

DATE: November 26, 2019

In Re:)
 [REDACTED]) Claims Case No. 2019-CL-012401.2
)
Claimant)

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

The burden of proving the existence of a valid claim against the United States is on those asserting the claim. The claim must also be filed within the time limit specified by law.

DECISION

A retired member of the U.S. Navy requests reconsideration of the appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2019-CL-012401.2, dated June 12, 2019. In that decision, DOHA sustained the Defense Finance and Accounting Service's application of the Barring Act, 31 U.S.C. § 3702(b), to the member's claim for retroactive retired pay.

Background

On September 30, 1961, the member enlisted in the Naval Reserve, now the Navy Reserve. On February 21, 1967, he entered active duty as a naval flight officer candidate. In May 1967 he was commissioned and served on active duty as a Naval Flight Officer for approximately four and a half years. He then was assigned to a naval air reserve unit.

On December 15, 1989, the Commanding Officer, Naval Reserve Personnel Center, notified the member that he was eligible to receive retired pay upon reaching the age of 60 because he had completed all necessary requirements. The Secretary of the Navy, through the Navy Personnel Command (NPC), issued the member his Honorable Discharge Certificate

effective September 30, 1995. On April 30, 2003, the member's 60th birthday, he became eligible for retired pay.

On June 22, 2008, the record reflects that the member sent a request for an application for retired pay after age 60 to the Commander, Naval Reserve Forces Command, and attached his letter of eligibility dated December 15, 1989. However, the member acknowledges that he received no response and his submission was returned by mail to him.

On December 20, 2016, the NPC received the member's application for retired pay. However, upon receipt of the documentation from the Navy, the Defense Finance and Accounting Service (DFAS) took no action to establish the member's retired pay account. On April 12, 2018, the NPC notified the member that his application for retired pay was approved. On May 22, 2018, DFAS received a congressional inquiry on the status of the member's retired pay account. As a result, on June 5, 2018, DFAS then issued the member a retroactive payment of retired pay in the amount of \$88,051.33 for the period December 21, 2010, through December 31, 2015. On June 8, 2018, DFAS issued the member a second retroactive payment of retired pay in the amount of \$40,529.52 for the period January 1, 2016, through April 30, 2018. However, pursuant to 31 U.S.C. § 3702(b)(1), DFAS was barred by the statute of limitations from paying \$99,171.83, the portion of the retired pay accrued between April 30, 2003, through December 20, 2010. Under 31 U.S.C. § 3702 (b), also referred to as the Barring Act, the administrative statute of limitations limits jurisdiction to consider claims to those that are filed within 6 years after they accrue. On July 24, 2018, DFAS mailed the member a letter explaining that the date he submitted his application for retired pay was greater than six years from his actual retirement date. Therefore, due to the Barring Act, any retired pay due the member prior to December 21, 2010, was barred from payment. DFAS also provided the member his appeal rights. On August 14, 2018, DFAS received another congressional inquiry on the member's retired pay status, specifically addressing the barred retroactive payment of retired pay and the member's rank. On August 23, 2018, DFAS received the member's appeal.

After further review of the member's retired pay account, DFAS corrected the member's rank from Lieutenant (O-4) to Commander (O-5). DFAS found that due to the original erroneous establishment of the member's retired pay account as a lieutenant, he received an additional \$50,916.00 for the period December 21, 2010, through September 30, 2018. DFAS also recalculated the barred amount of the member's claim for retroactive retired pay for the period April 30, 2003, through December 20, 2010, from \$99,171.83 to \$160,667.20.

In the appeal decision, the attorney examiner upheld DFAS's application of the Barring Act to the member's claim for the retroactive payment of his retired pay in the amount of \$160,667.20 for the period April 30, 2003, through December 20, 2010. The attorney examiner explained that since the member was entitled to receive retired pay on April 30, 2003, but his application for retired was not received by the Navy until December 20, 2016, DFAS was barred from paying him any of the retroactive retired pay prior to December 21, 2010. The attorney examiner also advised the member that under 31 U.S.C. § 3702(e), upon request of the Secretary concerned, the Secretary of Defense may waive the time limitations established by 31 U.S.C. § 3702(b) for claims involving a uniformed service member's pay, allowances, or survivor benefits. He explained that the member may claim any amount due, but waiver can be granted

so as to allow payment up to a maximum of \$25,000.00. He further advised the member that he may wish to petition the Board for Correction of Naval Records (BCNR).

In his request for reconsideration, the member disputes that the date of accrual of his retired pay claim was his 60th birthday, April 30, 2003. He states that the material fact at issue in his claim for retroactive non-Regular retired pay is the date upon which the 6-year accrual period began. He states that the accrual of his claim began long after his 60th birthday. He also claims it began after the Navy received his retirement application on December 20, 2016, and after his application was approved by the Navy Personnel Command on April 12, 2018. He maintains that his claim did not accrue until DFAS partially disapproved his retroactive payment of retired pay on July 24, 2018. Therefore, he asserts that his claim is not time-barred until July 24, 2024. He cites *Garcia v. United States*, 223 Ct. Cl. 110 (1980), in support of his position.

Discussion

The question of limitations is the sole issue presented in this case. For the reasons set forth below, we find that DFAS's application of the Barring Act is proper and the member's claim is barred by 31 U.S.C. § 3702(b), the 6-year statute of limitations.

Claims settlement under 31 U.S.C. § 3702 is subject to a statute of limitations. Each claim must be "received by the official responsible under subsection [3702](a) for settling the claim or by the agency that conducts the activity from which the claim arises within 6 years after the claim accrues." Unless otherwise provided by law, appropriated funds are not legally available to pay claims on which the applicable limitation has run. Absent statutory authority, agencies may not waive or extend the time allowed by the Barring Act. *See* 70 Comp. Gen. 292 (1991); 62 Comp. Gen. 80, 83 (1982); B-249968, Feb. 16, 1993. Therefore, DOHA's jurisdiction, as is DFAS's, to consider claims is limited to those that are filed within 6 years after they accrue.

The age and service requirements applicable to retired pay for non-Regular service are currently found under 10 U.S.C. § 12731.¹ Subsection 12731(a) provides that, except as provided in subsection 12731(c), a member is entitled, upon application, to retired pay if the member is at least 60 years old; has performed at least 20 years of service computed under 10 U.S.C. § 12732; has performed certain qualifying service while a member named in the category under 10 U.S.C. § 12732 if the member has completed at least 20 years of service before 2005, or has completed 8 years of qualifying service if the member has completed at least 20 years of service before 1994; and is not entitled to retired pay under any other provision of law. The member's application for retired pay must be made to the Secretary of a military department having jurisdiction at the time of application over the armed force in which the applicant is serving or last served. *See* 10 U.S.C. § 12731(b). In addition, 10 U.S.C. § 12731(d) provides that the Secretary of the service concerned shall notify, in writing, each member who has

¹Prior to 1994, the provisions governing non-Regular retired pay were codified under 10 U.S.C. §§ 1331-1337, *et seq.* They were transferred to 10 U.S.C. §§ 12731-12738, by Div. A, Title XVI, section 1662(j)(f) of Pub. L. No. 103-337, Oct. 5, 1994, 108, Stat. 2998, 3005.

completed the years of service required for eligibility for retired pay within one year after the member completes that service.

On December 15, 1989, the Navy notified the member in writing that he had completed the years of service required for eligibility for retired pay. The member was entitled to receive retired pay on his 60th birthday in April 2003. Therefore, his claim accrued on that date. Although he requested an application for retired pay in 2008, he acknowledges that his submission was returned to him by mail. He did not file his application for retired pay with the Navy as required by 10 U.S.C. § 12731(b) until December 20, 2016. Therefore, the member's claim for non-Regular retired pay based on his application of December 20, 2016, is subject to the 6-year Barring Act. *See* B-274195, Oct. 8, 1996.

The member cites *Garcia v. United States, supra*, in support of his position. In *Garcia*, the Court of Claims addressed the issue of whether an Army reservist's claim for non-Regular retired pay following delayed notification of satisfactory completion of his 20 years of service was limited by the Court's 6-year statute of limitations (28 U.S.C. § 2501), or whether his claim accrued only when the Army notified him that he had completed the necessary 20 years of service. The Court held that 10 U.S.C. § 1331(d), the predecessor to 10 U.S.C. § 12731(d) as explained in footnote 1, created a statutory condition precedent to the accrual of a cause of action. That condition was satisfied by the Department of Defense determination and notification to the member that he had met the years of service requirement, and thus, the provisions of 28 U.S.C. § 2501 did not limit his recovery. This case was followed by the Comptroller General in 62 Comp. Gen. 227 (1983) when examining the statute of limitations under 31 U.S.C. § 3702(b).

The case in front of us does not involve delayed notification of the member's satisfactory completion of his years of service, and is therefore distinguishable from both *Garcia* and 62 Comp. Gen. 227, *supra*. The member was notified of his entitlement by the Navy in 1989. He was discharged in 1995. He became eligible for retired pay on his 60th birthday, April 30, 2003. The facts in this case are analogous to the facts in B-274195, *supra*. In B-274195, the Comptroller General found that neither the holding in *Garcia* nor 62 Comp. Gen. 227, *supra*, applied to a case where there was no delayed notification, and therefore, no condition precedent to the accrual of a reservist's claim for retired pay. The Comptroller General found that an agency's determination is a condition precedent to the accrual of a claim only when it is required by statute. This is in keeping with the fact that absent statutory authority, agencies may not waive or extend the time allowed by the Barring Act.

As set forth in the appeal decision, the member has a right to seek waiver of the Barring Act under 31 U.S.C. § 3702(e), to allow payment of up to \$25,000.00, with the Assistant Secretary of the Navy. Although this will not grant him the full payment of the retroactive retired pay barred by the statute of limitations, he may also seek review by the BCNR, as explained by the attorney examiner in the appeal decision.

Conclusion

The claimant's request for relief is denied and we affirm the appeal decision dated June 12, 2019, upholding the application of the Barring Act to the claim. In accordance with DoD Instruction 1340.21 ¶ E7.15.2, this is the final administrative action of the Department of Defense in this matter.

SIGNED: Catherine M. Engstrom

Catherine M. Engstrom
Chairman, Claims Appeals Board

SIGNED: Ray T. Blank, Jr.

Ray T. Blank, Jr.
Member, Claims Appeals Board

SIGNED: Gregg A. Cervi

Gregg A. Cervi
Member, Claims Appeals Board