

DATE: November 17, 2015

In Re:)

[REDACTED])

) Claims Case No. 2015-WV-092801.2

Claimant)

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

Under the provisions of 10 U.S.C. § 2774, when a person is aware or should be aware that she has received a payment in excess of her entitlement, she does not acquire title to the excess amount and has a duty to hold it for eventual repayment.

DECISION

The claimant requests reconsideration of the October 6, 2015, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2015-WV-092801. In that decision, this Office declined waiver of an erroneously issued second death gratuity payment in the amount of \$100,000.00.

Background

In this case, the claimant is the sister of the deceased member, a veteran of the U.S. Army. On March 1, 2010, the member completed the *Record of Emergency Data* (DD Form 93) designating his sister as the beneficiary of his death gratuity. On July 16, 2010, the member died, and that same day the claimant submitted a *Claim Certification and Voucher for Death Gratuity Payment* (DD Form 397). As a result of her claim, the claimant received a \$100,000.00 death gratuity payment on April 26, 2011. However, due to an administrative error, the claimant was erroneously issued a second \$100,000.00 death gratuity payment on May 2, 2011, causing her to be overpaid \$100,000.00.¹

¹ The long length of time between claim and payment was due to the requirement for the Department of Veterans Affairs (VA) to make a service connection decision for the cause of death, as the member died within 120 days of separation.

The claimant contends that she was unaware that the second payment was erroneous. She states that she also received benefit information from the Department of Veterans Affairs (VA), and she believed the second payment was a death gratuity from them. She states that if the best interests of the United States were truly considered when an erroneous payment is made, it would be more cost effective to not try to recoup the payment. The claimant does not want the fact that she repaid the overpayment to reflect that she was aware there was an overpayment. She states that she only made the repayment because she received a letter from the Defense Finance and Accounting Service (DFAS) which threatened legal action and indicated that she had been previously notified. She denies that she received previous notifications. Finally, she believes her brother would want this reconsideration granted, as he served his country with distinction and collected virtually nothing in the way of pension or veteran's benefits.

Discussion

Section 2774 of title 10, United States Code, provides authority for waiving claims for erroneous payments of pay and certain allowances made to or on behalf of members or former members or the uniformed services, if collection of the claim would be against equity and good conscience and not in the best interests of the United States. Generally, those criteria are met by a finding that the claim arose with no indication of fraud, fault, misrepresentation, or lack of good faith on the part of the member or any other person having an interest in obtaining a waiver of the claim. However, waiver is not appropriate if a person knew, or should have known, that she received payment in excess of her entitlement. A person is not entitled to waiver as a matter of right merely because she received an erroneous payment due to administrative error. When the person receives a questionable payment, she has a duty to question the payment, and set the excess amount aside for possible repayment to the government.

An examination of the claimant's belief that the second payment was a death gratuity from the VA reveals the following facts from the record. First, as previously noted, the claimant filed a DD Form 397 on July 16, 2010, for the death gratuity from the Department of Defense (DoD). This form is in the record. The claimant did receive from the VA a letter dated April 8, 2011, which advised her of the decision the VA made in her brother's case. Because his death occurred within 120 days after separation from active service, it was necessary that the VA determine his death to be service connected for DoD to be able to pay the death gratuity benefit. Once they made that decision, DFAS paid the death gratuity on April 26, 2011; and due to an administrative error, DFAS paid it again on May 2, 2011. Included in that VA letter dated April 8, 2011, was a section entitled: "What is Your Entitlement?" The claimant was informed that a VA Form 21-601, *Application for Accrued Amounts Due a Deceased Beneficiary*, was enclosed if she wanted to submit such a claim; that she could complete a VA Form 21-534, *Application for Dependency and Indemnity Compensation, Death Pension and Accrued Benefits by a Surviving Spouse or Child*; and that the surviving dependents might be eligible for Dependents Educational Assistance. There is no evidence in the record that the claimant was ever advised that she was eligible for a death benefit from the VA; there is no record of the claimant's having filed any forms to request any benefits from the VA; and there appears to be no VA benefit available for the sister of a deceased member.

The only benefits available to a sister of a deceased member are those to which the sister is a “named beneficiary” as she was for the death benefit. If she had been named as a beneficiary for the Servicemember’s Group Life Insurance (SGLI), she would have received that benefit.² The only other example would be if she was the “next of kin,” but her standing would be behind a spouse, children, and parents.

The claimant’s contention that it would be in the best interests of the United States to simply not recoup erroneous payments as it would be more cost effective is simply without foundation. Department of Defense Instruction 1340.23, *Waiver Procedures for Debts Resulting from Erroneous Pay and Allowances* (hereinafter Instruction) ¶ E4.1.1 states: Generally, persons who receive a payment erroneously 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.

The claimant does not want any weight placed upon the fact that she did make repayment. She believes that it does not show she was aware the payment was erroneous. She states that she only made the repayment after DFAS sent her a letter which threatened legal action. She denies that she had previous notice before that letter was sent. The file contains two notices of debt, one dated June 5, 2013, and the other dated July 8, 2013. The letter that DFAS sent dated July 8, 2013, which the claimant describes as “threatening” is their standard letter which outlines the legal and administrative actions available to DFAS when attempting to collect individual debts. Should the claimant have concerns about the letter, she should direct them to DFAS. Whether or not the claimant made repayment of the overpayment is not relevant to a waiver consideration.

As to the claimant’s belief that her brother would want this reconsideration granted because he received virtually nothing in pension or VA benefits, this has no relation to this issue. The claimant has requested waiver under 10 U.S.C. § 2774, and we must apply that statute and the relevant standards and precedents.

The claimant states that when she received the second payment, she checked with her bank and was advised that the second payment was also from DFAS, but from a different section. She states that she believed the second payment to be from the VA. Since the claimant filed no paperwork for a benefit from the VA, and neither of the payments were from the VA, this Office believes that it was not reasonable for the claimant to assume that she received a benefit from the VA. Since both the payments were from DFAS, the claimant should have questioned DFAS personnel regarding her entitlement to the second death gratuity. There is no indication in the record that the claimant was advised by an agency or an agency official that she was entitled to two death gratuities from DFAS. Since there is no indication that she questioned the second payment, this Office believes that collection of the overpayment would not be against equity and good conscience, nor would it be contrary to the best interests of the United States. See DOHA Claims Case No. 09092401 (October 16, 2009), DOHA Claims Case No. 03021006 (February 14, 2003), and DOHA Claims Case No. 98012301 (February 3, 1998).

² She was named as the contingent beneficiary for the SGLI, if the member’s daughters had not been living.

The claimant asks that waiver be granted because the overpayment was the result of an administrative error. While an administrative error occurred, this Office has long held that the waiver statute does not automatically relieve the debts of all persons who, through no fault of their own, have received erroneous payments from their Government. Waiver action under 10 U.S.C. § 2774 is a matter of grace or dispensation, and not a matter of right that arises solely by virtue of an erroneous payment being made by the Government. If it were merely a matter of right, then virtually all erroneous payments made by the Government would be excused from repayment. *See* DOHA Claim Case No. 03021006, *supra*.

Conclusion

The claimant's request for reconsideration is denied and we affirm the October 6, 2015, appeal decision. In accordance with the Instruction ¶ E8.15, this is the final administrative action of the Department of Defense in this matter.

///Original Signed///

Jean E. Smallin
Chairman, Claims Appeals Board

///Original Signed///

Catherine M. Engstrom
Member, Claims Appeals Board

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Natalie Lewis Bley
Member, Claims Appeals Board