

DATE: February 6, 2023

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In Re: )

[REDACTED] )

Claimant )

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) Claims Case No. 2020-CL-091402.2  
)  
)

**CLAIMS APPEALS BOARD  
RECONSIDERATION DECISION**

**DIGEST**

The well-established general rule is that a claim may be allowed only for an expense authorized by statute or regulation. Further, the burden of proving the existence of a valid claim against the United States is on the person asserting the claim. The claimant must prove by clear and convincing evidence on the written record that the United States Department of Defense is liable under the law for the amount claimed. Federal agencies and officials must act within the authority granted to them by statute in issuing regulations. Thus, the liability of the United States is limited to that provided by law (including implementing regulations). Since military pay entitlements, including allowance for basic allowance for housing (BAH), are governed by statute, the Defense Office of Hearings and Appeals (DOHA) must apply the appropriate statute without regard to equitable considerations.

**DECISION**

A member of the U.S. Army requests reconsideration of the appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2020-CL-091402, dated April 21, 2022.

**Background**

The record reflects that the member, an officer in the Army, sought increased allowances on the basis that his mother was dependent on him for her support. Specifically, during the period 2010 through 2020 the member sought a secondary dependency determination for his mother with the Defense Finance and Accounting Service (DFAS) for the purposes of receiving

basic allowance for housing (BAH) at the dependent rate and the issuance of the Uniformed Services Identification and Privilege (USIP) card for her. In 2010, DFAS denied the member's initial request for secondary dependency status for his mother. At that time, the member's mother resided with him. The record reflects that the member was assigned to a duty station in Washington, D.C., in August 2011. In 2011 and 2012, DFAS approved his mother's secondary dependency status. In 2012, the member sold his house to his mother for \$162,000.00, and loaned her \$107,000.00, for a term of 84 months at a 1% interest rate. The member calculated the monthly mortgage to be \$1,319.44. After the member submitted his annual recertification package in 2013, DFAS requested further documentation from the member, but it was not received. Therefore, DFAS did not make a dependency determination in 2013, but failed to terminate the member's BAH and his mother's USIP card. In 2014, the member's mother was again approved as the member's secondary dependent. In 2015, his mother was disapproved twice, but was eventually approved as his secondary dependent. In 2016, the member did not submit the required annual recertification documentation, but DFAS failed to terminate the member's BAH and his mother's USIP card. From 2017 until 2019, DFAS approved the member's mother's secondary dependency status. In 2020, the Army and DFAS disapproved the member's application for secondary dependency of his mother on the basis that her income was more than half of her monthly expenses. Therefore, the member's claim for BAH at the with dependent rate was denied. DFAS advised the member that he had the right to reapply, but if he did choose to do so, he should submit: (1) receipts with dates and proof of payment made for furniture, appliances and home repairs; (2) billing statements for the medical and USIP expenses; (3) current proof of all incomes listed that state what the monthly payment amount is; and (4) bank statements for named accounts for the full calendar year of 2020.

On April 30, 2020, the member requested that his secondary dependency request be reviewed by the Army Disbursing officer or designee, and if needed, forwarded to the Defense Office of Hearings and Appeals (DOHA). DFAS reviewed the member's reapplication and determined that the member's mother no longer met the criteria for approval as a secondary dependent for 2020. DFAS found that in the member's 2020 submission, he included the \$1,319.44 monthly mortgage in Block 6 - Household Expenses, of the DD Form 137-3, *Dependency Statement – Parent*. Both the Army and DFAS determined that as outlined in Block 11 of that form, the monthly mortgage payments should have ended in February 2019. Further, as set forth in Block 8 of that form, the home was valued at \$285,000.00, and therefore the member's mother had 100% equity in it. Thus, DFAS concluded that since the member's mother now owned the home, solely in her name, mortgage free, then Block 6 of the DD Form 137-3 should have been entered "none." DFAS then calculated the member's mother's total monthly income to be \$3,157.00 and half of her monthly expenses to be \$2,184.00. DFAS determined that her dependency was not established because her monthly income exceeded more than half of her monthly expenses. The member appealed DFAS's determination, contending that DFAS miscalculated his mother's income. He also stated that his mother's situation is unique. He stated that his father passed away in 1989, and he was his mother's sole provider and care-giver, and takes care of 90% of the requirements to maintain her health and well-being. He explained his mother's health issues and stated that her fragile state requires daily care and oversight. He maintained that the unique circumstances in his situation could not be captured on the DD Form 137-3. He alleged that the rules established by the Department of Defense (DoD) Financial Management Regulation (DoDFMR) in limiting dependency status to situations where a parent's

income be less than one half of the parent's expenses, and the member's contributions be more than one half of the parent's expenses result in an unfair determination, and are against equity and good conscience. He stated that DFAS ignored a critical portion of the applicable regulation in making its secondary dependency determination. He cited the DoDFMR, Volume 7A, Chapter 26 (version December 2019) concerning the "Family Unit Rule" for support of his argument that DFAS's determination resulted in a manifest injustice.

In the DOHA appeal decision, the attorney examiner upheld DFAS's denial of the member's claim. The attorney examiner found insufficient evidence to show that the Army and DFAS's secondary dependency determination was in error. He noted that the Family Unit Rule applies when either the claimed dependent lives with a member or the claimed dependent lives with others outside of the member's home. As DFAS previously explained, other considerations may be made if the application of the Family Unit Rule results in a manifest injustice. However, these other considerations by statute rest with the Secretary concerned, in this case the Secretary of the Army. The attorney examiner determined that in any event, the Family Unit Rule did not apply because the member's mother lived by herself in the house she owned.

In his reconsideration request, the member states that DFAS misapplied the regulations when DFAS counted uninvested capital as a capital asset of his mother. He further argues that DFAS's interpretation of the regulations caused a manifest injustice. In this regard, he states that DFAS approved his mother's dependency status six times over the past ten years. He states that DFAS has now arbitrarily determined its determination was incorrect. He states that DFAS is now demanding over \$45,000.00 from him in repayment of approved BAH right before his planned retirement. He attaches his mother's medical records reflecting her cognitive impairment. He states that this information further demonstrates the necessity of considering non-financial factors in evaluating a parent's dependency status. He states that the regulations provide for equity and good conscience in determining dependency as set forth under DoDFMR ¶ 260304-B.

## **Discussion**

In 1996, Congress transferred the authority once held by the Comptroller General of the United States (General Accounting Office, now the Government Accountability Office or (GAO)), to settle claims for military pay and allowances, including retired pay and survivor benefits under 31 U.S.C. § 3702(a)(1)(A), to the Director of the Office of Management and Budget (OMB). *See* Section 211 of Public Law No. 104-53, 109 Stat. 514, 535, November 19, 1995. The Director of OMB delegated his authority to the Secretary of Defense effective June 30, 1996. The authority of the Secretary of Defense in this regard was later codified in Section 202(n) of Public Law No. 104-316, 110 Stat. 3826, October 9, 1996. DOHA exercises the authority transferred and delegated to the Secretary of Defense. Under 31 U.S.C. § 3702(a)(1), DOHA's authority to decide cases such as this is derived from the same authority that provided the Comptroller General the authority to decide such claims. Specifically, under 31 U.S.C. § 3702(a)(1), DOHA settles claims involving uniformed service member's pay, allowances, travel, transportation, payments for unused accrued leave, retired pay, and survivor

benefits. The implementing regulation for DOHA's authority is set forth in Department of Defense Instruction 1340.21 (May 12, 2004).

The well-established general rule is that a claim may be allowed only for an expense authorized by statute or regulation. *See* DOHA Claims Case No. 2012-CL-070601.2 (October 16, 2012). The rights of individuals to receive benefits under Federal statutes are by virtue of the language of the statute and subject to the conditions and limitations contained therein. *See* Comptroller General Decision B-203903, Feb. 11, 1985. When the language of a statute is clear on its face, the plain meaning of the statute will be given effect and that plain meaning cannot be altered or extended by administrative action. *See* DOHA Claims Case No. 05021409 (March 30, 2005), and Comptroller General Decision B-230854, Sept. 1, 1988. Statutory provisions with unambiguous and specific directions may not be interpreted in any manner that will alter or extend their meaning. *See* 61 Comp. Gen. 461 (1982). The interpretation of a statutory provision, as expressed in the implementing regulations by the agency responsible for execution of the statute, is entitled to great deference and will be sustained and deemed consistent with Congressional intent unless found to be arbitrary, capricious, an abuse of discretion or contrary to the statutory purpose. *See* DOHA Claims Case No. 2018-CL-101803.2 (March 24, 2020); DOH Claims Case No. 2010-CL-092106.2 (January 20, 2011); DOHA Claims Case No. 2010-CL-071901 (August 31, 2010); and DOHA Claims Case No. 2010-CL-020202.2 (April 20, 2010).

Under 37 U.S.C. § 403, a member who receives basic pay is generally entitled to BAH, unless assigned to appropriate government housing for himself and his dependents. BAH is paid at the with-dependent or without-dependent rate. Section 403(a)(2) requires that a member, in accordance with regulation, make a certification to the Secretary concerned indicating the status of the dependent, prior to becoming entitled to BAH at the with-dependent rate. Pursuant to 37 U.S.C. § 403(k)(1), the Secretary of Defense shall prescribe regulations for the administration of the payment of BAH to members of the uniformed services. Under section 403(k)(2), the Secretary concerned may make dependency and relationship determinations. In addition, when warranted by the circumstances, the Secretary concerned may reconsider and change or modify any such determination. Section 403(k)(2) specifically states the following:

The authority of the Secretary concerned under this subsection may be delegated. Any determination made under this section with regard to a member of the uniformed services is final and is not subject to review by any accounting officer of the United States or a court, unless there is fraud or gross negligence.

Dependent is defined in 37 U.S.C. § 401, and can include a member's spouse, child, parent or an unmarried person placed in the legal custody of the member by a court. The definition of "dependent" that applies to the member's mother is listed in 37 U.S.C. § 401(a)(3). It states that the term "dependent" includes a parent of the member if:

- (A) the parent is in fact dependent on the member for more than one-half of the parent's support;
- (B) the parent has been so dependent for a period prescribed by the Secretary concerned or became so dependent due to a change of circumstances arising after the member entered on active duty; and

(C) the dependency of the parent on the member is determined on the basis of an affidavit submitted by the parent and any other evidence required under regulations prescribed by the Secretary concerned.

The regulations regarding BAH promulgated pursuant to 37 U.S.C. § 403, are contained in Chapter 26, Volume 7A of the DoDFMR. Paragraph 460304-B reads, in pertinent part, as follows:

A Service member is authorized a housing allowance on behalf of a parent who depends on the Service member for more than one-half of the parent's support. The parent's income, not counting the Service member's contributions, must be less than one-half of the parent's monthly living expenses and the Service member's contribution must be more than one-half of the parent's monthly living expenses.

Preliminarily, we must stress that DOHA's authority in this case is limited to a review of whether or not the claim is payable under applicable statute and regulation. Again, DOHA has no authority to grant a claim in variance with the law. Therefore, DOHA is precluded from considering equity in determining the allowance of a claim. In addition, we have consistently held that DOHA will not overturn an agency's determination in the area of BAH entitlements unless it lacks any reasonable basis in the record and thus constitutes an abuse of discretion. *See* DOHA Claims Case No. 2010-CL-091206.2, *supra*; and case decisions cited therein. Further, as set forth above, under the specific statutory authority for payment of BAH, the Secretary concerned's determination is final and not subject to review unless there is fraud or gross negligence. *See* 10 U.S.C. § 403(d)(2). Therefore, the statutory standard of review is far stricter than the standard of "abuse of discretion." In any event, our review authority is severely limited by this specific statutory section. *See* B-249667, Feb. 8, 1992; B-205314, June 8, 1982; and B-195383, Nov. 6, 1979. In this case, the Army and DFAS made the determination that the member was not entitled to receive BAH at the dependent rate on behalf of his mother in 2020. Both the Army and DFAS came to this conclusion on the basis that the member failed to establish his mother's dependency status because her monthly income exceeded more than half of her monthly expenses. In calculating the member's mother's income, while not requiring her to liquidate her assets, DFAS included the total interest earned by her capital assets. We find no basis to question DFAS including this amount in its calculation, especially since the DD Form 137-3, section 9B, required it to be included. Therefore, DOHA finds no error in the administrative determination, made by the Army and DFAS, that the member's mother was not in fact dependent on the member for support within the meaning of the applicable statute and regulation during the period in question.

The member raises DoDFMR ¶ 260304-B-1, and the language contained therein to support his mother dependency's status on the basis that a manifest injustice occurred by the fact the Army and DFAS strictly construed the application of the Family Unit Rule to the facts and circumstances in this case. However, we see no application of the rule to the circumstances in this case. First, there is no evidence that DFAS applied the Family Unit Rule. By the plain language contained in the regulation itself, the discretion to consider principles of equity and good conscience in determining the dependency status of a member's parent rather than the Family Unit Rule is for situations in which a parent resides in a charitable institution, public or

private. See DoDFMR ¶ 260304-B. Historically, the rule’s application evolved from situations in which a member’s parents resided in the same household. The general rule was that the dependency status of the mother or father was determined on the basis of a family unit, and the family income ordinarily must be considered as a general fund for the support of the parents. See, e.g., *Meyer v. United States*, 157 Ct. Cl. 141 (1962) (discussing the Comptroller General’s role in reviewing the Secretary concerned’s application of the Family Unit Rule to a member’s claim for increased allowances based on mother’s dependency status). As explained by the attorney examiner in the appeal decision, the Family Unit Rule does not apply in this case because the member’s mother lived alone in her own home.

As for any resulting indebtedness for the period in question resulting from erroneous payments made to the member for BAH at the with-dependent rate that the Army and DFAS is seeking to collect, we note that the member has the right to request waiver of the debt under the authority of 10 U.S.C. § 2774. If the member wishes to pursue waiver of his debt, he should submit his request for waiver of indebtedness to DFAS. He may make this request by submitting a DD Form 2789, *Waiver/Remission of Indebtedness Application*, to DFAS.

### **Conclusion**

The member’s request for reconsideration is denied, and we affirm the appeal decision dated April 21, 2022. 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

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Catherine M. Engstrom  
Chairperson, Claims Appeals Board

SIGNED: Richard C. Ourand, Jr.

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Richard C. Ourand, Jr  
Member, Claims Appeals Board

SIGNED: Jennifer I. Goldstein

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Jennifer I. Goldstein  
Member, Claims Appeals Board