

KEYWORDS: Retired pay

DIGEST: The Defense Finance and Accounting Service (DFAS) is required to honor the request for a direct payment of a portion of the member's retired pay under 10 U.S.C. § 1408 when a former spouse presents a proper court order requiring such a payment.

CASENO: 2017-CL-112804.2

DATE: 03/05/2019

DATE: March 5, 2019

In Re:)	
[REDACTED])	Claims Case No. 2017-CL-112804.2
Claimant)	

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

The Defense Finance and Accounting Service (DFAS) is required to honor the request for a direct payment of a portion of the member's retired pay under 10 U.S.C. § 1408 when a former spouse presents a proper court order requiring such a payment.

DECISION

The claimant, a retired member of the U.S. Army, requests reconsideration of the appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2017-CL-112804, dated July 12, 2018. In that decision, our Office sustained DFAS's denial of 1) his claim for a refund of a portion of the member's retired pay withheld under 10 U.S.C. § 1408, the Uniform Services Former Spouses Protection Act (USFSPA); 2) a reduction of the withholdings along with a refund of the difference of withholdings already made; and 3) payment of interest on those amounts.

Background

On December 17, 1981, the member was married. On May 16, 2002, he divorced. At the time of the divorce the member was serving in the U.S. Army Reserves, but had not qualified for receipt of retired pay. However, the divorce decree awarded the member's former spouse 45% of his "disposable retired pay," effective concurrent with the member's first receipt of retired pay. Specifically, paragraph 17 of the divorce decree stated the following:

MILITARY RETIREMENT PAY – NOT YET RETIRED. Effective concurrent with his first receipt of U.S. Army retired pay, the Husband shall pay, or cause to be paid, to the Wife as a property right, from the Husband's United States Army retirement pay, **45%** of his "disposable retired pay" as defined in the Uniformed Services Former Spouses Protection Act per the attached point schedule as of January 11, 2001. The military points printout is attached hereto as composite Exhibit "B."

In July 2002 the former spouse applied for direct payment of the member's retired pay under the USFSPA, and DFAS approved the application pending the commencement of the member's entitlement to retired pay.

In May 2013 the member challenged DFAS's interpretation of the divorce decree as awarding his former spouse 45% of his retired pay. He argued that since he was retired as a reservist, DFAS was required to calculate his former spouse's award as a formula or a hypothetical, using the number of points referenced in his divorce decree. On June 6, 2013, the member advised DFAS that he was reopening the matter in court and seeking an amended order dividing his retired pay. He requested that DFAS suspend any payments to his former spouse. On June 18, 2013, DFAS advised the member that they were unable to suspend former spouse payments without a court order. On July 1, 2013, DFAS began payments to the former spouse.

In January 2014, upon motion of the member, the state court addressed the percentage of retired pay the former spouse was entitled to receive in the original divorce decree:

1. ... the Final Judgment seems to be raising some concerns on behalf of the former Husband because we have this big bold 45% of disposable retired pay.
2. It is reasonable for the former Wife to feel that she was to receive 45% of the former Husband's retired pay, and probably should have been spelled out more clearly regarding these points and all instead of just an attachment.
3. This court rules that the former Wife is entitled to 45% of the former Husband's Disposable United States Army Retirement Pay as determined by DFAS.

The member subsequently appealed the clarifying order with the court. On November 6, 2014, the court affirmed it. The clarifying order was not provided to DFAS at the time it was issued. In March 2016 the member, through his U.S. Senator, renewed his challenge to DFAS's interpretation of the 2002 divorce decree. After receiving the Senator's inquiry, DFAS reviewed the former spouse's USFSPA application and divorce decree from 2002. DFAS determined that

the former spouse's application should not have been approved because the divorce decree did not comply with the USFSPA. Specifically, DFAS found that since the decree described the former spouse's award as a formula, but no formula was actually stated in the decree, it was ineffective. Unaware of the 2014 clarifying order, DFAS terminated the former spouse's payments in March 2016; refunded the member over \$84,000.00 of his retired pay withholdings paid to the former spouse during the period July 1, 2013, through March 1, 2016; and indebted the former spouse for the refunded amount.

In May 2016 the former spouse provided DFAS with the 2014 clarifying order. DFAS determined that the clarifying order replaced the formula-award in the 2002 divorce decree and was effective to award the former spouse 45% of the member's disposable retired pay. DFAS then withdrew the member's refund and resumed former spouse payments based on clarifying order. DFAS later determined that the former spouse payments made during the period July 1, 2013, through January 1, 2014, the date of the clarifying order, were incorrect. DFAS initiated a refund of these payments to the member and collection of them from the former spouse.

The member appealed DFAS's determination to our Office. He claimed \$84,942.25 of the refund DFAS had collected from him. He requested a reduction of the \$2,612.70 per month former spouse withholding from his retired pay to \$643.76 per month, plus a refund of the difference in the withholdings already made. He also requested interest on these amounts calculated under 28 U.S.C. § 1961. He based his claims on two arguments. First, that his former spouse actually claimed 45% of his disposable retired pay when she should have actually received a fixed amount that was a hypothetical award of a future value. Second, that contrary to state law and the Department of Defense Financial Management Regulation (DoDFMR), her award erroneously included the member's pay and benefits derived from his military service after the divorce. He then supplemented his appeal by arguing that the clarifying order was illegal because it had been issued 12 years after his divorce and DFAS had no authority to correct errors in a court order. He also argued that DFAS erroneously included his early retirement benefits given to him under the National Defense Authorization Act (NDAA) for Fiscal Year 2008 in his former spouse's USFSPA payments.

The DOHA adjudicator affirmed DFAS's denial of the member's claim and the calculation of the amount of his former spouse's portion of his retired pay. The adjudicator upheld DFAS's determination that the early retired pay the member received by virtue of the NDAA 2008 was properly divisible under the USFSPA and payable to the former spouse.

In the member's request for reconsideration of the adjudicator's appeal decision, he states that since his former spouse's application was approved by DFAS on July 22, 2002, and the approval was based on the 2002 divorce decree, then his former spouse should only receive \$643.76 per month. He states that the 2002 divorce decree specifically referenced his estimated monthly retired pay as \$1,430.58. Therefore, 45% of \$1,430.58 is \$643.76. Thus, he contends that DFAS erred in their calculation of the former spouse payments from his retired pay by accepting the clarifying order and paying her \$2,605.05 per month, instead of \$643.76 per month. He believes that once DFAS approved his former spouse's application in 2002, both DFAS and his former spouse were barred by the doctrine of equitable estoppel from claiming that she was due more than \$643.76 per month. He states that he would not have continued on

active duty during the period 2002 through 2011 if he knew that she would subsequently awarded over \$2,000.00 per month of his retired pay. He further states that since DFAS maintains that their 2002 approval of the former spouse award was a mistake, then there is no basis for the clarifying order issued by the court in 2014. He contends that his former spouse's claim lapsed in 2002 because DFAS found the language in the divorce decree ineffective to grant her a portion of his retired pay. He further argues that since she did not file a DD 2293, *Application for Former Spouse Payments from Retired Pay*, after the clarifying order was issued in 2014, DFAS improperly made payments to her. He further argues that the clarifying order was not a clarification of the divorce decree, since DFAS found the 2002 divorce decree ineffective to award his former spouse payments. He contends that the clarifying order awarded new benefits to his former spouse. He requests a hearing from DOHA and DFAS on the recalculation of his former spouse's portion of his retired pay. If DOHA and DFAS do not hold a hearing, he requests that the case be held in abeyance while the state court decides the value of his former spouse's payments.

Discussion

Under 31 U.S.C. § 3702, this Office settles claims of retired pay of members of the uniformed services. The burden of proving a valid claim against the United States is on the person asserting the claim. A claimant must prove, by clear and convincing evidence, on the written record that the Department of Defense is liable under the law 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.

The USFSPA, 10 U.S.C. § 1408, gives state courts the authority to treat a member's disposable retired pay either as the property of the member or as the property of the member and his spouse, in accordance with the law of the jurisdiction of such court. *See* 10 U.S.C. § 1408(c). The USFSPA does not require a division of military retired pay; it merely provides a mechanism to enforce a valid state court order directing such a division for retired pay. Under prescribed limitations, the law provides that the Secretary concerned shall make payments directly to the spouse or former spouse of a portion of the member's disposable retired pay under state court order as child support, alimony, or, as here, a division of property. *See* 10 U.S.C. § 1408(d). The term "disposable retired pay" as defined in 10 U.S.C. § 1408(a)(4) is the member's total monthly retired pay from which certain deductions have been made.

All valid court orders directing payment of a portion of retired pay to the former spouse must be honored under the USFSPA if the divorcing couple was married for at least 10 years during which the member was in service. Absent facial invalidity of the court order, the government is not liable with respect to any payments made in conformity with a state court order under authority of the USFSPA. *See* DOHA Claims Case No. 2013-CL-110501.2 (July 17, 2014); and DOHA Claims Case No. 2013-CL-062801.2 (October 31, 2013).

The USFSPA gives the Department of Defense authority to prescribe implementing regulations, which are found in Chapter 29, Volume 7B of DoD 7000.14-R, the Department of Defense Financial Management Regulation (DoDFMR), Military Pay Policy and Procedures-Retired Pay. *See* 10 U.S.C. § 1408(j). A court order is defined as a final decree of divorce, dissolution, annulment or legal separation issued by a court, or a property settlement incorporated into such an order. *See* DoDFMR ¶ 290204. The court order must be certified by the court that issued the order. *See* DoDFMR ¶ 290401. The court order must be regular on its face and must award the former spouse a portion of the member's retired pay. There is no requirement in federal law that specifies how military retired pay will be divided. However, if the court order contains a retired pay award that award must be expressed as a fixed dollar amount or as a percentage of disposable retired pay. If the former spouse and the member were divorced prior to the member becoming entitled to receive retired pay, the retired pay award may be expressed as a formula or hypothetical retired pay award. Since the computation of formula and hypothetical retired pay awards result in a percentage, they are considered a type of percentage award. DFAS will construe all percentage awards as a percentage of disposable retired pay, regardless of the language of the order. *See* DoDFMR ¶ 290601.

A former spouse applies for payment under the USFSPA by submitting a DD Form 2293, along with a certified copy of the court order awarding military retired pay. Although payments will not start under the USFSPA until after the member starts to receive retired pay, DFAS can conditionally approve a former spouse's application prior to that, and retain the application pending the member's retirement. *See* DoDFMR ¶ 290401 and ¶ 290404. If the former spouse applies prior to the member receiving retired pay, DFAS will perform a legal review of the application, and may conditionally approve it based on information available at the time of the review concerning the member's duty status (Active or Reserve). At the time the member begins to receive retired pay, DFAS will perform a second review prior to establishing the former spouse's direct payments. If the former spouse's award was based on a formula or hypothetical retired pay amount, and the member's status has changed since the initial legal review, it may be necessary to reject the application, and require the former spouse to submit a clarifying order providing the necessary information. *See* DoDFMR ¶ 290405.

In order to prevent a former spouse's USFSPA payments from starting, a member must provide DFAS with documentary evidence that the former spouse's court order is legally defective or has been appealed, amended, or set aside. If DFAS determines that the documentary evidence is sufficient to bar payments to a former spouse, DFAS will not start the payments, and will inform the former spouse that the payments will not start. *See* DoDFMR ¶ 290505.

In this case, the member has failed to show the facial invalidity of the court order. After the divorce, the former spouse submitted a completed DD Form 2293, dated May 26, 2002, along with the divorce decree dated May 16, 2002, which awarded her a percentage of the member's military retired pay. DFAS preapproved the former spouse's application pending the member's retirement. When the former spouse actually began to receive a portion of the member's retired pay in 2013 the member immediately challenged her USFSPA application. However, DFAS informed him that in absence of a court order, they were unable to suspend payments to her. It was not until 2016 that the member renewed his challenge to DFAS's

payments to his former spouse under the USFSPA. Unaware of the clarifying order, DFAS agreed with the member's argument that the divorce decree was legally insufficient to award former spouse payments. DFAS agreed that the documentary evidence was sufficient to bar further payments to the former spouse and refunded the member the retired pay withholdings from July 1, 2013, through January 1, 2014.

After being notified by DFAS of the termination of former spouse payments, the former spouse submitted the clarifying order to DFAS. Neither the USFSPA nor the DoDFMR required the former spouse to resubmit the DD Form 2293. The clarifying order states that the former spouse's award is 45 percent of the member's monthly disposable retired pay. Once DFAS received the clarifying order, DFAS reversed its determination and effective 2014 began former spouse payments in compliance with it. We find no error with DFAS's actions.

The member's theory of equitable estoppel is not persuasive because equitable estoppel cannot be applied against the government due to inaction or inattentiveness of its representatives. *See* DOHA Claims Case No. 06062318 (June 29, 2006). As for the member's argument that DFAS erred by not using the date of dissolution for calculating the former spouse's payments, DFAS has no authority to go behind the language of the court order. The court's intention in awarding the member's former spouse a portion of his retired pay was clear and reaffirmed in the clarifying order. There is no evidence in the court order reflecting that the former spouse's share of the member's retired pay was restricted to a particular period he spent in the Army during their marriage.

The member has asked that DOHA hold a hearing. Once the jurisdiction of the DOHA Claims Appeals Board has been requested in a claim for reconsideration, under DoD Instruction 1340.21 ¶ E7.15.1.2, DOHA may affirm, modify, reverse, or remand the appeal decision (generally with instructions to provide additional information). There is no provision to hold decisions in abeyance or to conduct a hearing.

Although the claimant raises other issues, our authority is limited to the liability of the United States for the monetary claims the member has made. We find DFAS properly concluded that effective 2014 the former spouse was entitled to receive a portion of the member's retired pay in compliance with the divorce decree and clarifying order. Our decision in this matter does not preclude the member from seeking any relief with the state court.

Conclusion

The claimant's request for reconsideration is denied, and we affirm the July 12, 2018, appeal decision in DOHA Claim No. 2018-CL-112804 disallowing the claim. 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: Charles C. Hale

Charles C. Hale
Member, Claims Appeals Board

SIGNED: Ray T. Blank, Jr.

Ray T. Blank Jr.
Member, Claims Appeals Board