KEYWORDS: Military member pay and allowance claim; Basic Allowance for Housing (BAH)

DIGEST: The burden of establishing liability of the United States to pay a claim is on the claimant. A reserve component member's (without a dependent) claim for basic allowance for housing (BAH) while attending accession training is denied because he has not proved, as set forth under 37 U.S.C. § 403(g), that at the time he was called to active duty to attend accession training, he was maintaining a primary residence for which he was responsible for rental payments.

CASENO: 2010-CL-092106.2

DATE: 1/20/2011

DATE: January 20, 2011

In Re:	)	
[REDACTED]	)	Claims Case No. 2010-CL-092106.2
Claimant	)	

CLAIMS APPEALS BOARD
RECONSIDERATION DECISION

DIGEST

The burden of establishing liability of the United States to pay a claim is on the claimant. A reserve component member's (without a dependent) claim for basic allowance for housing (BAH) while attending accession training is denied because he has not proved, as set forth under 37 U.S.C. § 403(g), that at the time he was called to active duty to attend accession training, he was maintaining a primary residence for which he was responsible for rental payments.

DECISION

A reserve component member of the Air National Guard requests reconsideration of the November 12, 2010, appeal decision of the Defense Office of Hearings and Appeals (DOHA), in DOHA Claim No. 2010-CL-092106. In that decision, DOHA disallowed the member's claim for basic allowance for housing (BAH) while he was attending basic military training (BMT).

Background

The record shows that the member enlisted in the Air National Guard on March 9, 2010. At the time of his enlistment, the member's home of record was listed as the address of his aunt and uncle's house.[1] The member remained in drill status pending performance of BMT. By orders issued on May 24, 2010, the member was to attend BMT on June 15, 2010. The member's address listed on his orders also was the address of his aunt and uncle's house. The record reflects that the member finished his BMT on August 16, 2010. However, the record reflects that the member attended further training beginning August 27, 2010.

Prior to attending BMT, the member submitted documentation to his financial services officer (FSO) for receipt of BAH at the single rate when assigned to BMT. On or about April 10 or 11, 2010, the member presented documents to his FSO to show he had entered into a rental agreement on February 1, 2010, for a property owned by his cousin. After reviewing the member's request for BAH, the FSO found that the rental agreement "did not include information normally found on a rental agreement." Specifically, the rental agreement was notarized on March 22, 2010, after its purported start date. Also, there was no unit number listed, and the zip code was incorrect for the address of the property. On April 16, 2010, the FSO requested the member obtain a new rental agreement with complete and accurate address information and historical proof of payment of rent since February 1, 2010. On May 21, 2010, the member provided a new rental agreement dated April 30, 2010. The member mentioned to the clerk that he was renting from his cousin (who also was an airman). The clerk passed on the information to the FSO. On June 6, 2010, the FSO advised the member in writing that his claim for BAH was denied. The FSO stated that according to Air Force guidance, specifically an Air Force Reserve Component (AFRC) Instruction issued on April 24, 2008,[2] a rental agreement between family members disqualifies a member from receiving BAH. He also considered the following factors in denying the claim: 1. The member's original agreement was signed and notarized two months after it purported to start; 2. The address on the notarized agreement was incorrect; 3. The member enlisted approximately five weeks after he moved into the rental property but did not list this address on his enlistment paperwork; 4. The agreement is with a relative (the member was not on the primary mortgage or lease); 5. The member did not provide

[1]The member's enlistment order, Special Order P-32, dated March 9, 2010, lists the member's home of record (HOR) as the address of his aunt and uncle.

[2]The Air Force policy guidance is entitled Basic Allowance for Housing (BAH) for Non-Prior Service (NPS) Basic Military Trainees (BMT) in Accession Pipeline Training.

adequate proof of payment even though the FSO requested proof back to February 1, 2010 (The only proof shown was a phone transfer of funds the same day the FSO contacted the member about the problem with the agreement on April 16, 2010.); and 6. The new rental contract delivered to the FSO was not notarized. By email message dated June 7, 2010, the National Guard Bureau (NGB), agreed with the FSO.

The member subsequently appealed his BAH claim to the Defense Finance and Accounting Service (DFAS). DFAS upheld the agency's denial stating that the notarized statement was insufficient to prove a formal, legal lease, and the member had not submitted consistent, historical documentation of payments for the rental property. DFAS cited the implementing regulation authorizing BAH for a reserve component member without dependents attending accession training, Volume 1, Joint Federal Travel Regulations (JFTR), paragraph U10416-D(2), and the AFRC Instruction interpreting ¶ U10416-D(2).

The DOHA adjudicator upheld the denial of the claim. However, the adjudicator found that the revised rental agreement was valid under state law. He also found that the cited AFRC Instruction could not be followed because it was not reviewed prior to issuance as required by DoD regulation. The adjudicator denied the member's BAH claim on the grounds that the member had failed to prove he paid rent during the period he attended BMT. The adjudicator cited 1 JFTR ¶ U2510-A, concerning documentation requirements for lodging expenses. The adjudicator also cited our Office's governing regulation, DoD Instruction 1340.21 (hereafter Instruction) (May 12, 2004). Under the Instruction, the claimant must prove, by clear and convincing evidence, on the written record, that the United States is liable to him for the amount claimed. All relevant evidence to prove the claim should be presented when a claim is first submitted.

In the member's request for reconsideration of the appeal decision, he states, through his authorized personal representative,[3] that the adjudicator conceded the legitimacy of his rental agreement, as well as the lack of applicability of the AFRC Instruction. However, the member alleges that the adjudicator erred when addressing his claim as a claim for BAH at the transit rate (BAH-T). He states that his claim has always been for BAH. Therefore, he argues that the requirement to provide receipts is not applicable to his BAH claim. He further states that if receipts are required, the DOHA adjudicator erred in requiring the member to submit receipts proving payment of rent prior to the issuance of the member's orders. He cites Table U10E-1 of ¶ U10400 of 1 JFTR, which he states defines the time for the BAH determination as "at the time called/ordered." He also argues that if receipts are required, he should have the opportunity to submit them. He attaches a document titled "Rent Receipt," reflecting monthly payments made from March to November, signed by his cousin.

Discussion

[3]The member has authorized his aunt to act as his agent in this matter.

Our Office must render decisions based on applicable statutes, regulations, and prior administrative decisions. The general rule is that reimbursement may be paid only for an expense authorized by statute or regulation. Furthermore, to the extent that facts are in issue, the governing regulation is DoD Instruction 1340.21, and under the Instruction the claimant must prove, by clear and convincing evidence, on the written record, that the United States is liable to him for the amount claimed. *See* Instruction ¶ E5.7. Here, the FSO, DFAS and the DOHA adjudicator determined that the evidence presented was insufficient to show that the member was responsible for making rental payments at his primary residence at the time he was ordered to BMT. This determination will not be overturned by our Office unless it lacks any reasonable basis in the record and thus constitutes an abuse of discretion. *See* DOHA Claims Case No. 2010-CL-020202.2 (April 20, 2010); DOHA Claims Case No. 09031102 (March 30, 2009); 71 Comp. Gen. 389 (1992)**; and B–261168, July 18, 1995.**

The purpose of BAH is to at least partially reimburse a member for the cost of housing when he does not receive government-provided housing. The entitlement to BAH is governed by 37 U.S.C. § 403. Section 403(g) sets out the law for BAH as it applies to reserve component members. Effective January 28, 2008, Public Law 110-181 amended 37 U.S.C. § 403(g) to provide BAH for reserve component members without dependents who attend accession training while maintaining a primary residence. Section 403(g)(1) states:

> **(g) Reserve members. - -(1) A member of a reserve component without dependents who is called or ordered to active duty to attend accession training, in support of a contingency operation, or for a period of more than 30 days . . . may not be denied a basic allowance for housing if, because of that call or order, the member is unable to continue to occupy a residence - -**
>
> **(A) which is maintained as the primary residence of the member at the time of the call or order; and**
>
> **(B) which is owned by the member or for which the member is responsible for rental payments.**

Prior to this amendment, BAH was only authorized for reserve component members during accession training if they had dependents. A review of the statutory history shows that with the enactment of this amendment, Congress intended to allow reserve component members without dependents to receive BAH during accession training if they are making rental or mortgage payments on a primary residence. *See* Congressional Budget Office Estimate, H.R. REP. No. 146, 110th Cong., 1st Sess., pt. 2, at 7 (2007).

The provision of the regulation that implements the amendment to 37 U.S.C. §

403(g) is found in paragraph ¶ U10416-D(2), 1 JFTR. It provides that a reserve component member without a dependent in accession training may not be denied BAH if the member maintains a primary residence at the time he is called or ordered to active duty and continues to be responsible for rent.[4] It explains that a member without a dependent in the accession pipeline is authorized basic allowance for housing at the transit rate (BAH-T) when in a travel, leave en route or proceed time status while transferring from the initial entry level training location, between training locations and to the first permanent duty station (PDS). Generally, a member is not authorized BAH while at the training locations since government quarters are assigned at the PDS. However, the regulation explains that effective February 1, 2008, a reserve component member without a dependent at accession training is authorized BAH based on the primary residence location at the time called or ordered to active duty if the member maintains a primary residence at the time he is called or ordered to active duty and continues to be responsible for rent.[5]

Preliminarily, in this case, we find it unnecessary to discuss the applicability of the AFRC Instruction to the claim. We find the statutory language to be dispositive. The statute and the JFTR require that in order to receive BAH, a reserve component member without a dependent must maintain a primary residence at the time he is called or ordered to active duty for accession training and continue to be responsible for rent at that residence. The address reflected on the member's orders dated May 24, 2010, calling him to active duty for BMT, is his aunt and uncle's residence. In addition, when enlisting, the member did not list the rental address on any paperwork (The address listed was his aunt and uncle's residence.) even though he was supposedly already living at the rental address.[6]

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[4]Under 1 JFTR ¶ U10416, Table U10E-12 further clarifies the situation. Rule 7 applies. If the member is a new accession in the pipeline in a travel, leave en route or proceed time status while transferring from the initial training location, between training locations and to the first PDS and the member has no dependents, then "[S]tart the transit rate when the member is in a travel status between duty/training stations and start the new PDS-based BAH rate the day the member reports to the new PDS (including a training location for 20 or more weeks). For an RC member, pay BAH based on the primary residence location at the time called/ordered to active duty for the accession training duration if the member maintains a residence and continues to be responsible for rent, or owns the residence."

[5]We believe that the DOHA adjudicator's characterization of the member's claim as BAH-T, rather than BAH, resulted from the way in which the amendment to 37 U.S.C. § 403(g) was incorporated into the JFTR. The amendment was incorporated in ¶ U10416, which is titled, "Member in Transit." This section of Chapter 10, Housing Allowances, in the JFTR generally deals with BAH-T.

[6]In his original appeal to our Office, the member stated that in December 2009, he and his cousin planned and executed an independent living scenario in which his cousin would buy a home, and the member would agree to rent from him. The member's aunt and uncle co-signed

At the time of enlistment, his aunt and uncle's address was his place of residence on his state driver's license.[7] His enlistment orders reflected his home of record (HOR) as his aunt and uncle's address.[8] The Alpha Roster for his unit listed his aunt and uncle's address. The only documentation submitted by the member (with the exception of the rental agreements) reflecting his address as his cousin's is a copy of an on-line employee profile dated June 13, 2010, for the member's civilian employment. Further, the member's April 2010 bank statement reflecting the phone transfer payment lists a completely different address than his cousin's and his aunt and uncle's addresses. Therefore, we conclude that the evidence is insufficient to reflect that he was maintaining a primary residence at his cousin's address. The member's primary residence at the time the member was called to active duty for accession training was his aunt and uncle's house. We need not go further in our analysis since there is no evidence that the member was obligated to pay rent or was making rental payments to his aunt and uncle for his occupancy at their house. However, even if the evidence showed the member's primary residence was his cousin's address at the time he was ordered to BMT, there is nothing in the record to prove that the member had a continuing obligation to make rental payments to his cousin while he attended BMT. As stated in the statute, he must show that he was maintaining a primary residence at the time he was ordered to accession training for which he was responsible for rental payments. The original rental agreement was created after the fact (or at least notarized two months after the agreement supposedly started). Finally, the member did not provide adequate proof of payment of the rent for this residence at the time it was requested by the FSO.[9]

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on the mortgage for their son's home. The member stated that he moved into his cousin's home in January 2010 and was allowed to have one month of free rent. In February 2010 the member obtained civilian employment. On March 9, 2010, the member enlisted.

[7]The member's state driver's license with his aunt and uncle's home as his address was issued on January 19, 2010.

[8]Appendix A of the JFTR defines home of record as the place recorded as the individual's home when commissioned, appointed, enlisted, inducted, or ordered into a tour of active duty. Travel and transportation allowances are based on the officially corrected recording in those instances when, through a bona fide error, the place originally named at time of current entry into the Service was not in fact the actual home. Any such correction must be fully justified, and the home, as corrected, must be the member's actual home upon entering the Service, and not a different place selected for the member's convenience. *See also*, DOHA Claims Case No. 2009-WV-040805.3 (August 12, 2010)(discussing adequate proof of establishment of a new home of record from the one originally recorded at the time the member entered active duty).

[9]We point out that proof of the obligation to pay rent is troublesome when a member is alleging he is obligated to do so with a relative. Although we are unable to apply the AFRC Instruction, there is some basis for disqualifying agreements between family members as proof

Accordingly, for the reasons stated above, this Office finds no basis to change the determination of the appeal decision.

Conclusion

The request for reconsideration is denied, and the appeal decision of November 12, 2010, is affirmed. In accordance with Department of Defense Instruction 1340.21, ¶ E7.15, this is the final administrative action of the Department of Defense in this matter.

Signed: Michael D. Hipple

Michael D. Hipple
Chairman, Claims Appeals Board

Signed: Jean E. Smallin

Jean E. Smallin
Member, Claims Appeals Board

Signed: Catherine M. Engstrom

Catherine M. Engstrom
Member, Claims Appeals Board

of entitlement to BAH. Paragraph U4129-E of 1 JFTR prohibits reimbursement for lodging costs when staying with friends and family while on temporary duty (TDY). The Comptroller General has recognized that the prohibition against reimbursing friends and relatives is to eliminate potential abuses from occurring in connection with claims involving lodging with friends or family. *See* DOHA Claims Case No. 2009-WV-040805.3 (August 12, 2010), DOHA Claims Case No. 09031102 (March 30, 2009), and 60 Comp. Gen. 57 (1980). While this does not apply directly to BAH payments because they are determined without regard to the amount a specific member pays for rent, a mortgage, etc., we have applied it to whether or not a member used the erroneously paid BAH for housing expenses for himself and his dependents under the waiver statute, 10 U.S.C. § 2774. *See* DOHA Claims Case No. 2009-WV-040805.3, *supra*.