

Guard, appellant also performed military drill work as a member of the New Mexico Air National Guard.¹ He participated in military drills for two days each month and periodically attended field training sessions which were also characterized as “summer” drills.

Appellant underwent surgical procedures on his left eye in March, April and July 1994.² By decision dated March 14, 1995, appellant received a schedule award for an 84 percent permanent impairment of his left eye.

Appellant claimed on Forms CA-7 that he was entitled to compensation for lost military drill pay and lost late-shift pay for periods beginning in October 2001. He asserted that he was entitled to compensation for brief monthly military drills as well as for longer field military drills, the “summer” military drills.

By decision dated March 22, 2002, the Office denied appellant’s claim for lost military drill pay on the grounds that he did not submit sufficient medical evidence to show that he was unable to perform his military drill duty.³

Appellant asserted that his disqualification from military duty prevented him from performing his military drills and periodic late-shift work. He submitted an October 30, 2001 letter in which an official for the New Mexico Air National Guard declared him medically disqualified from all military duty. He also submitted physical profile serial reports, signed on September 1 and November 19, 2001, in which officials for the New Mexico Air National Guard indicated that he was restricted from night duty due to defective vision in his left eye.⁴

Appellant retired from his civilian employment on disability retirement effective July 12, 2002. He elected to receive Office of Personnel Management (OPM) benefits effective July 13, 2002, rather than compensation under the Act for employment-related disability from his civilian aircraft engine mechanic job.

By decision dated August 9, 2002, the Office reversed its March 22, 2002 decision and found that appellant was entitled to \$3,470.00 in lost military drill pay.⁵ It found that the new evidence submitted by appellant showed that he could not perform his military drill work due to the March 28, 1994 employment-related eye injury.

¹ Appellant was paid under the WG-10 civilian grade status for his work as an aircraft engine mechanic and under the E6 military grade for his drill work.

² Appellant initially received compensation from the Office for his employment injury. He returned to his aircraft engine mechanic job in late 1994.

³ It does not appear that the Office made a finding regarding appellant’s claim for lost late shift pay.

⁴ The official also noted the October 30, 2001 determination that appellant was medically disqualified from all military duty. The record was later supplemented to include a September 9, 2001 report of an Air Force National Guard physician who indicated that appellant’s eye condition prevented him from maintaining membership in the Air Force National Guard.

⁵ After the Office’s March 22, 2004 decision, appellant claimed that he was due compensation through July 2002. The \$3,470.00 figure was comprised of 10 payments of \$347.00 for 10 military drill periods between October 2001 and July 2002.

Appellant continued to claim entitlement to compensation from the Office for periods of lost military drill work. The Office paid \$1,637.24 for lost “summer” drill work for the period October 27 to November 9, 2001,⁶ \$2,429.00 for lost “summer” drill work for the period June 10 to 23, 2004 and \$347.00 for lost drill work for each month between August 2002 and July 2003. Appellant argued that he was entitled to receive compensation for his lost military drill and field training work, even after his retirement, because the loss of his military status caused him to lose his civilian job with the National Guard.

The record contains a September 1, 2004 letter in which Imogene Hatch, a compensation specialist with the New Mexico Air National Guard, stated that appellant left the employ of New Mexico Air National Guard because he lost his military membership which was “a condition of employment” with the National Guard. Ms. Hatch stated: “He also had entitlement to monthly drill checks that he lost when he lost his military membership.”⁷

By letter dated September 27, 2004, the Office advised appellant of its preliminary determination that he received an \$8,230.24 overpayment of compensation due to his receipt of military drill pay between July 2002 and July 2003.⁸ The Office stated: “You retired and received OPM retirement benefits effective July 13, 2002 and yet you claimed [Office] benefits after that date for loss of military drill pay.” The Office also made a preliminary determination that appellant was at fault in the creation of the overpayment and, therefore, it was not subject to waiver. The Office asserted that appellant knew that he had retired but did not put this information on his CA-7 forms when he claimed loss of military drill pay. The Office advised appellant that he had 30 days to submit evidence and argument concerning the fact and amount of the overpayment, the finding of fault and the matter of waiver of the overpayment.

Appellant contested the Office’s findings regarding the overpayment, including the finding of fault and requested waiver of the overpayment. He completed a financial information questionnaire which had been provided by the Office.

By decision dated November 26, 2004, the Office finalized its preliminary determinations that appellant received an \$8,230.24 overpayment of compensation and that he was at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment.

⁶ The record contains an August 24, 2002 letter, in which an employing establishment official indicated that appellant’s eye injury prevented him from performing drill work during this period.

⁷ The record also contains a document memorializing a November 5, 2003 telephone conversation between Ms. Hatch and an Office official, which indicates that Ms. Hatch stated on that date that appellant’s military status with the National Guard was a condition of his civilian employment with the National Guard. In November 2003, the Office advised appellant that he was not entitled to receive compensation for military drill work since he retired in July 2002.

⁸ The \$8,230.24 figure was calculated by adding the \$1,637.24 paid for “summer” drill work for the period October 27 to November 9, 2001, the \$2,429.00 paid for lost “summer” drill work for the period June 10 to 23, 2004 and the \$347.00 paid for each of 12 scheduled drills between July 2002 and July 2003.

LEGAL PRECEDENT

Section 8116(a) of the Federal Employees' Compensation Act provides that while an employee is receiving compensation or if he has been paid a lump sum in commutation of installment payments until the expiration of the period during which the installment payments would have continued, the employee may not receive salary, pay or remuneration of any type from the United States, except in limited specified instances.⁹

The Office's procedure manual provides that wages paid for National Guard service are included in pay rate calculations "when membership in the National Guard is a condition of an employee's civilian employment with the Guard." Such wages include those paid for "attending drills and field training."¹⁰

ANALYSIS

The Office based its finding that appellant received an \$8,230.24 overpayment of compensation on the grounds that he could not receive compensation from the Office for military drill pay after he retired from the employing establishment on July 12, 2002. In addition to this civilian employment as an aircraft engine mechanic for the New Mexico Air National Guard, appellant also had performed military drill work as a member of the New Mexico Air National Guard. The Office accepted that appellant sustained a ruptured globe of the left eye when he was working as an aircraft engine mechanic on March 28, 1994. It acknowledged that the March 28, 1994 employment injury prevented appellant from performing his military drill and field training work and paid him compensation for these lost hours. The Office continued to pay appellant for his lost military drill and field training work after he retired effective July 12, 2002, but later asserted that it was not required to do so because he received benefits from OPM beginning July 13, 2002.

The Board notes that it was appropriate for the Office to pay appellant for his lost military drill and field training work. The Office accepted that appellant was unable to perform the drill component of his work for the National Guard due to his March 28, 1994 employment injury and that he was required to maintain his military qualification for membership in the New Mexico Air National Guard as a requirement of his civilian employment with the National Guard.¹¹ As noted above, the Office's procedure manual provides that wages paid for

⁹ 5 U.S.C. § 8116(a).

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.7.b.13 (December 1995). In *Steven A. Berndt*, 51 ECAB 402 (2000), the Board noted that the employee's injury sustained in his civilian employ for the National Guard prevented him from performing the military drill component of his National Guard duty. It determined that it was appropriate to include the employee's military drill pay in wage-earning capacity calculations. The Board affirmed the Office's finding that the employee received an overpayment when he received both paychecks from the National Guard and Office compensation for military drill duty.

¹¹ The record contains documents in which Ms. Hatch, a compensation specialist for the New Mexico National Guard, provides support for this finding.

National Guard service are included in pay rate calculations “when membership in the National Guard is a condition of an employee’s civilian employment with the Guard.”¹²

Although the record shows that appellant was receiving benefits from OPM beginning July 13, 2002, there is no indication that these payments compensated appellant for his lost military drill and field training work after that date. Therefore, it cannot be said that appellant impermissibly received both Office compensation and OPM benefits for the same disability in contradiction of the strictures of section 8116(a) of the Act.¹³ For these reasons, the Board finds that the Office has not established that appellant received an \$8,230.24 overpayment of compensation.

Given the Board’s determination regarding the fact of overpayment, it is not necessary to consider whether the Office properly determined that appellant was at fault in creating the overpayment, thereby precluding waiver of recovery of the overpayment.

CONCLUSION

The Board finds that the Office improperly determined that appellant received an \$8,230.24 overpayment of compensation.

¹² See *supra* note 11 and accompanying text.

¹³ See *supra* note 10 and accompanying text. Therefore, the facts of the present case would not be analogous to the situation in *Steven A. Berndt* where the employee received an overpayment by receiving both paychecks from the National Guard and Office compensation for military drill duty. See *supra* note 11.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' November 26, 2004 decision is reversed.

Issued: September 9, 2005
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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