

DATE: March 1, 2022

In Re:)

[REDACTED])

) Claims Case No. 2016-CL-091608.3

Claimant)

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

When the language of a statute is clear on its face, the plain meaning of the statute will be given effect and that plain meaning cannot be altered or extended by administrative action.

DECISION

The Defense Finance and Accounting Service (DFAS) requests reconsideration of the appeal decision of the Defense Office of Hearings and Appeals (DOHA), in DOHA Claims No. 2016-CL-091608.2, dated June 8, 2017. In that decision, our office allowed the claim of a member's former spouse (hereinafter the claimant) for a division of his military retired pay under the Uniformed Services Former Spouses' Protection Act (USFPA).

Background

On March 1, 1995, the member and the claimant were married. On October 17, 2011, they were divorced. The divorce decree awarded the claimant a percentage of the member's monthly disposable retired pay. Under the USFPA, 10 U.S.C. § 1408, the claimant submitted an application to DFAS for direct payment of her court-awarded portion of the member's retired pay.

The member was authorized to retire under Section 1201 of Chapter 61 of Title 10 of the United States Code because he sustained a physical disability while on active duty. Effective June 27, 2014, he was separated with 23 years and 11 days of service. Effective June 28, 2014, the member was permanently disability retired with a compensable percentage for physical disability of 100%. Pursuant to 10 U.S.C. § 1201(a), the member's retired pay was computed under Section 1401 of Chapter 71 of the Title 10 of the U.S.C. § 1401(a). He was given the

option to have his retired pay computed based upon his percentage of disability (not to exceed 75%) multiplied by his high-36 months' pay or 2.5% multiplied by his years of service multiplied by his high-36 months' pay. He elected to have his retired base pay multiplied by the percentage of his disability on the date when he retired.

In September 2014, the claimant claimed her portion of the member's retired pay. DFAS denied the application because the member was a Chapter 61 disability retiree receiving 100% disability retired pay. As a result, there was no "disposable retired pay" available for division under 10 U.S.C. § 1408. The definition of "disposable retired pay" under 10 U.S.C. § 1408(a)(4)(A)(iii) excludes the amount of retired pay of a member under Chapter 61 computed using the percentage of the member's disability.

The member applied for a disability determination from the Department of Veterans Affairs (VA). On June 25, 2015, the VA determined that the member was 100% disabled and entitled to VA disability compensation retroactive to the effective date of his retirement on June 28, 2014, pursuant to 38 U.S.C. § 1110. The member's decision to seek VA disability compensation and retired pay (although his retired pay was required to be reduced by the amount of VA compensation he received) financially benefitted him over a Chapter 61 disability retirement alone.

DFAS subsequently determined that the member was entitled to receive Concurrent Retirement and Disability Pay (CRDP). On March 22, 2016, the claimant resubmitted her application to DFAS for division of the member's retired pay. DFAS denied the claimant's application and advised the claimant that since the entire amount of the member's retirement was based upon disability, there was no disposable retired pay to be divided. In its final determination concerning the claim, DFAS acknowledged that CRDP is generally divisible under the USFPA. However, DFAS found that CRDP is not divisible if the member retires for physical disability under Chapter 61. The claimant appealed DFAS's determination to DOHA. The DOHA adjudicator allowed the claim.

On August 4, 2017, DFAS requested reconsideration of DOHA's appeal decision. In its request for reconsideration, DFAS states that DoD's longstanding policy has been that the amount of Chapter 61 disability retired pay calculated using the percentage of the member's disability is not divisible under the USFPA, regardless of whether the member qualifies for CRDP. DFAS states that Congress has not acted to alter this policy and DOHA is not the appropriate authority to mandate a sweeping change to DFAS's interpretation of the law. DFAS states that retired members do not qualify for retired pay pursuant to Chapter 71 of Title 10. Rather, Chapter 71 provides the statutory framework for computing retired pay authorized by other chapters within Title 10. DFAS maintains that CRDP does not serve to authorize payment of retired pay but serves to reduce the amount of retired pay that must be waived as the result of receiving VA disability compensation. DFAS states that the term "restoration of retired pay" is not a legal term of art. DFAS asserts that it is a succinct way of describing the full legal process which includes (1) the calculation of a member's retired pay, (2) the VA calculation of VA disability compensation, and (3) DFAS's determination of the amount of retired pay to be waived. While acknowledging that under CRDP, retired pay is generally subject to division under the USFPA, DFAS maintains that since the member retired with a 100% disability rating,

all his retired pay is exempt from division. DFAS states that when the member became eligible to receive VA disability compensation, he was required to waive his Chapter 61 disability retired pay in an amount equal to his VA disability compensation pursuant to 38 U.S.C. § 5305. DFAS asserts that since the member was entitled to retired pay and his disability rating was higher than 50 percent, he was a “qualified retiree” under 10 U.S.C. § 1414(a), and the provisions of 38 U.S.C. §§ 5304-5305 were no longer applicable. DFAS states under 10 U.S.C. § 1414, there is a special rule for members retired under Chapter 61 with 20 years or more of service, and the rule refers back to Title 38 for calculating a member’s CRDP entitlement. DFAS notes that the reduction of the Chapter 61 disability retired pay is limited under 10 U.S.C. § 1414(b)(1) because it is reduced only to the extent that the amount of the member’s retired pay under Chapter 61 exceeds the amount of retired pay to which the member would have been entitled under any other provisions of law if the member had not been retired under Chapter 61. DFAS contends that when the member began receiving CRDP, he was still receiving Chapter 61 disability retired pay which was computed using the percentage of his disability. This is because after DFAS computed and applied the waiver required by the CRDP statute, DFAS paid the member his remaining Chapter 61 disability retired pay. Therefore, DFAS denied the claimant’s request for direct payment of her share of the disposable retired pay because the member had no disposable retired pay to be divided. DFAS also states that it has been applying this policy for 13 years to over 20,000 retired members and Congress has not disturbed DFAS’s policy. Finally, DFAS notes that a change in policy will cause significant tax implications for certain members.

Discussion

Under Section 211 of Public Law No. 104-53, 109 Stat. 514, 535, November 19, 1995, the General Accounting Office’s (now the Government Accountability Office or GAO) authority to settle claims for pay and allowances, including retired pay, was transferred to the Director of the Office of Management and Budget (OMB). The Director of OMB delegated his authority to the Secretary of Defense effective June 30, 1996. The authority of the Secretary of Defense in this regard was later codified in Section 202(n) of Public Law No. 104-316, 110 Stat. 3826, October 9, 1996. DOHA now exercises the authority transferred and delegated to the Secretary of Defense. Pursuant to 31 U.S.C. § 3702, DOHA’s authority to decide cases such as this is derived from the same authority which provided the Comptroller General the authority to decide such claims. The transfer and delegation of authority to DOHA provides our office with appellate authority over military pay and allowances claims, including retired pay. *See* DoD Instruction 1340.21 (May 12, 2004). DOHA does not have the authority to make policy determinations. However, DOHA does have the authority to decide cases under 31 U.S.C. § 3702 on a case-by-case basis once the Component concerned, generally DFAS, denies the claim. Once a claimant appeals DFAS’s denial of their claim to DOHA, a DOHA adjudicator reviews the case on the written record as presented to DOHA by DFAS and the claimant. DOHA adjudicates the case by applying the facts to the pertinent statutes and regulations and issues an appeal decision. DOHA issued an appeal decision in this case on June 8, 2017, and DFAS has requested reconsideration of the appeal decision.

In the adjudication of cognizable claims under 31 U.S.C. § 3702, it is a well-established rule that a claim may only be allowed for an expense authorized by statute or regulation. *See*

DOHA Claims Case No. 2016-CL-052003.2 (September 27, 2016); and DOHA Claims Case No. 2012-CL-070601.2 (October 16, 2012). When the language of a statute is clear on its face, the plain meaning of the statute will be given effect, and that plain meaning cannot be altered or extended by administrative action. *See* DOHA Claims Case No. 2016-CL-112901.2 (February 2, 2017); DOHA Claims Case No. 2012-CL-070601.4 (August 31, 2015); and DOHA Claims Case No. 2012-CL-061105.2 (September 27, 2012). Statutory provisions with unambiguous and specific directions may not be interpreted in any manner that will alter or extend their meaning. *See* 71 Comp. Gen. 125 (1991); and 56 Comp. Gen. 943 (1977).

In 1981 the Supreme Court held in *McCarty v. McCarty*, 453 U.S. 210 (1981) that federal law precluded state courts in divorce proceedings from dividing military retired pay. The Court reasoned that Congress intended that military retired pay reach the member and no one else. Therefore, the Court found that state courts would only be able to treat military benefits as property of both the member and former spouse (community or marital property) in the presence of authorizing federal legislation. In direct response to *McCarty*, Congress enacted the USFSPA, 10 U.S.C. § 1408, in 1982, which allowed state courts to treat “disposable retired” pay either as property solely of the member or as property of the member and his spouse in accordance with the law of the state court. Benefits outside the scope of USFSPA cannot be treated as marital or community property. Disposable retired pay is defined as the total monthly retired pay to which a member is entitled minus certain deductions. *See* 10 U.S.C. § 1408(a)(4)(A). Under the USFSPA, state courts are able to treat disposable retired pay as marital property. Under 10 U.S.C. § 1408(a)(4)(A)(ii), the term “disposable retired pay” is defined as the total monthly retired pay to which a member is entitled, less amounts which are deducted from the retired pay as a result of a waiver of retired pay required by law in order to receive compensation under Title 38. Therefore, disability compensation is exempt from the definition of “disposable retired pay.” Further, in the case of a member entitled to retired pay under Chapter 61, “disposable retired pay” is the total monthly retired pay to which the member is entitled, less amounts which are equal to the amount of retired pay of the member under Chapter 61 computed using the percentage of the member's disability on the date when the member was retired (or the date on which the member's name was placed on the temporary disability retired list). *See* 10 U.S.C. § 1408(a)(4)(A)(ii).

The statutory provisions relating to retirement from the armed forces for physical disability are found in Chapter 61 of Title 10, United States Code. In order to be eligible for physical disability retirement, a member must have at least 20 years of service or the disability must be rated at least 30% under the VA's standard schedule of rating disabilities. *See* 10 U.S.C. § 1201(b)(3). Thus, some disability retired members are retired before obtaining eligibility for longevity retirement. Others have completed 20 or more years of service.

Until 2004 the law required that a member's retired pay regardless of which Chapter of Title 10 they were retired under, be reduced by the amount of VA disability compensation received. *See* 38 U.S.C. § § 5304-5305. This procedure is generally known as an “offset.”¹

¹According to the Congressional Research Service, in 1891 Congress first prohibited payment of both military retired pay and a disability pension since it was viewed as representing dual compensation for the same purpose. The law was modified in 1941, and the present system of VA disability compensation offsetting retired

Since 1891 Congress had prohibited payment of both military retired pay and disability compensation (pension) because payment of both represented dual or overlapping compensation for the same purpose. Congress enacted new legislation in 2004 establishing the CRDP program under 10 U.S.C. § 1414 (Members eligible for retired pay who are also eligible for veterans' disability compensation for disabilities rated 50 percent or higher: concurrent payment of retired pay and veterans' disability compensation). In enacting 10 U.S.C. § 1414, Congress legislated the full concurrent receipt of retired pay and VA disability compensation for qualified retired members. The implementing regulations for CRDP are found in Chapter 64 of Volume 7B of the DoD 7000.14-R, Financial Management Regulation (DoDFMR). Volume 7B defines CRDP as a program that restores retired pay of certain retired members who are also entitled to disability compensation from the VA. Under the CRDP program, regular or reserve members who are entitled to retired pay based on either length of service or disability, and who are also entitled to VA disability compensation based on a combined VA disability rating of 50% or greater may receive both retired pay and disability pay concurrently. Members retired under military disability provisions (Chapter 61 to Title 10 U.S.C) must have at least 20 years of creditable service. Under Chapter 64, *Concurrent Retirement and Disability Payment (CRDP)*, paragraph 640503 states that the CRDP entitlement represents the ability to draw both retired pay and VA disability compensation without regard to the waiver and offset requirement in 38 U.S.C. §§ 5304 and 5305, and CRDP payments are payments of retired pay.

Under 10 U.S.C. § 1414(a)(1), subject to subsection (b), a member who is entitled for any month to retired pay and is also entitled for that month to VA disability compensation, is entitled to be paid both without regard to 10 U.S.C. §§ 5304-5305.² Under subsection (b) of the CRDP statute, a member retired for disability under the provisions of Chapter 61 of Title 10, United States Code, with at least 20 years of service, is also entitled to CRDP. Specifically, under 10 U.S.C. § 1414(b)(1), the special rule for Chapter 61 disability retired members with 20 years of service is as follows:

CAREER RETIREES.—The retired pay of a member retired under chapter 61 of this title with 20 years or more of service otherwise creditable under section 1405 of this title, or at least 20 years of service computed under section 12732 of this title, at the time of the member's retirement is subject to reduction under sections 5304 and 5305 of title 38, but only to the extent that the amount of the member's retired pay under chapter 61 of this title exceeds the amount of retired pay to which the member would have been entitled under any other provision of law based upon the member's service in the uniformed services if the member had not been retired under chapter 61 of this title.

pay was adopted in 1944. *See* Concurrent Receipt: Background and Issues for Congress, Congressional Research Service, Nov. 30, 2017, at 12.

²To conform with the CRDP statute, Congress amended 38 U.S.C. § 5305, the statute requiring deduction from retired pay of an amount equivalent to what the member was receiving in VA compensation. *See* Veterans Benefits Improvement Act of 2004, Pub. L. No. 108-454, 308(b), 118 Stat. 3598, 3614 (in amending 38 U.S.C. § 5305, Congress struck out "Any person" and inserted "Except as provided in section 1414 of title 10, any person").

Under 10 U.S.C. § 1414(e)(4)(B), the amount of applicable retired pay payable to a qualified Chapter 61 retired member means the amount of monthly retired pay to which the member could have been entitled under any other provision of law based upon the member's service if the member had not been retired under Chapter 61. *See* DoDFMR, Volume 7B, Chapter 64, paragraph 640401. However, if any amount the member had been entitled to receive as calculated under Chapter 61, exceeds what he is now being paid as calculated under Chapter 71, that amount is still subject to the VA offset.

The VA's statutes and regulations conform to the CRDP statute and DoD regulations. The VA amended its own regulations that were codified in the Code of Federal Regulations (CFR) under 38 CFR Part 3, concerning concurrent receipt of military retired pay and VA disability compensation. *See* Federal Register, Volume 70, No. 129, July 7, 2005. Of note, in making the proposed changes, the VA changed the title of 38 CFR 3.750, to conform with 10 U.S.C. § 1414, from "Retirement Pay" to "Entitlement to concurrent receipt of military retired pay and disability compensation." In addition, the VA amended 38 CFR 3.750(b)(2) to conform with 10 U.S.C. § 1414(b) to state that members who retire under Chapter 61 with 20 or more years of creditable service must waive a portion of their disability retired pay to receive disability compensation, but only to the extent that disability retired pay exceeds the amount of retired pay they would have received had they retired based on length of service. The VA also made clear by amending 38 CFR 3.750(b)(4), that members receiving VA disability compensation are entitled to receive military retired pay at the same time, but that in determining entitlement to the improved disability pension, military retired pay will be treated as countable income.

The VA has also updated its Veterans Benefits Manual to conform to the CRDP statute. *See* Veterans Benefits Manual, M21-1, Part 111, Subpart V, January 21, 2016. On Page 20 of this document, the notes state that the VA should not automatically assume that the retired pay of a Veteran with 20 or more years of service receives is based on length of service. Even with 20 or more years of service, a Veteran's retired pay may be based on disability. If a Veteran with 20 or more years of service is receiving retired pay based on disability, "CRDP is only applicable to that portion of his/her retirement pay that is based on length of service."

In this case, DFAS argues that since the member retired under Chapter 61 of Title 10, no CRDP payments he subsequently receives may be characterized as disposable retired pay subject to division under USFSPA. At the time of the member's disability retirement, DFAS correctly denied the claimant's application for a portion of his retired pay since by definition under the USFSPA, he was not receiving any disposable retired pay. Further, the VA disability compensation awarded to the member retroactive to the date of his retirement was not divisible under the USFSPA. However, DFAS then determined that the member was entitled to receive CRDP. DFAS contends that the resulting CRDP payments made to the member are not divisible under the USFSPA since the calculation of CRDP for a member retired under Chapter 61 refers back to 38 U.S.C. § 5305. Therefore, DFAS states that when the member began receiving CRDP, he was essentially still receiving Chapter 61 disability retired pay which is not divisible under USFSPA pursuant to 10 U.S.C. § 1408(a)(4)(A)(iii).

As a restoration of retired pay, CRDP is considered disposable retired pay under 10 U.S.C. § 1408, the USFSPA, and subject to the laws and regulations governing military retired

pay. *See* DoDFMR, Volume 7B, Chapter 64, paragraph 640502. The express language contained in the CRDP statute specifically includes members who are retired under Chapter 61 with 20 years or more of service and defines the amount of CRDP they are entitled to receive as the amount of retired pay to which they would be entitled if they had not retired for disability.³ Therefore, a member retired under Chapter 61, with more than 20 years of service, is no longer receiving Chapter 61 retired pay as calculated under 10 U.S.C. § 1201(b)(3); but is being paid CRDP based on the principles and calculations under 10 U.S.C. § 1414. Thus, the exception to disposable retired pay contained in 10 U.S.C. § 1408(a)(4)(A)(iii) does not apply.

We further note that if Congress had intended Chapter 61 disability retirees receiving CRDP to be exempt from the provisions of the USFSPA, Congress would have done so by clear direction in the statute, as Congress did for Combat-Related Special Compensation (CRSC) under 10 U.S.C. § 1413a. The CRSC statute, like the CRDP statute, contains special rules for Chapter 61 disability retirees. *See* 10 U.S.C. § 1413a(b)(3). However, subsection (g) of 10 U.S.C. § 1413a(g) specifically states that CRSC payments are not retired pay. *See also*, DoDFMR, Volume 7B, Chapter 63, paragraph 630101(C) (stating that CRSC is not retired pay and is not subject to the USFSPA relating to payment of retired pay in compliance with court orders).⁴ Unless the plain language of a statute clearly conflicts with its intent, we will construe a statute consistent with its explicit terms. *See* 71 Comp. Gen. 125, *supra*; and 56 Comp. Gen. 943, *supra*. In this case, the member retired under Chapter 61 and subsequently became entitled to receive CDRP. The restoration of his retired pay under the statute authorizing CRDP, 10 U.S.C. § 1414, is subject to division under the USFSPA. CRDP is a restoration of retired pay based on longevity, which is 20 years of service. It is divisible under the USFSPA. The USFSPA is consistent with the CRDP statute and the implementing regulations contained in Chapter 64 of Volume 7B of the DoDFMR. Any contrary interpretation would provide the member with an entitlement or benefit that was not explicitly authorized by Congress.

As for any tax consequences, revenue rulings concerning the income tax liabilities and withholding credits of individual taxpayers are reserved by statute and regulation for determination primarily by the Department of Treasury, Internal Revenue Service. *See* 63 Comp. Gen. 322 (1984). Our decision in this case is limited to whether the restoration of the member's retired pay under CRDP is divisible under the USFSPA. Revenue rulings are not within our jurisdiction.

³Specifically, under 10 U.S.C. § 1414(e)(4)(B) APPLICABLE RETIRED PAY.—In subparagraph (A), the term "applicable retired pay" for a qualified retiree means the amount of monthly retired pay to which the qualified retiree is entitled, determined without regard to this section or sections 5304 and 5305 of title 38, except that in the case of such a retiree who was retired under chapter 61 of this title, such amount is the amount of retired pay to which the member would have been entitled under any other provision of law based upon the member's service in the uniformed services if the member had not been retired under chapter 61 of this title. This section is implemented under ¶ 640401 of the DoDFMR.

⁴Specifically under 10 U.S.C. § 1413a(b)(3) SPECIAL RULES FOR CHAPTER 61 DISABILITY RETIREES.—(A) GENERAL RULE.—In the case of an eligible combat-related disabled uniformed services retiree who is retired under chapter 61 of this title, the amount of the payment under paragraph (1) for any month may not, when combined with the amount of retired pay payable to the retiree after any such reduction under sections 5304 and 5305 of title 38, cause the total of such combined payment to exceed the amount of retired pay to which the member would have been entitled under any other provision of law based upon the member's service in the uniformed services if the member had not been retired under chapter 61 of this title.

Conclusion

In accordance with the Department of Defense Instruction 1340.21 ¶ E7.15, 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: Charles C. Hale

Charles C. Hale
Member, Claims Appeals Board

SIGNED: Gregg A. Cervi

Gregg A. Cervi
Member, Claims Appeals Board