COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

30944

B-150929 May 21, 1973

Chaplain (Colonel) Emmett L. Walsh, USA (Ret.)
2059 Huntington Avenue
Alexandria, Virginia 22303

Dear Chaplain Walsh:

Further reference is made to your letter dated February 25, 1973, requesting reconsideration of the settlement dated January 23, 1973, of our Transportation and Claims Division which disallowed your claim for basic allowance for quarters on behalf of your sister, Gladys H. Walsh, whom you have adopted, for the reasons stated.

You say in your letter that in the spring of 1970 while you were stationed at Fort Leavenworth, Kansas, your sister, who had resided with you since September 1968, went to McAllen, Texas, for a visit. While there you say she was hospitalized and has not resided with you since that time. On November 30, 1970, you filed an application for basic allowance for quarters as a member with a dependent, effective September 2, 1970, listing your elder sister, born in 1900, as your dependent. You indicated that by decrees of the District Courts, Hidalgo County, Texas, dated September 2 and September 16, 1970, you adopted your sister. The application was returned by the Department of the Army with the statement that you were not entitled to basic allowance for quarters for a dependent sister, citing a decision of the Comptroller General, B-150929, dated April 11, 1963 (42 Comp. Gen. 578).

You subsequently filed a claim with this Office which was disallowed by settlement dated January 23, 1973, also citing our prior decision B-150929 of April 11, 1963.

You now contend that the cited decision cannot be rationalized in view of 37 U.S. Code 401 and also that your case is not the same as the cited decision.

Section 401 of title 37, U.S. Code, defines the term "dependent" with respect to a member of a uniformed service for purposes of entitlement to allowances. A sister is not included in the term. Clause (2) provides, however, that such term includes,

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his unmarried legitimate child (including a stepchild, or an adopted child, who is in fact dependent on the member) who either—

(A) is under 21 years of age; or

(B) is incapable of self-support because of a mental or physical incapacity, and in fact dependent on the member for over one-half of his support; * * *

A literal reading of the above statute might seem to support your contention that your sister has become your lawful dependent since you adopted her and she is over 21 and incapable of self-support. However, it has long been the view of this Office that adoptions of this type are not such as are contemplated by the statute and do not entitle a member of the uniformed service to have such adopted adult considered as a dependent for entitlement to allowances.

In 9 Comp. Gen. 299 (1930) we considered the effect of the Act of February 21, 1929, 45 Stat. 1254, amending section 4 of the act of June 10, 1922, 42 Stat. 627, to provide that the term "dependant"—

shall include at all times and in all places a lawful wife and unmarried legitimate children, stepchildren, or adopted children under twenty-one years of age where such legitimate children, stepchildren, or adopted children are in fact dependent upon the person claiming dependency allowance. * * *

The above act is a predecessor statute of what is now section 401, title 37, U.S. Code. In commenting on the above definition as it related to an officer claiming a quarters allowance for an adopted child, we stated,

As the act of 1929 was cast in its final form primarily to prevent payments of increased allowances in the case of adopted child or children where the adoption was of a near relative of the adopting officer, the child remaining in the custody of its natural parent or parents, and prima facie no purpose was served other than to give the officer a basis for claiming increased allowances because of having an adopted child, more complete information as to the circumstances of the child and the child's natural parent or parents, if any, will be required * * * (emphasis added)

B-150929

In our decision of April 11, 1963, 42 Comp. Gen. 578, a copy of which you were furnished, we had for consideration the case of a single female officer who claimed an increase in basic allowance for quarters because of newly acquired dependents. It appeared that the officer adopted as her children her elder brother and sister, both of whom were unemployable and not residing with the officer.

In your situation the facts are very similar. You are requesting payment of an increase in basic allowance for quarters as a member with a dependent, your elder sister, whom you adopted as your child. Although you say your sister at one time resided with you, according to the statements contained in your letter to this Office, dated February 25, 1973, she did not reside with you immediately prior to the adoption, having left your station in Kansas for Texas in the spring of 1970, and she has not resided with you since her adoption in September 1970.

As pointed out in our decision of April 11, 1963, prior to 1949 the definition of "dependent" did not include a legitimate or adopted child over 21 years of age. Section 102(g) of the Career Compensation Act of 1949, ch. 681, 63 Stat. 804, broadened the definition to include legitimate children over 21 years of age who are incapable of self-support and who are in fact dependent on the member for over one-half of their support. And, it was provided that the term "children" included stepchildren and adopted children when they are in fact dependent on the member.

After discussing the legislative history of the change in the term "dependent" in section 102(g) of the 1949 act, we said:

> It seems evident that, insofar as legitimate children are concerned, the Congress intended that the basic allowance for quarters should be provided to an officer on account of a child after such child reaches 21 years of age only in the event that there is a need for continued support of the child after reaching that age, as a result of inability to earn a living because of his or her mental or physical disability. We do not believe that by including adopted children within the meaning of the term "children" it was intended to broaden the scope of the law to cover situations where the parent and child relationship did not exist when the children reached the age of 21 and the disability existed at the time of adoption. In any event, it appears extremely doubtful that the Congress contemplated the extension of the benefits of the law to an officer who adopts a brother, sister, or other

relative over the age of 21 where no bona fide relationship of parent and child exists. In this case, it does not appear that a bona fide parental relationship exists between the officer and her adopted "children" since they are in fact her older brother and sister and they do not reside with her.

Therefore, since no bona fide relationship of parent and child resulted from the adoption of your elder sister, and since, as far as the record shows, her disability did not exist at the time she reached the age of 21, we are of the opinion that her adoption provides no basis to pay you a quarters allowance as a member with a dependent. Accordingly, the settlement of January 23, 1973, is sustained.

Sincerely yours,

PAUL G. DEMBLING

For the Comptroller General
of the United States