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

Claimant: [name]

Organization: [agency component]

Indian Health Service Public Health Service

U.S. Department of Health and

Human Services

[city & State]

Claim: Physician Special Pay and Physician and

Dentist Pay

Agency decision: Denied

OPM decision: Granted in part

OPM file number: 09-0011

//Ana A. Mazzi

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Deputy Associate Director

Merit System Audit and Compliance

8/30/2010

Date

On February 4, 2009, the U.S. Office of Personnel Management received a claim for Physician Special Pay (PSP) from [claimant], MD. The claimant was employed as a Supervisory Physician, GS-602-14, at the Indian Health Service (IHS), [agency component], at the Department of Health and Human Services (HHS). He requests Physician Special Pay (PSP)/Physician and Dentist Pay (PDP) for the concluding months of his tenure with IHS, from January 4, 2006, to his retirement on March 31, 2006.

The claimant had been receiving PSP from 2000-2005 under a series of service agreements, the last of which was originally scheduled to expire on December 17, 2005. Under the title 38 PSP system in effect at that time, a physician who received PSP was required to sign a service agreement which served as a commitment to remain in the position for a specified period of time. The agency did not pay the claimant PSP after December 17, 2005. On January 8, 2006, the new title 38 PDP system authorized by P.L. 108-445 went into effect, but the agency did not authorize PDP for the claimant.

The claimant cites "HHS Personnel Instruction 590-1, Title 38 Physician Special Pay" which was in effect when his last service agreement was originally scheduled to expire:

PSP is available for use to recruit and retain highly qualified physicians. Payment of PSP is optional in each OPDIV. However, if paid to a position or specific category of positions, other physicians performing the same or similar duties in the same OPDIV must be considered for PSP.

Within budgetary constraints, HHS policy is to compensate physicians at levels reasonably comparable with those paid to other Federal sector physicians in the same local area.

The claimant states he was one of two physicians on the staff at the [agency component] during the time period in question and that the other physician was receiving PSP and "at no time had his PSP interrupted and continued to receive the pay throughout the time in question." The basis for his claim is this resulted in an inequity in compensation between himself and the other physician. The claimant asserts: (1) "the relevant paragraph cited above aims for equity in pay for the same work performed by employees in the same OPDIV [operating division]," (2) "[c]onsideration" of an applicant with identical duties without actually granting the financial incentives would ignore the intent of this rule and make its provisions toothless," and (3) "[o]nce administration has determined that they want to retain physicians with PSP and treat both (all) equitably, then the next sentence in the federal rules applies to possible budgetary restraints that if enacted at all, would clearly affect all workers with similar credentials, duties, and pay."

The agency counters that under the new title 38 PDP authority, HHS policy allows for discretionary payment of market pay to physicians based on recruitment and retention issues and budgetary constraints and there is no entitlement to the additional allowance. They point out the claimant previously received special pay under PSP provisions and was paid through the end of his PSP service agreement period, but was not offered market pay under PDP due to budgetary constraints. They cite "HHS Instruction 590-1, Title 38 Physician and Dentist Pay (PDP)":

<u>Discretionary Application</u>: PDP is available for use to recruit and retain highly qualified physicians. Payment of PDP is optional in each OPDIV. (Throughout this Instruction, references to OPDIV Head infers authorities may be redelegated.)

Within budgetary constraints, HHS policy is to compensate physicians at levels reasonably comparable to those paid to other Federal section physicians in the same local area.

The claimant presents a contradictory argument in that he does not dispute the discretionary nature of PSP but suggests the statement "other physicians performing the same or similar duties in the same OPDIV must be considered for PSP" imposes a requirement to grant PSP to all employees in the interest of equity, ostensibly because consideration is meaningless if the outcome is not positive. Notwithstanding the claimant's perception, the PSP instruction specifically states "payment of PSP is optional in each OPDIV." Although equity within the OPDIV must be considered, it is clearly not mandatory. We note both the claimant and the other physician had been receiving PSP during their shared tenure at the [agency component].

However, PSP service agreements were eliminated prior to the originally scheduled December 17, 2005 expiration date of the claimant's PSP service agreement, and prior to the January 8, 2006, effective date of PDP under transition provisions in statute that were delegated to HHS on June 9, 2005, under the title 38 delegation agreement with OPM authorized under 5 U.S.C. 5371 and 1104. Subsection 3(e)(1)(B)(i) of P.L. 108-445, provided that a PSP agreement in effect before the enactment date of the Act (i.e., December 3, 2004) must terminate on the date of enactment. This subsection also provided that a physician in receipt of special pay pursuant to such an agreement on that date must continue to receive special pay under the terms of such agreement until the effective date under subsection (d). The effective date under subsection (d) was the January 8, 2006, PDP effective date. Therefore, the claimant's PSP agreement was terminated by statute on December 3, 2004, and the claimant was entitled to continue to receive PSP under the terms of that agreement until the day before the PDP authority effective date of January 8, 2006. Thus, the claimant is due PSP from December 18, 2005, until the end of the day on January 7, 2006.

The claimant was subsequently not offered market pay under the PDP system, which is specified as optional in the agency PDP instruction. OPM's title 38 delegation agreement, in effect for the period of the claim, provided HHS the discretion to implement the title 38 PDP authority as a recruitment and retention tool. The claimant's argument that equity be the primary consideration in granting PDP directly contradicts its primary purpose as a recruitment and retention tool. The agency PDP instruction does not include the agency's former PSP requirement that internal equity be considered in awarding additional pay, but does include the statement that HHS's policy is to compensate physicians "at levels reasonably comparable to those paid to other Federal sector physicians in the same local area." Reference to *other Federal sector* physicians refers to external pay comparability as the guiding principle and purpose of PDP, not internal equity as the claimant erroneously suggests. Since the claimant states he and his colleague were the only Federal sector physicians in the local area, the issue of external pay comparability is moot. The claimant's interpretation of PDP would render its discretionary nature meaningless.

¹ The claimant asserts his Lower Brule colleague was "automatically converted to the new program with continuing physician special pay." OPM's responsibility in adjudicating a claim is to apply controlling law and regulation to the facts of the case. Therefore, whether his colleague received PDP does not control our independent assessment of the agency's decision to not grant the claimant PDP.

OPM does not conduct investigations or preside over adversary hearings in adjudicating claims, but relies on the written record submitted by the parties. See Frank A. Barone, B-229439, May 25, 1988. Where the record presents a factual dispute, the burden of proof is on the claimant to establish the liability of the United States, and where the agency's determination is reasonable, OPM will not substitute its judgment for that of the agency. See, e.g., Jimmie D. Brewer, B-205452, March 15, 1982, as cited in *Philip M. Brey*, B-261517, December 26, 1995. 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 agency has the discretion to determine if continued payment of an incentive to retain an employee is necessary and whether it is practical within budget limitations. As there is no inherent entitlement to an incentive such as PDP and the agency's action was not arbitrary, capricious, or unreasonable, the claim for PDP is denied. As discussed previously in this decision, the claimant is due PSP from December 18, 2005, until the end of the day on January 7, 2006. As stated in 5 CFR 550.806, the claimant is also owed interest on the PSP back pay.

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

² See HHS Instruction 590-1, Title 38 Physicians and Dentist Pay at 590-1-70.E (6)—"The amount of market pay of a particular physician or dentist shall take into consideration . . . (6) Consideration of unique circumstances, qualifications or credentials, if any, and the comparison of these circumstances to the equivalent compensation level of non DHHS physicians and dentists in the local health care labor market area." Elsewhere in the instruction, it refers to compensating "at levels reasonably comparable to other Federal sector physicians in the same local area" and "within available budgetary constraints." See HHS Instruction 590-1-40.A. The law at 38 U.S.C. 7431(c)(5) provides the factors that must be considered in determining the amount of market pay. While budgetary conditions and rates received by other Federal sector physicians is not specifically listed, section 7431(c)(5)(F) provides for "such other considerations as the Sectary considers appropriate." OPM delegated the use of this title 38 provision to HHS in April 2006.