

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

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**ROBERT J. LIMA, Appellant**

**and**

**DEPARTMENT OF STATE, AMERICAN  
EMBASSY, Budapest, Hungary, Employer**

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**Docket No. 03-18  
Issued: May 13, 2004**

*Appearances:*  
*Robert J. Lima, pro se*  
*Thomas G. Giblin, Esq., for the Director*

*Oral Argument February 5, 2004*

**DECISION AND ORDER**

Before:

DAVID S. GERSON, Alternate Member  
MICHAEL E. GROOM, Alternate Member  
A. PETER KANJORSKI, Alternate Member

**JURISDICTION**

On September 30, 2002 appellant filed an appeal of a decision of the Office of Workers' Compensation Programs dated October 9, 2001, finding that his pay rate for compensation purposes had been properly calculated. Pursuant to 5 U.S.C. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction to review the merits of the pay rate issue. In addition, the Board has jurisdiction over an April 10, 2002 decision, denying his request for reconsideration and a July 1, 2002 decision denying his request for a hearing.

**ISSUES**

The issues are: (1) whether the Office properly determined appellant's pay rate for compensation purposes; (2) whether the Office properly denied appellant's request for reconsideration as insufficient to warrant merit review of the claim; and (3) whether the Office properly denied appellant's request for a hearing.

## **FACTUAL HISTORY**

On October 30, 1998 appellant filed a claim alleging that on July 4, 1998 he fractured his right ankle while in the performance of duty and that the injury occurred in Budapest, Hungary. Appellant was exiting the back door of his apartment building when he twisted his ankle and fell. In a statement dated November 9, 1999, appellant indicated that the apartment building was owned by the employing establishment and that he was required to live in housing provided by the government.

The Office initially denied the claim by decision dated March 8, 2000, finding that appellant was not in the performance of duty at the time of the injury. By decision dated September 4, 2000, the Office vacated the March 8, 2000 decision and determined that appellant was in the performance of duty, citing the “bunkhouse rule.”<sup>1</sup> The Office accepted that he sustained an avulsion fracture of the right ankle. It is not clear from the record whether appellant was paid compensation for wage loss.

By decision dated May 9, 2001, the Office issued a schedule award for a 20 percent permanent impairment to the right leg. The period of the award was 57.60 weeks of compensation, commencing January 30, 2001. The pay rate for compensation purposes was reported as \$1,188.04 per week, based on an annual salary of \$61,778.00.

In a letter dated August 3, 2001, appellant contended that his pay rate had been incorrectly calculated. He noted that 5 U.S.C. § 8114(e) provided that the value of quarters should be included in pay rate and that the employing establishment had provided his quarters while on assignment overseas. In response to inquiry from the Office, the employing establishment reported, in a letter dated September 27, 2001, that appellant’s base salary was \$61,778.00 per year. According to the employing establishment, while assigned to the U.S. Embassy in Budapest, he did not receive a post allowance, nor did he receive living quarters allowance because he resided in U.S. Government quarters. The employing establishment indicated that the value of a living quarters allowance for Budapest was \$24,200.00 per year. With respect to the U.S. Embassy in Rome, the employing establishment indicated that appellant received \$4,110.00 per year for a post allowance, with no living quarters allowance, as he was currently residing in government quarters.<sup>2</sup>

By decision dated October 9, 2001, the Office determined that appellant’s pay rate was properly calculated. The Office found that, since appellant did not receive a living-quarter allowance, his pay rate for compensation purposes would not include the value of quarters. With respect to post allowance, the Office found that this represented a cost-of-living differential and was not included in calculating pay rate.

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<sup>1</sup> When an employee is required or expected to live in quarters provided by the employer, an injury during the reasonable use or occupancy of such quarters is considered to arise out of and in the course of employment. *See Edmond B. Wagoner*, 39 ECAB 758 (1988).

<sup>2</sup> The specific periods that appellant spent in Rome and Budapest are not clear from the record.

In a decision dated April 10, 2002, the Office denied appellant's request for reconsideration without review of the merits of the claim. By decision dated July 1, 2002, the Office determined that appellant was not entitled to a review of the written record because he had previously requested reconsideration on the same issue. The Office further denied the request on the grounds that appellant could request reconsideration and submit relevant evidence on the pay rate issue.

### **LEGAL PRECEDENT -- ISSUE 1**

The Federal Employees' Compensation Federal Employees' Compensation Act, at 5 U.S.C. § 8114(e), provides:

“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, and premium pay under section 5545(c)(1) of this title are included as part of pay, but account is not taken of--

- (1) overtime pay;
- (2) additional pay or allowance authorized outside the United States because of differential in cost of living or other special circumstances;  
or
- (3) bonus or premium pay for extraordinary service including bonus or pay for particularly hazardous service in time of war.”

### **ANALYSIS -- ISSUE 1**

The Office based its determination of pay rate for compensation purposes on appellant's annual salary. The record establishes that, at the time of injury on July 4, 1998, appellant was working in Budapest and was provided living quarters by the employing establishment. The provision of living quarters was not by appellant's choice; he indicated that the employing establishment required him (and other similarly situated employees) to live in government-owned quarters.

The issue is whether the pay rate for compensation purposes should include the value of the quarters provided in this case. The Office's position in the October 9, 2001 decision was that the value is not included unless an employee receives payment of a living quarters allowance. For the reasons discussed below, the Board disagrees with the Office's interpretation of 5 U.S.C. § 8114(e).

The legislative history of section 8114(e) is useful in providing insight into the intent of Congress on this issue. The original statute, as promulgated in 1916, stated: “Subsistence and the value of quarters furnished an employee shall be included as part of the pay, but overtime pay shall not be taken into account.”<sup>3</sup> The clear language of the statute indicates that the value of

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<sup>3</sup> 39 Stat. 746 (1916).

quarters was intended to be included as part of pay. In 1949, the statute was amended to broaden the scope beyond subsistence and quarters: “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, shall be included as part of pay.”<sup>4</sup> The congressional report accompanying the 1949 amendments noted that “The bill would retain so much of the old language as requires the taking into account of elements of pay in kind, such as the value of subsistence and quarters, and would include other forms of remuneration in kind for services, provided the value thereof can be estimated in money.”<sup>5</sup> A 1966 amendment added the premium pay clause found in the current statute.<sup>6</sup>

The legislative history suggests that it was the intent of Congress to include in the computation of pay certain elements that would not be reflected in an employee’s base salary. The value of subsistence and quarters were to be included as they are specifically enumerated; the 1949 amendments indicate that additional forms of remuneration may also be included. Although the 1916 statute did not specifically refer to “in kind” remuneration, the legislative history from the 1949 amendments suggests Congress anticipated the value of quarters and subsistence would generally be “elements of pay in kind.” The addition of the clause “and any *other* form of remuneration in kind” further supports this interpretation. (Emphasis added.)

The word “remuneration” is generally defined as “reward; recompense; salary; compensation.”<sup>7</sup> With respect to the meaning of “in kind,” the Board has noted that the term has been defined as “in the same kind, class or genus; of the same class, description or kind of property” or “with produce or commodities” rather than with money: pay in kind.<sup>8</sup> In *Forman*, the Board found that payment of school fees in money did not constitute “remuneration in kind,” as opposed to, for example, the provision of free tuition at a school operated by the employing establishment.<sup>9</sup>

In the present case, the employing establishment provided living quarters to appellant rather than a direct payment of money. This was clearly “in kind” remuneration provided to him. As the legislative history of 8114(e) illustrates, the value of quarters was intended to be included in determining an employee’s pay rate for compensation purposes. The Board finds that the provision of living quarters in this case is the type of remuneration that Congress intended to include in 8114(e).

The Director argues that, since appellant was required, as a condition of employment, to live in the housing facility where he was injured, the value of such quarters should not be included under 8114(e). According to the Director, if the value of quarters is included in the computation of pay, it would result in treating the living quarters as a condition of employment

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<sup>4</sup> 5 U.S.C. § 762, section 12(b); 63 Stat. 862 (1949).

<sup>5</sup> S. Rep. No. 836 (1949); 1949 U.S.C.C.A.N. 2137.

<sup>6</sup> 80 Stat. 1164 (1966).

<sup>7</sup> *BLACK’S LAW DICTIONARY* 1165 (5<sup>th</sup> ed. 1979).

<sup>8</sup> *Helen S. Forman (Lawrence T. Forman)*, 39 ECAB 212, 216 (1987).

<sup>9</sup> *Id.*

for purposes of coverage under the Federal Employees' Compensation Act, and as remuneration in kind for purposes of calculating pay rate. The Board finds, however, that the computation of pay rate and the determination of coverage under the Act are separate issues and must be treated accordingly. There is nothing in the language of section 8114(e) or its legislative history to suggest that Congress intended to consider whether the quarters were a "condition of employment." The language in 8114(e) is clear and explicit that the value of quarters is to be included in pay rate. In this case, appellant received remuneration in kind for services in the form of living quarters while overseas. For the above reasons, the Board finds that the value of such quarters should be included in determining appellant's pay rate for compensation purposes.

With respect to the "value" of the quarters provided in this case, the Director does not contest that the value can be estimated in money. It is not clear from the record, however, how the specific value should be calculated in this case. There is, for example, evidence of the value of quarters from both Rome and Budapest. However, the record is not clear as to the specific periods that appellant was provided living quarters in locations other than Budapest. The Office should determine the appropriate date that pay rate is to be determined, secure any additional relevant evidence and make an appropriate determination as to the value of quarters in this case.

The Office should also make appropriate findings with respect to a post allowance. The employing establishment reported that appellant received a post allowance with respect to his employment in Rome; it is not clear whether such post allowance was applicable at the time the pay rate was determined in this case. The Office's finding with respect to the post allowance in the October 9, 2001 decision failed to discuss whether Office procedures require the inclusion of a post allowance.<sup>10</sup>

In view of the Board's holding on the pay rate issue, the Board will not consider the nonmerit issues raised in the July 1 and April 10, 2002 Office decisions.

### **CONCLUSION**

The Board finds that the Office improperly determined appellant's pay rate for compensation purposes. The case will be remanded to the Office for an appropriate decision on the issue.

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<sup>10</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.7(b) (December 1995) (post differential paid pursuant to the Overseas Differential and Allowances Act is administratively included in pay rate).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated July 1 and April 10, 2002 and October 9, 2001 are set aside and the case remanded for further action consistent with this decision of the Board.

Issued: May 13, 2004  
Washington, DC

David S. Gerson  
Alternate Member

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member