

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

ROBERT J. LIMA, Appellant

and

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

)
)
)
)
)
)
)
)
)
)
)

**Docket No. 06-282
Issued: June 5, 2006**

Appearances:
Robert J. Lima, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On November 17, 2005 appellant filed a timely appeal of an October 24, 2005 decision of the Office of Workers' Compensation Programs regarding an overpayment of compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office properly determined that an overpayment of \$15,372.70 was created; and (2) whether the Office properly denied waiver of the overpayment.

FACTUAL HISTORY

The case was before the Board on a prior appeal.¹ The Board found that appellant's pay rate should include the value of the living quarters provided, as set forth in 5 U.S.C. § 8114(e). The case was remanded for the Office to determine the appropriate date for the pay rate determination, the value of the living quarters, and a determination as to whether post allowance

¹ 55 ECAB ____ (Docket No. 03-18, issued May 13, 2004).

was appropriate in this case. The history of the case is provided in the Board's prior decision and is incorporated herein by reference.

The Office requested that the employing establishment provide additional information regarding the pay rate issues presented. In a January 18, 2005 letter, the employing establishment stated in pertinent part:

“While there is an LQA [living quarters allowance] for Budapest, we do not believe that it is a useful indicator in attempting to calculate or assign some value to the government provided housing that [appellant] resided in at the time of his injury. In a letter dated September 27, 2001, the [employing establishment] indicated, ‘the value of the LQA for Budapest is \$24,200.00 per annum.’ This statement was based on reference to the LQA that are posted on the [employing establishment's] website at the time of that letter in 2001. The LQA amount is not intended to be, nor is it, an accurate reflection of the value of government provided housing in Budapest. As noted above, the LQA is a maximum reimbursement allowance, depending on actual costs incurred. Moreover, up until 1995, no LQA amount had been established for Budapest. A rate was established in 1995 based on one employee's costs. This rate has not been updated or changed in the last 10 years.”

The employing establishment also stated that appellant did not receive a post allowance at any time during his assignment in Budapest. His annual salary on the date of injury, July 4, 1998, was \$43,279.00, while in 2001 his annual salary was \$61,778.00.

The Office issued appellant a payment of \$20,021.82 on March 18, 2005, representing additional compensation for his schedule award from January 30, 2001 to March 9, 2002. By decision dated March 16, 2005, the Office found that appellant was not entitled to a post allowance in determining his rate of pay. The Office also stated that the January 18, 2005 letter from the employing establishment indicated that the quarters allowance in Budapest on the date of injury was \$24,200.00

By letter dated August 23, 2005, the Office advised appellant of a preliminary determination that an overpayment of \$15,372.70 was created. The Office explained that it had initially paid appellant compensation pursuant to a schedule award totaling \$51,425.16, using a weekly pay rate of \$1,188.04 (\$61,778.00 annually). The additional payment of \$20,021.82 was based on weekly pay rate of \$1,653.42 (\$61,778.00 plus \$24,200.00 living quarters, or \$85,978.00 annually). The Office stated that the proper date to calculate the pay rate was July 4, 1998, the date of injury, and at that time appellant had \$43,279.00 in salary plus \$24,200.00 living quarters, or \$67,479.00 per year. The correct pay rate therefore was \$1,297.67 per week, resulting in total payments owed of \$56,074.28 for the period of the schedule award from January 30, 2001 to March 9, 2002. Since appellant had received \$71,446.98, an overpayment of \$15,372.70 was created.

The Office further advised appellant that he was not at fault in creating the overpayment, and requested evidence with respect to waiver of the overpayment. Appellant submitted financial evidence, including an overpayment recovery questionnaire (Form OWCP-20).

By decision dated October 24, 2005, the Office finalized its determination that an overpayment of \$15,372.70 was created. The Office also denied waiver of the overpayment on the grounds that his assets exceeded the established resource base of \$8,000.00 for an individual with a spouse.

LEGAL PRECEDENT

Under 5 U.S.C. § 8101(4), “‘monthly pay’ means 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...” This section applies to compensation paid pursuant to a schedule award.²

ANALYSIS

The period of the schedule award was January 30, 2001 to March 9, 2002. The Office initially used a pay rate date of 2001, based on the date of maximum medical improvement. As noted above, however, the date used to determine the pay rate is based on 5 U.S.C. § 8101(4). There is no indication in the record that any specific date of disability was established, as appellant indicated that he did return to work following the injury, nor is there evidence in the record of a recurrence of disability. The appropriate pay rate date therefore is the date of injury, July 4, 1998. The Board notes that the employing establishment indicated that appellant did not receive a post allowance, and no contrary evidence was presented.

With respect to the fact and the amount of any overpayment, the Office based its determination on a figure of \$24,200.00 as representing the value of the quarters provided in Budapest. This information had been provided by the employing establishment in a September 27, 2001 letter. The January 18, 2005 response from the employing establishment, however, indicated that further development was warranted. The employing establishment disputed the accuracy of the \$24,200.00 amount, without providing sufficient information to resolve the issue. On the one hand the January 18, 2005 letter suggests that the figure may be inaccurate because an LQA represents a maximum allowance; on the other hand, it raises the possibility that the figure is too low, since it was based on actual costs in 1995 and was never updated.

Since the overpayment was based on calculating appellant’s pay rate using \$24,200.00 as the value of the quarters provided, the Office must properly resolve the issue. On remand the Office should secure pertinent and relevant evidence necessary to make a proper finding as to the value of quarters provided to appellant in Budapest as of July 4, 1998. After such further development as the Office deems necessary, it should issue an appropriate decision.³ The Board will not address the issue of waiver of the overpayment at this time, as the issues of fact of overpayment and amount must be resolved.

² *Sherron A. Roberts*, 47 ECAB 617, 619 (1996).

³ As appellant has raised the issue of interest owing to appellant, the Office should consider the issue in its decision.

CONCLUSION

The Board finds that based on the evidence the date of injury is appropriate to determine the rate of pay. The case will be remanded for further development on the value of the living quarters provided.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 24, 2005 is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: June 5, 2006
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