

The member claimed one of the children as a dependent child for purposes of basic allowance for housing (BAH) effective January 31, 2013, unbeknownst to his former spouse. The member submitted forms over the years including AF Form 594, *Application and Authorization to Start, Stop or Change BAQ or Dependency Redetermination*, and DD Form 114, *Military Pay Order*. On these forms, the member identified one of his children as his dependent in his custody.

In September 2017, the Air Force Office of Special Investigations (AFOSI) initiated an investigation of the member based on information from an Air Force Inspector General referral that the member falsely claimed a dependent to obtain dependent rate BAH. After completion of its investigation, the AFOSI found elements of proof that the member made a false or fraudulent claim. The Air Force Personnel Center advised the Defense Finance and Accounting Service (DFAS) of the investigation. As a result, DFAS established a debt against the member for the amount of BAH he received during the period January 31, 2013, through August 29, 2017, in the amount of \$84,352.80, and initiated recoupment of that amount.

The member then reclaimed the amount of BAH at the single rate (BAH-S) he alleged he was entitled to receive during the period January 31, 2013, through August 29, 2017. He requested that either he receive payment for the BAH-S due him during that period, or DFAS credit the amount towards his debt. DFAS subsequently denied his reclaim in the amount of \$53,223.82 for BAH-S because it was tainted by fraud by the member's previous claim. DFAS found that, from January 2013 to August 2017, the member submitted information to the Air Force that was grossly inaccurate and misleading, clearly establishing an indication of fraud. On appeal, the DOHA attorney examiner upheld DFAS's denial of the member's claim for BAH-S.

In the member's reconsideration request, he again requests credit for the amount of BAH-S he was entitled to receive for the period of recoupment. He states that he had no malicious intent to deprive the government unlawfully of something of value. He cites Comptroller General decision B-220119, Nov. 14, 1998, which states that the burden of establishing fraud rests upon the party alleging it and must be proven by evidence sufficient to overcome the existing presumption in favor of honesty and fair dealing. He maintains that under this standard, he did not submit false claims. He states that his divorce decree provided for joint legal custody and cites Chapter 10, Paragraph 10206-A(4) of the Joint Federal Travel Regulations (JTR) in support of his claim that he did not submit false information. This section states that in joint legal custody cases, when physical custody changes from one parent to another, each parent is authorized a housing allowance for the child during the period the child is actually in that parent's physical custody. He states that he believed his former spouse was only claiming their oldest child, not their youngest. He states that he received no court-martial or Article 15 (Non-Judicial Punishment (NJP)). He also references the results of a polygraph examination dated July 23, 2018, which supports his claim that he did not believe he was collecting BAH that he was not entitled to receive.

Discussion

Under DoD Instruction 1340.21 (May 12, 2004), the claimant must prove, by clear and convincing evidence, on the written record that the United States is liable to the claimant for the amount claimed. All relevant evidence to prove the claim should be presented when a claim is first submitted. In the absence of compelling circumstances, evidence that is presented at later stages of the administrative process will not be considered.

The burden of establishing fraud which will support either the denial of a claim or recoupment action in the case of an already paid claim rests upon the party alleging it, and must be proven by evidence sufficient to overcome the existing presumption in favor of honesty and fair dealing. Circumstantial evidence is competent for this purpose, provided it affords a clear inference of fraud and amounts to more than suspicion or conjecture. However, if the circumstances are as consistent with honesty and good faith as with dishonesty, the inference of honesty must be drawn. *See* B-220019, *supra*, *citing* B-187975, July 28, 1977. The question of whether fraud exists depends on the facts of each case. Although it is the member's responsibility to accurately complete a voucher to ensure proper payment, it may not be assumed automatically that a member who has not observed all the requirements of the pertinent regulations in completing a voucher is filing a fraudulent claim. Innocent mistakes are made and shortcuts are sometimes taken in the completion of vouchers. Not every inaccuracy on a voucher should be equated with an intent to defraud the government. Generally, when discrepancies are minor, small in total dollar amounts, or when they are infrequently made, a finding of fraud would not normally be warranted absent the most convincing evidence to the contrary. By the same token, when discrepancies are glaring, involve greater sums of money, or are frequently made, a finding of fraud could be more readily made, absent a satisfactory explanation from the claimant. *See* DOHA Claims Case No. 2013-CL-081301.2 (December 23, 2013); DOHA Claims Case No. 2012-CL-121902.2 (April 30, 2013); and DOHA Claims Case No. 2011-CL-071801.2 (May 21, 2012).

The Department of Defense Financial Management Regulation (DoDFMR), Volume 5, Chapter 12 defines a fraudulent claim as any intentional deception designed to unlawfully deprive the United States of something of value or to secure from the United States a benefit, privilege, allowance, or consideration to which a member is not entitled. Paragraph 120201 in pertinent part states:

Inaccuracy of a claim is not proof of intent to defraud the government. When minor discrepancies exist because of clerical or computation errors, misunderstanding of procedure, or failure to properly document, the intent to deceive is less likely, thus decreasing the probability of a finding of fraud without evidence.

In this case, the Air Force and DFAS found sufficient evidence in the record to establish that the member submitted fraudulent claims for BAH. The AFOSI investigation clearly revealed that the member submitted the AF 594s claiming that he had custody of one of his children for the purpose of obtaining BAH at the dependent rate. Although the record reflects that the member and his former spouse lived in the same state until she made a permanent

change of station (PCS) move in 2014, both children were in her physical custody pursuant to the divorce decree. After her PCS in 2014, at no time did either child reside with the member or visit him outside the occasional holidays and weekends. In fact, the member was deployed after his former spouse made her PCS. In addition, when the member made his own PCS in 2016, he listed his daughter as his primary dependent, and in answer to the question concerning whether he was claiming her as his primary dependent but not in his custody, he answered "N/A." The next question on the form asked if the child resided with a military member, to provide the member's name and duty location. The member did not complete this portion of the form and then digitally signed it.

As for the member's assertion that he was filing the forms in conformance with JTR ¶ 10206-A(4), we note that pursuant to the divorce decree, the member did not have primary and physical care, custody and control of his children, but he did have certain visitation rights. Therefore, the member's situation is accurately reflected in JTR ¶ 10206-A(1), which states:

Unless the members agree to the contrary, the custodial parent is authorized a housing allowance for the child(ren) regardless of the child support amount received by that member. In addition to the court order, a separate notarized agreement between the members must be provided for the non-custodial member to receive a housing allowance for the child(ren).

The record reflects that during the period the member claimed his child for BAH, there were no changes made by the court to the divorce decree and the child custody arrangement incorporated therein.

The fact that the member did not face NJP or punitive administrative action does not affect our analysis of the record evidence. We have long held that the disposition of criminal liability does not determine civil liability. *See* DOHA Claims Case No. 2012-CL-121902.2, *supra*. The burden of proof for conviction of a crime is different from that required for proof in a civil claim. Therefore, an acquittal in a criminal case or no charges being brought against the member under the Uniform Code of Military Justice (UCMJ), does not preclude denial of a claim where fraudulent action is established by sufficient evidence.

The member's submission of a privately administered polygraph examination is not sufficient evidence to overcome the Air Force and DFAS's finding that he submitted fraudulent claims. In *United States v. Scheffer*, 523 U.S.C. 303 (1998), the Supreme Court found that there was simply no consensus that polygraph evidence is reliable; and therefore, held that a *per se* rule excluding it was a rational and proportional means of advancing the legitimate interest in barring unreliable evidence. Therefore, due to the questions concerning the validity of polygraphs, the competence of the examiner, and the reliability of the particular test, DOHA discounts any weight it has in this forum. *See also Milas v. United States*, 42 Fed. Cl. 704 (1999) (relying on *Scheffer*, the Court of Federal Claims upheld the decision of the Board for Correction of Naval Records (BCNR) to discount the weight of a member's polygraph examination because the probative value of the polygraph evidence is questionable since the reliability of polygraph evidence has not been sufficiently established).

Although the member states that he is only claiming the amount of BAH-S that he was entitled to receive during the period of recoupment, our office follows the decisions of the Comptroller General. The Comptroller General held that a fraudulent representation of lodging costs taints the entire item of lodging costs for a given day. We have followed this rule in our decisions. *See* DOHA Claims Case No. 2011-CL-071801.2, *supra*; and DOHA Claims Case No. 05091301 (October 31, 2005).

We have consistently adhered to case precedent that the resolution of a claim upon the presentation of a fraudulent claim against the Government, or one even tainted by the suspicion of fraud or irregularity, is to deny payment. Inasmuch as the record in the instant case contains substantial evidence of making a false claim or irregularity with respect to the filing of forms claiming his child for BAH purposes, payment on the reclaim is not authorized. *See* B-247574, March 18, 1992; and B-225187, June 9, 1987.

Conclusion

The member's request for reconsideration is denied, and we affirm the appeal decision in DOHA Claim No. 2019-CL-031403, dated June 13, 2019, disallowing the claim. In accordance with DoD Instruction 1340.21 ¶ E7.15.2, this is the final administrative action of the Department of Defense in this matter.

SIGNED: Catherine M. Engstrom

Catherine M. Engstrom
Chairman, Claims Appeals Board

SIGNED: Ray T. Blank, Jr.

Ray T. Blank, Jr.
Member, Claims Appeals Board

SIGNED: Gregg A. Cervi

Gregg A. Cervi
Member, Claims Appeals Board