

DATE: October 18, 2023

In Re:)
)
 [REDACTED]) Claims Case No. 2023-CL-060606.2
 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. Navy requests reconsideration of the appeal decision of the Defense Office of Hearings and Appeals (DOHA), in DOHA Claim No. 2023-CL-060606, dated July 27, 2023. In that decision, DOHA upheld the Defense Finance and Accounting Service's (DFAS's) finding that the member was entitled to receive Combat Related Special Compensation (CRSC) in 2021 on the basis that he did not submit his election to change from CRSC to Concurrent Retirement and Disability Pay (CRDP) until after the time limit had passed.

Background

In a memorandum dated May 31, 2018, the Navy informed the member that his application for CRSC was approved. The Navy further explained that since the member was in receipt of CRDP, within 60 to 90 days of the Navy's memorandum approving his CRSC claim, DFAS would determine which program, CRDP or CRSC, would be more beneficial for the member and change the member's election from CRDP, if appropriate. The Navy noted that concurrent payments of both CRDP and CRSC were prohibited. DFAS, after making its computations, determined that CRSC was the best option for the member and changed his election from CRDP to CRSC. DFAS subsequently sent Open Season letters to the member for calendar years 2019 and 2020. However, the member did not respond to these letters and as a result, continued to receive CRSC. On December 18, 2020, DFAS provided the member a letter advising him that he had the opportunity to change his current election to either CRDP or CRSC

in the Open Season for calendar year 2021. DFAS's letter also provided the member with an application titled *CRDP/CRSC Annual Open Season Election*. That application stated that he was currently receiving CRSC in the amount of \$2,844.00 per month, and if he wished to change to CRDP, he would receive \$2,844.00 per month. The application 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, 2021. DFAS's letter further explained the following:

Please note that CRDP is taxed in the manner as your retired pay and is normally considered taxable income. CRDP is also subject to the provisions of the Uniformed Services Former Spouse[s'] Protection Act. CRSC is nontaxable and is not subject to the provisions of the Uniformed Services Former Spouse[s'] Protection Act.

It is important to understand if your disability rating changes at any point during the year, your entitlement amount may also change. Your 2021 entitlements are calculated using the most recent information we have received from the Department of Veterans Affairs. Your election to either keep or change entitlements will remain in effect until the next annual open season.

DFAS reports that the member took no action to change his CRSC entitlement to CRDP until after the deadline, January 31, 2021, had expired. On April 4, 2022, DFAS advised the member that his request to change his entitlement from CRSC to CRDP was invalid because it was not received by January 31, 2021.

The member submitted a letter appealing DFAS's determination regarding payment of CRSC for 2021, requesting payment from DFAS of CRDP for that year. He stated that his retired pay changed when his CRSC was reduced from 70% to 40% effective September 2021 and October 2021, and changed when his CRSC was reduced to 50% effective November 2021, December 2021 and January 2022. He stated that for those five months, he lost a total of \$9,940.94 in retired pay. He acknowledged that his Open Season election had to be received by DFAS no later than January 31, 2021. However, he questioned why DFAS did not choose CRDP over CRSC for calendar year 2021 since it was more beneficial for him.

In the appeal decision, the DOHA attorney examiner upheld DFAS's determination to award the member CRSC for 2021. In the member's reconsideration request, he states that he was approved by DFAS to receive CRSC on May 31, 2018, and began receiving CRSC on July 1, 2018. Therefore, he did not choose CRSC, but DFAS determined payment of CRSC was more beneficial to him than CRDP. He acknowledges that for calendar years 2019 and 2020, he chose to continue receiving CRSC because it was more beneficial to him. He states that had he known that the Department of Veterans Affairs (VA) would reduce one of his disabilities in August 2021 so that his CRSC payments would be affected, he would have chosen to receive CRDP in January 2021. He again questions why DFAS did not choose CRDP for him in August 2021 when it became more beneficial for him to receive it instead of CRSC. Finally, he states that he is not asking for extra payment but is just trying to recover his lost retired pay that he earned with his 24 years of service.

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.

In this case, the member was in receipt of CRDP and then was found to be entitled to CRSC in 2018. DFAS advised the member that he could not receive both CRDP and CRSC. DFAS determined that payment of CRSC was more beneficial to the member than CRDP. DFAS in the subsequent years sent the member Open Season letters advising 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 31st of the applicable year. DFAS received no responses to the letters. Specifically, DFAS sent the member an Open Season letter dated December 18, 2020, advising him he had until January 31, 2021, to change from payment of CRSC to CRDP. Since the member did not respond to this notification, DFAS continued to pay him CRSC. Under statute and regulation, DFAS properly paid him CRSC for 2021, and there is no legal basis for payment of CRDP for 2021. *See* DOHA Claims Case No. 2016-CL-092602.2 (March 30, 2017).

Finally, DOHA's decision in this case does not affect the member's right to change his election during any future Open Season, which ends on January 31st of the new year.

Conclusion

The member's request for reconsideration is denied, and we affirm the appeal decision dated July 27, 2023. 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
Chairperson, 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