UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

June 30, 2015

CBCA 4579-RELO

In the Matter of BENJAMIN A. KNOTT

Benjamin A. Knott, Arlington, VA, Claimant.

Rickey N. Lawrence, Chief, Financial Management, Department of the Air Force, Arlington, VA, appearing for the Department of the Air Force.

LESTER, Board Judge.

This is our second decision relating to Dr. Benjamin A. Knott's challenge to the Department of the Air Force's determination limiting his reimbursement for temporary quarters subsistence expense (TQSE), which he was authorized to incur on an "actual expense" (AE) basis. In *Benjaman A. Knott*, CBCA 4579-RELO, 15-1 BCA ¶ 35,961, decided April 22, 2015, we determined that, "[a]lthough Dr. Knott is entitled to TQSE(AE) for the forty-two days that he is seeking, he cannot recover the full lodging and meal costs that he incurred." *Id.* at 175,713. Nevertheless, we were unable to understand the basis of the Air Force's calculations of the amount allegedly owed Dr. Knott, finding that the calculations "ma[d]e no sense based upon the existing record." *Id.* at 175,715. Accordingly, we requested further information from the parties to establish the proper calculation of the amount owed. The Air Force did not provide any written response, even though we gave it two opportunities to do so. This decision follows.

Background

As we explained in our prior decision, Dr. Knott was authorized sixty days of TQSE(AE) as part of a permanent change of station (PCS) from Wright-Patterson Air Force

Base, Ohio, to Arlington, Virginia. Based upon his understanding that he was entitled to reimbursement of lodging and meal expenses up to the daily temporary duty (TDY) per diem rate for the Washington, D.C., area, Dr. Knott incurred (and submitted a request seeking reimbursement of) hotel lodging costs of $253.12 per night, plus varying meal expenses, from May 11 through June 21, 2014. The Air Force denied a large portion of that request, granting Dr. Knott TQSE(AE) totaling only $129 per day for twenty-one of the thirty days from May 11 through June 9, 2014 (giving him nothing for the other nine days within that period), and $96.75 per day from June 10 through 21, 2014.

In our prior decision, we explained that "'[t]he 'applicable per diem rate' for temporary quarters in the continental United States (CONUS) is the standard CONUS rate,' rather than the per diem for a particular locality." *Knott*, 15-1 BCA at 175,714 (quoting *Jerry L. Sorensen*, CBCA 3828-RELO, 14-1 BCA ¶ 35,790, at 175,055 (quoting 41 CFR 301-6.102 (2013))). We determined that "[t]he standard CONUS rate, as set forth in the Joint Travel Regulations (JTR) in effect at the time of Dr. Knott's transfer, was $83 for lodging and $46 for meals and incidental expenses, which, added together, total $129." *Id.* (citing JTR C5360-A.1). Accordingly, we held that, "for the first thirty days of his TQSE, Dr. Knott would be entitled to reimbursement of no more than $129 per day." *Id.* We then recognized that "'[t]he rates change after 30 days in temporary quarters,' limiting the employee to reimbursement of '.75 times the applicable per diem rate' for the remaining period." *Id.* (quoting 41 CFR 302-6.100). "Seventy-five percent of the applicable standard CONUS rate is $96.75," we found, "which is the maximum daily amount that Dr. Knott could receive after the first thirty days of his TQSE." *Id.*

Applying the standard CONUS rate to his TQSE claim, we then found that "Dr. Knott would be entitled to a total of $129 per day for the first thirty days of his TQSE entitlement and $96.75 per day for the remainder of his TQSE." *Knott*, 15-1 BCA at 175,714. Nevertheless, the Air Force only reimbursed Dr. Knott $129 for twenty-one of the first thirty days of his TQSE and $96.75 for the last twelve days, giving him nothing for nine of the days during which he incurred TQSE. The agency provided no explanation in its submission for this reduction, but the record contained a vague reference to a deduction for a six-day househunting trip (HHT)[1] that Dr. Knott may have taken. While we ultimately had to "deny Dr. Knott's request to recover TQSE at a rate above the standard CONUS rate," we ordered the Air Force to supplement its submission to the Board, no later than May 8, 2015, to detail "the basis upon which it calculated the amount of TQSE payment due Dr. Knott and to

[1] "A househunting trip is 'a trip made by the employee and/or spouse to [the employee's] new official station locality to find permanent living quarters to rent or purchase.'" *Knott*, 15-1 BCA at 175,715 n.1 (quoting 41 CFR 302-5.1).

provide us with copies of supporting documents," including a copy of any "orders under which Dr. Knott took HHT." *Knott*, 15-1 BCA at 175,175.

The Air Force did not respond to the Board's order by the due date. After confirming that the Air Force representative had actually received the Board's order and was aware of the requirement that it supplement its submission, the Board asked the Air Force to explain why it had not responded and provided it with another opportunity to submit the requested information, albeit out-of-time. Once again, the Air Force provided no written response.

Despite the Air Force's failure to respond, Dr. Knott made his own submission to the Board, acknowledging that he had, in fact, taken a six-day HHT from April 22 to 27, 2014 (prior to his PCS to Arlington, Virginia). He provided the Board with the orders and HHT reimbursement authorization that the Air Force failed to submit.

Discussion

"[I]n travel and relocation expenses cases, '[t]he burden is on the claimant to establish . . . [not only] the liability of the agency, and the claimant's right to payment,'" *Christopher R. Chin-Young*, CBCA 3734-RELO, 14-1 BCA ¶ 35,688, at 174,684 (quoting 48 CFR 6104.401(c) (2013)), but also the correctness of the amount sought. *Robert H. Laghaie*, GSBCA 15498-RELO, 01-1 BCA ¶ 31,411, at 155,142. Nevertheless, if the claimant establishes a *prima facie* case of entitlement to reimbursement of a specific dollar amount, the burden of production shifts to the Government to explain, and potentially to support with appropriate evidence, the reasons that the claimant's *prima facie* case does not support the award sought. *See Thompson v. Haynes*, 305 F.3d 1369, 1376 (Fed. Cir. 2002) (explaining how "the burden of going forward with the evidence – the burden of production – . . . can shift back and forth," even though the ultimate burdens of proof and of persuasion always remain with the party seeking relief). If the Government fails timely to "point out specific shortcomings" in the claimant's evidence, the tribunal "is entitled to treat the issue as waived." *Southern Nuclear Operating Co. v. United States*, 637 F.3d 1297, 1304 (Fed. Cir. 2011).

Here, Dr. Knott has clearly established that he used forty-two of the sixty days of TQSE that the Air Force had authorized. Despite the Air Force's complete failure to participate in these proceedings, he has also – commendably – acknowledged that he took six days of HHT. As we explained in our prior decision in this case, "[t]he JTR in effect at the time of Dr. Knott's transfer provides that, '[i]f an employee is paid/reimbursed for HHT days and authorized TQSE(AE) is subsequently claimed for more than 30 days, the actual number of HHT days (NTE [not to exceed] 10) paid/reimbursed . . . are deducted from the first authorized TQSE(AE) period.'" *Knott*, 15-1 BCA at 175,715 (quoting JTR C5634-A).

Dr. Knott was authorized to take up to sixty days of TQSE(AE). Accordingly, because he "was paid for [six] days of HHT," he can "be reimbursed for up to [fifty-four] days of TQSE, in addition to the HHT payment." *Id.* (quoting *Robert D. Tracy*, CBCA 3689-RELO, 14-1 BCA ¶ 35,636, at 174,500). Because he only used forty-two of his fifty-four authorized days of TQSE(AE), he is entitled to reimbursement for all of those forty-two days. *See James T. Rubeor*, CBCA 4084-RELO, 15-1 BCA ¶ 35,905, at 175,514 ("Where the agency has approved a sixty-day period for reimbursable TQSE, the period of HHT reimbursement is subtracted from the sixty days to determine the period that TQSE will be reimbursable.").

"Nevertheless, the HHT is 'deducted from the first authorized TQSE period.'" *Knott*, 15-1 BCA at 175,715 (quoting JTR C5634-A). Accordingly, Dr. Knott's six-day HHT counts against "the first thirty days of [his] authorized TQSE period," a period during which he was entitled to receive the daily $129 standard CONUS rate. *Id.* Therefore, Dr. Knott is entitled to receive payment of twenty-four days of TQSE at the daily $129 standard CONUS rate (totaling $3096). For the remaining eighteen days of his forty-two days of TQSE(AE), he is entitled to recover "the daily amount of $96.75, or .75 times the standard CONUS rate" (totaling $1741.50). *Id.*; *see* 41 CFR 302-6.100 (the employee is limited to ".75 times the applicable per diem rate" for any period "after 30 days in temporary quarters"). Combining these amounts, Dr. Knott is entitled to TQSE(AE) reimbursement totaling $4837.50.

This figure is far less than the more than $12,000 that Dr. Knott paid for lodging and meals during his time in temporary quarters. Dr. Knott indicates that he did not have information about the JTR maximum allowable reimbursement limits before submitting his vouchers and that, "when [he] asked for guidance from [his] organization, [he] was told that [he] was allowed the normal TDY Per Diem rate for lodging." As we said in our recent decision in *James A. Kester*, CBCA 4411-RELO, 15-1 BCA ¶ 35,966, "we express dismay at actions taken by agencies" that mislead "employees into believing they will receive benefits which, under law, they may not receive," and "[w]e strongly encourage agencies to ensure that their travel and transportation officials provide accurate advice to these individuals as to the proper scope of their . . . relocation benefits." *Id.* at 175,729. Unfortunately, we lack authority to authorize payment of any amount higher than the relevant regulations permit, even when an employee has acted reasonably in following the advice of other seemingly knowledgeable agency employees:

> Allowing an agency to make a payment for a purpose not authorized by statute or regulation would violate the Appropriations Clause of the Constitution. U.S. Const. art. I, § 9, cl. 7 ("No money shall be drawn from the Treasury, but in consequence of Appropriations made by Law."). The Supreme Court consequently has made clear that an executive branch employee's promise that the Government will make an "extrastatutory" payment is not binding. Where

> relevant statute and regulations do not provide for payment for a particular purpose, an agency may not make such payment.

Id. at 175,729-30 (quoting *Julie N. Lindke*, CBCA 1500-RELO, 09-2 BCA ¶ 34,141, at 168,784); *see Office of Personnel Management v. Richmond*, 496 U.S. 414, 424 (1990) (Government is not estopped by erroneous advice of officials that conflicts with statute).

We also cannot condone the agency's complete disregard of the Board's request for information about Dr. Knott's TQSE. The record contains no rational explanation of the agency's decision to pay for only thirty-three of Dr. Knott's forty-two TQSE(AE) days or the manner in which it calculated the rates at which Dr. Knott is supposed to be paid. To the extent that there is some reason that the Air Force declined to pay Dr. Knott for those nine days, it did not tell us what it was. The Board requested an explanation and supporting evidence, but, even though the Board confirmed the agency's receipt of two separate orders requesting supplemental information, the agency never provided a written response and never attempted to justify its calculations. To the extent that the Air Force had a basis for further reducing Dr. Knott's permissible recovery below the award that we are making, it has waived its opportunity to do so. *See Robert E. Sanders*, CBCA 3737-RELO, 15-1 BCA ¶ 35,943, at 175,671-72; *see also Southern Nuclear*, 637 F.3d at 1304. Even in the face of the agency's complete disregard of our orders and the resulting waiver, however, we remain powerless to provide Dr. Knott with any greater recovery than that which the existing record shows is authorized by the relevant regulations. *Kester*, 15-1 BCA at 175,729-30.

Decision

For the foregoing reasons, Dr. Knott is entitled to reimbursement of TQSE(AE) in the total amount of $4837.50. To the extent that the Air Force has already reimbursed Dr. Knott for some of his TQSE, that reimbursement amount should be deducted from Dr. Knott's additional payment.[2]

HAROLD D. LESTER, JR.
Board Judge

[2] To the extent that Dr. Knott, in his most recent submission, complains about the agency's reimbursement (or lack thereof) of his HHT expenses, those expenses are not a part of the claim before us. Dr. Knott is free, however, to raise them in a new claim.