

DATE: August 1, 2013

In Re:)

[REDACTED])

) Claims Case No. 2011-CL-072502.3

Claimant)

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

Claims against the government may be allowed only for expenses authorized by statute or regulation. 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.

DECISION

A member of the U.S. Marine Corps Reserve requests reconsideration of the April 24, 2013, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2011-CL-072502.2. In that decision, this office denied the member's claim for *per diem* and lodging expenses in the amount of \$69,666.67.

Background

Pursuant to orders issued on February 24, 2010, the member was ordered to active duty for annual training by Marine Corps Mobilization Command from his address in Cleburne, Texas, to Camp Smith, Hawaii, for 13 days from March 4, 2010, through March 16, 2010. Under these orders, his address in Texas was the Place from Which Called/Ordered to Active Duty (PLEAD). After performance of annual training, the member performed individual drill training (IDT) from March 17, 2010, through April 10, 2010. Pursuant to Activation-ADOS (Active Duty Operation Support) Contingency orders issued on March 26, 2010, the member was ordered to active duty for 202 days to report to the Commanding Officer, Camp Smith, from April 11, 2010, through October 29, 2010. These orders stated that the member's address in Texas was his PLEAD and authorized *per diem* in excess of 180/139 days in accordance with

volume 1, Joint Federal Travel Regulations (JFTR), paragraph U7150. The member acknowledged receipt of these orders at Camp Smith. Orders dated October 13, 2010, modified the March 26, 2010, orders to lengthen the member's tour to 234 days, ending on November 30, 2010. Orders issued on November 23, 2010, modified the October 13, 2010, orders to lengthen the member's active duty to 461 days from April 11, 2010, through July 15, 2011.¹

The member submitted vouchers claiming *per diem* for his active duty tour during the period April 11, 2010, through May 31, 2011, totaling \$69,666.67. The Defense Finance and Accounting Service (DFAS) subsequently denied the member's claim. DFAS determined that the member had traveled to Camp Smith for annual training from his PLEAD in Texas. However, the member then performed IDT. Therefore, the member experienced a break in service exceeding one full day when he performed IDT. Thus, when the member entered a new period of service by being ordered to active duty in conjunction with his orders for Activation ADOS Contingency, his PLEAD changed to Camp Smith. Since the member's new PLEAD was Camp Smith, he could not be paid *per diem* for duty at the PLEAD.

The member appealed DFAS's denial of his claim to our office. The DOHA adjudicator disallowed the claim and the member subsequently requested reconsideration of that denial. In his reconsideration request, he argues that he did not have a break in service.

Discussion

The burden of proving the existence of a valid claim against the United States is on the person asserting the claim. A 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. *See* DoD Instruction 1340.21 (Instruction) ¶ E5.7 (May 12, 2004). 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). The interpretation of a statutory provision and implementing regulation by those charged with their execution, and the implementation of them by means of a consistent administrative practice, are to be sustained unless shown to be arbitrary, capricious or contrary to law. *See* DOHA Claims Case No. 05033105 (November 30, 2005); DOHA Claims Case No. 05021409 (March 30, 2005); and DOHA Claims Case Nos. 02101611 through 02101635 (December 12, 2002). Thus, a claimant must prove that DFAS's interpretation or implementation of its authority was arbitrary, capricious or contrary to law. *See* Instruction ¶ E7.3.4 and DOHA Claims Case No. 07032201 (April 4, 2007).

Travel and transportation allowances for members of the reserve components (RC) are governed in part by 37 U.S.C. § 474, which provides in pertinent part as follows:

¹While this case and those of similarly situated members turn on the issue of the PLEAD, another issue is raised by the cases. While the members were ordered to perform temporary duty under contingency orders under 1 JFTR ¶ U7150-F2b(2), such orders are intended to be the exception rather than the rule. The record is silent as to whether proper consideration was given to issuing permanent change of station orders to this member and to others similarly situated, given the length of the TDY orders.

(a) Except as provided in subsection (f) and under regulations prescribed by the Secretaries concerned, a member of a uniformed service is entitled to travel and transportation allowances for travel performed or to be performed under orders, without regard to the comparative costs of the various modes of transportation—

The DoD-chartered Per Diem, Travel and Transportation Allowance Committee (PDTATAC) publishes the JFTR. The JFTR directly implements the travel and transportation entitlements authorized by law for members of the Uniformed Services and thus has the force and effect of law. Volume 1 of the JFTR, paragraph U7150, change 278, February 1, 2010, was the relevant regulation in effect at the time of the member's travel. Under paragraph U1750A1b, a RC member called to active duty may not be paid *per diem* when both the member's home/PLEAD and place of active duty are in the corporate limits of the same city or town, the member commutes daily between home/PLEAD and the place of active duty, or where the home/PLEAD and place of active duty are within a reasonable commuting distance of each other.²

Appendix A, 1 JFTR contains the definition of PLEAD and states that the PLEAD changes only if there is a break in service exceeding one full day, in which case it is the place of entry into the new period of service.³

The member was released from active duty effective March 16, 2010, while in Hawaii. The member performed IDT during the period March 17, 2010, through April 10, 2010, while in Hawaii. The member's performance of IDT constituted a break in service exceeding one full day.⁴ The member then entered a new period of service when he was ordered to active duty at Camp Smith. Thus, the member's PLEAD became Camp Smith. Although the member argues that IDT is active duty and thus, he did not experience a break in service, active duty is defined for pay and allowance purposes for the uniformed services under 37 U.S.C. § 101(18) as full-time duty in the active service of a uniformed service, and includes full-time training duty, annual training duty, full-time National Guard duty, and attendance, while in the active service, at a school designated as a service school by law or by the Secretary concerned. *See also* 1 JFTR Appendix A. In addition, the term active service means service on active duty. *See* 37 U.S.C. § 101(20). The term IDT is defined under a separate section of 37 U.S.C. § 101.⁵

²The language in 1 JFTR U7150 changed from "home or PLEAD" to "home/PLEAD," by Change 152, August 1, 1999. This change was merely stylistic with no substantive effect. Therefore, no *per diem* is payable to a member if either the member's home or PLEAD and place of active duty are in the corporate limits of the same city or town, the member commutes daily between either his home or PLEAD and the place of active duty, or where his home or PLEAD and place of active duty are within a reasonable commuting distance of each other.

³ Appendix A, 1 JFTR, change 286/540, October 1, 2010, was the regulation in effect at the time of the member's travel.

⁴Although "break in service" is not defined in the 1 JFTR, it is defined under Volume 7A, Chapter 1 of the Department of Defense Financial Management Regulation, DoD 7000.14-R. Under paragraph 010203.A.5, a break in service is defined as being "released from active duty, discharged."

⁵Under section 101(22) the term IDT "means duty prescribed for members of a reserve component by the Secretary concerned under section 206 of this title or any other law; and special additional duties authorized for members of a reserve component by an authority designated by the Secretary concerned and performed by them on a voluntary basis in connection with the prescribed training or maintenance activities of the units to which they are assigned; and includes those duties when performed by members of a reserve component in their status as members

Therefore, reimbursement of the amount the member claims for *per diem* and lodging expenses is denied in accordance with established law and regulations.

Conclusion

The member's request for relief is denied, and we affirm the April 24, 2013, appeal decision. In accordance with DoD Instruction 1340.21 ¶ E7, this is the final administrative action of the Department of Defense in this matter.

Signed: Jean E. Smallin

Jean E. Smallin
Chairman, Claims Appeals Board

Signed: Catherine M. Engstrom

Catherine M. Engstrom
Member, Claims Appeals Board

Signed: James E. Moody

James E. Moody
Member, Claims Appeals Board

of the National Guard, but (except as provided in section 206(d)(2) of this title) does not include work or study in connection with a correspondence course of a uniformed service.”