

for the pay rate determination, the value of the living quarters, and a determination as to whether post allowance was appropriate in this case. In a June 5, 2006 decision, the Board found that the appropriate pay rate date was the date of injury, July 4, 1998.² As to fact and amount of an overpayment, the Board noted there remained a question as to the value of the living quarters provided, and the case was remanded for further development. By order dated November 30, 2007, the Board remanded the case again for further development as to the value of the living quarters provided.³ The history of the case is provided in the prior Board decisions and orders, and is incorporated herein by reference.

In a letter dated February 20, 2008, the employing establishment referred to its September 27, 2001 letter (finding the value of living quarters was \$24,200.00) and indicated this continued to serve as its response to the Office inquiry. By letter dated March 13, 2008, the Office requested any additional information regarding the cost of appellant's living quarters in Budapest in 1998, such as budget records. The Office also sent appellant an April 15, 2008 letter requesting that he submit any relevant evidence on the issue. By letter dated May 14, 2008, the employing establishment indicated that it saw no reason to change the \$24,200.00 figure previously provided. The employing establishment indicated that this represented a maximum reimbursement.

By decision dated July 2, 2008, the Office found that an overpayment of \$15,372.70 had been created. It indicated that the value of the living quarters provided was \$24,200.00. With respect to waiver, the Office denied waiver based on the previously submitted financial information from 2005.

LEGAL PRECEDENT -- ISSUE 1

Under 5 U.S.C. § 8101(2), “‘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....” When compensation is paid on a weekly basis, the weekly equivalent of the monthly pay is deemed one-fifty-second of the average annual earnings.⁴

ANALYSIS -- ISSUE 1

As the Board noted in its June 5, 2006 decision, the pay rate in this case is based on the date of injury, July 4, 1998. The Office found the correct pay rate was \$1,297.67 per week, based on an annual salary of \$43,279.00 and \$24,200.00, the value of living quarters provided. With respect to the value of living quarters, it attempted, in accord with the Board's prior direction, to obtain additional evidence from the employing establishment. According to the employing establishment, the best estimate of the value remains at \$24,200.00 per year.

² Docket No. 06-282 (issued June 5, 2006).

³ Docket No. 07-1093 (issued November 30, 2007).

⁴ 5 U.S.C. § 8114(c).

Appellant had indicated in a June 15, 2006 letter that he was not contesting the living quarters' amount, and he had an opportunity to submit any relevant evidence on the issue. He was advised by telephone call dated January 30, 2008 and letter dated April 15, 2008 to submit any relevant evidence on the issue. The Board finds that no useful purpose would be served by additional development of the evidence on this issue. Based on the evidence of record, the value of the living quarters is found to be \$24,200.00 per year.

The evidence therefore supports the finding that as of July 4, 1998, appellant's pay rate was \$1,297.67 per week. For the schedule award period January 30, 2001 to March 9, 2002, he should have been paid \$56,074.28 according to the Office's calculations. Since appellant received \$71,446.98 for this period, an overpayment of \$15,372.70 was created.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of the Federal Employees' Compensation Act⁵ provides: "Adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of the Act or would be against equity and good conscience."⁶ Since the Office found appellant to be without fault in the creation of the overpayment, it may only recover the overpayment if recovery would neither defeat the purpose of the Act nor be against equity and good conscience. The guidelines for determining whether recovery of an overpayment would defeat the purpose of the Act or would be against equity and good conscience are set forth in sections 10.434 to 10.437 of Title 20 of the Code of Federal Regulations.

According to section 10.436, recovery of an overpayment would defeat the purpose of the Act if recovery would cause hardship because the beneficiary "needs substantially all of his or her current income (including compensation benefits) to meet current ordinary and necessary living expenses," and, also, if the beneficiary's assets do not exceed a specified amount as determined by the Office from data provided by the Bureau of Labor Statistics.⁷ For waiver under the "defeat the purpose of the Act" standard, appellant must show that he needs substantially all of his current income to meet current ordinary and necessary living expenses, and that his assets do not exceed the resource base.⁸ 20 C.F.R. § 10.437 provides recovery of the overpayment is considered against equity and good conscience when an individual would experience severe hardship in attempting to repay the debt, or when an individual, in reliance that such payments would be made, gives up a valuable right or changes his position for the worse.

⁵ 5 U.S.C. § 8101 *et seq.*

⁶ 5 U.S.C. § 8129(b).

⁷ Office procedures provide that the assets must not exceed a resource base of \$4,800.00 for an individual or \$8,000.00 for an individual with a spouse or dependent plus \$960.00 for each additional dependent. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a) (October 2004).

⁸ See *Robert E. Wenzholz*, 38 ECAB 311 (1986).

ANALYSIS -- ISSUE 2

The Office denied waiver of the overpayment, enclosing a copy of an October 24, 2005 memorandum that accompanied the final decision of that date. To properly determine whether waiver of the overpayment would defeat the purpose of the Act, or be against equity and good conscience, the Office must have current financial information.⁹ In this case the financial information previously submitted by appellant was nearly three years old at the time of the July 2, 2008 decision. There is no indication that the Office sought additional financial information relevant to the waiver issue. The Office should have attempted to obtain current information regarding appellant's income, expenses and assets.¹⁰ On remand, it should secure current relevant evidence on the waiver issue. After such further development as the Office deems necessary, it should issue an appropriate decision.

CONCLUSION

The evidence of record supports a finding that an overpayment of \$15,372.70 occurred from January 30, 2001 to March 9, 2002. The case is remanded on the issue of waiver of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 2, 2008 is affirmed with respect to the amount of the overpayment and set aside and remanded on the waiver issue.

Issued: July 14, 2009
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

⁹ See *Ronald E. Smith*, 36 ECAB 652 (1985).

¹⁰ See *Thomas E. Ray*, 51 ECAB 344 (2000) (the Board remanded the case as the Office relied on financial information that was not current).