

DATE: March 16, 2021

In Re:)
[REDACTED]) Claims Case No. 2020-CL-101501.2
Claimant)

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

A military reservist whose claim for retroactive retired pay beginning in 1994 was first received in the Defense Finance and Accounting Service (DFAS) in 2018, and whose claim was partially denied based on the six-year Barring Act (31 U.S.C. § 3702(b)), is entitled to payment because the claim first accrued when facts in his military record were changed by the Board for Correction of Military Records in 2020. The correction of his records gave him the 20 years of qualifying service he needed to receive retired pay, and thus, was a factual change in the record that gave rise to the claim as the date of the correction action.

DECISION

A retired member of the U.S. Army Reserve requests reconsideration of the appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2020-CL-101501, dated November 20, 2020. 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

The record reflects that in 1951 the member enlisted in the U.S. Air Force. He then enlisted in the Air Force Reserve and then the Army Reserve. In 1978 the member's unit in the Army Reserve requested that the Air Force Reserve, the Army Reserve, and the Army National Guard verify the member's points for the periods of his service for retirement purposes. The member then requested an investigation with the Army Inspector General (IG) in reference to the inquiries regarding his points for retirement. The IG wrote the member three times in 1978 concerning the investigation. In the IG's second letter, he stated that a special search was being

conducted by the Reserve Components Personnel and Administration Center (RCPAC) in an effort to construct the member's retirement points. In the third letter, the IG told the member that the investigation was continuing and the IG would provide the member with a statement of retirement points as soon as a response was received from the RCPAC in St. Louis, Missouri.

In 1981 the member was advised that his term of service in the Army Reserve would be expiring in the near future, and that he would be discharged unless he reenlisted. He was urged to reenlist since he had accumulated a substantial number of years of service. The record reflects that the member requested reenlistment and was reenlisted on May 25, 1981.

On October 31, 1981, the member was honorably discharged for expiration of his Army Reserve Service Obligation. In 1982 the member received a letter from the RCPAC stating that a study group had been created to look into issues with the retirement points accounting system. In 1983 the member received a Chronological Statement of Retirement Points. It only reflects the member's service in the Army; and notes his total qualifying years for retirement as 3 years, and total point creditable as 234. However, the total service (qualifying and nonqualifying) for longevity purposes is listed as 24 years, 9 months, 14 days. On July 29, 1994, the member turned 60 years old.

In April 2018, the member's daughter-in-law contacted the Defense Finance and Accounting Service (DFAS), requesting payment of retired pay for member. DFAS - U.S. Military Retired Pay responded by letter dated August 17, 2018, that they had no records for the member. DFAS stated that the member should contact his branch of service. DFAS further explained that changes to retirement factors are considered to be a correction of military record under 10 U.S.C. § 1552, and enclosed the DD Form 149, *Application for Correction of Military Record under Provisions of Title 10, U.S. Code, Section 1552*, for the member to request a records correction. On August 26, 2018, the member submitted his DD Form 149 to the Army Board for Correction of Military Records (ABCMR) requesting a correction of his record to reflect his 20-year retirement and placement on the retired list.

On February 10, 2020, the Chief of the Gray Area Retirements Branch, Army Human Resources Command, issued a memorandum to the Army Review Boards Agency, in response to Board's request for an advisory opinion on the member's request for a 20-year retirement. The Chief reviewed the member's record and determined that his DA Form 5016, *Chronological Statement of Retirement Points*, did not reflect the points that were earned throughout his military career. The Branch advised that the DA Form 5016 had been corrected, and the member had 22 years, 3 months and 28 days of qualifying service. On February 26, 2020, the ABCMR advised the member his record was corrected and that he was now eligible for retirement benefits. The ABCMR also enclosed the DD Form 108, *Application for Retired Pay Benefits*, and the DD Form 2656, *Data for Payment of Retired Personnel*, for the member to complete and submit to the Army Human Resources Command. The record reflects that the member's retired pay application was approved. DFAS established the member's retired pay account effective April 1, 2020. On April 13, 2020, DFAS issued the member a retroactive payment of retired pay in the amount \$65,810.37 for the period February 20, 2014, through March 31, 2020. However, citing the statute of limitations pursuant to 31 U.S.C. § 3702(b)(1), DFAS barred payment of \$163,454.23, the portion of the retired pay accrued between July 29, 1994, through February 19,

2014. 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 May 18, 2020, the member appealed DFAS's denial of his claim for the retroactive payment of retired pay in the amount of \$163,454.23. 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. The attorney examiner stated that prior to the member's application in February 2020, neither the Army nor DFAS had any evidence that an application for retired pay was filed by the member concerning his retired pay account. The attorney examiner stated that since the member was entitled to receive retired pay on July 29, 1994, but his application for retired pay was not received by the Army until February 2020, DFAS was barred from paying him any of the retroactive retired pay prior to February 2014. He further 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 and allowances, and retired pay. 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 ABCMR for full relief.

In his request for reconsideration, the member questions why the attorney examiner advised him to go to the ABCMR when he already petitioned the Board in 2018 and waited two years to finally get relief. He believes that the information he provided to DOHA on appeal was not considered by the attorney examiner. He resubmits all the documentation that he timely filed concerning his claim for retired pay. He attaches the certified mailing receipts reflecting that he sent the documentation to DFAS to be considered on appeal to DOHA.

Discussion

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. 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 question of limitations is the sole issue presented in this case. The question is when did the member's claim for retired pay first accrue for the purposes of the Barring Act: in July 1994 or when the ABCMR action was taken in February 2020.

Case precedent interpreting correction of records under 10 U.S.C. § 1552 has held that in order to give the claimant a new claim, *i.e.*, one first accruing upon the Correction Board's action, the correction made must be an actual change in the facts set out in the record that gives

rise to the additional payment. A correction that results from a change in the law or a shift in agency interpretation, does not give the claimant a new claim. *See* Comptroller General decisions B-205111, Feb. 19, 1982; and B-191650, May 18, 1978. In addition, an affirmation of facts already in a military record does not constitute a change in the record which gives rise to a new claim. *See* DOHA Claims Case No. 96121102 (August 22, 1997); and 50 Comp. Gen. 125 (1970). If a payment is due as a result of a correction of record, the claim for such payment accrues on the date of the correction. A claimant has six years from the date of the correction of record to claim the payment owed as a result of the correction of record. *See* Department of Defense Financial Management Regulation (DoDFMR) Volume 7B, Chapter 10, paragraph 10203.

In this case, it is clear that, prior to the ABCMR's action, the Army did not regard the member as having completed the requisite 20 years of service for retirement purposes. The ABCMR's action changed the member's military record to show that he had earned the sufficient retirement credit to qualify him for retired pay. That action was a factual change entitling the member to retired pay at age 60. *See* B-201947.OM, Nov. 16, 1981. Therefore, the member's claim accrued on the date of the ABCMR's action in February 2020. The member's claim is not barred and he should be paid the portion of his retroactive retired pay for the period July 29, 1994, through February 19, 2014, in the amount of \$163,454.23.

Conclusion

The member's request for relief is granted and we allow payment of the member's retroactive retired pay in the amount of \$163,454.23. 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: Richard C. Ourand, Jr

Richard C. Ourand, Jr
Member, Claims Appeals Board

SIGNED: Jennifer I. Goldstein

Jennifer I. Goldstein
Member, Claims Appeals Board