

KEYWORDS: Waiver of indebtedness, pay and allowances

DIGEST: Under 10 U.S.C. § 2274, the Defense Office of Hearings and Appeals (DOHA) has the authority to waive a claim for erroneous payment of pay and allowances made to members, if collection of the claim would be against equity and good conscience and not in the best interests of the United States, provided that there is no evidence of fraud, fault, misrepresentation or lack of good faith on the part of the member.

CASENO: 2018-WV-013002.2

DATE: 12/31/2018

DATE: December 31, 2018

)	
In Re:)	
[REDACTED])	Claims Case No. 2018-WV-013002.2
Claimant)	

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

Under 10 U.S.C. § 2274, the Defense Office of Hearings and Appeals (DOHA) has the authority to waive a claim for erroneous payment of pay and allowances made to members, if collection of the claim would be against equity and good conscience and not in the best interests of the United States, provided that there is no evidence of fraud, fault, misrepresentation or lack of good faith on the part of the member.

DECISION

A retired member of the U.S. Army requests reconsideration of the June 8, 2018 appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claims Case No. 2018-WV-013002. In that decision, DOHA denied waiver of the debt of \$65,981.54 owed by the member resulting from erroneous payments of retired pay.

Background

The claimant was serving on active duty in the U.S. Army during the Gulf War from March 23, 1999, to September 29, 2010. After a tour of duty in Iraq in 2003-2004, he was diagnosed with post-traumatic stress disorder (PTSD) in 2005. In 2005 he was highly regarded as one of the most dedicated and professional soldiers with whom his Commander had worked. He left active duty as of August 2005 and joined the Army National Guard, where he continued to seek help for his PTSD. In March 2007 he submitted a VA Form 21-526, *Veteran's Application for Compensation and/or Pension*, and indicated that he was not and would not be receiving retired or retainer pay based upon his military service. A note on the form indicated that receipt of VA compensation would result in reduction of any military retired pay he was then receiving. His application was later approved, and on October 1, 2010, he was awarded VA compensation. His disability rating was later reviewed and upgraded to 100%, effective September 30, 2010.

By 2009 and 2010 his condition deteriorated and he was unable to perform military duties. A medical evaluation board was convened to address continuation of duty. Since 2005 he had been diagnosed with acute and chronic PTSD and his symptoms continued to worsen by 2010. During the subsequent medical evaluation board process, a board liaison supervisor explained benefits claimant would be entitled to receive upon medical retirement. Claimant was led to believe that his disability rating of 70 percent and a VA rating of Individual Unemployability allowed him to receive all his VA compensation as well as his retired pay, however, his service time was insufficient to qualify him for both forms of compensation. Moreover, he was led to believe that DFAS would compute how much he would be entitled to receive in retired pay before he received that pay. This is corroborated by a letter he has now submitted, dated December 3, 2013, from the U.S. Army Physical Disability Agency. His retired pay commenced on April 9, 2014, retroactive to January 7, 2014, and continued until May 31, 2016, when a review determined he had been erroneously overpaid a total of \$65,981.54.

On appeal, our adjudicator determined that the Government is not liable for erroneous actions of its agents, that the claimant was on notice from the signed VA Form 21-526, in March 2007, that his retired pay might have to be reduced, and that the case file did not contain evidence reflecting that he was entitled to receive both forms of pay. The adjudicator also noted claimant had not previously provided any of his VA disability decision letters or other correspondence addressing receipt of both forms of compensation.

Discussion

Under 10 U.S.C. § 2774, we have the authority to waive collection of a claim for erroneous overpayments of pay or allowances against a member of the Army National Guard 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.

We have previously recognized that waiver may be granted in extraordinary situations when clear and convincing evidence demonstrates the member's mental condition is so impaired that it was unlikely that he knew or should have known of the overpayment, or that he was otherwise unable to attend to his ordinary financial affairs. *See* DOHA Claims Case No. 2016-WV-110301.2 (January 8, 2018); and DOHA Claims Case No. 07041305 (May 10, 2007).

The member has now presented clear and convincing evidence in the form of documentation of significant medical incapacitation which, in part, forms the basis for his new VA rating of 100% disability, that during the period of overpayment his neurocognitive disorder, traumatic brain injury, impaired judgment; impairment of short- and long-term memory; intermittent inability to perform activities of daily living; gross impairment of thought processes; and retention of only highly retained material provides clear and convincing evidence of medical reasons reflecting his inability to know or that he should have known of the overpayments. *See* DOHA Claims Case No. 00062601 (September 19, 2000).

Conclusion

For the reasons above, we hereby waive the debt of \$65,981.54. In accordance with the DoD Instruction 1340.23 ¶ E8.15, this is the final administrative decision of the Department of Defense in this matter.

SIGNED: Catherine M. Engstrom

Catherine M. Engstrom
Chairman, Claims Appeals Board

SIGNED: Charles C. Hale

Charles C. Hale
Member, Claims Appeals Board

SIGNED: Ray T. Blank, Jr.

Ray T. Blank, Jr.
Member, Claims Appeals Board

