Compensation Claim Decision Under section 3702 of title 31, United States Code

Claimant: [name]

Organization: [agency component]

Centers for Disease Control and

Prevention

Department of Health and Human

Services

Atlanta, Georgia

Claim: COLA and Severance Pay based on

Hawaii Duty Station

Agency decision: Denied

OPM decision: Denied

OPM file number: 07-0029

/s/ for

Robert D. Hendler

Classification and Pay Claims

Program Manager

Center for Merit System Accountability

3/11/2008

Date

The claimant was removed from her [position] effective December 6, 2002, for declining to accompany her function when it moved outside her commuting area (Honolulu, Hawaii) to Atlanta, Georgia. The claimant requests back pay for Cost of Living Allowance (COLA) from May 18, 2002, until her termination on December 6, 2002, and for severance pay she received March 24, 2006. The U.S. Office of Personnel Management received the claim on March 27, 2007, and the agency administrative report (AAR) on July 25, 2007. For the reasons discussed herein, the claim is denied.

The record shows the claimant was officially reassigned on May 19, 2002, from [position] in [agency component], Centers for Disease Control and Prevention (CDC), Department of Health and Human Services, with a duty station of Honolulu, Hawaii, to an identical additional position (PD Number 96L088) in Atlanta, Georgia. The claimant agrees she declined to relocate and, as a result, was removed from Federal employment. In her February 5, 2007, claim letter to CDC the claimant states she was instructed to:

...report to my new duty station in Atlanta, GA by May 20, 2002 and that any additional time that I spent in Hawaii beginning May 20, 2002 must be charged to annual leave....On May 8, 2002, I <u>declined</u> the reassignmentbecause of my health and personal (family's health/employment) reasons....On March 15, 2002-July15, 2002, I was on official workers' compensation (OWCP)....I used continuation of pay (COP) from March 15, 2002-April 30, 2002....I used sick and annual leave from May 1, 2002-July 15, 2002 instead of taking workers' compensation pay...From July 16, 2002-December 6, 2002, I took sick leave and annual leave and leave without pay due to my handicapping health condition and job stress because my supervisor refuse [sic] to grant me Family Medical Leave Act (FMLA).

On July 29, 2002 and August 1, 2002, I inform [sic] Mr. Kilgour that I declined the reassignment and that I was on worker'[sic] compensation and unable to return to work while on leave....From May 19, 2002-December 6, 2002, I received wages for my new duty station in Atlanta, GA with CDC deducting Hawaii State income tax because I was still residing in the State of Hawaii...My leave and earning statements (LES) and pay were sent to my duty station in Honolulu, Hawaii....On August 19, 2006, I received my LES for my severance pay that I receive [sic] on March 24, 2006. I was paid Atlanta, GA salary with Hawaii state income tax deducted from it....I did not receive Hawaii wages plus COLA. I filed Hawaii income taxes....I still reside in Hawaii. I have never relocated not did I report to my new duty station in Atlanta, GA for reassignment....According to 5 CFR 591.210, I should have been paid COLA until I was separate [sic] and while on all leave.

In its July 10, 2007, AAR, the agency states the claimant's entitlement to COLA terminated with her reassignment to Atlanta, Georgia, effective May 19, 2002. The agency states:

[Claimant] now claims her inability to report to Atlanta was because of an on-the-job injury. She did, in fact sustain a traumatic injury on March 15, 2002, while in a travel status. Department of Labor (DOL) memo dated April 23, 2002, informed [claimant] of their acceptance of her claim and provided her a Guide for Injured Federal Employees. She was authorized Physical Therapy from the date of injury to July 15, 2002. After review of her OWCP [Office of Workers' Compensation] file, there is no evidence that employee received compensation outside the Continuation of Pay (COP) that she was placed on from March 25-April 2, 2002.

There are no CA-7s (Claim for Compensation) in the file and when this office reviewed the AQS Worker Case Query there was no paid compensation during any time for this injury. This office also has not [sic] supporting medical documentation supporting her claim that she couldn't relocate to Atlanta because of an on the job [sic] traumatic injury.

The agency also states the claimant's declination to department from Honolulu "does not change the fact that CDC management intended for the employee to leave Honolulu and report to her new duty station in Atlanta, Georgia. Because Atlanta was the claimant's official duty station at the time of her separation, the agency states 5 CFR 550.709 required it to use the Atlanta rate of pay for severance pay calculation purposes."

In responding to her agency's claim denial rationale, the claimant asserts she was on workers compensation which allowed her to "use sick or annual leave in lieu of compensation pay." She further argued:

Computation of pay is calculated on the date of injury and COLA is included. I was injured while on Hawaii salary plus COLA. I should have continue [sic] receiving Hawaii salary plus COLA while I was out on sick or annual leave during my recovery period from my work-related injury.

Her assertions rely on language in OWCP publication CA-810 and CA-550, regarding how compensation is calculated after continuation of pay (COP) is exhausted.

The claimant also asserts CDC cannot consider Atlanta as her official worksite:

...because I did not ever perform regular duties there as stated in 5 CFR 531.605. In my leave and earning statements from CDC, Hawaii State Tax was deducted because I was still residing in Hawaii....According to 5 CFR 591.210, I should have been paid COLA until I was separated.

Again, I declined the reassignment to Atlanta, GA because of my health conditions and was on leave. My salary should not have been changed to Atlanta, GA wages because I was still in Hawaii on leave.

OPM does not conduct adversary hearings, but settles claims on the basis of the evidence submitted by the claimant and the written record submitted by the Government agency involved in the claim. 5 CFR 178.105; Matter of John B. Tucker, B-215346 (March 29, 1985). Moreover, the burden of proof is on the claimant to prove the liability of the Government and his or her right to payment. 5 CFR 178.105; Matter of Jones and Short, B-205282 (June 15, 1982). Thus, where the written record presents an irreconcilable dispute of fact between a Government agency and an individual claimant, the factual dispute is settled in favor of the agency, absent clear and convincing evidence to the contrary. 5 CFR 178.105; Matter of Staff Sergeant Eugene K. Krampotich, B-249027 (November 5, 1992); Matter of Elias S. Frey, B-208911 (March 6, 1984); Matter of Charles F. Callis, B-205118 (March 8, 1982).

The claimant's rationale would require us to conclude an employee who has suffered a work-related injury, has the authority to determine his or her place of employment for all ensuing pay purposes. Indeed, her rationale would require us to conclude each employee rather than the employing agency has the authority to determine the employee's official duty station and conditions of employment (March 8, 2002, letter from claimant to agency: "When I was hired by CDC to work in Hawaii, relocation was never a condition of my employment."), and her declination to accept the reassignment to Atlanta prevented the agency from changing her duty station. This interpretation is barred by 5 U.S.C. 7106(a) which makes clear agency management determines where to assign employees and determines the "personnel by which agency operations shall be conducted." Agencies have the authority to reassign employees (5 CFR 335.102(a)) and such decisions are not subject to review under the provisions of 31 U.S.C. 3702(a)(2).

The record shows the claimant was officially reassigned to a position with a duty station of Atlanta, Georgia, effective May 19, 2002. The fact the claimant was in a leave status and remained in Hawaii does not affect or alter the fact she encumbered the Atlanta position until she was terminated for failing to relocate to that duty station, and all pay actions subsequent to her reassignment were appropriately based on Atlanta as the official duty station. Therefore, the claimant's reliance on subpart B of part 591 of 5 CFR must be rejected since her position of record during the period of the claim with an official duty station in Atlanta, Georgia, was not covered by Hawaii COLA. Since her position in Hawaii ceased to exist effective May 19, 2002, that location may not be used as her official duty station for the purpose of determining her entitlement to nonforeign area cost-of-living allowances. (See 2002 version of 5 CFR 591.210(a) and the definition of "official duty station" in 5 CFR 591.201, in effect during the period of the claim.) The claimant's severance pay entitlement was correctly based on the the rate of basic pay for the position the claimant held at the time of separation; i.e., the rate of basic pay, including any locality payment, in effect for her position of record in Atlanta, Georgia. (See 2002 version of 5 CFR 550.707 and the definition of "rate of basic pay" in 5 CFR 550.703, in effect during the period of the claim.) The claimant's reliance on 5 CFR 531.605 must be rejected since this regulation was not in effect during the period of the claim. Indeed, it appears the agency afforded the claimant considerations not required by statute or regulation by permitting her to remain in a leave status for more than six months after she refused to accept her directed reassignment and permitting her to retain Honolulu as her residence for tax reporting and other payroll services until her separation.

The claimant's reliance on CA-550 with regard to this claim is also misplaced. While she was authorized and received Physical Therapy from the date of her injury (March 15, 2002) until the date of her removal (December 6, 2002), she did not receive compensation outside of the Continuation of Pay she was placed on from March 25 through April 2, 2002, prior to her official reassignment to Atlanta. Therefore, we must conclude the claimant was not receiving workers' compensation, as opposed to authorized medical treatment, during the period of this claim. Thus, her assertion: "I was injured on Hawaii salary plus COLA. I should have continue [sic] receiving Hawaii salary plus COLA while I was out on sick or annual leave during my recovery period from work related injury," is not supported by the record. Therefore, this claim must be denied in its entirety.

Although it does not affect this settlement decision, we note the claimant also misunderstands the provisions of FMLA: "I took sick leave and annual leave and leave without pay due to my handicapping health condition and job stress because my supervisor refuse [sic] to grant me Family Medical Leave Act (FMLA)." FMLA provides for "12 administrative workweeks of unpaid leave during any 12-month period" (5 CFR 630.1201(a)) and allows for the substitution of paid leave under specific circumstances (5 CFR 630.1205). The record fails to show the claimant officially invoked FMLA (5 CFR 630.1206). Assuming, *arguendo*, the claimant had invoked FMLA, the agency would have met its obligations since it permitted the claimant to use paid leave and carried her in a leave without pay status (unpaid leave) once her paid leave was exhausted.

This settlement is final. No further administrative review is available within OPM. Nothing in this settlement limits the claimant's right to bring an action in an appropriate United States court.