

KEYWORDS: Waiver of Indebtedness, VA compensation, VA disability

DIGEST: When a member is aware or should be aware that he is being overpaid, he does not acquire title to the excess amounts and has a duty to hold them for eventual repayment to the government.

CASE NO: 2017-WV-111407.2

DATE: 07/19/2019

DATE: July 19, 2019

In Re:)	
)	
[REDACTED])	Claims Case No. 2017-WV-111407.2
)	
Claimant)	

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

When a member is aware or should be aware that he is being overpaid, he does not acquire title to the excess amounts and has a duty to hold them for eventual repayment to the government.

DECISION

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-WV-111407, dated March 8, 2019.

Background

On December 15, 2005, the member applied for disability compensation from the Department of Veterans Affairs (VA), and signed a VA Form 21-526, *Veteran's Application for Compensation and/or Pension*. The VA Form 21-526 contains a question: "Are you receiving or will you receive retired or military pay that is based on your military service?" The member did not provide a response to this question. Section VII of the form specified that the member had to

formally elect to receive retired pay instead of VA compensation by signing item 21e. Section VII stated that by filing this application the member is telling the VA he wants to get VA compensation instead of retired pay. This section also advised the member to sign item 21e if he wants to keep getting military retired pay instead of VA compensation. The member did not sign 21e. Section VII further advised the member if he receives both military retired pay and VA compensation, some of the amount may be recouped.

On January 29, 2008, the VA granted the member's application for disability compensation retroactive to May 1, 2007.

Effective January 20, 2012, the member was placed on the Permanent Physical Disability Retirement List (PPDRL), and subsequently began receiving military retired pay. Since the member was in receipt of VA compensation, he was not entitled to receive any retired pay if it exceeded the amount of his VA compensation. Due to an administrative error, the member's military retired pay was not reduced when the member was placed on the PPDRL in January 2012. As a result he received retired pay from January 20, 2012, through April 30, 2016, while also receiving VA disability compensation, resulting in an overpayment of \$142,863.92 in retired pay.

In the appeal decision, the DOHA adjudicator upheld the Defense Finance and Accounting Service's denial of the member's waiver request. The adjudicator found the member was placed on notice when he completed the VA Form 21-526 on December 15, 2005, that his retired pay would be reduced by the VA compensation he received. The record reflects the member received at least seven notices from the VA between January 2008 and September 2011 reminding him of this potential reduction. In these notices, the VA enclosed the VA Form 21-8764, *Disability Compensation Award Attachment Important Information*, which contains a section entitled "What Conditions Affect Right to Payments?" which states in item 2 that the member's payments may be affected by certain listed circumstances and if such circumstances were applicable to the member, the member should promptly call it to the VA's attention. One of the circumstances listed is if the member is in receipt of military retired, unless the retired pay has been reduced because of award of disability compensation.

In his request for reconsideration, the member refers to documentation in the record reflecting his appointments with his local Director of Veterans Affairs office to discuss his benefits. He specifically refers to a witness statement from a person who accompanied him to the Retired Services Officer's (RSO) office supporting the member's version of events that the RSO advised the member he would qualify for both VA compensation and retired pay. The RSO filled out the paperwork on his behalf and explained to him that he would be entitled to 100% VA compensation and retired pay and discussed Concurrent Retirement Disability Pay (CRDP) with him. The member also provides documentation showing he suffers from severe PTSD. The member asks this Board consider the financial burden the debt poses to him and his family as well as his decorated and faithful service both in the military and as a Federal government employee.

Discussion

Under 10 U.S.C. § 2774, we have the authority to waive claims for erroneous payments of pay and certain allowances made to or on behalf of members or former members of the uniformed services, if repayment would be against equity and good conscience and not in the best interests of the United States, provided there is no indication of fraud, fault, misrepresentation, or lack of good faith on the part of the member. Waiver is not appropriate when the member knows, or reasonably should know, that a payment is erroneous, or does not attempt to obtain a reasonable explanation from an appropriate official concerning any unexplained payment of pay or allowance. The member has a duty to ascertain the reason for the payment and to set aside the funds in the event that repayment should be necessary. Furthermore, the fact that an erroneous payment is solely the result of administrative error or mistake on the part of the government is not sufficient basis in and of itself for granting waiver. *See* DoD Instruction 1340.23 (February 14, 2006) ¶¶ E4.1.1 through E4.1.5.

In this case, the DOHA adjudicator properly denied waiver on the basis that the member knew or should have known that he would not be permitted to receive full payment of retired pay while also receiving VA compensation. The member was on notice in December 2005 when he completed his VA Form 21-526 that his retired pay would be reduced by his VA compensation. In addition, the member has not articulated a valid reason why he thought he was entitled to full retired pay and VA compensation at the same time. Since the member failed to verify the amount of retired pay he was receiving, he is not without fault in the accrual of the debt, and waiver of the resulting debt is not appropriate. *See* DOHA Claims Case No. 2012-WV-012401.4 (December 28, 2017); DOHA Claims Case No. 08091608 (September 23, 2008); and DOHA Claims Case No. 04100402 (October 26, 2004).

Although the RSO may have informed the member that he was entitled to receive both VA disability compensation and retired pay, we believe under the circumstances, that the member should have pursued the matter further. In this regard, an objective analysis of the record evidence in this case indicates that the member should have been aware that he was not entitled to full retired pay. First, when he elected VA compensation he was advised of the VA offset. Second, he had not served 20 years to qualify for CRDP. *See* 10 U.S.C. § 1414. The CRDP statute eliminates the VA offset for those members who have retired after 20 years of service and restores the retired pay that had previously been offset by the VA compensation. *Id.* Third, he received multiple notices after receipt of VA compensation that if he received retired pay he should inform the VA so that his accounts could be properly adjusted to avoid potential recoupment. We believe a reasonable person in such circumstances would have pursued the issue with DFAS or the VA, and sought a complete explanation of his entitlement. The fact that the overpayments were made through administrative error does not relieve a member of the responsibility to determine the true state of affairs in connection with the overpayments. *See* DOHA Claims Case No. 2015-WV-040202.2 (June 29, 2015); and DOHA Claims Case No. 2013-WV-011807.2 (February 28, 2013).

The member suggests that he was under a disability during the period he received the overpayments. In prior decisions by our Office and the Comptroller General, we have recognized that waiver may be granted in extraordinary situations when the waiver applicant's

mental condition was so impaired as to render him unable to attend to his ordinary financial affairs or when any type of guardianship was thought necessary. *See, e.g.*, B-217914, June 25, 1986. The record here is very sparse, but based on what is provided it does not demonstrate by clear and convincing evidence that the member was in such poor health that it was unlikely that he knew or could have known of the overpayments, or that he was otherwise unable to attend to ordinary financial affairs. *See* DOHA Claims Case No. 03102401 (October 28, 2003).

As to the member's claim of financial hardship, financial hardship is not a factor for consideration in determining whether a waiver is appropriate. *See* Instruction ¶ E4.1.7. Finally, while financial hardship does not provide a basis for waiver, DFAS at its own discretion may arrange a repayment plan which takes any hardship appropriately into account. *See* DOHA Claims Case No. 2015-WV-040202.2, *supra*.

Conclusion

The member's request for reconsideration is denied, and we affirm the March 8, 2019, appeal decision to deny waiver in the amount of \$142,863.92. In accordance with Instruction ¶ E8.15, 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