



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

April 1, 2016

CBCA 4833-TRAV

In the Matter of JAMES E. McGUIRE

James E. McGuire, Washington, DC, Claimant.

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

POLLACK, 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 dental surgery in Honolulu, Hawaii.

Background

Mr. McGuire's permanent duty station (PDS) is 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 and dental services, employees and their dependents are sent off-island for necessary specialty care in accordance with the Joint Travel Regulations (JTR), chapter 7, part B, section 4, Employee and Dependent Medical Travel.¹ 10 U.S.C. § 1559b (2012) provides the statutory basis for the JTR provisions that allow dependents of employees to travel for medical purposes.

¹ Citations to the JTR throughout this decision refer to the December 1, 2014, edition of the JTR, which is the applicable version based on the December 2014 departure date on which claimant's spouse began her medical travel.

On November 27, 2014, Ms. Judith McGuire, the claimant's spouse, was authorized to travel to Honolulu, Hawaii for "non-urgent" dental surgery,² beginning on December 2, 2014 for approximately five days of temporary duty (TDY) travel with no variations authorized. On December 3, Ms. McGuire underwent dental surgery and was subsequently referred to Dr. Ishikawa, an endodontist, to complete the medical treatment. Dr. Ishikawa saw Ms. McGuire on December 4, and then recommended a re-evaluation on December 6.

Dr. Ishikawa's office attempted to contact the Kwajalein Hospital Medical Referrals, per Ms. McGuire's Patient Referral Instructions, but, because of an incorrectly listed phone number, was unable to reach the referral office until December 6.³ Ms. McGuire attended her re-evaluation appointment on December 6 and then returned to USAG-KA on December 8.

Upon her return to USAG-KA, Ms. McGuire sought reimbursement for per diem (lodging and meals and incidental expenses) for her entire TDY travel, December 2-8. The Department of Army (Agency or Army) denied her claim, stating that her travel order only authorized five days of TDY, two days of travel and three days of per diem. The Army reimbursed her for expenses for December 2-4.

On June 26, 2015, Mr. McGuire filed a claim with this Board appealing the agency's decision and seeking to modify the travel order. In its response to Mr. McGuire's claim, the agency argues that Ms. McGuire was not authorized to unilaterally amend her travel order because, pursuant to JTR 2215-B, itinerary variations "may be orally authorized by the AO [Authorizing Official] later confirmed in writing when an order does not contain itinerary variation authority, but circumstances arising after travel begins require itinerary variation." The agency states that Ms. McGuire failed to contact the AO or the Kwajalein referral office and could not in turn seek retroactive authorization for her extended TDY.⁴

² Ms. McGuire's medical referral form deemed her periodontal infection surgery to be "non-urgent," meaning that she would require medical travel within 1-6 weeks, as opposed to urgent or emergency medical travel, which would require travel within 1 week. This form stated that she would travel to Hawaii for periodontal infection surgery and then possibly visit an endodontist after the surgery.

³ In support of this fact, claimant provides an incomplete copy of an email message sent by an office assistant stating that the office called an incorrect phone number on December 4, and then called and left a message at the correct number on December 6.

⁴ In support of its factual claim, the agency provides an email from the Kwajalein medical referral office stating that Ms. McGuire contacted the office about her December 4 appointment, but failed to notify the office about her December 6 appointment.

JTR 2215-B provides the following:

B. Variation Not Authorized in the Order. Itinerary variation:

1. Changes may be orally authorized by the AO later confirmed in writing when an order does not contain itinerary variation authority, but circumstances arising after travel begins require itinerary variation.
2. Must not be substituted for inadequate advance preparation.
3. Does not create a blanket order.

The agency also contends that because Ms. McGuire's dental surgery was deemed non-urgent by her medical referral form, she should have only received one day of per diem, and thus she has been overcompensated. Furthermore, the Army asserts that even if the AO authorized an extension of her time, he could not have authorized additional days of per diem because of the limitation of days in JTR 7125-E, and the requirement that requires there being extraordinary circumstances in order to allow an extension.

JTR 7125-E provides in pertinent part:

E. Dental Care 1. Unless the AO specifically authorizes/approves a longer period because of extraordinary circumstances, per diem for periods in pars. 7190-B2 and 7190-B3⁵ for dental patients may not be authorized/approved for more than:

⁵ This reference to 7190-B2 and 7190-B3 is to an older version of the JTR. In the current version, this reference is to JTR 7125-B, which states,

B. Maximum Number of Days. Subject to pars. 7190-C, 7190-D, 7190-E, 7190-F, and 7190-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.

- a. 3 days for emergency dental care, and
 - b. 1 day for required dental care.
2. Extraordinary circumstances are limited to those situations that, because of the severity of the dental condition, require more time to complete emergency dental care.

In response, to the agency position, the claimant argues that the referral office was aware of the probability that his wife would need to visit the endodontist after her surgery and that office made a good faith effort to contact the Kwajalein referral office prior to her second appointment.

Discussion

The travel order under which Ms. McGuire traveled did not authorize variations, and it was not the intention or expectation of the parties at the time of the order that added days would be needed. However, circumstances changed. Added days were required to deal with dental issues that were discovered during Ms. McGuire's dental examination. There has been no material challenge to the medical decision to hold Ms. McGuire over for further treatment, and that has not formed a basis of the Army denial.

Ms. McGuire contends the dental office attempted to contact the AO regarding the need for added treatment, but that office had no success. The Army disputes her contention, states it has no record of contact, and concludes that Ms. McGuire failed to get AO approval prior to incurring the added time. We need not resolve that factual matter to decide this claim.

The Army denies the claim on two primary bases. One is that Ms. McGuire failed to contact the AO prior to taking the extended time, and the second is that she was not entitled to added days because her treatment was initially identified as non-emergency. The agency is incorrect as to both matters.

The JTR recognizes that unexpected matters come up from time to time that necessitate an employee extending or seeking to extend travel. That situation is addressed at JTR 2215-B, which sets out how the agency is to handle itinerary variations that are not authorized in the initial order. The regulations are straightforward in allowing an extension at the discretion of the AO. That discretion specifically includes allowing for extensions to be orally authorized by the AO and later confirmed in writing. The constraints in the regulation are that the circumstances justifying the variation need to occur after travel begins

and the use of variation is not to be substituted for adequate advance preparation. Despite the Army contention, there is nothing in the regulation that prohibits an AO from approving a change, even after the extended time has been taken. The Army position that the extension cannot be granted after-the-fact is simply incorrect and not consistent with the wording of the regulation. Clearly, the Army has discretion to consider after-the-fact requests for additional time.

As an alternative, the Army also contends that it cannot pay the claim because Ms. McGuire's dental surgery was designated as non-urgent on the medical referral form filled out prior to her travel for treatment. Counsel for the Army asserts that according to JTR 7125-E, per diem for dental care is limited to three days for emergency dental care, one day for required dental care, or may be authorized by the AO for a longer period due to extraordinary circumstances. According to agency counsel, because the initial referral form showed non-emergency status, she should have only been allotted one day of per diem. Furthermore, the Army argues that even if the AO authorized an extension of her time, the agency could not have authorized additional days of per diem because of the limitation in JTR 7125-E. Nothing in the agency denial challenges the medical judgment of the dentists in Hawaii. Instead, the agency urges us to support the denial on the basis of the designation as non-urgent on the original form. Once again the agency misreads the regulation. The operative regulations allow for an extension under extraordinary circumstances. Extraordinary circumstances are defined as situations that because of the severity of the dental condition, requiring more time to complete emergency dental care. That appears to be the situation in this case and at a minimum has to be considered in assessing the claim.

Finally, in what appeared to be a last gasp at denying the claim, the agency argues that the initial medical form, signed by Ms. McGuire, provided that if one did not validate additional appointments with the referral office, they might not be eligible for retroactive authorization. The agency charges that Ms. McGuire did not validate the appointment. First, we do not read the language on the form as a firm prohibition. More important, the language if interpreted as sought by the Army would run counter to prior cited regulation which allows for extension in appropriate instances.

Extensions, such as that sought by Ms. McGuire, are discretionary decisions to be decided by the appropriate agency official. We have repeatedly provided that when an order involves an exercise of discretionary, this Board "will not disturb an agency's discretionary judgments 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.

However, because the agency in this matter failed to provide a reasonable exercise of its discretion, we remand the matter back to the Army for consideration in line with our decision. We remand because the judgment to deny was not made on a discretionary basis, but rather, on the apparent (and incorrect) belief that payment in this case was legally barred.

In making his/her decision, the deciding official needs to take the various facts and other matters into account, and may well consider the actions of Ms. McGuire in attempting to secure prior agency approval. The decision in this matter, however, has to be one based on the exercise of discretion and not one dictated by the belief that the relief sought was barred by either law or regulation. Accordingly, we remand the matter to the AO to consider relief on a discretionary basis.

HOWARD A. POLLACK
Board Judge