

KEYWORDS: Waiver of indebtedness, VA disability compensation, retired pay, overpayment

DIGEST: Due to an administrative error, a member's retired pay was not reduced by the amount of the compensation he was receiving from the Department of Veterans Affairs (VA). When the member applied for VA disability compensation, he was considered to be on notice that when he became entitled to retired pay it would be reduced by the amount of his VA disability compensation. Under such circumstances, the member knew or should have known that he was not entitled to the full amount of his retired pay.

CASE NO: 2018-WV-042501.2

DATE: 05/30/19

DATE: May 30, 2019

In Re:)	
[REDACTED])	Claims Case No. 2018-WV-042501.2
Claimant)	

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

Due to an administrative error, a member's retired pay was not reduced by the amount of the compensation he was receiving from the Department of Veterans Affairs (VA). When the member applied for VA disability compensation, he was considered to be on notice that when he became entitled to retired pay it would be reduced by the amount of his VA disability compensation. Under such circumstances, the member knew or should have known that he was not entitled to the full amount of his retired pay.

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-042501.2, dated May 8, 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 \$22,150.38, which arose when the member was erroneously overpaid retired pay.

Background

On June 9, 2010, the member applied for disability compensation from the Department of Veterans Affairs (VA), and signed the VA Form 21-526, *Veteran's Application for Compensation and/or Pension*. He requested VA disability compensation based upon a service-connected disability. Section VII of the VA Form 21-526 advised him of the following:

When you file this application, you are telling us that you want to get VA compensation instead of military retired pay. If you currently receive military retired pay, you should be aware that we will reduce your retired pay by the amount of any compensation that you are awarded.

In addition, the member did not sign Section 21e of the VA Form 21-526 which asked if he wanted to receive retired pay instead of VA compensation.

On July 29, 2013, the member signed the VA Form 21-0819, *VA/DoD Joint Disability Evaluation Board Claim*. On the VA Form 21-0819, by not checking Box 13 under *Section IV: Military Retired Pay*, the member acknowledged that he chose to receive VA compensation instead of military retired pay; thereby waiving any portion of his retired pay that he may become entitled to receive equal in amount to the compensation he was awarded by the VA. On March 11, 2014, the VA notified the member that his VA disability compensation payments would begin retroactive to June 1, 2013.

On March 24, 2014, the member was placed on the Permanent Disability Retirement List effective April 28, 2014. On April 17, 2014, he completed the DD Form 2656, *Data for Payment of Retired Personnel*, applying for military retired pay. Although the member was receiving disability compensation from the VA, the record reflects that he did not indicate on the DD Form 2656 that he was receiving it. DFAS subsequently failed to reduce his retired pay by the amount of compensation he was receiving from the VA. Thus, the member was overpaid \$22,150.38¹ from April 28, 2014, through May 31, 2016.

The DOHA adjudicator upheld DFAS's denial of waiver of the overpayment on the basis that the member should have known that his retired pay was not being reduced by the amount of his VA disability compensation. The adjudicator found that the member was on notice by virtue of signing the VA Form 21-526 and the VA Form 21-0819, that he was not entitled to receive both VA disability compensation and full retired pay. In response to the member's contention the Retirement Service Officer (RSO) made a mistake when assisting him in completing his DD Form 2656, by checking the wrong box on the form indicating that he was not in receipt of VA disability compensation, the adjudicator concluded that since the member knew of the error and signed the form anyway, it did not affect her decision to deny waiver of the resulting debt. She cited the long-established rule that when a member is provided documentary evidence which, if reviewed, would put him on notice that he was erroneously being paid, he has a duty to question

¹During this period, DFAS discovered that the member was underpaid \$756.13, due to excess Survivor Benefit Plan (SBP) premiums withheld from his retired pay. This amount was applied to the member's original debt of \$22,906.51, reducing it to \$22,150.38, the amount DOHA then considered for waiver.

the proper pay officials regarding his entitlements, and to continue to pursue the matter until he receives official documentation concerning his entitlements.

In his request for reconsideration, the member states although he was aware that he was receiving VA disability compensation when he filled out his military retirement paperwork, he told the RSO to annotate it on the documentation. Once he completed the documentation and left his meeting with the RSO, he realized that the information was incorrect. He states that the change to his retirement paperwork was not done. Although he signed the paperwork with the error, the mistake was made by the RSO. Therefore, he is not solely responsible for the error. He states that once he began receiving his retired pay, he thought it was correct. Finally, he requests waiver on the basis of financial hardship.

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. *See* Department of Defense Instruction 1340.23 (Instruction) ¶ E4.1.2 (February 14, 2006). Generally, persons who receive a payment erroneously from the Government acquire no right to the money. They are bound in equity and good conscience to make restitution. If a benefit is bestowed by mistake, no matter how careless the act of the Government may have been, the recipient must make restitution. In theory, restitution results in no loss to the recipient because the recipient received something for nothing. A waiver is not a matter of right. *See* Instruction ¶ E4.1.1. Furthermore, the fact that an erroneous payment is solely the result of administrative error or mistake on the part of the government is not a sufficient basis by itself for granting waiver. *See* Instruction ¶ E4.1.3. Under 10 U.S.C. § 2774, 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.

In this case, the adjudicator properly denied waiver of the debt 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 receiving VA compensation. As the adjudicator determined, the member was on notice by the filing of the VA Form 526 and the VA Form 21-0819 that his retired pay would be reduced by his VA compensation. In addition, the member acknowledges that he knew the RSO answered incorrectly on the DD Form 2656, in not indicating that he was in receipt of disability compensation. Even though the member may have believed that a change was later made to his paperwork, he should have pursued the matter further considering the documentation he had been given. The member should have persisted in obtaining a definite determination in writing of his entitlement. Since the member failed to do so, waiver of the resulting debt is not appropriate. *See* DOHA Claims Case No. 2017-WV-110702.3 (April 12, 2018); DOHA Claims

Case No. 2015-WV-021801.2 (March 6, 2017); and DOHA Claims Case No. 00081601 (January 3, 2001).

The member suggests that he and the RSO should share responsibility for the mistake in filling out the DD Form 2656. However, there is no basis for apportioning fault under the waiver statute. Partial waiver of the debt may not be granted on the basis that the member was only partially at fault and did not cause the error, since the waiver statute precludes waiver if there is an indication of fault on the member's part. *See* DOHA Claims Case No. 2012-WV-070303.2 (November 20, 2012).

We understand the member's concern about his finances. However, the fact that financial hardship may occur as a result of collection of the debt is not a matter which may be considered in deciding whether or not to grant waiver. *See* Instruction ¶ E4.1.7. DFAS may take the member's financial hardship into consideration when establishing an appropriate repayment plan.

Conclusion

The member's request for reconsideration is denied, and we affirm the appeal decision dated May 8, 2019, denying the member's waiver request. 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

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