

DATE: July 15, 2024

In Re:)
[REDACTED]) Claims Case No. 2022-WV-110108.4
Claimant)
_____)

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

Due to an administrative error, a member’s retired pay was not reduced by the amount of the compensation he was receiving from the Department of Veterans Affairs (VA). When the member applied for VA disability compensation, he was considered to be on notice that when he became entitled to retired pay it would be reduced by the amount of his VA disability compensation. Under such circumstances, the member knew or should have known that he was not entitled to the full amount of his retired pay.

DECISION

A retired member of the U.S. Marine Corps requests reconsideration of the decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2022-WV-110108.3, dated January 12, 2024. In that decision, DOHA sustained the Defense Finance and Accounting Service’s (DFAS) denial of the member’s application for waiver of a debt to the government in the amount of \$19,217.00, which arose when the member was erroneously overpaid retired pay.

Background

On April 28, 1971, the member applied for disability compensation from the Department of Veterans Affairs (VA), and signed the VA Form 21-526, *Veteran's Application for Compensation or Pension*. He requested VA disability compensation based upon a service-connected disability. In addition, on November 11, 1974, the member completed a VA Form 21-651, *Election of Compensation or Pension in lieu of Retired Pay or Waiver of Retired Pay to Secure Compensation or Pension from Veterans Administration*. Section I of that form, above the member’s signature, stated the following:

I hereby elect to receive compensation of pension from the Veterans Administration in lieu of the total amount of retired pay, or waive that portion of my retired pay which is equal in amount to the compensation or pension which may be awarded by the Veterans Administration.

The Instructions included with the VA Form 21-651 stated:

A veteran entitled to or in receipt of retired pay may elect to receive the compensation or pension which may be awarded by the Veterans Administration in lieu of the total amount of retired pay if the compensation or pension is in a larger amount than the retired pay or may waive that portion of his retired pay which is equal in amount to the compensation or pension which may be awarded by the Veterans Administration.

Thus, the member signed the VA Form 21-651 electing to receive VA compensation in lieu of military retired pay.

The record further reflects that on August 24, 1979, the VA received the member's completed VA Form 21-526e, *Veteran's Application for Compensation or Pension at Separation from Service*. Directly above the member's signature on the form was the following statement:

NOTE: Filing of this application constitutes a waiver of military retired pay in the amount of any VA compensation or pension to which you may be entitled.

The member signed the 21-526e to request VA compensation in lieu of military retired pay.

The record reflects that the member submitted multiple supplemental VA compensation claims during the period March 1995 through 2002. The member became entitled to receive military retired pay on August 11, 2003, his 60th birthday. On June 1, 2003, he completed the DD Form 2656, *Data for Payment of Retired Personnel*, applying for military retired pay. On that form, the member noted that he was in receipt of VA disability compensation effective July 1, 1991, in the amount of \$2,868.00 per month. In the Remarks section of the form, the member stated the following:

I am 100% disable[d] combat veteran c Vietnam (1967 - 1969) and Desert Storm (1990). I request concurrent receipt of USMCR Ret and VA disability payments.

On August 22, 2003, the member began receiving full military retired pay, unreduced by the amount of VA disability compensation he was receiving. As a result of this administrative error, during the period January 1, 2004, through November 30, 2004, the member erroneously received \$27,467.00 (\$2,497.00 x 11 months) in military retired pay but was only entitled to receive \$8,250.00 (\$750.00 x 11 months) in military retired pay. Therefore, the member became indebted to the United States in the amount of \$19,217.00 (\$27,467.00 - \$8,250.00).

On November 1, 2004, DOHA received the member's waiver request from DFAS. DFAS recommended full waiver of the member's debt in the amount of \$19,217.00. DFAS

based their recommendation on the fact that the member had submitted significant medical evidence that led them to determine that collection of the debt would be against equity and good conscience and not in the best interest of the United States. The DOHA adjudicator reviewed the case file and requested more documentation and information from DFAS to properly adjudicate the case. After not receiving the documentation and information requested, the adjudicator remanded the case file to DFAS on March 29, 2023. On July 6, 2023, DFAS provided DOHA with some supplemental records and requested that DOHA resume its adjudication of the claim. On July 25, 2023, DOHA notified DFAS that the documentation necessary to adjudicate the claim had still not been provided, and after not receiving a response from DFAS, DOHA remanded the case again on August 23, 2023. On January 10, 2024, DFAS submitted supplemental documentation and requested DOHA resume its adjudication.¹

The DOHA adjudicator disagreed with DFAS's recommendation to waive the claim. The adjudicator found that the member was on notice by virtue of signing the VA Form 21-651 and the VA Form 21-526e, that he was not entitled to receive both VA disability compensation and full retired pay. The adjudicator noted the record was absent any official documentation from a qualified physician that the member lacked the mental capacity to attend to his finances or comprehend the pay documents he received before and during the period of overpayment. Moreover, the adjudicator noted that the member completed the VA Form 21-526 multiple times requesting VA compensation in lieu of military retired pay, and he noted on his DD Form 2656 that he was claiming military retired pay concurrently with VA compensation, but received no notice from either the VA or DFAS that he was entitled to both VA compensation and military retired pay concurrently.

In his request for reconsideration, the member states that he is a refugee from Nazi Germany. He is a veteran of Vietnam and Operation Desert Storm. He has prostate cancer, Post Traumatic Stress Disorder (PTSD), and Leukemia from being exposed to toxic water at Camp Lejeune. He states that he has already paid back almost \$10,000.00 of his debt, and requests waiver of the remaining balance.

Discussion

Under 10 U.S.C. § 2774, we have the authority to waive claims for erroneous payments of pay and certain allowances made to or on behalf of members or former members of the uniformed services, if repayment would be against equity and good conscience and not in the best interests of the United States, provided there is no indication of fraud, fault, misrepresentation, or lack of good faith on the part of the member. *See* Department of Defense Instruction 1340.23 (Instruction) ¶ E4.1.2 (February 14, 2006). Generally, persons who receive a payment erroneously from the Government acquire no right to the money. They are bound in equity and good conscience to make restitution. If a benefit is bestowed by mistake, no matter

¹The DOHA adjudicator specifically requested that DFAS address the fact that the member was in receipt of VA disability compensation and military retired pay during the period August 11, 2003, through December 31, 2003. However, the member was not placed in debt for that period. DFAS requested that DOHA only adjudicate the member's request for waiver of his debt for the period January 1, 2004, through November 30, 2004, in the amount of \$19,217.00.

how careless the act of the Government may have been, the recipient must make restitution. In theory, restitution results in no loss to the recipient because the recipient received something for nothing. A waiver is not a matter of right. *See* Instruction ¶ E4.1.1. Furthermore, the fact that an erroneous payment is solely the result of administrative error or mistake on the part of the government is not a sufficient basis by itself for granting waiver. *See* Instruction ¶ E4.1.3. Under 10 U.S.C. § 2774, waiver is not appropriate when the member knows, or reasonably should know, that a payment is erroneous, or does not attempt to obtain a reasonable explanation from an appropriate official concerning any unexplained payment of pay or allowance. The member has a duty to ascertain the reason for the payment and to set aside the funds in the event that repayment should be necessary. *See* Instruction ¶¶ E4.1.1 through E4.1.5.

In this case, the adjudicator properly denied waiver of the debt on the basis that the member knew or should have known that he would not be permitted to receive full payment of retired pay while receiving VA compensation. As the adjudicator determined, the member was on notice by the filing of the VA Form 21-526, the VA Form 21-651, and the VA Form 21-526e that his retired pay would be reduced by his VA compensation. Even though the member requested concurrent receipt of his VA disability compensation and military retired pay at the time he filled out his DD Form 2656, he should have pursued the matter further considering the documentation he had been given. The member should have persisted in obtaining a definite determination in writing of his entitlement. Since the member failed to do so, waiver of the resulting debt is not appropriate. *See* DOHA Claims Case No. 2017-WV-110702.3 (April 12, 2018); DOHA Claims Case No. 2015-WV-021801.2 (March 6, 2017); and DOHA Claims Case No. 00081601 (January 3, 2001).

Conclusion

The member's request for reconsideration is denied, and we affirm the appeal decision dated January 12, 2024, denying the member's waiver request. In accordance with the Instruction ¶ E8.15, this is the final administrative action of the Department of Defense in this matter.

Signed: Catherine M. Engstrom

Catherine M. Engstrom
Administrative Judge
Chair, Claims Appeals Board

Signed: Richard C. Ourand, Jr.

Richard C. Ourand, Jr.
Administrative Judge
Member, Claims Appeals Board

Signed: Charles C. Hale

Charles C. Hale
Administrative Judge
Member, Claims Appeals Board