DATE: August 31, 2015

In Re: [REDACTED] Claimant	)))))	Claims Case No. 2012-CL-070601.4

CLAIMS APPEALS BOARD
RECONSIDERATION DECISION

DIGEST

It is a well-established rule that a claim may be allowed only for an expense authorized by statute or regulation.

DECISION

A retired member of the Army Reserve requests reconsideration of the June 26, 2015, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claims Case No. 2012-CL-070601.3. In that case, this Office denied the member's claim for Basic Allowance for Housing (BAH) and other allowances retroactive to April 2005 based on the member's adoption of his adult sister on September 16, 2014.

Background

Since November 10, 2004, the member's sister, who is incapable of supporting and caring for herself, has lived with him, and he has provided more than one-half of her support. On January 11, 2005, the member was appointed as his sister's guardian. The member claimed BAH based on his sister as his dependent, medical and dental care for her and a United States Identification and Privilege (USIP) card for her. His claim was subsequently disallowed because his sister did not qualify as a dependent for BAH, medical and dental care, and a USIP card under the applicable statutes and regulations.

On September 16, 2014, the member legally adopted his sister. The member then claimed BAH based on his sister as his dependent. On January 21, 2015, the Defense Finance and Accounting Service (DFAS) allowed the member's BAH claim back to the date of the court

order of adoption. The member subsequently claimed BAH retroactive to the date of January 11, 2005, when he was appointed his sister's guardian. He also claimed "other allowances" for his adopted sister.

In the appeal decision, the DOHA adjudicator upheld DFAS's denial of the member's claim for BAH prior to his adoption of his sister. The adjudicator noted that while the relevant statute, 37 U.S.C. § 401, recognizes an adopted child as a child for BAH purposes, it does not address the issue of when the adoption becomes effective. The adjudicator cited case precedent from the Comptroller General and explained that the legal issues involving the adoption of a child by a service member are resolved by consulting the statutes of the state in which the adoption took place. The adjudicator found that under the controlling state's (Virginia) adoption statutes, the member's legal adoption of his sister was effective on September 16, 2014.

The member argues that his claim for BAH should be granted retroactive to 2005 when his sister was placed in his home by the Surrogate Court of Green County, New York, based on the definition contained in 37 U.S.C. § 401(b)(1)(B), which defines a child of a member as:

> An adopted child of the member, including a child placed in the home of the member by a placement agency (recognized by the Secretary of Defense) in anticipation of the legal adoption of the child by the member.

The member further requests that DOHA reconsider the adjudicator's interpretation of 64 Comp. Gen. 333 (1985). The member states that the decision makes clear that the determinative factor in granting the increased housing allowance is the existence of a bona fide parent/child relationship. He states that the decision recognizes that certain adoptions did not create this relationship and members could not receive the increased allowance. He argues that if it is possible that an adoption does not necessarily create a parent/child relationship, then why is it not possible that a parent child relationship exists in the absence of a formal adoption? The member states that DFAS and DOHA have simply recited verbatim previous Comptroller General decisions and statutory language without any analysis of Congressional intent or statutory interpretation. He asks whether it was Congress's intent that he undertake a lengthy and expensive adult adoption in Virginia simply to qualify for an extra housing allowance when the resulting adoption did not change any part of his existing parent/child relationship with his sister.

Discussion

It is a well-established rule 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); DOHA Claims Case No. 05021409 (March 30, 2005). 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. 2011-CL-020701.2 (May 19, 2011); and DOHA Claims Case No. 05021409, *supra*. Statutory provisions with unambiguous and specific directions may not be interpreted in any manner that will alter or extend their meaning. 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. 2011-CL-020701.2, *supra*; and DOHA Claims Case No. 2010-CL-071901.2 (August 31, 2010); and DOHA Claims Case No. 08020701 (February 28, 2008).

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. Dependent is defined in 37 U.S.C. § 401, and can include a member's spouse, child, parent or ward (an unmarried person placed in the legal custody of the member by a court), if that person meets the requirements of the statute. The definition of "dependent" that applies to the member's adopted sister is specifically listed in 37 U.S.C. § 401(a)(2)(B). It states that the term "dependent" includes an unmarried child of the member who is incapable of self-support because of mental or physical incapacity and is in fact dependent on the member for more than one-half of the child's support. The term "child" is defined under 37 U.S.C. § 401(b)(1). The definition of "child" that applies to the member's adopted sister is listed under 37 U.S.C. § 401(b)(1)(B). It states that the term "child" includes an adopted child of the member, including a child placed in the home of the member by a placement agency (recognized by the Secretary of Defense) in anticipation of the legal adoption of the child by the member.

Before we discuss the merits of the member's claim, the Defense Finance and Accounting Service's (DFAS's) determination that the member was re-litigating a claim that had already been adjudicated deserves some discussion. The doctrine of *res judicata* is that a valid judgment rendered on the merits constitutes an absolute bar to a subsequent action on a claim. DFAS applied *res judicata* to the portion of the member's claim involving retroactive payment of BAH back to 2005. DFAS determined that DOHA had made a final, administrative action on July 20, 2012, denying the member's claim for BAH, under the facts and circumstances that his sister was an adult incapacitated ward during that period. Therefore, DFAS found that they had no authority to reconsider the claim. However, the DOHA adjudicator based his decision on the applicable statute, Comptroller General case precedent and the adoption laws of the state of Virginia. An examination of the case precedent issued by the Comptroller General and cited by the DOHA adjudicator reveals that members were claiming housing allowances and other benefits for their adopted minor children during the probationary or pre-adoption custody periods of the adoption process prior to the entry of the final order of adoption. *See* 60 Comp. Gen. 170 (1980); B-214017, Feb. 23. 1984; and B-209495, Apr. 22, 1983. These decisions state that in order for a member to be entitled to dependency benefits on account of an adopted child, a legal adoption must have been accomplished so that, under the applicable state statutes, the child was for all intents and purposes the child of the adopting member during the entire period for which the benefits are claimed. The cases held that the question as to whether, during the period of probationary or pre-adoption custody, a member's adopted child may be considered as a dependent as defined under 37 U.S.C. § 401 is determined by the provisions of the adoption laws of the state having jurisdiction over the adoption proceedings. We note that the cases cited by the adjudicator pre-date a change in the law under 37 U.S.C. § 401, and we can find no relevant case law since the changes were made. Therefore, the member is correct when he cites the language contained under 37 U.S.C. § 401(b)(1)(B). Accordingly, we will examine the merits of

the member's claim that he be granted BAH retroactive to 2005 when his sister was placed in his home by the Surrogate Court of Green County, New York, based on the definition contained in 37 U.S.C. § 401(b)(1)(B).

The member argues that no one has analyzed the legislative history and congressional intent of 37 U.S.C. § 401. We note that prior to December 5, 1991, 37 U.S.C. § 401 only defined "dependent" as a member's spouse, parent with certain statutory requirements and his unmarried child including an adopted child who is under 21 years of age; or is incapable of self-support because of a mental or physical incapacity, and in fact dependent on the member for over one-half of his support. There was no mention of the status of a child placed in the home of a member but not yet legally adopted by the member, nor was there any mention of the status of a ward.[1] On December 5, 1991, Public Law 102-190, § 621, 105 Stat. 1290, amended 37 U.S.C. § 401 to include in the definition of child, "an adopted child of the member, including a child placed in the home of the member by a placement agency for the purposes of adoption." Presumably, the Comptroller General decisions involving pre-adoption periods may have been a catalyst for the change in the law. However, the legislative history of § 621 clearly reflects that the primary purpose of Congress in amending 37 U.S.C. § 401 was to provide medical care to minors who were in the care of members. In 1991 Congress recognized that members and retired members were taking legal custody of minors for humanitarian reasons and were unable to obtain military medical care for them because the minors did not meet the definition of dependent in 37 U.S.C. § 401, as it existed at the time. Congress ordered the Secretary of Defense to submit a report on the feasibility of providing military medical care to such minors, and § 621 was enacted in response to the report.[2] The language under 37 U.S.C. § 401(b)(1)(B) was further amended on October 5, 1994, by Public Law 103-337, § 701, 108 Stat. 2663, by striking out "placement agency for the purpose of adoption" and inserting in lieu thereof "placement agency (recognized by the Secretary of Defense) in anticipation of the legal adoption of the child by the member."

The member argues that his sister was placed in his legal custody in 2005. In this regard, the member was appointed his sister's guardian on January 11, 2005, by the Greene County Surrogate's Court, New York. Therefore, under 37 U.S.C. § 401(b)(1)(A), he argues that he is entitled to receive BAH retroactive to 2005. However, there is no evidence that the member's sister was placed in his home in 2005 by a placement agency in anticipation of her legal adoption. The record reflects that the member did not begin the process of adopting his sister until 2014 and did so in the state of Virginia, not New York. The record is devoid of any procedures the member implemented in the state of Virginia to effect his legal adoption of his sister, save the final order of adoption dated September 16, 2014. In the final order of adoption, the Court found that there was no need to refer the matter for investigation and report or interlocutory order and that the probationary period be omitted. Therefore, there is no evidence that the member's sister was placed in his home in anticipation of adoption. In addition, there is nothing contained in the guardianship concerning the member's intent to adopt his sister. In fact,

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[1]Wards were included among dependents with the enactment of Public Law 103-160, § 623, 107 Stat. 1683 (1993).

[2]*See* H.R. Rep. No. 102-68, 102nd Cong. 1st Sess. (1991). The House Report states that it is the sense of Congress that creative solutions should be found to enable a member to obtain military medical care for a minor who is in the legal custody of the member and is related by blood or adoption to the member.

the letter notifying the member of the guardianship states that the member and another individual (presumably his brother) were both named as guardians. The final order of adoption reflects that the co-guardian gave his consent to the member's adoption. Further, the statutory history of 37 U.S.C. § 401, reveals that in 1991 Congress recognized that members were taking legal custody of minors for humanitarian reasons; but because the minors did not meet the definition of dependent under the statute as it existed at the time the members were unable to obtain military medical care for them. The member's sister was 34 years old in 2005 when the member was appointed her guardian. The term "minor" is derived in civil law which described a person under a certain age as less than so many years. In most states, a person is no longer a minor after reaching the age of 18, the age of majority. *See* Black's Law Dictionary 997 (6th ed. 1990). We note that 37 U.S.C. § 401(a)(2) include as dependents unmarried children under 21 years of age or unmarried children under 23 years of age (enrolled in a full-time course of study in an institution of higher education). Even using these ages for the purpose of defining a minor, the member's sister does not meet the definition. However, since the member adopted his sister, she is considered his child under 37 U.S.C. § 401(b)(1)(B), and continues to be his dependent because she is incapable of self-support because of mental or physical incapacity. *See* 37 U.S.C. § 401(a)(2)(B).

The member insists that 64 Comp. Gen. 333, *supra*, requires the Services to examine certain factors in determining whether a bona fide parent/child relationship exists. However, we note that this decision predates the changes made to the law in 1991, and the changes made in 1993 by adding wards. The member mentions that he has been given incorrect advice since 2005 on how to pursue his claim. He states that had he known he had to adopt his sister in order to receive the extra housing allowance, he would have done so in 2005. There is a rule of long standing that the government is not liable for the erroneous or negligent acts of its officers, agents or employees. *See* DOHA Claims Case No. 98032612 (June 9, 1998); DOHA Claims Case No. 97110304 (January 12, 1998); DOHA Claims Case No. 97020601 (June 26, 1997); DOHA Claims Case No. 96070222 (January 27, 1997); and DOHA Claims Case No. 96070225 (September 17, 1996). A member's entitlement to pay and allowances is based on applicable statutes and regulations such as the Joint Travel Regulations (JTR). We must apply those statutes and regulations in our decisions. Incorrect information provided by a government officer, agent or employee cannot change a member's entitlements. Under the JTR, Army, Navy and Air Force determinations of dependency and relationships for secondary dependents and doubtful primary dependents are made by DFAS. *See* JTR ¶ 10002-D. Prior to the member's adoption of his sister, he claimed her as his dependent based on her status as a ward under 37 U.S.C. § 401(a)(4). Such a dependent is an unmarried person who is placed in the legal custody of a member as a result of an order of a court of competent jurisdiction for a period of at least 12 consecutive months. The statute requires that the person be under 21, under 23 if a full-time student or incapable of self-support due to a mental or physical incapacity which occurred while the person was a dependent. *See* 37 U.S.C. § 401(a)(4)(B). DFAS denied the member's claim, and our Office upheld DFAS's denial because the one condition which the member could not meet was that his sister was incapable of self support because of a mental or physical incapacitation that occurred while she was considered his dependent. His sister's incapacitation occurred at birth while she was a dependent of her parents. However, since the member has adopted his sister, that condition does not apply. Under the JTR, adopted children are considered primary dependents. *See* JTR ¶ 10118. As a result, a dependency determination is no longer

required for an adopted child. However, a member who claims a housing allowance for an adopted child must provide proof of parentage in the form of a document showing the member is the child's legal parent. The member has submitted documentation reflecting that he adopted his sister on September 16, 2014. DFAS properly allowed the member's claim for BAH based on his adoption of his sister effective September 16, 2014. We base our decisions on the written record and applicable statutes and regulations. We have no authority to imply or make a retroactive exception under the clear language contained in the applicable statute and regulation; or to disregard the regulations in certain individual cases and to enforce them in others.

Conclusion

For the reasons stated above, the claimant's request for reconsideration is denied. In accordance with Department of Defense Instruction 1340.21 ¶ E7.11, this is the final administrative action of the Department of Defense in this matter.

Signed: Jean E. Smallin

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Jean E. Smallin
Chairman, Claims Appeals Board

Signed: Catherine M. Engstrom

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Catherine M. Engstrom
Member, Claims Appeals Board

Signed: Gregg A. Cervi

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Gregg A. Cervi
Member, Claims Appeals Board