DATE: October 16, 2012

In Re:	)	
[REDACTED]	)	Claims Case No. 2012-CL-070601.2
Claimant	)	

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.

DECISION

The member of the Army Reserve requests reconsideration of the appeal decision, dated July 20, 2012, of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claims Case No. 2012-CL-070601. In that case, this Office denied the member's request to have his sister recognized as his dependent for the Basic Allowance for Housing (BAH) and medical and dental care.

Background

The member's sister was born on January 30, 1970, with Down's syndrome resulting in mental impairment to the extent that she cannot manage her own affairs. She has other significant medical issues as well. An order of court, dated February 19, 1988, from the Greene County Surrogate's Court, designated the member's parents as his sister's guardians. That order designated the member as her stand-in guardian. Both of the member's parents are now deceased. Since November 10, 2004, the member's sister has lived with him and he has provided more than one-half of her support.[1] By letter, dated January 11, 2005, the Judge of the Greene County Surrogate's Court appointed the member as his sister's guardian.

The member is in the United States Army Reserve. He states that in April 2005, he applied to the Army Human Resources Command, Alexandria, Virginia, to have his sister

[1] The member is currently deployed to Afghanistan.

designated as his dependent, but he was verbally advised that she did not qualify. The member applied to have his sister recognized as his dependent by filing a DD Form 137-5, *Dependency Statement – Incapacitated Child Over Age 21*, dated April 20, 2007. The member applied to have his sister recognized as his dependent for purposes of Basic Allowance for Housing (BAH) and for issuance of a United States Identification and Privilege (USIP) card. The application was rejected by DD Form 27-88, *Notice Concerning Claimed Dependency Under the Dependents Medical Care Act*, dated May 5, 2007. The explanation for that action was provided by an attached memorandum, dated May 4, 2007, from the Defense Finance and Accounting Service (DFAS), Indianapolis Center. The memorandum explained that since the member's sister had been incapacitated at birth when she was a dependent of the member's parents, DFAS concluded that she could not be considered the member's dependent for purposes of BAH, nor could she be issued a USIP card.

On April 2, 2012, the member filed a DD Form 137-5 to have his sister recognized as a dependent for BAH purposes. On that same date, the member filed a DD Form 1172-2, *Application for Identification Card/DEERS [Defense Eligibility Enrollment Reporting System] Enrollment*, to have his sister recognized as his dependent for health care purposes. DFAS denied both applications on the grounds that the member's sister did not qualify under the applicable statutes because the 1988 court order designated the member as the standby guardian, but did not place his sister into his custody at that time; there was no evidence that the sister resided with the member and was dependent upon him prior to her attaining the age of 21; and the member's sister is now 42 years of age and has never been determined to be dependent upon the member.

The member argued that the statutory requirements were met because he was appointed her legal guardian in 1988 and she has resided with him since 2004. The member contends that the law does not require the conditions of eligibility to occur simultaneously. The member also notes that his sister's dependence on him has been well known by senior military officials, and recognized by the Internal Revenue Service (IRS) and the Social Security Administration (SSA). The member's claim was submitted to this Office and the member continued to argue the points noted above. On July 20, 2012, our Office issued an appeal decision which denied the member's claim.

Discussion

The well-established general rule is that a claim may be allowed only for an expense authorized by statute or regulation. *See* Comptroller General Decision B-205113, February 12, 1982. 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, September 1, 1988. Statutory provisions with unambiguous and specific directions may not be interpreted in any manner that will alter or extend their meaning. *See* Comptroller General Decision, 61 Comp. Gen. 461 (1982).

The medical and dental care of members of the uniformed services and their dependents is authorized by 10 U.S.C., subtitle A, part II, chapter 55. The definition of "dependent" is

defined by 10 U.S.C. § 1072(2). Specifically, the definition that might apply to the member's sister is 10 U.S.C. § 1072(2)(1):

> (1) an unmarried person who--
>
> > (i) is placed in the legal custody of the member or former member as a result of an order of a court of competent jurisdiction in the United States (or possession of the United States) for a period of at least 12 months;
> >
> > (ii) either--
> >
> > > (I) has not attained the age of 21;
> > >
> > > (II) has not attained the age of 23 and is enrolled in a full time course of study at an institution of higher learning approved by the administering Secretary; or
> > >
> > > (III) is incapable of self support because of a mental or physical incapacity that occurred while the person was considered a dependent of the member or former member under this subparagraph pursuant to subclause (I) or (II)
> >
> > (iii) is dependent on the member or former member for over one-half of the person's support;
> >
> > (iv) resides with the member or former member unless separated by the necessity of military service or to receive institutional care as a result of disability or incapacitation or under such other circumstances as the administering Secretary may by regulation prescribe; and
> >
> > (v) is not a dependent of a member or former member under any other subparagraph.

Allowances, other than travel allowances, for uniformed service members are established by 37 U.S.C. § 401. The definition of "dependent" that might apply to the member's sister is specifically listed in 37 U.S.C. § 401(a)(4). It states that, "An unmarried person who-- (A) is placed in the legal custody of the member as a result of an order of a court of competent jurisdiction in the United States (or Puerto Rico or a possession of the United States) for a period of at least 12 consecutive months; (B) either--[the language mirrors the definition of the requirements for medical and dental care cited above].[2]

There are five conditions for being a dependent as an unmarried person. The record shows that the first, third, fourth, and fifth conditions have been met. The condition in question is the second one.

[2] The requirements of AR 600-8-14 for issuance of USIP cards to "legal custody wards" contains the same conditions as 10 U.S.C. § 1072 and 37 U.S.C. § 401. In the application of a regulation, the plain meaning of its words are to be followed. *See* DOHA Claims Case No. 07032401 (April 6, 2007).

The member was appointed his sister's guardian on January 11, 2005, by the Greene County Surrogate's Court. At that time she was 34 years old. Thus, she was not less than the age of 21. She was not less than the age of 23 and attending an institution of higher learning. She was incapable of self support because of mental incapacity due to Down's syndrome that had existed since her birth when she was a dependent of her parents. The incapacity did not occur on or after November 10, 2005, when she entered the custody of the member. Thus, the second condition for being a dependent unmarried person under 10 U.S.C. § 1072 and 10 U.S.C. § 401 is not met.

The member argues that the February 19, 1988, order of the Greene County Surrogate Court made him his sister's guardian. At the time the order was issued, the State of [redacted] Surrogate's Court Procedures Act (SPCA), § 1753,[3] stated:

> 1. Upon application or consent of both parents, natural or adoptive, if living, or the surviving parent or of a guardian or guardians, a standby guardian of the person or property or both of a mentally retarded person may be appointed by the court. . . .
>
> 2. Such standby guardian, or alternate in the event of such guardian's death or incapacity or his renunciation, shall without further proceedings be empowered to assume the duties of his office immediately upon death or adjudication of incompetency of the last surviving of the natural or adoptive parents of such mentally retarded person, subject only to confirmation of his appointment by the court within sixty days following assumption of his duties of such office. . . .

Thus, the member was not the guardian of his sister when the 1988 order was issued, but only when he assumed the duties after the deaths of his parents, and received confirmation of his appointment by letter from the court, dated January 11, 2005.

The member contends that the requirements of the statutes do not have to occur simultaneously to establish an unmarried person's dependency. This is not the case. The clear language provides that an unmarried person qualifies as a dependent if she is incapable of self support because of a mental or physical incapacity that occurred when the person was considered a dependent of the member or former member under this paragraph pursuant to clause (i) or (ii) [which requires that the person be under the age of 21 or under the age of 23 and enrolled in full time study . . .] The incapacitation of the member's sister occurred at birth when she was a dependent of her parents.

The member notes that the dependency of his sister is well known among senior military officials. However, such knowledge is not a factor in establishing dependency. He also notes that both the IRS and the SSA have recognized his sister has his dependent. However, this is a claim before this Office and not regarding Federal taxes or disability benefits.

The member also takes issue with a determination made by DFAS in their administrative report, dated May 30, 2012. DFAS stated, "In fact, [his sister] is now 42 years old and has never

[3] Since 1989, these provisions have been found in SPCA, § 1757.

been determined to be the dependent of the member." The member argues that this statement is overly broad, and could be interpreted by some that his sister is not his legal ward, which he states is obviously not the case.

This Office finds that the record clearly supports the contention that the member's sister has been determined to be a dependent of the member. On January 11, 2005, the Greene County Surrogate's Court granted Letters of Guardianship appointing the member as guardian and his sister as ward. The member has indicated that the IRS and the SSA recognize his sister as his dependent. This Office is certain that the member could provide the appropriate documentation to support this claim. Additionally, the member has provided financial information on two DD Form 137-5 which indicate the member is providing over one-half of his sister's support.[4] The member has stated that his sister has resided with him since November 2004, although she is currently separated from him due to his deployment.

Despite all the above, the one condition which the member cannot meet is that his sister was incapable of self support because of a mental or physical incapacitation that occurred while the person was considered a dependent of the member. His sister's incapacitation occurred at birth while she was a dependent of her parents. Compare this with a Comptroller General decision concerning the case of a member of the uniformed services who adopted her 26-year old disabled brother who was incapable of self support, and claimed him as her dependent to receive BAH at the with dependent rate. In this case the "child" was legally adopted, was in fact dependent upon the member for support, and resided with the member; thus, a bona fide parent and child relationship existed. *See* 64 Comp. Gen. 333 (1985). In this case, adoption of an adult was authorized under state law.

Conclusion

For the reasons outlined above, the claimant's request for relief is denied, and we affirm the July 20, 2012, appeal decision. 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.

///Original Signed///

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Jean E. Smallin
Chairman, Claims Appeals Board

[4] The member lists that he is the payee of his sister's SSA disability payments.

///Original Signed///

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Gregg A. Cervi
Member, Claims Appeals Board

///Original Signed///

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Natalie Lewis Bley
Member, Claims Appeals Board