

DATE: September 9, 2020

In Re:)

[REDACTED])

) Claims Case No. 2020-CL-031204.2

Claimant)

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

The burden of proving the existence of a valid claim against the United States is on the person asserting the claim.

DECISION

A retired member of the U.S. Army requests reconsideration of the May 7, 2020, appeal decision of the Defense Office of Hearings and Appeals (DOHA), in DOHA Claim No. 2020-CL-031204. In that decision, DOHA upheld the Defense Finance and Accounting Service's (DFAS's) finding that the member elected Concurrent Retirement and Disability Pay (CRDP) in 2018 on the basis that he did not decline CRDP. The member seeks payment of Combat Related Special Compensation (CRSC) for 2018.

Background

While on terminal leave prior to his retirement, the member applied for disability compensation from the Department of Veterans Affairs (VA). On October 1, 2016, the member retired from the Army. In January 2017 the VA determined that the member's service-connected disabilities combined for a total rating of 90 percent, which entitled him to payment of VA disability compensation effective October 1, 2016. The VA advised DFAS of the fact that the member was receiving disability compensation based on those service-connected disabilities. As a result, DFAS instituted payment of CRDP effective January 1, 2017, at full restoration of the member's retired pay.

In June 2017 the member filed a claim with the Army for CRSC. On May 1, 2018, the Army approved the member's claim for CRSC at a total combined percentage of 50% for combat-related disability effective October 1, 2016. On May 10, 2018, DFAS sent the member a letter advising him that since he was entitled to receive both CRDP and CRSC, he had the right to elect which one he wanted to receive. The letter also advised him that if he did not make an election within 45 days of the letter, the most beneficial entitlement would be elected for him. On November 5, 2018, the Army, upon reconsideration of the member's CRSC combined disability rating, awarded the member a CRSC combined disability rating of 90 % effective October 1, 2016. The Army advised DFAS of the member's new CRSC rating. As a result, DFAS conducted an audit of the member's account and reviewed any prior periods of entitlement to CRSC to determine if the member had been provided with election letters. For 2016 and 2017, DFAS found no election letters were provided to the member. Therefore, DFAS determined that CRSC was the greater entitlement for 2016 and 2017. However, since DFAS did provide the member with an election letter for 2018, and did not receive the member's election within 45 days, the most beneficial entitlement was elected for him at that time, which was CRDP.

The member appealed DFAS's determination regarding payment of CRDP for 2018, requesting payment from DFAS of CRSC for that year. He stated that he did not respond to DFAS's letter dated May 10, 2018, requesting that he elect CRDP for 2018 because he was in the process of appealing the Army's determination concerning his CRSC entitlement. Therefore, he could not make a choice at that time between CRDP at 90% or CRSC at 50%. He states that he submitted his appeal to the Army along with additional evidence on June 1, 2018, and it was not until November 2018 when the Army issued a decision awarding him CRSC at 90%.

In the appeal decision, the DOHA attorney examiner upheld DFAS's determination to award the member CRDP for 2018. He explained that DFAS acted properly under applicable law and regulations. In the member's reconsideration request, he acknowledged that the attorney examiner provided a legal and regulatory basis for denying his request to receive CRSC for 2018. However, he states that the appeal decision did not adequately consider all relevant facts he presented, which collectively justified granting him CRSC for 2018. He states that the attorney examiner gave no weight to the extenuating circumstances surrounding his case. He argues that the attorney examiner found that in order to preserve his right to receive CRSC for 2018 at 90%, he should have responded to DFAS's election letter in May or June 2018, and elected CRSC at 50%, even though at that time, it was a lesser benefit than CRDP at 90%. He states that he would have made that election if he had known he had to, in order to preserve his right to CRSC because this is exactly the outcome he was pursuing by appealing the Army's initial CRSC determination. He believes that it is unfair to expect a veteran to make a one-time, irrevocable decision with one government agency regarding benefits, while a decision directly relevant to that election is still pending with another government agency. He states that the decision to disapprove his request for CRSC for 2018 has denied him over \$12,000.00 in disability-related benefits. Finally, the member raises a taxation issue with regard to the retroactive payment issued to him by DFAS for CRSC for 2017. He states that DFAS issued him a gross payment of \$6,466.65 in May 2019 for CRSC for 2017. However, \$1,059.48 of that payment was withheld for federal income taxes, leaving him with a net payment of \$5,407.17.

He requests that DFAS be directed to reclassify the \$6,466.65 in taxable income paid to him as tax-free income, since CRSC is not taxable.

Discussion

Under DoD Instruction 1340.21 (May 12, 2004), the claimant must prove, by clear and convincing evidence on the written record, that the United States is liable to the claimant for the amount claimed. Federal agencies and officials must act within the authority granted to them by statute in issuing regulations. Thus, the liability of the United States is limited to that provided by law (including implementing regulations). The interpretation of a statutory provision and implementing regulation by an agency charged with their execution, and the implementation of them by means of a consistent administrative practice, is to be sustained unless shown to be arbitrary, capricious or contrary to law.

Under 10 U.S.C. § 1414(d)(1), a retired member entitled to CRDP who is also an eligible for CRSC under 10 U.S.C. § 1413a as an eligible combat-related disabled retired member, may receive CRSC in accordance with section 1413a or retired pay in accordance with section 1414, but not both. Section 1414(d)(2) provides that the Secretary concerned shall provide an annual period (referred to as an “open season”) during which a member entitled to both CRDP and CRSC shall be given the right to make an election to change from receipt of CRSC to CRDP, or the reverse, as the case may be. Any such election must be made under the regulations prescribed by the Secretary concerned. The regulations shall provide for the form and manner for making such an election and shall provide for the date as of when such an election shall become effective.

The implementing regulations for this statutory provision are found under Chapter 64, Volume 7B of the DoD Financial Management Regulation 7000.14-R (DoDFMR). Paragraph 640501 explains the relationship between CRDP and CRSC, specially reiterating that a member entitled to both may receive either one, but not both. In addition, all members entitled to both CRDP and CRSC will be provided an annual open season period during with the member may elect to change between the two programs; and eligible members will be notified of the opportunity to elect to change between CRDP and CRSC. This notification will specify the date that an election change will be effective. However, changes in the amount of a member’s entitlement to either CRDP or CRSC, which occur after the close of an annual open season period, will not be the basis to alter a current election between CRDP and CRSC prior to the next annual open season. This limitation includes changes in a member’s VA disability rating, which have a retroactive effective date prior to the date that DFAS is notified of the change.

In this case, the member was entitled to CRDP effective January 1, 2017. On May 1, 2018, the Army approved his entitlement to CRSC at a 50% rating. On May 10, 2018, DFAS notified the member of his opportunity to elect to change between the two programs and specified that if he did not make an election within 45 days of the date of the letter, the most beneficial entitlement would be elected for him. Since the member did not respond to this notification, DFAS chose the most beneficial entitlement available to the member after the close of the open season period, or 45 days from the date of DFAS’s letter. Under statute and regulation, DFAS properly paid the member CRDP for 2018, and there is no legal basis for payment of CRSC for 2018.

As for the issue the member raises concerning the taxation of the payment made to him for the year 2017, the application of the tax laws to a member's pay is solely within the jurisdiction of the taxing authority, and DOHA has no authority to consider the issue of taxes. However, DFAS has informally advised DOHA that the gross amount of \$6,466.65 issued to the member was for a former spouse credit as a result of the change from CRDP to CRSC during 2017. The change in entitlement changed the member's income, resulting in a former spouse credit payment to the member. DFAS further advised that since this was part of the member's retired pay, it is subject to taxes. The member should contact DFAS to address any further questions in the matter.

Conclusion

The member's request for reconsideration is denied, and we affirm the May 7, 2020, appeal decision in DOHA Claim No. 2020-CL-031204. In accordance with DoD Instruction 1340.21 ¶ E7.15.2, this is the final administrative action of the Department of Defense in this matter.

SIGNED: Catherine M. Engstrom

Catherine M. Engstrom
Chairman, Claims Appeals Board

SIGNED: Gregg A. Cervi

Gregg A. Cervi
Member, Claims Appeals Board

SIGNED: Jennifer I. Goldstein

Jennifer I. Goldstein
Member, Claims Appeals Board