

DATE: January 31, 2022

In Re:)
)
 [REDACTED]) Claims Case No. 2021-CL-022313.2
)
 Claimant)

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

The burden of proving the existence of a valid claim against the United States is on the person asserting the claim.

DECISION

A retired member of the U.S. Army requests reconsideration of the appeal decision of the Defense Office of Hearings and Appeals (DOHA), in DOHA Claim NO. 2021-CL-022313, dated October 29, 2021. In that decision, DOHA upheld the Defense Finance and Accounting Service's (DFAS's) finding that the member was entitled to receive Concurrent Retirement and Disability Pay (CRDP) in 2019 on the basis that he did not submit his election to change from CRDP to Combat Related Special Compensation (CRSC) until after the time limit had passed.

Background

In a letter dated December 20, 2018, DFAS advised the member that since he was entitled to receive both CRDP and CRSC, he had the right to elect which one he wanted to receive. The letter advised him that he was currently receiving CRDP in the amount of \$1,786.00 per month, and if he wished to change to CRSC, he would receive \$1,786.00 per month. It further advised him that if he wished to change his current entitlement, he had to complete and sign the enclosed form and return the entire letter to DFAS in the envelope provided before January 31, 2019. The member signed the form electing to change his entitlement to CRSC on February 20, 2019. On February 26, 2019, DFAS determined the member's election was invalid because it was not received by the January 31, 2019 deadline.

The member submitted a letter appealing DFAS's determination regarding payment of CRDP for 2019, requesting payment from DFAS of CRSC for that year. He stated that he applied for CRSC in 2014, and believed his application was approved at that time. He stated that he has been receiving CRSC since then and does not understand when it got changed to CRDP.

In the appeal decision, the DOHA attorney examiner upheld DFAS's determination to award the member CRDP for 2019. In the member's reconsideration request, he states that he has always been paid CRSC, not CRDP. He never changed from CRSC to CRDP. He has asked that DFAS and DOHA look in his file and find proof he changed from CRSC to CRDP. He states that no form can be found because one does not exist. He states that this is no longer an administrative error, but fraud on the Department of Defense's part. He requests that he be awarded CRSC as he actually requested when he became eligible.

Discussion

Under DoD Instruction 1340.21 (May 12, 2004), the claimant must prove, by clear and convincing evidence on the written record, that the United States is liable to the claimant for the amount claimed. Federal agencies and officials must act within the authority granted to them by statute in issuing regulations. Thus, the liability of the United States is limited to that provided by law (including implementing regulations). The interpretation of a statutory provision and implementing regulation by an agency charged with their execution, and the implementation of them by means of a consistent administrative practice, is to be sustained unless shown to be arbitrary, capricious or contrary to law.

Under 10 U.S.C. § 1414(d)(1), a retired member entitled to CRDP who is also eligible for CRSC under 10 U.S.C. § 1413a as an eligible combat-related disabled retired member, may receive CRSC in accordance with section 1413a or retired pay in accordance with section 1414, but not both. Section 1414(d)(2) provides that the Secretary concerned shall provide an annual period (referred to as an "open season") during which a member entitled to both CRDP and CRSC shall be given the right to make an election to change from receipt of CRSC to CRDP, or the reverse, as the case may be. Any such election must be made under the regulations prescribed by the Secretary concerned. The regulations shall provide for the form and manner for making such an election and shall provide for the date as of when such an election shall become effective.

The implementing regulations for this statutory provision are found under Chapter 64, Volume 7B of the DoD Financial Management Regulation 7000.14-R (DoDFMR). Paragraph 640501 explains the relationship between CRDP and CRSC, especially reiterating that a member entitled to both may receive either one, but not both. In addition, all members entitled to both CRDP and CRSC will be provided an annual open season period during which the member may elect to change between the two programs. Eligible members will be notified of the opportunity to elect to change between CRDP and CRSC. This notification will specify the date that an election change will be effective. However, changes in the amount of a member's entitlement to either CRDP or CRSC, which occur after the close of an annual open season period, will not be the basis to alter a current election between CRDP and CRSC prior to the next annual open

season. This limitation includes changes in a member's VA disability rating, which have a retroactive effective date prior to the date that DFAS is notified of the change.

DFAS has advised DOHA that in 2014, the member was only entitled to receive CRSC. However, in December 2014 the member became eligible for both CRSC and CRDP. DFAS reports an open season letter was sent to the member in January 2015 that showed DFAS elected the greater entitlement, CRDP, but also gave the member an option to switch to CRSC. DFAS maintains that the member was in receipt of CRDP and did not respond to any of the open season letters sent to him until 2019. Since the member did not respond to the open season letter sent to him by DFAS in December 2018 until February 2019, he was late, and DFAS paid him the existing entitlement, CRDP. Under statute and regulation, DFAS properly paid the member CRDP for 2019, and there is no legal basis for payment of CRSC for 2019. *See* DOHA Claims Case No. 2020-CL-031204.2 (September 9, 2020).

Finally, the member should be aware that he has the right to change his election during the open season of each year which ends on January 31st of the new year.

Conclusion

The member's request for reconsideration is denied, and we affirm the appeal decision in DOHA Claim No. 2021-CL-022313, dated October 29, 2021. In accordance with DoD Instruction 1340.21 (May 12, 2004) ¶ 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