

DATE: September 3, 2024

In Re:)
) [REDACTED]) Claims Case No. 2023-WV-082301.2
))
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. Army requests reconsideration of the appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2023-WV-082301, dated April 4, 2024. In that decision, DOHA sustained the Defense Finance and Accounting Service’s (DFAS’s) denial of the member’s application for waiver of a debt to the Government in the amount of \$53,303.42, which arose when the member was erroneously overpaid retired pay.

Background

On June 19, 2007, 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 and/or Pension*. He requested VA disability compensation based upon a service-connected disability, acknowledging the following on the VA Form 21-526, Section VII:

When filing this application, you are telling us that you want to get VA compensation instead of military retired pay. If you currently receive military retired pay, you should be aware that we will reduce your retired pay by the

amount of any compensation that you are awarded. VA will notify the Military Retired Pay Center of all benefit changes.

The member began receiving VA disability compensation retroactive to December 1, 2006. On February 24, 2014, orders were issued placing the member on the Permanent Disability Retirement List effective November 28, 2013, based on a 90 percent disability rating. When the member's retired pay account was established, DFAS failed to reduce his military retired pay by the amount of compensation he was receiving from the VA. As a result, on December 1, 2013, the member began receiving full military retired pay based on a 90 percent disability rating. During the period November 29, 2013, through April 30, 2016, the member received \$61,557.12 in military retired pay and \$53,303.42 in VA compensation. Therefore, he was only entitled to receive \$8,253.70 in retired pay (\$61,557.12 - \$53,303.42). Since he received \$61,557.12, he was erroneously overpaid \$53,303.42 in retired pay (\$61,557.12 - \$8,253.70).

The DOHA adjudicator upheld DFAS's denial of waiver of the overpayment. The adjudicator found that the member was on notice in June 2007 when he filled out the VA Form 21-526 that any retired pay he might receive would be reduced by the VA compensation he received. The adjudicator stated that the member did not provide any documentation, such as an official statement from the VA and/or DFAS, reflecting that he was entitled to receive both VA disability compensation and retired pay during the period of overpayment.

In his request for reconsideration, the member states that at the time he completed his VA Form 21-526, he was not receiving nor intended to receive retired pay. He states that his retirement date was seven years after filing for VA disability compensation by submitting the VA Form 21-526. At the time he applied for VA compensation, he states that his intentions were to fulfill his service contract and not to extend it. He states that it was years later when he was led to believe that he should push for a medical retirement in order to receive full retirement benefits. He also states that during the seven years a lot changed, including the expansion of Combat Related Special Compensation (CRSC) to retired members under Chapter 61 with less than 20 years of service by Congress passing the National Defense Authorization Act of 2008, and the phasing in of Concurrent Retirement and Disability Pay (CRDP). He states that he did not question the amount of his retired pay because he was told by his case manager and unit that either the CRSC or the CRDP, or both programs, would restore his retired pay if he received a medical retirement. He states that he was also told that the CRDP was an automatic program, and he would be enrolled so that he could receive his retired pay. Therefore, when he received his retired pay, he had no doubt that he was entitled to it. He states that he was also told by his unit that since he was in receipt of VA disability compensation, he would automatically qualify for CRSC. He states that he never once suspected the existence of an error and had no reason to question his military retired pay. He states that he has been unable to reach his Physical Evaluation Board Liaison Officer (PEBLO) to obtain her signed, sworn statement for submission with his reconsideration request.

Discussion

Under 10 U.S.C. § 2774,¹ 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 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. We note that the member acknowledged in his September 2016 waiver request that upon returning home after his October 2005 injury, he began an 8-year battle for his medical retirement. Therefore, when the member signed his VA Form 21-526 in June 2007, he was at least contemplating receiving a medical retirement. As the adjudicator determined, the member was on notice by the filing of the VA Form 21-526, that his retired pay would be reduced by his VA compensation. Even though the member may have been advised by his case worker and unit that he was entitled to receive full military retired pay, he should have pursued the matter further considering the documentation he had signed. 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. 2018-WV-030501.2 (July 25, 2019); DOHA Claims Case No. 2016-WV-120502.2 (April 17, 2017); DOHA Claims Case No. 2015-WV-040202.2 (June 29, 2015); and DOHA Claims Case No. 2013-WV-011807.2 (February 28, 2013).

As for the member's entitlement to CRSC, the record reflects that the member has applied for it and has been found eligible for the compensation. We note that CRDP is available to certain retired member if they have a 50 percent or more VA disability rating and are also

¹Although the member was a member of the Army National Guard, when he retired, he became entitled to military retired pay under title 10 of the United States Code. Therefore, we will consider his request for waiver of his retired pay debt under 10 U.S.C. § 2774. If the member had accrued a debt while he was still a member of the Army National Guard, prior to his retirement, that debt would be considered for waiver under the statutory authority of 32 U.S.C. § 716. However, the standards for waiver under 32 U.S.C. § 716 are the same as under 10 U.S.C. § 2774.

entitled to receive retired pay for a “years of service” retirement. *See* 10 U.S.C. § 1414. The CRDP amount paid is determined by statute and reflects in most cases a restoration of retired pay that is offset under 38 U.S.C. § 5305. However, the debt in this case is due to the member’s receipt of full VA compensation and full military retired pay and does not include a determination of whether the member is eligible for CRDP. *See* DOHA Claims Case No. 2013-WV-011807.2, *supra*.

Conclusion

The member’s request for reconsideration is denied, and we affirm the appeal decision dated April 4, 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: Michelle P. Tilford

Michelle P. Tilford
Administrative Judge
Member, Claims Appeals Board