

KEYWORDS: Waiver of Indebtedness, VA compensation, Retired pay

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: 2018-WV-030501.2

DATE: 07/25/2019

DATE: July 25, 2019

In Re:	)	
[REDACTED]	)	
Claimant	)	Claims Case No. 2018-WV-030501.2

**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. 2018-WV-030501, dated May 9, 2019. In that decision, DOHA sustained the Defense Finance and Accounting Service’s (DFAS’s) denial of the member’s application for waiver of a debt to the government in the amount of \$25,367.79 that arose when the member was erroneously overpaid retired pay.

**Background**

On March 10, 2010, the member applied for disability compensation from the U.S. Department of Veterans Affairs (VA). He signed the VA Form 21-526, *Veteran’s Application for Compensation and/or Pension*, acknowledging that:

When filing this application, you are telling us that you want to get VA compensation instead of military retired pay.

On October 7, 2010, he began receiving VA compensation retroactive to July 19, 2009. On March 10, 2014, the member completed DD Form 2656, *Data for Payment of Retired Personnel*, applying for military retired pay. In response to question 12a, which specifically asked the member whether he was receiving VA disability compensation, the member answered “No.” On April 13, 2014, the member began receiving military retired pay retroactive to March 11, 2014. When the member’s retired pay account was established, DFAS failed to reduce his military retired pay by the amount of compensation he was receiving from the VA. Therefore, the member was overpaid retired pay in the amount of \$25,367.79 from March 11, 2014, through July 13, 2015.

The DOHA adjudicator upheld DFAS’s denial of the overpayment. The adjudicator found that the member was on notice when he filled out the VA Form 21-526, in March 2010 that his retired pay would be reduced by the VA compensation he received. The adjudicator stated that the member did not provide any documentation, such as an official statement from the VA and/or DFAS, reflecting that he was entitled to receive both VA compensation and retired pay during the period of overpayment.

In the member’s request for reconsideration, his attorney states that the adjudicator erred when she stated that DOHA requested additional information from the attorney’s office in March 2018, and when the attorney’s office responded to that request on April 22, 2019. She requests that DOHA produce this correspondence. The attorney further states that the adjudicator erred when she relied on the finding that the member reasonably should have known that an error existed by virtue of the VA Form 21-526 and that by signing the form, he was on notice that he was not entitled to receive both his VA compensation and military retired pay. She states that although DOHA admits that government administrative error led to the overpayment, DOHA applies the “reasonably should have known standard” to the member to hold him partially at fault for the accrual of the debt. She notes that all the DOHA decisions she has researched use this standard and all resulted in the denial of waiver. She maintains that the member was not on notice that he was not entitled to receive unreduced retired pay along with his VA compensation. She states that the version of the VA Form 21-526 the member signed in March 2010 is unmistakably speaking to veterans who were then “currently” receiving retired pay. She states that she was able to obtain the 2014 version of the form and the VA has reworded the section to remove the words “currently getting” retired pay. She states that since the member correctly noted on the form in 2010 that he was not in receipt of military retired pay, the member was not on notice that he was affected.

## **Discussion**

Preliminarily, we will discuss the issue of the adjudicator’s development of the case file by requesting additional information. The adjudicator received the member’s appeal of DFAS’s denial of his waiver request on March 5, 2018. After a review of the appeal package, she requested further information from DFAS concerning the case file, not the attorney’s office. As

required by Department of Defense Instruction 1340.23 (Instruction) ¶ E8.6, in order for DOHA to properly adjudicate a waiver case file, DFAS is required to provide DOHA with certain information and documentation which includes a detailed itemization reflecting the aggregate amount of the debt, legible copies of leave and earnings statements or retired pay statements, and military orders. Certain information was missing, and DOHA properly requested it from DFAS in March 2018. DFAS provided the information DOHA requested on April 22, 2019.

Our authority in this matter pertains to the appropriateness for waiver under 32 U.S.C. § 716 (the waiver statute applicable to National Guard members) and 10 U.S.C. § 2774 (the waiver statute applicable to active duty and reserve members). Under those statutes, we have the authority to waive claims for erroneous payments of pay, including military retired 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. *See* Instruction ¶¶ E4.1.1 through E4.1.5. As the appeal decision indicates, by itself, the fact that erroneous payments were made due to administrative error does not entitle the member to waiver. The legal definition of “fault” does not imply any ethical lapse on the part of the member or former member. It merely indicates that he is not entirely without responsibility for the resulting overpayment and that therefore, the equitable remedy is not available to him. *See* DOHA Claims Case No. 03041804 (April 24, 2003).

In this case, when the member applied for VA disability compensation, he acknowledged that by filling out the application, he was telling the VA that he wanted to get VA compensation instead of military retired pay. Although it is true that the member had not yet retired and began receiving military retired pay, when he filled out the DD Form 2656 in 2014 applying for it, he stated that he was not in receipt of VA compensation. At that time, the member had been receiving monthly payments of VA compensation since 2010, retroactive to July 2009. Under the circumstances, the member should have answered that he was in receipt of VA compensation and the monthly amount he was receiving. The general instructions to the DD Form 2656 state that the routine use of the form is for disclosure to the VA regarding establishments, changes and discontinuing of VA compensation to retired members. Therefore, we agree that under the circumstances, the information contained on the VA 21-526, plus the failure of the member to disclose his receipt of VA compensation on his retired pay application form, reflects that the member had enough evidence at his disposal to suspect that he was not entitled to receive his full retired pay and VA disability compensation. *See* DOHA Claims Case No. 2015-WV-040202.2 (June 29, 2015); and DOHA Claims Case No. 03041804, *supra*. Moreover, if the member had noted on the DD Form 2656 that he was in receipt of VA compensation, the overpayment may have been avoided since this would have triggered the procedures to reduce/limit his retired pay by the amount of VA compensation he was receiving.

We find no error in the appeal decision, nor the DOHA cases cited as precedent by the adjudicator. As in each of those decisions, the member here was specifically alerted before he received his retired pay, via the VA Form 21-526 and the DD Form 2656, that his retired pay was affected by the amount of VA compensation he was receiving.

Finally, as DFAS already advised the member, he may be entitled to either Concurrent Retirement and Disability Pay (CRDP) or Combat Related Special Compensation (CRSC). If he wishes to seek either benefit, he should do so as explained to him by DFAS.

### **Conclusion**

The member's request for reconsideration is denied, and we affirm the appeal decision dated May 9, 2019. In accordance with the Instruction ¶ E8.15, this is the final administrative action of the Department of Defense in this matter.

SIGNED: Catherine M. Engstrom

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Catherine M. Engstrom  
Chairman, Claims Appeals Board

SIGNED: Charles C. Hale

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Charles C. Hale  
Member, Claims Appeals Board

SIGNED: Ray T. Blank, Jr.

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Member, Claims Appeals Board