

KEYWORDS: waiver of indebtedness

DIGEST: Due to 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). The member was receiving disability compensation from the VA, and acknowledges that he was informed 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.

CASENO: 2012-WV-021004.2

DATE: 3/30/2012

DATE: March 30, 2012

In Re:)	
[REDACTED])	
Claimant)	Claims Case No. 2012-WV-021004.2
)	
)	
)	

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

Due to 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). The member was receiving disability compensation from the VA, and acknowledges that he was informed 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. Air Force Reserve requests reconsideration of the February 27, 2012, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2012-WV-021004.

Background

The record shows that on January 28, 1992, 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 in February 1992.

On June 22, 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 August 16, 2007. Once the member received 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 \$15,516.00 from August 16, 2007, through November 30, 2008. DFAS applied credits due the member for Concurrent Retirement Disability Pay (CRDP) in the amount of \$10,618.50, reducing the debt to \$4,897.50.

In the appeal decision, the DOHA adjudicator denied waiver of the \$4,897.50 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 properly completed the DD Form 2656, dated June 22, 2007, notifying DFAS that he was receiving VA compensation in the amount of \$984.00 per month. He notes that two months prior to receiving retired pay, DFAS was in possession of documentation reflecting his receipt of VA compensation. He acknowledges that he was aware there would be a deduction from his retired pay to offset the amount he was receiving in VA compensation. However, DFAS sent him a letter dated August 24, 2007, informing him that his net retired pay in the amount of \$1,076.05 for the initial period of entitlement, would be transmitted to his payment address. He states that the definition of net pay is gross pay less deductions. Therefore, he states that it was his understanding that the VA offset was one of the deductions from his retired pay. Thus, he states that he did not know he was receiving pay in excess of his proper entitlement.

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). Generally, persons who receive an erroneous payment 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. It is available to provide relief as a matter of equity, if the circumstances warrant. *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 sufficient basis in and of itself for granting waiver. *See* Instruction ¶ E4.1.3. A waiver is usually not appropriate when a recipient knows, or reasonably should know, that a payment is erroneous. The recipient has a duty to notify an appropriate official and to set aside the funds for eventual repayment to the Government. *See* Instruction ¶ E4.1.4.

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 August 2007) while also receiving VA compensation.¹ The member acknowledges that he knew that his VA compensation would offset his retired pay. When he completed his DD Form 2656, he properly informed DFAS that he was receiving \$984 per month in disability compensation from the VA. He states that when he became entitled to receive retired pay, he assumed that the offset was done after DFAS notified him of the net amount of his retired pay. However, when the member began receiving retired pay in August 2007 and no deduction was listed on his Retiree Account Statement for VA disability compensation, he should have known that he was being overpaid. Pay statements are issued to members in order that they may verify the accuracy of their pay. We have consistently held that a member who receives such documentation has a duty to carefully examine it and report any errors. Since the member had information, in the form of pay statements, which should have put him on notice that an error might be occurring, he should have contacted DFAS with regard to the amount of retired pay he was receiving. Since he did not do so, he is not without fault in the accrual of the debt, and waiver of the 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. 00100332 (December 28, 2000); DOHA Claims Case No. 99112916 (January 19, 2000); and DOHA Claims Case No. 98110227 (November 19, 1998).

¹This 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 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).

Conclusion

The member's request for relief is denied, and we affirm the February 27, 2012, appeal decision to deny waiver in the amount of \$4,897.50.

Signed: Jean E. Smallin

Jean E. Smallin
Chairman, Claims Appeals Board

Signed: Catherine M. Engstrom

Catherine M. Engstrom
Member, Claims Appeals Board

Signed: Natalie Lewis Bley

Natalie Lewis Bley
Member, Claims Appeals Board