his consent and not as an involuntary Presidential call. The employing establishment noted that in the year prior to the date of injury, appellant had attended two-day military reserve training weekends in May, June, July and August 2012 for which he received $718.60 for each two-day tour.[6]

By decision dated April 28, 2015, an OWCP hearing representative noted the March 9, 2015 correspondence and found that the overpayment had been calculated based on military pay in the amount of $11,138.30 whereas, because appellant had volunteered for active duty and was not part of an involuntary Presidential call, the only reserve earnings that could be included in his rate of pay were $2,874.40, for his periods of reserve duty each month from May through August 2012. She set aside the July 2, 2014 decision and remanded the case to OWCP to issue a new preliminary overpayment determination reflecting actual reserve pay of $2,874.40 and to recalculate the overpayment of compensation. The hearing representative noted that appellant could submit additional evidence to prove that his active duty was in fact based on an involuntary Presidential call. Otherwise, the employing establishment's statement that he volunteered for the active duty would be accepted.

On April 30 and August 10, 2015 appellant forwarded additional information regarding his reserve status, including military service orders. He maintained that his Army reservist duty was required as a condition of his employment and that, in the year prior to his injury, until March 8, 2012, he was receiving active duty pay. Appellant provided a copy of an active duty service order dated June 14, 2011, which noted that he was to report that day for participation in "reserve component warriors in transition medical retention processing program for completion of medical evaluation and treatment." The authority cited was 10 U.S.C. § 12301(h).[7]

On December 22, 2015 OWCP issued a preliminary finding of an overpayment in the amount of $56,461.27 for the period January 7, 2013 to April 14, 2015 because appellant's FECA compensation had been based on an incorrect military pay rate. Appellant was again found without fault. An overpayment worksheet dated December 3, 2015 indicated that the correct pay rate for compensation purposes included appellant's base civilian weekly pay rate of $1,090.86 with the additional weekly military pay of $55.28 (the total pay for military reserve training of $2,874.40 divided by 52 weeks). This yielded a weekly pay rate of $1,146.14 ($1,090.86 plus $55.28 = $1,146.14). The memorandum indicated that the total compensation paid at the incorrect pay rate was $122,414.94, and the correct amount of compensation was $65,953.67, which yielded an overpayment of compensation of $56,461.27. OWCP provided appellant an overpayment action request form and an overpayment recovery questionnaire (Form OWCP-20). It afforded him 30 days to submit a response.

[6] The dates for the monthly military reserve duty were listed as May 19 to 20, June 2 to 3, July 14 to 15, and August 4 to 5, 2012.

[7] Appellant also provided a copy of a service order from June 2008 which ordered him to active duty as a member of his Reserve Component unit for 365 days for the purpose of mobilization for Operation Enduring Freedom. Service orders dated May 2009 and April 2010 extended that active duty, ordering him to report for duty on July 6, 2009 and July 2, 2010 respectively. The authority cited for those orders was 10 U.S.C. § 12301(d).

Appellant timely requested a prerecoupment hearing. On June 23, 2016 OWCP forwarded a second overpayment recovery questionnaire, advising appellant that it was necessary, along with supporting financial documentation, for the determination of waiver and a reasonable repayment collection.

At the hearing, held on August 2, 2016, counsel argued that the preliminary overpayment decision was incomprehensible and that appellant should not be penalized for mistakes made by the employing establishment and OWCP. The hearing representative advised appellant of the importance of submitting the overpayment recovery questionnaire.

In correspondence dated August 24, 2016, the employing establishment again confirmed that a condition of appellant's employment was membership in a military reserve component. Copies of Army Reserve policies and personnel records regarding appellant were provided. These included an order to active duty in support of Operation Enduring Freedom beginning July 2, 2008, which was extended until March 8, 2012. The employing establishment also forwarded a copy of *R.E.*,[8] an overpayment case in which the Board explained the meaning of a "Presidential call."

By decision dated September 21, 2016, an OWCP hearing representative found that the evidence of record established that appellant's active duty service in the year preceding his employment injury was not based on an involuntary Presidential call. She further found an overpayment in the amount of $56,461.27 for the period January 27, 2013 to April 14, 2015, and that appellant was without fault in creating the overpayment. The hearing representative denied waiver because appellant had not provided a completed overpayment recovery questionnaire or supporting financial documentation needed to determine waiver. She ordered repayment in full.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of FECA provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of his or her duty.[9] Section 8129(a) of FECA provides, in pertinent part:

> "When an overpayment has been made to an individual under this subchapter because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled."[10]

Section 8105(a) of FECA 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 (or 75 percent if the employee has a spouse or dependents), which is known as his

[8] Docket No. 08-1728 (issued April 10, 2009).

[9] 5 U.S.C. § 8102(a).

[10] *Id*. at § 8129(a).

basic compensation for total disability."[11] Section 8101(4) of FECA 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...."[12] OWCP's regulations define "disability" as "the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury."[13]

OWCP procedures provide that reservist wages are included in the rate of pay where membership in the reserve or National Guard is a condition of employment.[14] Further, OWCP procedures provide that wages earned as an activated reservist or National Guard member are not included in determining the rate of pay unless the activation is a result of an involuntary presidential call under § 12301(a), § 12302, or § 12304 of Title 10, United States Code.[15]

FECA further provides requirements for determining the monthly pay. Section 8114(d)(2) provides that if the employee did not work in employment in which he was employed at the time of his injury during substantially the whole year immediately preceding the injury, but the position was one which would have afforded employment for substantially a whole year, the average annual earnings are a sum equal to the average annual earnings of an employee of the same class working substantially the whole immediately preceding year in the same or similar employment by the United States in the same or neighboring place, as determined under paragraph (1) of this subsection.[16]

ANALYSIS -- ISSUE 1

The record reflects that at the time of the August 9, 2012 employment injury, appellant had been working in federal employment as a civilian since March 8, 2012 and also maintained membership in the Army Reserve as a condition of his federal civilian employment. In the year prior to his August 9, 2012 injury, appellant had been on full-time active duty for approximately seven months (from August 9, 2011 until his discharge from active duty on March 8, 2012). The Board finds that the evidence of record is sufficient to affirm the fact of overpayment, but the evidence is insufficient to affirm the amount of overpayment based on several deficiencies.

As appellant's membership in the Army Reserve was a condition of his employment, his rate of pay would include any eligible military pay he received in the year prior to the date of

[11] *Id.* at § 8105(a). Section 8110(b) of FECA 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).

[12] 5 U.S.C. § 8101(4).

[13] 20 C.F.R. § 10.5(f).

[14] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.6(a)(11) and 7(b)(6).

[15] *Id.* at Chapter 2.900.7(b)(5); *see also R.E.*, Docket 08-1728 (issued April 10, 2009).

[16] 5 U.S.C. § 8114(d)(2).

injury.[17] Active duty pay, however, is only included in the rate of pay calculation if that active duty call up was based on an involuntary Presidential call, under 10 U.S.C. § 12301(a), § 12302, or § 12304.[18]

In this case, OWCP properly determined that appellant's call to active duty was not pursuant to an involuntary Presidential call, and therefore was properly not included in the rate of pay. The determining factor as to whether appellant's active duty pay would be included in the rate of pay depends on the authority by which appellant was called to active duty. The military service order dated June 14, 2011 (covering the year prior to his date of injury) indicated that he was to report that day to participate in the reserve component warriors in transition medical retention processing program for completion of medical evaluation and treatment. The authority cited was 10 U.S.C. § 12301(h), which provides that a member of a reserve component, with his or her consent, may be ordered to active duty to receive authorized medical care, to be medically evaluated for disability or other purposes, or complete a required Department of Defense health care study. Therefore, there is no evidence to support that appellant's military active duty in the year prior to the August 9, 2012 employment injury was based on an involuntary Presidential call, under 10 U.S.C. § 12301(a), § 12302, or § 12304.[19]

The Board finds that OWCP also properly determined that the only military pay that appellant received in the year prior to his date of injury that was eligible for inclusion in his rate of pay was the pay he received from monthly reserve training duty.[20] Accordingly, the Board finds that the military component of his rate of pay was properly set at $2,874.40, which was $718.60 for each two-day tour of Reserve training in May, June, July, and August 2012, or a weekly amount of $55.28.

The Board finds, however, that OWCP did not properly determine appellant's date-of-injury pay consistent with 5 U.S.C. § 8114(d)(2). This provision provides that if the employee had not worked in the employment in which he was employed at the time of his injury during substantially the whole year immediately preceding the injury, but the position was one which would have afforded employment for substantially a whole year, the average annual earnings are a sum equal to the average annual earnings of an employee of the same class working substantially the whole immediately preceding year in the same or similar employment.[21] In the case at hand, appellant has not disputed the rate of pay for his civilian position, nor has he disputed the figure used for that date-of-injury position. However, appellant had been working for only five months following his March 8, 2012 discharge from active duty, when he was injured on August 9, 2012 and the pay rate must be consistent with the statutory requirements in situations such as these. Accordingly, although the weekly pay rate may be the same as that already calculated, the Board finds, nevertheless, that the rate of pay for appellant's date-of-

[17] *Supra* note 13.

[18] *Supra* note 14.

[19] *Id.*

[20] *Supra* note 13.

[21] *Supra* note 16.

injury civilian position has not been determined following the statutory provisions of FECA and must be remanded for proper development of that aspect of the overpayment.

Following the August 9, 2012 injury, appellant received FECA compensation for total disability beginning January 27, 2013 until he returned to work on July 29, 2014, and thereafter for intermittent compensation for medical and therapy appointments until April 14, 2015 based on the previously determined rate of pay of $2,229.71.[22] The Board finds that OWCP properly determined the period of overpayment.

Further, the Board notes that the employing establishment notified OWCP that during this period of overpayment, while receiving FECA compensation, appellant continued to participate and be paid for military weekend training. This would be a prohibited dual benefit under section 8116 of FECA.[23] Upon remand, the employing establishment should be requested to provide supporting documentation to establish appellant's active participation in military reserve duty during the same period for which he also received FECA compensation for total disability and the amount of the overpayment should be revised as appropriate.

The case will be remanded to OWCP to be followed by a *de novo* decision consistent with the issues presented herein. In view of the Board's holding, the issue of waiver will not be addressed at this time.[24]

CONCLUSION

The Board finds this case is affirmed as to the fact and period of overpayment, but is not in posture for decision with regard to the amount of overpayment.

[22] The record reflects that his disability apparently did not also disqualify him from continuing his military reserve duty. *See supra* note 5.

[23] Section 8116 of FECA defines the limitations on the right to receive compensation benefits. This section provides that while an employee is receiving compensation, the employee may not receive salary, pay, or remuneration of any type from the United States, except in return for service actually performed; pension for service in the Army, Navy, or Air Force; other benefits administered by the Department of Veterans Affairs unless such benefits payable for the same injury or the same death. 5 U.S.C. § 8116.

[24] *See T.M.*, Docket No. 15-0149 (issued March 9, 2015).

ORDER

IT IS HEREBY ORDERED THAT the September 21, 2016 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part. The case is remanded for further proceedings consistent with this opinion of the Board.

Issued: August 24, 2017
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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