

A retired member of the U.S. Marine Corps requests reconsideration of the March 28, 2012, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2012-WV-011703.2.

Background

The record shows that on April 2, 1995, the member applied for disability compensation from the Department of Veterans Affairs (VA), and signed VA Form 21-526 (*Veteran's Application for Compensation or Pension*). The member was subsequently awarded compensation from the VA and began receiving the entitlement.

On September 21, 2007, the member completed DD Form 2656 (*Data for Payment of Retired Personnel*) applying for military retired pay. Therefore, he became eligible to receive military retired pay when he turned 60 years old on December 1, 2007. Once the member began receiving military retired pay, his military retired pay should have been reduced by the amount of compensation he was receiving from the VA. However, due to an administrative error, the Defense Finance and Accounting Service (DFAS) failed to reduce his retired pay by the amount of compensation he was receiving from the VA. As a result, the member was overpaid \$24,844.00 from December 1, 2007, through January 31, 2010. DFAS applied credits due the member for Concurrent Retirement and Disability Pay (CRDP) in the amount of \$22,162.00, reducing the debt to \$2,682.00.

In the appeal decision, the DOHA adjudicator denied waiver of the \$2,682.00 because the member should have known that his retired pay was not being reduced by the amount of his VA disability compensation.

In his request for reconsideration, the member states that he contacted DFAS when he began receiving his retired pay because he did not receive any paperwork regarding his retirement. He states that he was told not to worry and that DFAS would handle everything. He was told that he would hear from them only once per year about the changes in rates of pay, when DFAS would issue him a Retiree Account Statement.¹ However, he states that he did not hear from DFAS. He states that it took three years for DFAS to determine that an error was made and they were overpaying him. He states that he still has not received a proper accounting as to how this happened. He has requested documentation concerning this matter, but has not received anything. He points out that DFAS and DOHA erred in his status when they referred to him as a retired Army member when he is a retired Marine Corps member. In addition, he states that he is returning the four DOHA Claims Appeals Board decisions that were included in the appeal decision in his case and requests that they be sent to the correct individuals.

¹Specifically, the member refers to the DFAS-CL Form 7220, which is a Retiree Account Statement.

Discussion

Under 10 U.S.C. § 2774, we have the authority to waive collection of erroneous payments to a member or former member of the uniformed service if repayment 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 or former member. *See* Department of Defense Instruction 1340.23 (Instruction) (February 14, 2006). The legal definition of “fault” does not imply any ethical lapse on the part of the member or former member. It merely indicates that he is not entirely without responsibility for any resulting overpayment and that therefore the equitable remedy of waiver is not available to him. The standard we employ to determine fault is that of a reasonable person; if such a person knows or should know that he is receiving money to which he is not entitled, he is at fault if he fails to bring the excess payment to the attention of the appropriate authorities. In such a situation, waiver is precluded. *See* DOHA Claims Case No. 04061502 (June 17, 2004).

Preliminarily, neither our Office nor DFAS (so far as we can determine from the record), has suggested that the member was at any time less than honest with the government. We have no reason to doubt the member’s version of events, and for the purposes of this decision, we accept his statements at face value. We commend his service to the United States. However, in deciding this case, we are bound by legal precedent and an objective analysis of the record evidence.

While there is no issue here of fraud, misrepresentation, or lack of good faith on the part of the member, the DOHA adjudicator properly denied waiver on the basis that the member knew or should have known that he would not be permitted to receive full payment of retired pay (when he became eligible to receive it at age 60 in December 2007) while also receiving VA compensation.² The member properly completed his DD Form 2656 by informing DFAS that he was receiving \$1,586.60 per month in disability compensation from the VA. He states that when he became entitled to receive retired pay but did not receive any Retiree Account Statements, he immediately called DFAS. Even though he may have been told not to worry, he should have persisted in obtaining documentation regarding the calculation of his retired pay, especially since he never received Retiree Account Statements. Pay statements are issued to members in order that they may verify the accuracy of their pay. The member should have continued to question the amount he was receiving in retired pay until a definite determination and statement had been made to him fully explaining his entitlement. Since the member failed to verify the amount of retired pay he was receiving, he is not without fault in the accrual of the debt, and waiver of the

²This is because the member is considered to be on notice by virtue of completing the application for VA compensation that when he became entitled to retired pay it would be reduced by the amount of VA disability compensation he received. Above his signature on his application for disability compensation, there is a block which reads as follows: “Note: Filing of this application constitutes a waiver of military retired pay in the amount of any VA compensation to which you may be entitled.” *See* DOHA Claims Case No. 09083102 (September 2, 2009); and DOHA Claims Case No. 08091608 (September 23, 2008).

resulting debt is not appropriate. *See* DOHA Claims Case No. 09031702 (March 24, 2009); DOHA Claims Case No. 08091608 (September 23, 2008); DOHA Claims Case No. 04100402 (October 26, 2004); DOHA Claims Case No. 00100332 (December 28, 2000); DOHA Claims Case No. 99112916 (January 19, 2000); and DOHA Claims Case No. 98110227 (November 19, 1998).

The fact that the overpayments were made through administrative error does not relieve a member of the responsibility to determine the true state of affairs in connection with the overpayments. It is fundamental that persons receiving money erroneously paid by the government acquire no right to the money and are bound in equity and good conscience to make restitution. *See* Comptroller General decisions B-216951, Apr. 12, 1985; and B-197286, May 20, 1980.

While it is unfortunate that DFAS and the DOHA adjudicator erred in addressing the member as a retired member of the Army, this error is not material to our determination that waiver is not appropriate in this case, as explained above. The member should contact DFAS regarding an accounting of his debt. If he is still not receiving Retiree Account Statements, he should continue to pursue the matter with DFAS-Retired and Annuitant (R&A) Pay. We note that DFAS's website indicates that these statements are available on-line. *See* <http://www.dfas.mil/retiredmilitary.html>. Finally, the cases included in the appeal decision are legal precedent and were cited by the DOHA adjudicator as analogous to the facts presented in the member's case.

Conclusion

The member's request for relief is denied, and we affirm the March 28, 2012, appeal decision to deny waiver in the amount of \$2,682.00. In accordance with Instruction ¶ E8.15, this is the final administrative action of the Department of Defense in this matter.

Signed: Jean E. Smallin

Jean E. Smallin
Chairman, Claims Appeals Board

Signed: Catherine M. Engstrom

Catherine M. Engstrom
Member, Claims Appeals Board

Signed: Gregg A. Cervi

Gregg A. Cervi
Member, Claims Appeals Board