UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

July 20, 2015

CBCA 4357-TRAV

In the Matter of BRIAN J. EBEL

Brian J. Ebel, FPO Area Pacific, Claimant.

Holly Kay Botes, Command Counsel, Department of the Army United States Army Garrison – Kwajalein Atoll, APO Area Pacific, appearing for the Department of the Army.

SHERIDAN, Board Judge.

Claimant, a civilian employee stationed at the United States Army Garrison – Kwajalein Atoll (USAG-KA), contests the agency's denial of additional compensation for the lodging and per diem associated with his dependent spouse's delivery of their child in Fort Collins, Colorado.

Background

Claimant's permanent duty station (PDS) was the USAG-KA, located in the Republic of the Marshall Islands, approximately 2100 nautical miles southwest of Hawaii. Due to USAG-KA's remote location and limited medical services, employees and their dependents are sent off-island for necessary specialty or obstetric care in accordance with the Joint Travel Regulations (JTR), chapter 5 (Permanent Duty Travel), part C (Dependent Travel and Transportation Allowances), section 5 (Dependent Medical Travel). JTR C5134.[1]

The statutory basis for the JTR provisions on dependent medical travel is found in 10 U.S.C. § 1599b (2012). When employees or dependents are sent off-island for necessary

[1] Citations to the JTR throughout this decision refer to the June 1, 2013, edition of the JTR, which is the applicable version based on the June 2013 departure date on which claimant's spouse began her medical travel.

specialty or obstetric care, they are typically sent to what is referred to as a "designated point" which, based on the advice of an appropriate professional certifying physician, is the facility closest to the employee's PDS at which suitable health care may be obtained. JTR C5134-F. JTR C5138-B addresses the travel for the dependent and limits transportation from the OCONUS [outside the contiguous United States] PDS to the designated point and back, but sets forth certain exceptions for obstetrical patients:

> 2. Obstetrical Patients. An obstetrical patient may elect to travel to a/an:
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> > a. CONUS [contiguous United States]/non-foreign OCONUS area, with transportation at GOV'T expense authorized to the nearest CONUS POE [point of entry]; or
> >
> > b. OCONUS location that is not the designated point if the employee elects and executes an excess cost agreement. See par. C5138-B1.

JTR C5134-B.2.

JTR C5138-C and -D also provide:

> C. Required Health Care Determination. Required health care is medical or dental care that the AO [authorizing or approving officer] determines is needed by a dependent whose employee sponsor is stationed at a foreign OCONUS PDS at which there is no adequate facility to provide suitable care. This determination must be based on the advice of an appropriate professional certifying physician.
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> D. Authorized Health Care
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> 1. Medical Care. Qualified medical care is treatment that . . . [i]ncludes specialized examinations, special inoculations, obstetrical care, and hospitalization ([*Lena E. Hagedorn*,] GSBCA 15948-TRAV, [03-2 BCA ¶ 32,318,] 30 April 2003).

JTR C5140 (entitled "Per Diem" for dependent medical travel) addresses how, and for how long, per diem expenses related to dependent travel, including obstetrical care, may be authorized, and in pertinent part provides:

B. Maximum Number of Days. Subject to pars. C5140-C, C5140-D, C5140-E, C5140-F, and C5140-G, the AO may authorize/approve per diem for up to, ***but in no case for more than***, 180 consecutive days including:

1. Travel time to and from the designated point/elective destination, and

2. Necessary delays before treatment and while awaiting return transportation, and

3. Necessary outpatient treatment periods.

C. Elective Destinations. If a dependent elects travel to other than the designated point, per diem may be authorized/approved for travel periods to and from the elective destination, but for no longer than the constructed travel time to and from the designated point.

D. Hospital Stays. Per diem is not authorized/approved for a dependent during a hospitalization period.

. . . .

F. Obstetric Care. A dependent traveling for obstetric care ordinarily leaves the PDS 6 weeks before the expected delivery date and returns 6 weeks thereafter. The AO may not authorize/approve per diem for obstetric care travel for a period longer than 90 days, unless an early departure from, or delayed return to, the PDS is medically required.

G. Newborn Infant. A newborn infant is authorized per diem under the same circumstances and conditions as the mother, except at one-half the applicable locality rate.

H. Per Diem Rates. The applicable locality per diem rate applies. If the dependent elects health care travel to a location other than the designated point, the per diem rate may not exceed the rate for the designated point.

On May 17, 2013, claimant's dependent spouse was issued travel orders authorizing approximately sixty-four days of per diem for maternity care prior to delivery and post-natal care after delivery. The sixty-four days included travel time and a proceed date of June 20, 2013. The designated point, or closest location to Kwajalein Atoll at which suitable obstetrical health care could be obtained, was Honolulu, Hawaii. However, as an obstetrical patient, claimant's spouse was entitled to select another United States area and be

compensated for airfare, on a constructed cost basis, "to the nearest CONUS POE." JTR C5138-B.2.a. Claimant's spouse opted to travel to Denver, Colorado, and that destination was shown on her travel orders. Claimant was authorized a combination of leave, tele-work, and furlough so he could stay with his spouse while she was on medical travel status. Claimant, his spouse, and newborn were expected to return to Kwajalein on September 2.

On June 19, 2013, claimant and his spouse traveled by the government charter flight from Kwajalein Atoll to Honolulu. Five days later, on June 25, they left Honolulu and flew to Ontario, California. The following day, they traveled from Ontario to Phoenix, Arizona. Claimant and his spouse left Phoenix on July 1 and took a trip to Santa Fe, New Mexico; Beaver Creek, Colorado; and Denver, arriving in Denver on July 6. On July 17 claimant and his spouse left Denver and traveled to Fort Collins, Colorado.

While in Fort Collins, claimant's spouse delivered a daughter on July 22, 2013. The mother and newborn both had infections and were not released from the hospital until July 28, 2013. Claimant, his spouse, and his child traveled from Fort Collins to Denver on July 29.

Claimant got his leave extended and remained with his family. The family took a trip to Santa Fe for three days beginning on September 9, 2013, and then returned to Denver. On September 16, claimant, his spouse, and his infant child returned to Honolulu. They stayed in Honolulu for three days before departing for Kwajalein Atoll on September 19.

After they returned to Kwajalein Atoll claimant was compensated $3976.81: $1576 for lodging, $1294 for meals and incidental expenses (M&IE), and $1106.81 for other reimbursable expenses. Included in other reimbursable expenses was $794.89 for airfare. The agency calculated this amount using a constructive cost method. Claimant was also compensated $160.75 in per diem costs for his dependent child.

Claimant submitted two letters from medical professionals. Physician's assistant Lindsay Von Bernuth wrote on August 6, 2013, "I am writing on behalf of [claimant's child] who is currently under my care. Due to difficulties with delivery and subsequent infection she is unable to travel until she is two months of age. She is at risk for adverse events and [I] instructed [her] parents against flying until that time. Because of these circumstances, I advise against travel until [September 22, 2013]." Dr. Eric Yeh, MD, wrote a letter on August 8, 2013, stating: "My patient, [claimant's spouse], is under my care until her 8 weeks post partum. She is not able to travel internationally until she is cleared at that time."

Discussion

The agency asserts the compensation was calculated based on the constructive cost basis to and from the designated point of Honolulu per JTR C5140-C, as set forth in its cost construction spreadsheet, and notes that claimant and his dependent spouse were not compensated for what the agency refers to as "personal travel to additional elective locations outside of the authorization of the travel orders."

While the agency's constructive cost spreadsheet provides some details as to how claimant was compensated, claimant has not provided details or a breakdown of precisely what compensation he seeks or where he disputes the agency's calculations. In some instances, the Board is unable to discern precise areas of dispute. Therefore, we will provide details where we are able to do so, and where we are not, we will provide the general principles that should be applied to the matter and direct the agency to apply them.

It appears that claimant does not dispute the $1106.81 he was compensated for other reimbursable expenses, except possibly the cost of airfare, which we address below.[2]

The compensable expenses for transportation, in this matter airfare, are limited to the transportation expenses to the nearest CONUS POE.

The spouse's travel is governed by the JTR. Typically, an eligible dependent is authorized health care transportation from a foreign OCONUS PDS to the designated point and return to the PDS. JTR C5134. As an obstetrical patient, claimant's spouse could, and did, elect to receive maternity and post-natal care in a location other than the designated point, and be compensated for transportation expenses to the nearest CONUS POE. JTR C5138-B. To the extent that the transportation, in this case airfare, exceeded the cost of airfare to the nearest CONUS POE, claimant is responsible paying for the difference.

The agency should verify the amount of compensable airfare from Kwajalein Atoll to the nearest CONUS POE and, if necessary, make adjustments to the $794.89 figure to reflect the amount due to (or owed by) claimant.

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[2] We do not address an expense item unless it appears that the claimant disagrees with the amount calculated by the agency.

Claimant's spouse is entitled to receive up to sixty-four days of per diem, including lodging, meals, and incidental expenses from June 19, when she left Kwajalein Atoll, to September 2, when she was scheduled to return.

Per diem is authorized for the dependent spouse and newborn child, subject to the limitations in JTR C5140 and C5146. Regarding obstetrical care, the JTR provides: "A dependent traveling for obstetric care ordinarily leaves the PDS 6 weeks before the expected delivery date and returns 6 weeks thereafter. The AO may not authorize/approve per diem for obstetric care travel for a period longer than 90 days, unless an early departure from, or delayed return to, the PDS is medically required."[3] JTR C5140-F. The JTR also provides that "[t]he applicable locality per diem rate applies. If the dependent elects health care travel to a location other than the designated point, the per diem rate may not exceed the rate for the designated point." JTR C5140-H. "A newborn infant is authorized per diem under the same circumstances and conditions as the mother, except at one-half the applicable locality rate." JTR C5140-G. It stands to reason the per diem for a newborn infant would be limited to MI&E. Per diem is not authorized while the spouse or infant is hospitalized. JTR C5140-D.

The agency limited its payment of lodging and M&IE to forty-two days for claimant's spouse (from June 20 to July 31, 2013), and three days for the infant (from July 28 to July 31, 2013). Citing *Andrew R. Gonzales*, CBCA 603-TRAV, 07-1 BCA ¶ 33,544, the agency took the position that it would not compensate claimant's spouse for expenses incurred away from the designated point, Denver, because it was "for personal travel outside the authorization of the travel orders and the JTR."

We recently had the opportunity to review the same position taken by the agency in *David C. Scheivert*, CBCA 4123-TRAV (July 2, 2013), where we concluded:

> The Board's application of the FTR [Federal Travel Regulation] provision at issue in *Gonzales* does not inform our reading of the JTR provisions in the present case. The agency's characterization of the claimant's wife's time spent . . . [at a location] away from the elected destination . . . as "personal travel" misses the underlying purpose of the provisions authorizing

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[3] The sixty-four days of per diem shown on claimant's spouse's travel authorization evidences the agency's intent to generally adhere to the guidelines set forth in JTR C5140-F by providing approximately four and one-half weeks of per diem before and after the birth. We note that the agency is not required by regulation to follow the six week guidance set forth in the JTR; it is within the discretion of the agency to authorize more or fewer days of per diem, as long as that discretion is exercised in a reasonable way.

> medical travel. The traveler in this instance is not an employee of the DOD [Department of Defense] traveling for government work at a specific location. Instead, the traveler, a dependent of a DOD employee, is traveling for personal medical care authorized pursuant to JTR provisions that allow for reimbursement of per diem at "[t]he applicable locality per diem rate . . . not to exceed the rate for the designated point." JTR C5140-F. There is no provision in JTR part C section 5 that bars reimbursement of per diem when a dependent on medical travel for maternity and post-natal care visits more than one CONUS destination. As stated in JTR [C]5140-H, the limitation on elective destinations is simply the applicable locality per diem rate, not to exceed the rate for the designated point.

Id., slip op. at 6.

In this matter, the per diem payments are limited to the sixty-four days (including travel time), June 19 to September 2, which was provided for in claimant's spouse's travel orders. Claimant is only entitled to the per diem rate applicable to the locality in which his spouse was located, and the per diem may in no instance exceed the locality rate for the designated point, Honolulu. No per diem is payable for the spouse or the infant while they were hospitalized. JTR C5140-D. Upon release from the hospital, per diem for the infant is authorized at half the applicable locality rate for the spouse. JTR C5140-G.

Lodging. As already indicated, claimant is entitled to be paid for expenses incurred by his spouse, including lodging, for sixty-four days from when the spouse left Kwajalein Atoll. To receive any compensation for lodging, claimant must provide appropriate documentation that lodging costs were incurred, e.g., hotel receipts establishing the daily lodging rate and showing that lodging costs were paid.[4] The burden of proof is on claimant to establish the liability of the agency and the claimant's right to payment. CBCA Rule 401(c) (48 CFR 6104.401(c) (2014)).

To the extent the agency believes that the claimant's spouse should not be paid lodging because she did not remain in Denver the entire time she was waiting to deliver, the agency is incorrect. Claimant's spouse was free to travel wherever she wished so long as the lodging expenses for which she is compensated do not exceed the daily rate for lodging at the designated point. The JTR does not require medical travelers to stay at their designated point, or any particular place, provided the Government is not responsible for any more per diem expenses than it would have been responsible for at the designated point.

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[4] If claimant's spouse stayed with friends or relatives, lodging expenses are not recoverable except under limited circumstances not present here.

The parties do not dispute that Honolulu was the designated point for claimant's spouse's care, even though Denver was elected and authorized for the care. Since Honolulu was the designated point, the maximum daily lodging rate that can be paid for any incurred lodging expense is the lodging rate for Honolulu, which in this case appears to be $177 a day. If lodging was paid for locations other than Honolulu, e.g., Denver; Fort Collins, Colorado; Ontario, California; or Santa Fe, New Mexico, claimant's daily lodging compensation is limited to the lodging rate established for that locality, but may not exceed the lodging rate set for Honolulu.

It is irrelevant that claimant's spouse may not have lodged in Denver the entire time she was in CONUS. So too, claimant's spouse is not entitled to be compensated for lodging for the time she was in the hospital delivering the child.

Meals and Incidental Expenses. Principles similar to those that are applied to lodging apply to M&IE. Claimant's spouse and child are entitled to M&IE even if lodging with friends or relatives. JTR C4130-G. The maximum daily M&IE rate that can be paid is the rate for the designated point, Honolulu. If claimant's spouse was in a location other than Honolulu, the daily M&IE compensation is limited to the rate established for that locality, but in no event may it exceed the locality rate for Honolulu. The infant is entitled to compensation at one-half of the daily rate for the spouse.

The current medical evidence is insufficient to support a medical need to extend the medical travel granted beyond the sixty-four days authorized.

While the agency has the discretion to determine the duration of medical leave it will allow for obstetrical and post-natal care, it must exercise that discretion reasonably. "[W]e will not disturb an agency's discretional judgements unless we are convinced that they are arbitrary, capricious, or clearly erroneous." *William T. Orders*, GSBCA 16095-RELO, 03-2 BCA ¶ 32,389, at 160,290.

The JTR provides guidance regarding this discretion by stating that a dependent spouse traveling for obstetric care "ordinarily leaves the PDS 6 weeks before the expected delivery date and returns 6 weeks thereafter." JTR C5140-F. No more than 90 days is allowed, "unless an early departure from, or delayed return to, the PDS is medically required." JTR C5140-F.

In this matter the record contains a letter from the physician's assistant treating the infant stating that "due to difficulties with delivery and subsequent infection" the newborn should not travel until "she is two months of age." Likewise, the spouse's physician stated in a letter that claimant's spouse should not travel internationally for eight weeks after giving birth. Neither of these letters contains the specificity necessary to evaluate why these

statements were made. Furthermore, the statement regarding the infant was made by a physician's assistant as opposed to a physician. The JTR speaks in terms of receiving authorizations from "professional certifying physicians." JTR C5134-C. Absent more detailed information regarding the medical necessity for a longer stay than the sixty-four days originally authorized by the agency, it appears that the agency will be acting reasonably if it decides to limit reimbursement to the amount authorized on the claimant's spouse's travel orders.

PATRICIA J. SHERIDAN
Board Judge