

DATE: September 3, 2024

In Re:)
) [REDACTED]) Claims Case No. 2023-WV-031604.2
))
Claimant)

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

A member separating from the service properly received separation pay. Subsequently, he requested a correction of his service record to reflect that he was retired. His record was corrected to reflect that he was retired, and he began receiving retired pay. In this situation, recoupment of the separation pay is required by statute. Since the separation payment was proper when made, the claim resulting from the statutorily required recoupment is not subject to waiver under 10 U.S.C. § 2774.

DECISION

A retired member of the U.S. Air Force requests reconsideration of the appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2023-WV-031604, dated March 18, 2024. In that decision, DOHA upheld the Defense Finance and Accounting Service’s (DFAS’s) determination that the recoupment of the member’s separation pay in the amount of \$51,385.15 cannot be considered for waiver.

Background

On March 31, 2009, the member separated from the Air Force and received a separation payment in the amount of \$51,385.15. The member subsequently petitioned the Air Force Review Boards Agency to correct his military record to reflect that he was retired from the Air Force based on a permanent disability, instead of separated. On November 6, 2019, orders were issued reflecting that effective April 1, 2009, the member was retired from the Air Force based on a permanent disability with a compensable percentage of 30 percent. As a result, recoupment

of the separation payment in the amount of \$51,385.15 was required. Thus, the member became indebted to the United States in the amount of \$51,385.15.

In the appeal decision, the DOHA adjudicator sustained the DFAS's determination that the member's debt could not be considered for waiver under 10 U.S.C. § 2774, because it did not represent an erroneous payment. The adjudicator explained that the member received separation pay upon the issuing of proper orders. The adjudicator further explained that a claim arising from a properly paid separation payment which later must be recouped because of a member's receipt of retired pay, is not a claim arising from an erroneous payment which may be considered for waiver under 10 U.S.C. § 2774.

In his request for reconsideration, the member, through his attorney, contends that he was erroneously separated with severance pay and subsequently medically retired from service following his successful appeal to the Physical Disability Board of Review (PDBR). He maintains that the orders authorizing severance pay were not proper as they were based upon a misapplication of the law by the Physical Evaluation Board (PEB). He states that the PEB recommended that the member be separated with severance pay after determining that his planter fasciitis and right shoulder pain were unfitting. He maintains that the PEB erred in issuing its decision because it erroneously lumped together the member's planter fasciitis in his left and right feet into one 10% rating rather than awarding the member separate 10% ratings for each foot. As a result, the member was separated from service with severance pay rather than being placed on the Permanent Disability Retired List. Therefore, he argues that DFAS and DOHA had the authority to consider the member's waiver request on its merits under 10 U.S.C. § 2774. He concludes that based on equity and good conscience, the member's debt should be waived under the authority of 10 U.S.C. § 2774.

Discussion

Under 10 U.S.C. § 1174, separation pay is a contingency payment to ease the re-entry into civilian life by members of the armed services involuntarily separated prior to becoming entitled to retired pay. *See* DOHA Claims Case No. 2015-WV-081701.2 (April 26, 2016); DOHA Claims Case No. 2012-WV-071302.3 (August 19, 2014); and Comptroller General decision B-266193, Feb. 23, 1996. The statute requires "coordination" when a member who has received a separation payment later qualifies for retired or retainer pay or VA disability compensation. *See* 10 U.S.C. § 1174(h). Regarding coordination with retired pay, 10 U.S.C. § 1174(h)(1) provides in pertinent part as follows:

A member who has received separation pay . . . based on service in the armed forces, and who later qualifies for retired or retainer pay . . . shall have deducted from each payment of such retired or retainer pay an amount, in such schedule of monthly installments as the Secretary of Defense shall specify, taking into account the financial ability of the member to pay and avoiding the imposition of undue financial hardship on the member and member's dependents, until the total amount deducted is equal to the total amount of separation pay . . . so paid.

Under the law, Congress clearly did not intend members to receive both separation pay and retired pay for the same period of service. Therefore, a member who receives separation pay is required to repay it if he later qualifies for and receives retired pay.

Under 10 U.S.C. § 2774, we have the authority to waive a claim of the United States against members or former members of the uniformed services for erroneous payments of pay and allowances if collection would be against equity and good conscience and not in the best interests of the United States. A debt cannot be considered for waiver unless the payment was erroneous when made. Section 2774(a) of title 10 specifically requires “an erroneous payment of any pay or allowances made . . . to or on behalf of a member or former member of the uniformed services” as a condition for applying the statute. In this case, the separation pay payment was proper when made. Therefore, the claim resulting from the required recoupment of the separation pay payment because of receipt of retired pay cannot be considered for waiver under 10 U.S.C. § 2774, because the debt did not arise from an erroneous payment. *See* DOHA Claims Case No. 2015-WV-081701.2, *supra*; and DOHA Claims Case No. 2012-WV-071302.3, *supra*.

The fact that in 2019, upon the member’s request that the PDBR review the PEB’s finding and decision in 2009, the PDBR recommended that an adjudication of each foot be done separately, so that each be rated 10%, instead of just a combined rating of both at 10%, does not change the nature of the separation payment made to the member in 2009. The separation payment was proper when made, and never determined erroneous by the PDBR, as the member suggests. Of note, the PDBR stated the following in its panel recommendation:

In the matter of the bilateral plantar fasciitis, the panel recommends each foot be separately adjudicated as follows: an unfitting right plantar fasciitis, coded 5399-5310 and rated 10%; and an unfitting left plantar fasciitis, coded 5399-5310 and rated 10%, both IAW VASRD §4.71a. In the matter of the shoulder condition and IAW VASRD §4.71a, the panel recommends no change in the PEB adjudication. There are no other conditions within the panel’s scope of review for consideration.

The panel recommends the CI’s prior determination be modified as follows; and, the discharge with severance pay be re-characterized to reflect permanent disability retirement, effective the date of medical separation.

Based on the PDBR’s recommendations, the Air Force then corrected the member’s record to reflect that the member was retired effective April 1, 2009. As a result, the member’s separation payment must be recouped under 10 U.S.C. § 1174(h).

As explained above, our authority in this case is restricted to a consideration of whether the member’s debt may be waived under 10 U.S.C. § 2774. The member separated from service and properly received separation pay. The separation payment was proper when made, and an indebtedness, created afterwards due to the statutory requirement to recoup the separation payment, is not within the terms of 10 U.S.C. § 2774.

Conclusion

The member's request for relief is denied, and we affirm the appeal decision. In accordance with DoD Instruction 1340.23 ¶ E8.15, this is the final administrative action of the Department of Defense.

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: David F. Hayes

David F. Hayes
Administrative Judge
Member, Claims Appeals Board