

DATE: October 30, 2015

In Re:)

[REDACTED])

Claimant)

) Claims Case No. 2015-WV-072003.2
)
)

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

A waiver usually is 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.

DECISION

A retired member of the U.S. Army requests reconsideration of the September 22, 2015, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2015-WV-072003.

Background

On May 11, 1987, the member was married. On July 27, 2012, the member was divorced while he was serving on active duty. In the divorce decree, the member was obligated to pay his former spouse alimony in the amount of \$3,000.00 per month commencing on the first day of the first month after the effective date of the divorce decree, or August 1, 2012. His obligation to pay alimony was to continue uninterrupted until the sooner of the member's retirement from active duty, his former spouse's death or her re-marriage. Paragraph 8 of the divorce decree awarded the member's former spouse a portion of his retired pay. Specifically this paragraph stated:

8. Retirement Accounts/Benefits: Wife is awarded her own retirement benefits which she may now or hereinafter possess. Husband is serving on active

duty with the U.S. Army. Said retirement is awarded for years of service and will be in accord with the years of military service to be credited.

Defendant/Wife shall be awarded a monthly percentage of Husband's retired/retainer pay upon Husband's retirement from the U.S. Army. Such award shall be in accord with the provisions of the Uniformed Services Former Spouses' Protection Act of September 8, 1982 (Public Law 97-252).

Plaintiff/husband entered active military service on July 31, 1984, and is in active service at the time of this divorce. The parties were married on May 11, 1987 and Wife shall be credited with 25 years of marriage during Husband's military service credited for retirement purposes.

Wife is entitled to a share of any military retirement in proportion to the length of the marriage to Husband while he was accruing credits for military retirement. At the time of this divorce the date of the Husband's anticipated military retirement is not known.

Under the Uniformed Services Former Spouses' Protection Act, the Defendant/Wife is entitled to share the military retirement as follows:

$$\frac{1}{2} \times \frac{a}{b} \times c = \text{Wife's Monthly retirement share}$$

One half (1/2) multiplied by the fraction of number of years of marriage while in active duty military service (a) over number of years of active duty military duty service credited to Husband for military retirement (b) multiplied by the Plaintiff/Husband's disposable military retired/retainer pay (c) equals the Wife's amount of Husband's military retirement plan benefits awarded to her in this divorce.

Wife's share of Husband's disposable military retired/retainer pay shall depend on the total number of years credited to Husband for retirement.

Husband shall arrange with the appropriate Military Finance Office for the Defendant (former Wife) to receive her awarded share of Husband's military retirement when Husband is entitled to receive it.

Wife may contact the appropriate Military Finance Office and provide certified copies of this divorce decree as evidence of her entitlement under the Uniformed Services Former Spouse's Protection Act of September 8, 1982.

On January 24, 2014 the member's former spouse applied to the Defense Finance and Accounting Service (DFAS) for payments pursuant to the Uniformed Services Former Spouses' Protection Act (USFSPA). She included a copy of the divorce decree dated July 27, 2012, with her application. DFAS has advised us that they erroneously rejected her USFSPA application on February 3, 2014, and informed her that she needed to obtain a clarifying court order in order to

provide a missing figure not contained in the divorce decree. Apparently, DFAS erroneously advised her that she needed the clarifying order to set forth the number of months of her marriage to the member during his military service. Under the existing regulation contained in the Department of Defense Financial Management Regulation (DoDFMR), if a divorce decree expresses the formula for calculating the former spouse's share of the member's retired pay in years, DFAS is required to convert it to months. Therefore, the divorce decree met the requirements of the regulation and no clarifying order was necessary for DFAS to accept the former spouse USFSPA application.

In March 2014 the member retired and became entitled to receive retired pay on April 1, 2014. The member's former spouse obtained a *Military Clarifying Order* on June 5, 2014. In the clarifying order, the member was obligated to pay his former spouse 43% of his disposable retired pay. On July 16, 2014, the former spouse submitted an *Application for Former Spouse Payments from Retired Pay*, DD Form 2293, and attached a certified copy of the clarifying order. On July 24, 2014, DFAS informed the member that they had received the application for a portion of his retired pay and payment to his former spouse would tentatively begin effective September 2014, with an initial payment date of October 1, 2014.

As previously mentioned, DFAS subsequently discovered that they erroneously rejected the former spouse's first USFSPA application. Thus, DFAS later determined that since the member became entitled to receive retired pay on April 1, 2014, they should have begun his former spouse's payments not later than 90 days after April 1, 2014. Therefore, DFAS should have begun her payments by June 2014 with an initial payment date of July 1, 2014. Since DFAS did not start the former spouse's payments until September 2014, DFAS owed the former spouse her portion of the member's disposable retired pay for June, July and August 2014. Since the member's disposable retired pay was \$4,688.00 per month for these three months, DFAS owed the former spouse \$6,047.52, *i.e.*, $\$4,688.00 \times 43\% = \$2,015.84$; $\$2,015.84 \times 3 \text{ months} = \$6,047.52$. DFAS subsequently issued the \$6,047.52 to the former spouse and initiated recoupment of the payment by establishing a debt on the member's retired pay account.

On November 26, 2014, the member requested waiver of the debt on the bases that the overpayment resulted from no fault on his part and repayment of the debt would cause him financial hardship. On March 2, 2015, DFAS denied the member's request for waiver on the basis that pursuant to the divorce decree dated July 27, 2012, the member was on notice that once he retired from the Army and began receiving retired pay, that his former spouse was entitled to receive a portion of his retired pay. DFAS found that if the member had reviewed his Retiree Account Statement (RAS), he would have noticed that there was no deduction for his former spouse's portion of his retired pay. DFAS stated that it has been consistently held that it is ultimately the retired member's responsibility to review his RASs and other official documentation to ensure he is paid correctly and report any discrepancies to the proper officials.

On March 27, 2015, the member appealed DFAS's denial of his waiver request. In his appeal, the member continued to assert that he was not at fault for the overpayment. He stated that in response to his congressman's inquiry, DFAS admitted that they erroneously rejected his former spouse's original USFSPA application. He stated that as soon as he began receiving his retired pay, he did not want to take the chance of paying his former spouse her portion of his

retired pay at the same time DFAS was paying her a portion of his retired pay. He also continued to assert the financial hardship repayment of the overpayment would cause him. Specifically, the member stated that he began supporting both his adult daughter and her child during the period of overpayment. He stated that his daughter subsequently died and he took guardianship of his grandchild. He stated that he has acquired a lot of additional, unexpected costs.

In DFAS's Administrative Report dated June 22, 2015, DFAS stated that while the passing of the member's daughter was unfortunate, there is no authority for DFAS to consider financial hardship as a basis for waiver. DFAS also stated that the member alluded to his responsibility to make payment to his former spouse and that he states that a DFAS website states that if there is any overpayment to the former spouse, DFAS will not pay the arrears. DFAS noted that they were unsure of the website the member was referring to since he did not mention it in his appeal.

In his rebuttal to DFAS's Administrative Report, the member stated that his biggest concern with DFAS as an agency has been the lack of concern for his pay as a retired military member. He stated that a DFAS clerk or paralegal originally denied his former spouse's USFSPA application and "coached" his former spouse on what to do. He stated that DFAS did not inform him, the retired member, of the issues with the original divorce decree. He stated that the error could have been prevented if he was informed immediately of the issues with the original divorce decree. If he had been informed, he could have worked with his lawyer to ensure the decree had the correct wording pursuant to DFAS's requirements.

DOHA subsequently denied the member's appeal. In his reconsideration request, the member states that the issues in his case are not just black and white. He states that his waiver request is being denied in accordance with some outdated policy. He states that DOHA sent him someone else's information and he finds it disturbing because of the recent breach of personal information involving the Office of Personnel Management (OPM). He again asserts that repayment of the debt will cause him financial hardship because he has taken on the responsibility of raising his grandson. The member also states that a DFAS clerk erroneously denied his former spouse's original USFSPA application and coached her. He states that DFAS did not inform him of the issues with the original divorce decree and DFAS admittedly delayed payments to his former spouse. He states that he went from paying his former spouse until her death or remarriage to having to pay her for the rest of her life. He states that the whole situation was created by DFAS's error and DFAS did not involve him in his own divorce case.

Discussion

Under 10 U.S.C. § 2774, we have the authority to waive repayment of erroneous payments of military pay and allowances to members of the uniformed services 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. In this case, the erroneous payments of retired pay totaling \$6,047.52 were made as a result of an administrative error and there is no indication of fraud, misrepresentation or lack

of good faith on the member's part. However, a member is considered to be at least partially at fault, and waiver is precluded when, in light of all the circumstances, it is determined that he should have known he was being overpaid. The standard we employ to determine fault is whether a reasonable person knew or should have known that he was receiving payments in excess of his entitlement. Waiver is not appropriate when a member is aware that he is being overpaid or had no reasonable expectation of payment in the amount received. A member is considered to be aware of an erroneous payment when he possesses information which reasonably suggests that the validity of the payment may be in question. Once a member receives information that brings the validity of the payment into question, he has a duty to hold the amount received for eventual repayment. *See* DOHA Claims Case No. 2013-WV-053004.2 (April 29, 2014); and DOHA Claims Case No. 01010219 (March 19, 2001).

In this case, the member knew by terms of his divorce decree that when he retired and became entitled to receive retired pay, his former spouse was entitled to receive a monthly portion of it. Therefore, when the member began receiving his retired pay, a review of his RAS would have alerted him to the fact that there was no deduction listed for his former spouse's portion of his retired pay. At that time, the member should have questioned why no deduction was reflected on his RAS. Since he failed to do so, waiver of the claim against him is not appropriate. Although DFAS may have erred in not accepting the former spouse's original USFSPA application, this does not change the fact that the member was on notice by virtue of the divorce decree that his former spouse was entitled to receive a portion of his retired pay. In addition, by the terms of the divorce decree, the member had a responsibility to arrange with the appropriate military finance office for his former spouse to receive her awarded share of his military retired pay when he became entitled to receive it.

We are unclear about what the member means by DOHA sending him someone else's information. The DOHA adjudicator attached a prior, redacted DOHA Claims Appeals Board decision to her appeal decision dated September 22, 2015, to support the holding that the government is not liable for the erroneous actions of its officers, agents or employees even though committed in the performance of their official duties. *See* DOHA Claims Case No. 2013-WV-030508.2 (September 17, 2013).

As for DFAS not contacting the member concerning the issues associated with his former spouse's submission of the divorce decree with her original USFSPA application, as DFAS previously advised the member, DFAS erroneously rejected the application because the formula cited in the divorce decree expressed time periods in years and not months. However, DFAS later discovered the error and found that the payments of the member's retired pay to his former spouse should have started in June 2014. DFAS has no authority to change the language of a court order. If the member disagrees with the language of the divorce decree or clarifying order, his recourse remains with the state court of issuance.

The member alludes to the fact that the clarifying court order somehow changed his obligation from the original divorce decree in that he went from paying his former spouse until her death or remarriage to having to pay her for the rest of her life. As previously explained by DFAS, there was no language contained in the divorce decree stating that the former spouse's portion of the member's retired pay would terminate if she remarried. We believe the member

may be referring to the language in the divorce decree concerning payment of alimony to his former spouse.

Conclusion

The member's request for relief is denied, and we affirm the September 22, 2015, appeal decision. In accordance with DoD Instruction 1340.23 ¶ E8.15, this is the final administrative action of the Department of Defense.

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