

DATE: August 1, 2024

In Re:

[REDACTED]

Claimant

)
)
)
)
)

Claims Case No. 2017-WV-110303.3

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

Under 10 U.S.C. § 2774, when a member is aware or should be aware that he is receiving payments in excess of his entitlements, he does not acquire title to the excess amounts and has a duty to hold them for eventual repayment to the government.

DECISION

A 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. 2017-WV-110303.2, dated February 5, 2024.

Background

The record shows that the member was married and properly receiving basic allowance for housing (BAH) at the dependent rate (BAH-D) based on his spouse's location in Virginia. On May 18, 2009, he was issued permanent change of station (PCS) orders to Germany. His PCS orders stated that he elected to move his dependents to a designated location in Florida, and that the member was authorized to accompany his dependents to that location for the purpose of settling them. Effective November 12, 2009, the member began to properly receive BAH-D based on his dependents' designated location in Florida, through May 31, 2010. Effective June 1, 2010, the member's pay records were updated to reflect that his dependents were residing in New York instead of Florida. As a result, the member began receiving BAH-D based on their location in New York. However, it was later determined that he should have continued to receive BAH-D based on his dependents' designated location in Florida. During the period June 1, 2010, through February 29, 2012, the member erroneously received \$64,757.70 in BAH-D

based on New York but was only entitled to receive \$44,282.70 in BAH-D based on Florida, causing the member to be erroneously overpaid \$20,475.00 (\$64,757.70 - \$44,282.70). Effective March 1, 2012, he began to receive BAH-D based on Florida based on his dependents' designated location in Florida.

Effective July 10, 2012, the member was reduced in pay grade to an E-6, and became entitled to receive BAH-D at the pay grade of an E-6 instead of his previous grade of an E-7. However, due to an administrative delay in updating his military pay records to reflect his reduction in grade, he erroneously received BAH-D at the grade of an E-7 during the period July 10, 2012, through August 30, 2012, causing him to be overpaid \$75.60. This increased the member's indebtedness to \$20,550.60 (\$20,475.00 + \$75.60).

The member requested waiver of the indebtedness and the Defense Finance and Accounting Service (DFAS) denied the member's waiver request. The member appealed DFAS's denial of his waiver request to DOHA. In the member's appeal, he argued that he did not request a BAH-D rate change when he updated his records to reflect that his dependents had relocated to New York. He stated that when his mother moved to New York, he reported her move. He stated that he was merely complying with his unit's policy by submitting an address change to report his dependents' new location. In DFAS's administrative report, DFAS explained that it was only the member's mother moving to New York, not his spouse, who remained in Florida. An investigation by the Army Criminal Investigation Division (CID) found that the member's family remained in Florida. DFAS found no new information that warranted a reversal of DFAS's denial of the member's waiver request and forwarded the waiver package to DOHA. In the appeal decision, the DOHA adjudicator sustained DFAS's denial of the member's waiver request. The adjudicator noted that the member's BAH-D increased from \$2,049.00 per month in May 2010 (the Florida rate) to \$3,066.00 per month in June 2010 (the New York rate), an increase of over \$1,000.00 per month. Therefore, the adjudicator found that the member should have questioned the increase in his BAH-D especially since he was not requesting a rate increase. The adjudicator also noted that although the member stated he was deployed to a combat zone while assigned permanently to Germany, where he would be lucky to have access to a computer, let alone his leave and earnings statements (LESSs) to review, there was no documentation in the record from the member's pay officials reflecting that the member was not granted access to his LESSs at any time during the period of overpayment. The adjudicator also found that the member should have expected his BAH-D to be less when he was reduced in rank to an E-6. Therefore, the adjudicator denied waiver of the member's debt in the amount of \$20,550.60.

In his reconsideration request, the member reiterates that he did not request a change in his BAH-D rate. He just reported the new location of his dependents as required by his unit policy. He also reported their location in New York because he intended New York to be his final destination after his retirement from the service. He states that he did not question the rate change because it matched the zip code for his dependents' location. He states that while he was overseas, he was in a remote location in Afghanistan and there was no way for him to question pay officials about the increase. He further states that just a year after the increased BAH-D payments began, he was accused by a First Sergeant of collecting BAH-D that he was not entitled to. The First Sergeant retaliated against him because he had filed an Inspector General (IG) complaint against him. He states that the overpayment arose and came to light due to

complicated circumstances, and that is why he requested an in person hearing in order to present documents and the origins of the BAH-D rate issue. He states that he believes the debt to be invalid because he chose New York as his retirement location. He states that his unit should have either amended his orders to reflect his dependents' location or his finance office should never have initiated a rate change. He requests that the funds he has repaid on the debt be returned to him because he did not receive the payments fraudulently. He has suffered huge financial hardship in the repayment of the debt.

Discussion

Under 10 U.S.C. § 2774, we have authority to waive collection of erroneous overpayments of pay and allowances to a member of the uniformed services if collection would be against equity and good conscience and not in the best interest 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 (hereinafter Instruction), *Waiver Procedures for Debts Resulting from Erroneous Pay and Allowances*, ¶ E4.1.2 (February 14, 2006). In the present case, the erroneous payments were made as a result of an administrative error and there is no indication of fraud, misrepresentation, or lack of good faith on the part of the member. However, 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 in and of itself for granting waiver. *See* Instruction ¶ E4.1.3.

A member is considered to be partially at fault, and waiver is precluded, if in light of all the circumstances, it is determined that he should have known that he was being overpaid. The legal definition of "fault" in waiver determinations does not imply any ethical lapse on the part of the member. It merely indicates that the member is not entirely without responsibility for any resulting overpayment, and that, therefore, the equitable remedy is not available to him. Thus, if a member is furnished with documentary records or information which, if reviewed, would cause a reasonably prudent person of the same rank and experience to be aware of or suspect the existence of an error, but the member fails to review the documents carefully or otherwise fails to take corrective action, the member is not without fault and waiver is precluded. *See* DOHA Claims Case No. 2019-WV-042502.2 (November 25, 2019).

In this case, the member was a Sergeant First Class when the erroneous payments began. Those payments continued for almost two years from June 1, 2010, through February 29, 2012. We appreciate the fact that the member was in Afghanistan for part of the overpayment period. However, our authority is limited by the waiver statute, 10 U.S.C. § 2774, the standards for waiver and case precedent. We have consistently held that when a member is aware or reasonably should be aware that he is receiving pay in excess of his proper entitlement, he has a duty to retain such amounts for subsequent refund to the government, and to make inquiry to proper pay officials. We cannot stress too highly the importance of careful review by each member of the LESs provided by the agency. Since LESs are issued to members in order that they can verify the accuracy of their pay, we have consistently held that a member who receives an LES has a duty to carefully examine it and report any error. Here, the member did not request a BAH-D rate change, but once he reported his dependents' location in New York, his BAH-D

rate increased by over \$1,000.00 per month. Therefore, under the circumstances, we find the member was not without fault in the matter, which statutorily precludes waiver. *See* DOHA Claims Case No. 2016-WV-030807.2 (January 30, 2017).

In addition, we agree that once the member was reduced in grade to an E-6, he should have expected his BAH-D payment to decrease. As for the member's request for an in person hearing and his insistence that we do not have a complete record in his case, our Office adjudicates cases on the written record which is provided to us by the Component concerned and the member requesting waiver. We are not an investigative body and do not hold oral hearings or take testimony. In addition, the establishment of a debt is a matter for administrative determination, and the validity of a debt is an issue separate from the waiver process. Our authority in this matter pertains only to the availability of the equitable remedy of waiver. Finally, as expressed by the DOHA adjudicator in her decision, the denial of a waiver under 10 U.S.C. § 2774 does not preclude the member from pursuing other available remedies through the Army.

Conclusion

The request for reconsideration is denied, and we affirm the appeal decision dated February 5, 2024. In accordance with Department of Defense Instruction 1340.23 ¶ 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