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Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Technical Sergeant Fred D. Walker, USAF -
Claims for BAQ and VHA at the with-dependent
rate

File: B-240236

Date: September 12, 1991

DIGESTS

1. A member with dependents is entitled to a basic allowance for quarters at the "with-dependent" rate (BAQ-W) when adequate government quarters are not provided for him and his dependents. A divorced member may qualify for BAQ-W for a child living with the member's former spouse in private quarters if he pays child support in an amount at least equal to the difference between BAQ at the "with-" and "without-dependents" rates.
2. The cost of maintaining a separate residence for the times when the member has custody of the child may not be used instead of or in addition to support payments to qualify for BAQ-W.
3. A divorced member who is entitled to a variable housing allowance (VHA) may receive the higher rate for a member with dependents (VHA-W) for continuous periods in excess of 3 months when his child is living with him. The costs of maintaining a home for the child's visits does not entitle him to VHA-W when the child is living with the member's former spouse or visiting the member for shorter periods.

DECISION

We have been asked to render an advance decision on the claim of Technical Sergeant Fred D. Walker, USAF, for basic allowance for quarters (BAQ) and Variable Housing Allowance (VHA), both at the rates for a member with dependents (BAQ-W and VHA-W).^{1/} VHA is provided to assist members entitled to BAQ to defray housing costs in high housing-cost areas. In connection with this claim, we have also been asked a series of questions regarding the entitlement to BAQ-W of divorced service members who share custody of their children. For the reasons presented below, Sergeant Walker is not entitled to

^{1/} The Department of Defense Military Pay and Allowance Committee has assigned the number DO-AF-1502 to the request.

BAQ-W or VHA-W. We have responded to the shared custody questions posed to us as well.

Sergeant Walker and his wife were divorced November 9, 1987. According to their divorce decree, they share legal custody of their son, but Mrs. Walker was awarded primary physical custody. The child spends approximately 2 days per week during the school year and 3 days per week during the summer with Sergeant Walker, who pays \$90 per month in child support. Neither Sergeant Walker nor his former wife, a civilian, reside in government quarters. We have been asked whether all or part of Sergeant Walker's expenses of providing a residence for his son may be used to increase his entitlement to BAQ and VHA.

Members of the uniformed services who are entitled to basic pay are entitled to BAQ unless they are provided government quarters adequate for themselves and their dependents. 37 U.S.C. § 403. A divorced member may qualify for BAQ-W for a child living with the member's former spouse in private quarters if he pays child support in an amount at least equal to the difference between BAQ at the "with-" and "without-dependents" rate for his grade. Department of Defense Military Pay and Allowances Entitlements Manual (Pay Manual), paragraph 30236(d).^{2/}

Since Sergeant Walker's former wife has primary physical custody of their son, he should be considered a non-custodial parent for the purpose of entitlement to allowances. Thus, as noncustodial parent of a child living in private quarters, Sergeant Walker would be entitled to BAQ-W if he paid sufficient child support--in his case, \$123.90. Sergeant Walker is obligated to pay \$90. If he were voluntarily to pay the additional \$33.90 per month, his ex-wife would have to agree to accept the additional amount in order for him to qualify for BAQ-W. Pay Manual paragraph 30236(g). She apparently has not done so. Sergeant Walker is therefore entitled to BAQ at the rate for members without dependents only.

Likewise, to qualify for BAQ-W on a basis other than sufficiency of child support, the dependent child must reside with the member on a nontemporary basis, e.g., for a continuous period in excess of 3 months, to qualify for the BAQ-W for the nontemporary period. The cost of maintaining a residence sufficient to accommodate a child would not entitle a member to the "with-dependent" allowance. Major Norris G. Cotton, 69 Comp. Gen. 407 (1990). See also Major Garry R.

^{2/} A member who fails to make ordered payments is not entitled to BAQ-W. See Pay Manual, paragraph 30236(b).

Scott, USAF, and Captain Christopher Bonwich, USAF, 64 Comp. Gen. 224 (1985) (a case which provides further explanation of the 3-month rule).

A member entitled to BAQ is also entitled to VHA whenever permanently assigned to duty in an area of the United States which is a high housing-cost area with respect to the member. 37 U.S.C. § 403a(a)(1). The Joint Federal Travel Regulations (JFTR) paragraph U8000-1 et seq. implement the law. A member who is not assigned to government quarters and receives BAQ-W solely because he is paying child support is entitled to VHA only at "without-dependent" rate. 37 U.S.C. § 403a(a)(4) and JFTR para. U8011-B.

Thus, while Sergeant Walker may be entitled to VHA if he lives in a high-cost area, he is not entitled to VHA-W unless his son lives with him for a continuous period in excess of 3 months, as the fact that he maintains a residence sufficient to accommodate his dependent child does not entitle him to VHA-W when his son lives with his former wife or lives with him for shorter periods. See 69 Comp. Gen. 407, 409, supra.

We have also been asked a series of questions regarding entitlement to BAQ-W when joint custody is awarded. Our responses refer to divorced parents with joint physical custody in instances where the parties do not live in government quarters.

In instances where both parents are service members, the Pay Manual, paragraph 30236.1(i), provides that in the absence of support payments each member will be entitled to BAQ-W for the periods when the child actually lives with him or her. If support is paid, support payments will take precedence over physical custody.

If only one parent is a member, the previous discussions of entitlement to BAQ-W apply. See Pay Manual, paragraph 30236(d), and 64 Comp. Gen. 224, supra. During a period when the child is living with the member in private quarters for a continuous period in excess of 3 months, BAQ-W is payable without additional payment of child support. The cost of maintaining a home is not a factor in determining entitlement to BAQ-W and cannot be used instead of or in addition to child support to qualify for the increased allowances.

Since Sergeant Walker's claim is denied, the vouchers submitted will be retained by this Office.

for 
Comptroller General
of the United States