

DATE: April 26, 2005

In Re:

[REDACTED]

Claimant

)
Claims Case No. 05040601

CLAIMS APPEALS BOARD DECISION

DIGEST

After being ordered to active duty in support of a contingency operation, a member received basic allowance for housing (BAH) at the rates of his various duty stations, and not his principal place of residence at the time he was recalled to active duty. Waiver of the debt under 10 U.S.C. § 2774 is not appropriate, since the member should have been aware that he was receiving amounts to which he was not entitled.

We will not disturb the Coast Guard's determination of a member's principal place of residence for BAH purposes where the member never changed the location for his home of record before the issuance of his orders.

DECISION

This is in response to an appeal of Defense Office of Hearings and Appeals (DOHA) Settlement Certificate, DOHA Claim No. 04111804, dated February 1, 2005, which waived in part (\$312.46) and denied waiver in part (\$4,168.96), a Coast Guard Reserve member's application for waiver of a portion of an erroneous overpayment of basic allowance for housing (BAH) in the amount of \$4,481.42. ⁽¹⁾ The member was overpaid in the total amount of \$20,901.22. ⁽²⁾ On appeal, the member now requests that we waive \$14,087.79.

Background

The main issue in controversy is the member's principal place of residence at the time he was recalled to active duty in support of a contingency operation. The member asserts that his principal place of residence was Greer, South Carolina, at the time he was ordered to active duty. The Commandant of the Coast Guard concluded that at the time the member was called to active duty in support of a contingency operation, his principal place of residence was Huntsville, Alabama.

The record shows that the member is a captain in the Coast Guard Reserves with over twenty-five years of service. On September 16, 2001, while residing in Greer the member was recalled to active duty in support of a contingency operation. As a reserve component member called to active duty in support of a contingency operation, the member was entitled to BAH because he was unable to continue to occupy his primary residence because of the call to active duty. ⁽³⁾ The member should have been paid at the BAH rate of the location of his principal place of residence at the time he was ordered to active duty. However, between September 16, 2001, and May 31, 2003, the member was overpaid because he received payment of BAH based on his temporary residence (Greer) and a subsequent temporary duty station (Miami, Florida) rather than the location of his principal place of residence (Huntsville, Alabama). Specifically, during the period September 16, 2001, to October 28, 2001, the member received BAH based on his temporary residence; he received the higher Greer rate instead of the Huntsville rate resulting in an overpayment of \$312.46. ⁽⁴⁾ He was assigned government quarters in Memphis, Tennessee, from October 29, 2001, to February 11, 2002, and therefore did not receive BAH. During the period February 12, 2002, through May 31, 2003, the member received BAH at the higher

Miami rate instead of the Huntsville rate resulting in an overpayment of \$20,588.76.⁽⁵⁾

In August 2003 the Personnel Service Center (PSC) discovered the member was overpaid because he should have received BAH at the Huntsville rate from September 16, 2001, through October 28, 2001, and from February 12, 2002, through May 31, 2003. The member appealed the PSC determination, stating that in August 2000 he had changed employers, moved to Greer and left his wife behind in Huntsville. He argued that he put his house in Huntsville on the market one week before he was mobilized in September 2001 and that his wife joined him in Greer at that time. His wife subsequently moved with him to Memphis and then Miami. Based on these facts, the member contended that he was entitled to receive BAH at the Greer rate (versus the Huntsville rate) for the periods covered by the overpayment since Greer was his principal place of residence at the time he was ordered to active duty. PSC reviewed his case again and concluded that member's BAH should have been based on the Huntsville rate and determined the total overpayment to be \$20,901.22. In November 2003 the member submitted his waiver application. His waiver application was endorsed by his command on January 20, 2004, recommending waiver in the amount of \$4,481.42 (which is the amount the member and his command found represented the difference between Huntsville and Greer). On September 9, 2004, the Commandant of the U.S. Coast Guard (G-WPM-2) denied waiver of the overpayment in the amount of \$20,901.22. The member appealed the decision to our Office on October 20, 2004. In his appeal the member agreed that he was responsible for \$16,419.80 of the \$20,901.22. Therefore, he only appealed waiver of the \$4,481.42, reasserting that Greer was his principal place of residence when he was recalled to active duty.

In DOHA Settlement Certificate No. 04111804, the adjudicator granted waiver of \$312.46. This represents the amount the member was overpaid during the period September 16, 2001, through October 28, 2001, when he was being paid BAH at the Greer rate. The adjudicator denied waiver of the remaining \$4,168.96, on the basis that the member should have questioned the fact that he was receiving BAH at the Miami rate instead of his presumed principal place of residence (Greer, South Carolina).

On appeal, the member requests that we reconsider \$14,087.79 of the \$20,901.22. The member reasserts that Greer was his principal place of residence at the time he was ordered to duty, and therefore, he accepts that he was overpaid in the amount of \$6,813.43 (which he says represents the difference between the Miami rate and the Greer rate rather than Huntsville).

Discussion

Preliminarily, we will address the member's claim that Greer was his principal place of residence for BAH purposes. This action involves waiver of the overpayment under 10 U.S.C.

§ 2774. If the member wishes to further contest the rate of BAH he should contact the Coast Guard. However, for the purposes of this appeal, in the absence of clear error, we will not disturb the Coast Guard's determination that the member's principal place of residence at the time of issuance was Huntsville, since military authority has broad discretion over these types of administrative matters. *See* DOHA Claims Case No. 00090820 (February 26, 2001); DOHA Claims Case No. 97111901 (December 12, 1997); and Comptroller General decision B-244598, Oct. 2, 1991. The Commandant made a determination that the member's principal place of residence for BAH purposes at the time he was ordered to active duty was Huntsville and his temporary residence was Greer. The Commandant based this conclusion on the fact that the member's home of record (legal residence) for state tax purposes was Alabama, his family remained in Huntsville when he temporarily relocated to Greer, and he owned a home in Huntsville. There is nothing in the record to show that the Coast Guard erred in its determination. The member's leave and earnings statements clearly show that the state of Alabama was his home of record.⁽⁶⁾ Since the member knowingly allowed the Coast Guard to maintain that location as his home of record, the member was entitled under the regulations to BAH at the Huntsville, Alabama rate.

Under 10 U.S.C. § 2774, we have the authority to waive collection of erroneous payments of military pay and allowances if repayment would be against equity and good conscience and not in the best interest of the United States, provided that there is no indication of fraud, fault, misrepresentation, or lack of good faith on the part of the member. In the present case, the erroneous payments resulting from the payment of BAH at the incorrect rate were made as a result of administrative errors and there is no indication of fraud, misrepresentation, or lack of good faith on the member's

part. However, a member is considered to be at least partially at fault, and waiver is precluded when, in light of all of the circumstances, it is determined that he should have known that an error existed and taken steps to have it corrected. The standard we employ to determine whether a member was at fault in accepting an overpayment is whether, under the particular circumstances involved, a reasonable person would have been aware that he was being overpaid. *See* B-256417, July 22, 1994. In such a situation, the member does not acquire title to the payments and has a duty to hold them for eventual repayment to the government. *See* DOHA Claims Case No. 03040101 (April 21, 2003).

In the case before us, we note that the member has accepted responsibility for the overpayment resulting from being paid at the incorrect rate while he was living in Miami. Our adjudicators have already waived \$312.46 which is the amount the member was overpaid during the period September 16, 2001, to October 28, 2001, when he received BAH at the Greer rate instead of the Huntsville rate. The member has consistently asserted that Greer was his principal place of residence for BAH purposes. The record shows that prior to moving out of government quarters in February 2002 the member was alerted to the fact that a member's BAH rate would be based on his principal place of residence. In September 2001 a message was released to everyone in the Coast Guard specifically outlining members' entitlements to BAH and the rates that would be applicable.⁽⁷⁾ In November 2001 the member was briefed by telephone concerning his entitlement to BAH.⁽⁸⁾ Since the member insists that Greer was his principal place of residence for BAH purposes at the time he was ordered to active duty, when the member vacated government quarters while stationed in Memphis, Tennessee, and began receiving BAH at a rate other than the Greer rate, he should have known there was a mistake in his pay.⁽⁹⁾ Therefore, waiver of the overpayment is not proper.

As for the member's concerns about the calculation of the debt, this Office must accept the calculations of the member's debt by the Coast Guard in the absence of clear and convincing evidence to the contrary. *See* DOHA Claims Case Nos. 04022402 (March 10, 2004); 99071601 (September 28, 1999); and 97011407 (June 6, 1997). If he disputes their calculations or requires information regarding their calculations, he should contact the Coast Guard.

Conclusion

We affirm the Settlement Certificate.

_____/s/_____

Michael D. Hipple

Chairman, Claims Appeals Board

_____/s/_____

Jean E. Smallin

Member, Claims Appeals Board

_____/s/_____

Catherine M. Engstrom

Member, Claims Appeals Board

1. The member's command endorsed this amount, \$4,481.42, for waiver.
2. The member was paid \$39,439.56 during the period September 16, 2001, through May 31, 2003. However, he was only entitled to \$18,538.34.
3. *See* Chapter 3, section C.10 of U.S. Coast Guard Pay Manual.
4. The member was paid at the Greer rate of \$1,195.00 per month when he should have been paid at the Huntsville rate

of \$977.00 per month.

5. When the member first moved to Miami from Memphis, his leave and earnings statements indicated that he was being paid at the BAH rate for Memphis. However, he received a retroactive BAH payment so that he was paid BAH at the Miami rate for the entire period he spent there. Therefore, during the period February 2002 through December 2002 the member was paid at the Miami rate of \$2,308 per month when he should have been paid at the Huntsville rate of \$1,031 per month. During the period January 2003 through May 2003 the member was paid at the Miami rate of \$2,637 per month when he should have been paid at the Huntsville rate of \$1,235 per month.

6. *See* Chapter 8, section A.4 of the Coast Guard Pay Manual, "Legal Residence. Each member must designate a legal residence, and report any changes thereto. A member's legal residence does not change because of change of permanent station. The legal residence at the time of entry into the Service remains the same until changed by the member."

7. The message states, "Reservists recalled to AD on or after 14 Sept 01 or whose previous mobilization orders were converted to duty authorized under Title 10 USC Sec 12302. are entitled to BAH based upon their principal place of residence, and not the place to which ordered to duty. Personnel are not authorized BAH based upon the unit to which ordered to AD unless their primary place of residence is in that units military housing area (MHA). See Figure 3-8, Rule 3, of Ref. C [Coast Guard Pay Manual]"

8. The record shows that in November 2001 the member spoke to an official at the Military Compensation Office, Coast Guard Headquarters, regarding his BAH entitlements. The record shows that in that conversation the member was specifically advised of his BAH entitlements. The fact that the member was in government quarters in November 2001 and did not begin receiving BAH again until February 2002 does not negate the fact that he was properly advised.

9. The February 2002 leave and earnings statement (LES) reflects that BAH for zip code 38103 (Memphis, Tennessee) started February 12, 2002.