UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

March 9, 2011

CBCA 2265-RELO

In the Matter of JORGE J. MARTINEZ

Jorge J. Martinez, San Juan, PR, Claimant.

Abel L. Smith, Office of Chief Counsel, Federal Motor Carrier Safety Administration, Washington, DC, appearing for Department of Transportation.

WALTERS, Board Judge.

On January 13, 2011, claimant, Jorge J. Martinez, an employee of the Department of Transportation, Federal Motor Carrier Safety Administration (FMCSA or agency), submitted a claim to this Board for "overseas tour renewal travel" and related per diem, in the amount of $6000, plus an added $20,000 for pain and suffering caused by agency actions that allegedly forced Mr. Martinez to fund several years' worth of travel costs, for himself and his family, from Puerto Rico, where he is currently stationed, back to the continental United States. As explained below, we find Mr. Martinez entitled to reimbursement of actual renewal agreement travel (RAT) costs incurred for himself and his family for one trip per year, beginning after January 13, 2005. The claim item for alleged pain and suffering we deny.

Background

Mr. Martinez was employed at the Federal Highway Administration (FHWA) Trenton, New Jersey, office and had resided in New Jersey for several years. In 1999, he applied for a merit system position vacancy with FHWA in San Juan, Puerto Rico, and was transferred to the Puerto Rico office, effective September 26, 1999. His position was shifted in early

2000 from FHWA to FMCSA. Thereafter, until the present, he has continued in the same position and his duty station has remained in Puerto Rico.

In connection with his transfer to Puerto Rico, Mr. Martinez executed a continued service agreement on August 6, 1999, under which he agreed to remain in the employ of the Government for a period of twelve months following the effective date of the permanent change of station (PCS), in consideration for his having been provided reimbursement of travel and relocation costs. The term of this agreement expired twelve months after the PCS effective date of September 26, 1999, i.e., on September 26, 2000. Mr. Martinez was not offered and thus did not execute any subsequent continued service agreements. He also was never advised of any entitlements he may have had to RAT reimbursement for travel to and from the continental United States as a result of his posting to Puerto Rico. As early as August 2004, and possibly earlier, Mr. Martinez began to inquire of agency human resources personnel regarding what he termed his "overseas package issue," including entitlement to both home leave and RAT reimbursement. Although at one stage, it appears that some agency officials recognized that Mr. Martinez did have "certain entitlements," including "home leave," the issue remained unresolved for several years. Mr. Martinez continued to make follow-up e-mail inquiries to various people in the agency through 2007, when it appears that he filed an equal employment opportunity (EEO) complaint for alleged racial discrimination, which included a number of points of contention, including the "home leave" issue.

An agency decision denying the EEO complaint was issued on January 10, 2008. As to the "home leave" issue, the agency decision was to the effect that Mr. Martinez had failed to comply with agency instructions regarding submission of the home leave request through his chain of command. Subsequently, the EEO matter was elevated to the United States District Court for the District of Puerto Rico. The court, by opinion and order dated March 26, 2010, found nothing to suggest "that the agency's failure to act promptly on [Mr. Martinez's] request for home leave was based on a discriminatory animus." Rather, the court attributed the agency's delay to agency officials having "no clue as to what to do with his home leave request." *Martinez v. Peters*, No. 08-1307CCC, slip op. at 3-4 (D. P.R. Mar. 26, 2010).

On November 19, 2010, as amended by e-mail on November 22, 2010, Mr. Martinez renewed his request for an "overseas entitlement package," submitting it through his chain of command, seeking not only "home leave," but also several other items, including "entitlement of expenses of round trip travel for me (the employee) and the transportation of my immediate family to the continental U.S.," i.e., RAT reimbursement. Mr. Martinez followed up several times with the agency, and, by e-mail message of January 3, 2011, notified the agency that, if it failed to provide the requested entitlements by January 7, 2011,

he would proceed as if the agency had denied such entitlements. In response, the FMCSA Delaware Division Administrator notified Mr. Martinez, by e-mail message of January 6, 2011, that the agency was "represented" by the United States Attorney for Puerto Rico in the matter, and advised Mr. Martinez as to how to contact the United States Attorney via e-mail. The claim to this Board followed shortly thereafter.

Discussion

The statute governing RAT reimbursement, 5 U.S.C. § 5728(a) (2006), provides as follows:

> [A]n agency shall pay from its appropriations the expenses of round-trip travel of an employee, and the transportation of his immediate family, but not household goods, from his post of duty outside the continental United States, Alaska, and Hawaii to the place of his actual residence at the time of appointment or transfer to the post of duty, after he has satisfactorily completed an agreed period of service outside the continental United States, Alaska, and Hawaii and is returning to his actual place of residence to take leave before serving another tour of duty at the same or another post of duty outside the continental United States, Alaska, and Hawaii under a new written agreement made before departing from the post of duty.

RAT reimbursement is not merely a matter of privilege, but rather a mandatory requirement. *Estelle C. Maldonado*, 62 Comp. Gen. 545 (1983). Although the Commonwealth of Puerto Rico may be treated as a part of the United States for certain purposes, it does not fall within the "continental United States," which is limited to the forty-eight contiguous states and the District of Columbia. *Oscar G. Rivera*, GSBCA 16332-TRAV, 04-2 BCA ¶ 32,735, at 161,912. Because the place of his actual residence at the time he was transferred to Puerto Rico was New Jersey, Mr. Martinez is fully eligible for RAT reimbursement. Although the statute contemplates execution of new written agreements "before departing from the post of duty," where the Government fails to offer a new agreement or refuses to negotiate one with the employee, this will not defeat his entitlement to such travel reimbursement. *Vicky Hawkinson*, CBCA 935-TRAV, 08-1 BCA ¶ 33,848, at 167,508; *Rivera*; *Dick D. Hendricks*, B-205137 (May 18, 1982).

In its response, the agency requests that the Board dismiss the claim for various reasons or, in the alternative, that we deny it. In terms of claim denial, the agency focuses almost entirely on whether Mr. Martinez would be entitled to home leave as a current and, at this point, long-time resident of Puerto Rico. In this regard, the agency mischaracterizes the claim, which is one for RAT reimbursement and not one for home leave, and argues that

Mr. Martinez would be ineligible for home leave as a matter of law. For RAT reimbursement, the issue is not an employee's current residence, but rather where the employee resided when first posted overseas. Here, Mr. Martinez was a New Jersey resident when he was transferred to Puerto Rico for his current position (in which he has remained with both FHWA and FMCSA). Under such circumstances, as a matter of law, Martinez would be entitled to RAT reimbursement. Although, in 1999, Mr. Martinez was interviewed for the position while on vacation in Puerto Rico, he was not a Puerto Rican "local hire," as the agency now contends.

The agency's requests for dismissal are based on: (1) the contention that the claim falls outside the Board's jurisdiction, since it is essentially one for home leave, which is the bailiwick of the Office of Personnel Management (OPM); (2) the contention that Mr. Martinez failed to exhaust his administrative remedies, there being no adjudication or decision by the agency with respect to his claim; (3) the contention that the claim is barred by the doctrine of res judicata, in light of the aforesaid District Court decision; and finally, (4) the contention that the claim is barred by the applicable statute of limitations. Other than that relating to the statute of limitations, the agency's arguments are groundless. The claim, as we indicate, is not one for home leave, which admittedly falls within the purview of OPM and not this Board, *Rivera*, 04-2 BCA at 161,913, but rather a claim for RAT reimbursement, something that clearly does fall within our jurisdiction. *Ralph J. Mulder*, GSBCA 14562-TRAV, 99-1 BCA ¶ 30,202 (1998) (matter of renewal agreement travel first filed with OPM and later transferred by OPM to the Board, based on the Board's authority under 31 U.S.C. § 3702(a)(3)).

In terms of exhaustion of administrative remedies, it seems disingenuous for the agency to complain that it was not permitted to adjudicate or render an administrative decision on the claim, when its Delaware Division Administrator avoided providing any meaningful response to the claim, choosing instead to refer Mr. Martinez to the United States Attorney, who had previously represented the agency in the EEO litigation before the United States District Court for the District of Puerto Rico. By this action, the agency clearly indicated that it would not grant the claim.

Regarding the notion that res judicata somehow bars the claim before this Board, it seems to us, as it did to the district court, that the agency has "no clue," not only as to how to respond to the employee's claim, but also as to the doctrine of res judicata. It is plain from reading the district court's decision that the court was dealing with home leave and not RAT reimbursement, the matter currently before us. Although requests for home leave and RAT reimbursement may coincide, they are matters of separate entitlement. *Lawrence J. Brenner*, GSBCA 15178-TRAV, 01-1 BCA ¶ 31,208, at 154,076 n.2 (2000) (citing *Maldonado*). Moreover, the court did not render a decision on the merits of claimant's entitlement to home

leave, but merely found that the agency's failure timely to address the claim did not stem from racially-based animus, the sole issue presented by the EEO lawsuit.

As to the statute of limitations argument, we do agree with the agency that 31 U.S.C. § 3702(b)(1) would serve to bar a claim against the Government if it is not brought within six years of when the claim accrues. We also agree that "accrual" signifies the date when all events that fix the alleged liability are known or should have been known. *See Kinsey v. United States*, 852 F.2d 556, 557 (Fed. Cir. 1998). In terms of a claim for travel reimbursement, including one for RAT reimbursement, however, the claim will not accrue until the costs have been incurred or at least until the employee has a "definite and concrete intention" to incur a cost. *See Julio Gagot-Mangual*, GSBCA 16117-TRAV, 04-1 BCA ¶ 32,467, at 160,587 (2003). The present case involves not a single RAT reimbursement claim, but rather, in effect a series of separate claims for RAT reimbursement for travel taken by Mr. Martinez and his family to and from the continental United States over many years, beginning in 2000. Thus far, the agency has been unwilling to acknowledge any entitlement for Mr. Martinez, let alone entertain any claim from him for reimbursement of costs relating to renewal agreement travel. The filing with the Board was, in fact, the first time Mr. Martinez quantified his claim, and it was only recently, in response to the Board's inquiries regarding substantiation of the $6000 claimed for RAT, that Mr. Martinez came forward with an itemization and documentation of specific costs actually incurred for individual trips he and his family had taken during the years 2000 through 2008. Although we find some of the claim barred, to the extent of costs incurred and known more than six years before Mr. Martinez filed the claim with the Board, i.e., costs incurred on or before January 13, 2005, the statutory bar will not apply to reimbursement of RAT costs incurred more recently, limited to one trip actually taken during any one year.[1] Determination of the amount of reimbursement should be on a "constructive basis," that is, "the cost the employee would have incurred on the basis of Government rates had the travel been authorized at the time it was performed." *See George E. Lingle*, GSBCA 13946-TRAV, 97-2 BCA ¶ 29,292, at 145,721. Although Mr. Martinez would be permitted to have visited other destinations within the continental United States during the years in question, reimbursement for RAT would be limited to his "cost of return to the actual residence." *See James A. Wolfe & David A. Niemann*, GSBCA 14545-TRAV, 99-1 BCA ¶ 30,165 (1998). Accordingly, Mr. Martinez is entitled to be reimbursed based on Government contract fares in effect at the times in question, between San Juan, Puerto Rico, and his former residence in New Jersey.

[1] RAT is not cumulative from one period of service to another if not actually used. *George E. Lingle*, GSBCA 13946-TRAV, 97-2 BCA ¶ 29,292 .

Although he had not sought it initially in connection with the claim submitted to the Board on January 13, 2011, as part of his reply to the agency's response, Mr. Martinez states that he is seeking "a determination as to whether Section 302-1.5 (2000) and/or Section 302-3.300 (2004) of the FTR [Federal Travel Regulation] provides that claimant (an employee) who was transferred outside the continental United States is entitled to expenses of return travel transportation, and moving expenses upon separation from service at that post of duty." In this regard, since there is no indication that Mr. Martinez is imminently contemplating separation from the Government and return to the continental United States,[2] the Board can only direct the parties' attention to the current version of the FTR, which clearly provides for reimbursement of return travel for both the employee and his immediate family members upon completion of his overseas tour of duty. 41 CFR 302-3.510, and .512 (2010). As with RAT reimbursement, return travel would only be reimbursed upon actual incurrence of the cost and only to the extent of costs incurred for return to the actual place of residence at the time of the overseas appointment – for Mr. Martinez, that would be his former residence in New Jersey. The FTR also provides for reimbursement of the costs of movement or storage of household goods for "an employee transferred between official stations, within or outside the continental United States (CONUS)" or "an employee being returned to CONUS for separation from an outside CONUS assignment, after completion of an agreed upon period of services," when the relocation has been determined to be "in the interest of the Government." 41 CFR 302-7.1.

Finally, as to the additional claim Mr. Martinez asserts for $20,000 of pain and suffering, we must summarily reject such a claim, since there simply is no statutory or regulatory authority to compensate an employee for pain and suffering in connection with the dilatory processing of claims for travel reimbursement.

[2] There was correspondence in the materials presented indicating discussion of the possibility of Mr. Martinez being transferred back to New Jersey at some point.

Decision

For the above reasons, we grant the claim, to the extent it relates to renewal agreement travel costs incurred after January 13, 2005, with reimbursement on a "constructive basis," limited as described above.

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RICHARD C. WALTERS
Board Judge