

DATE: September 9, 2020

In Re:)

[REDACTED])

) Claims Case No. 2020-CL-042202.2

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 June 29, 2020, appeal decision of the Defense Office of Hearings and Appeals (DOHA), in DOHA Claim No. 2020-CL-042202. In that decision, DOHA upheld the Defense Finance and Accounting Service's (DFAS's) finding that the member elected Combat Related Special Compensation (CRSC) in 2019 on the basis that he did not decline CRSC. The member seeks payment instead of Concurrent Retirement and Disability Pay (CRDP) for 2019.

Background

On June 1, 2005, the member retired. Effective September 1, 2009, the member became eligible for CRDP when the Department of Veterans Affairs (VA) established his service-connected disability rating on December 1, 2009. On January 10, 2010, DFAS advised the member that he was also eligible for CRSC effective September 1, 2009. The Army notified the member that his claim for CRSC was received and sent to DFAS for processing. The Army also advised the member that he could not receive both CRDP and CRSC, and that DFAS would determine which entitlement was more beneficial to him. DFAS subsequently determined that payment of CRSC (the member's 70% total combat-related disability) was more beneficial to the member than CRDP (the member's 50% VA disability rating).

DFAS sent the member an open season letter for 2011, which notified him that in order to change his election from CRSC to CRDP, he had to respond. DFAS did not receive a response from the member. DFAS advised that in 2012, CRDP became the more advantageous benefit for the member. DFAS continued to send the member open season letters for 2012, 2013, 2014, 2015, 2016, 2017 and 2018. No response was received from the member. DFAS continued to pay the member CRSC.

On December 17, 2018, DFAS sent the member an open season letter for 2019. DFAS advised the member that he had until January 31, 2019, to respond. DFAS also advised the member of the difference between the two entitlements; \$1,215.86 per month in nontaxable CRSC, which is not subject to the Uniform Services Former Spouses' Protection Act (USFSPA), or \$2,654.00 per month in taxable CRDP, which is subject to the USFSPA. DFAS did not receive a response from the member until March 11, 2019. As a result, DFAS paid the member CRSC for 2019.

The member appealed DFAS's determination regarding payment of CRSC for 2019, requesting payment from DFAS of CRDP for that year. He stated that he never received the letter DFAS sent him for the 2019 open season. In the appeal decision, the DOHA attorney examiner upheld DFAS's determination to award the member CRSC for 2019. The attorney examiner explained that DFAS acted properly under applicable law and regulations.

In the member's reconsideration request, he argues that DFAS should have automatically paid him the most beneficial entitlement in 2012, which was CRDP. He argues that the regulation clearly awards the member the most advantageous entitlement. He maintains that the regulation does not state that the member will receive an open season letter inquiring if the member wants to change their election. He also states that all of the open season letters he received from 2012 through 2018 never listed the monetary value of each entitlement. He did not understand that CRDP was more advantageous to him until he received the 2019 letter that listed each entitlement. He believes that the burden should not be on the member to determine which entitlement is more beneficial since the system is so complex.

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. § 1413a, the Secretary concerned is authorized to make payment of CRSC to certain combat-related disable retired members. Subsection (f) of section 1413a refers to 10 U.S.C. § 1414(d) for coordination between CRSC and CRDP. 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 CRDP and CRSC may receive either one, but not both. An approved application for CRSC will cause the member’s CRDP payments to be reconsidered. Unless the member elects otherwise, CRSC will be paid instead of CRDP if the member has applied for and been approved for such benefits and the gross CRSC entitlement is found to exceed the gross CRDP entitlement. In addition, all members entitled to both CRDP and CRSC will be provided an annual open season period during which the member may elect to change between the two programs; and eligible members will be notified of the opportunity to elect to change between the two benefits. 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 September 1, 2009. He was also found to be entitled to CRSC effective September 1, 2009. He was advised that he could not receive both CRDP and CRSC. DFAS determined that payment of CRSC was more advantageous to the member. DFAS then sent him open season letters advising him each time of the period in which he had to request a change of benefit. DFAS received no responses to the letters. Specifically, on December 17, 2018, DFAS sent the member an open season letter advising him that he had until January 31, 2019, to change from payment of CRSC to CRDP. Since the member did not respond to this notification, DFAS continued to pay him CRSC. Under statute and regulation, DFAS properly paid the member CRSC for 2019, and there is no legal basis for payment of CRDP for 2019.

Conclusion

The member's request for reconsideration is denied, and we affirm the June 29, 2020, appeal decision in DOHA Claim No. 2020-CL-042202. 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