



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

April 8, 2022

CBCA 7285-RELO

In the Matter of ALPHONSO H.

Alphonso H., Claimant.

Tracey Z. Taylor, Office of Counsel, Humphreys Engineer Support Activity, United States Army Corps of Engineers, Alexandria, VA, appearing for Department of the Army.

ZISCHKAU, Board Judge.

Alphonso H. (claimant), an employee of the United States Army Corps of Engineers (USACE), seeks reimbursement of meals and incidental expenses (M&IE) per diem in the amount of \$14,850 for his wife and two children during his eighty-nine-night, ninety-day delayed stay in Winchester, Virginia, while en route for a permanent change of station (PCS) to Qatar. Claimant has so far received per diem for himself that includes lodging, lodging taxes, M&IE, and rental car reimbursements. We conclude that the claimant is also entitled to receive M&IE for his dependents during the administrative delay in Winchester.

Background

Claimant was issued orders for a PCS to a position in Qatar while employed by the Army Corps of Engineers, with his wife and children accompanying him. He and his family were scheduled to stop in Winchester for processing and did in fact go to Winchester. An authorization for Department of Defense (DoD) civilian permanent duty travel dated April 30, 2021, for claimant lists his three dependents for concurrent dependent travel. On these PCS orders, block 12a for "per diem for employee" is checked "Yes," and block 12b for "per diem for dependent(s)" is also checked "Yes."

While waiting in Winchester, claimant and his family were delayed due to the agency having difficulty obtaining claimant's visa from the Qatar embassy, and this delay lasted from May 25 through August 29. As a result of the delay, the Middle East District of the Army Corps of Engineers decided to place claimant on temporary duty (TDY) thirty days after arriving in Winchester. He received a payroll advance of \$19,935.25 on July 3 and travel advances of \$3642 on June 24 and \$2400 on June 28. He received a total of \$23,257.41 for lodging, lodging taxes, M&IE for the claimant, and a rental car. Despite indications that he would receive per diem for his family during the delay period, the agency ultimately denied reimbursement for his dependents' M&IE because the agency considered claimant and his family to be on TDY status for most of their stay in Winchester.

Claimant calculates a total M&IE of \$14,850 that his spouse and two dependents should have received, using a rate of \$55 per day for ninety days for each.

Discussion

As a federal civilian employee who works for the USACE, claimant is subject to both the Federal Travel Regulation (FTR) and the Joint Travel Regulations (JTR). As we stated in *Rebecca J. Lott*, CBCA 6354-RELO, 19-1 BCA ¶ 37,328, the FTR is a "legislative rule" of "controlling weight," and "any JTR provision (or interpretation of a JTR provision) that conflicts with the FTR is invalid 'because the JTR 'does not have the force of law and cannot alter an FTR determination.'"" (Citations omitted.)

The agency asserts that there is no provision in the JTR to pay per diem for family members accompanying an employee on a TDY order. The agency asserts that per diem for dependents is only authorized for PCS travel when (1) an employee is in an "active" travel status, meaning a transition from an old PDS to the new PDS, citing JTR 053902 (May 2021) (PCS Per Diem for a Civilian Employee's Dependent), and (2) when the employee is authorized temporary quarters subsistence expenses and searching for permanent housing at a new PDS, citing JTR 053605 (Temporary Quarters Subsistence Expense). The agency argues that because an employee cannot simultaneously be in both a PCS and TDY status, and claimant was placed in TDY status during the administrative delay period, the JTR precludes his dependents from receiving per diem. We do not agree.

We begin with FTR 302-4.201, which provides:

How are my authorized en route travel days and per diem determined for relocation travel?

Your authorized en route travel days and per diem are determined as follows: The number of authorized travel days is the actual number of days used to complete the trip, but not to exceed an amount based on a minimum driving

distance per day determined to be reasonable by your agency. . . . An exception to the daily minimum driving distance may be made when delay is beyond control of the employee, such as when it results from acts of God or restrictions by Government officials; when the employee is physically handicapped; or for other reasons acceptable to the agency.

48 CFR 302-4.201 (2020) (FTR 302-4.201). Next, FTR 302-4.202 spells out the circumstances where per diem is not allowed for immediate family members:

If [the employee is]:

- (a) A new appointee;
- (b) Assigned to posts of duty outside CONUS [the Continental United States] returning to place of actual residence for separation; or
- (c) Being relocated under the Government Employees Training Act (5 U.S.C. 4109).

None of these conditions precluding per diem for dependents applies to the claimant here. In addition, FTR 302-4.203 states that for transferred employees, the maximum amount the employee's spouse may receive if the spouse accompanies the employee while performing PCS travel is three-fourths of the employee's daily per diem rate. And FTR 302-4.206 provides that immediate family members age 12 or older receive three-fourths of the employee's per diem rate, and children under 12 receive one-half of the per diem rate.

The agency relies on item 9 of JTR 053902 table 5-76, which states: "If a dependent travels to, from, or while at an en route TDY location, then per diem is not authorized for a dependent." JTR 053902, tbl. 5-76. However, the introductory paragraph of JTR 0539 provides:

Per diem is payable for any days travel time is authorized. . . . The specified per diem applies for all related travel unless otherwise stated in the JTR. Per diem is payable for situations such as delays for reasons beyond the civilian employee's control . . . , necessary delays awaiting further transportation, delays at the point of embarkation or point of debarkation, or a TDY en route.

JTR 053902 provides:

A civilian employee is authorized per diem for each dependent's actual travel between the old PDS and new PDS when the civilian employee is transferred. . . . Travel time for a dependent is determined under par. 053807 in the same manner as for the civilian employee, not by the civilian

employee's travel time or the amount of per diem paid for the civilian employee's PCS travel.

Here the claimant's travel orders authorized per diem for both the employee and his dependents. While everyone contemplated a brief stop in Winchester for processing, the stop lasted ninety days due to the agency's difficulties in obtaining the claimant's visa from Qatar. Claimant was not responsible for the delay. The agency points out that it decided to place the claimant in a TDY status so that it could process vouchers to pay him as he was detained and incurring expenses in Winchester. The agency states that by placing him on TDY it was trying to help minimize the claimant's financial burden of having to bear all the expenses until he arrived at his new PDS. The claimant's TDY status does not here diminish his ability to recover for appropriate amounts of M&IE for his dependents as provided under the regulations for the delay not caused by the claimant. The FTR and JTR provide for his dependents to obtain M&IE for those ninety days, and the agency's interpretation of item 9 of table 5-76 of JTR 053902 cannot contradict that rule. *David A.*, CBCA 7214-RELO (Feb. 18, 2022) (JTR provision cannot be interpreted as nullifying FTR provision authorizing reimbursement of excess baggage). The agency failed to consider the applicable FTR provisions, FTR 302-4.201 to .203, and .206, which authorize reimbursement of dependents' per diem. *Robert R. Devisser*, CBCA 1812-TRAV, 10-1 BCA ¶ 34,429 (claimant who faced "unique" circumstances of a delay in travel while moving from one PDS to another was entitled to reimbursement of his dependents' per diem); see *Debra C. Clark-Burnside*, CBCA 6450-RELO, 19-1 BCA ¶ 37,442 (authorizing per diem for claimant and her granddaughter who had to remain in Baltimore for an extended period during travel between old and new duty stations to await passport renewal that was delayed as a result of a processing error). Here, as in *Devisser* and *Clark-Burnside*, the TDY was part of enroute PCS travel.

Decision

We return the matter to the agency to determine the proper per diem amounts since the record is not clear on the ages of the dependent children.

Jonathan D. Zischkau

JONATHAN D. ZISCHKAU

Board Judge