

KEYWORDS: VA disability, Retired Pay

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 his retired pay 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-072401.2

DATE: 04/12/2019

DATE: April 12, 2019

In Re:)	
)	
[REDACTED])	Claims Case No. 2018-WV-072401.2
)	
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 his retired pay 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. Public Health Service (USPHS) requests reconsideration of the decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2018-WV-072401, dated February 22, 2019.

Background

The member retired on October 1, 2007, and subsequently began receiving military retired pay. On September 25, 2008, 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*. In response to the VA Form 21-526's question, "Are you receiving or will you receive retired or military pay that is based on your military service?" the member answered that he was retired from the USPHS and was receiving retired pay in the amount of \$3,677.00 per month. Section VII of the form specified the member had to formally elect to receive retired pay instead of VA compensation by signing 21e. Section VII also stated that by filing this application the member is telling the VA he wants to get VA compensation instead of retired pay. It further advised the member to sign 21e if he wanted to continue receiving his military retired pay instead of VA compensation. The member did not sign 21e. Effective November 1, 2008, the member began receiving VA disability compensation with a 40% service-connected disability rating.

Once the member began receiving compensation from the VA, his military retired pay should have been reduced by the amount of VA compensation. However, due to an administrative error, the responsible finance office failed to reduce his retired pay by the amount of compensation he was receiving from the VA from November 1, 2008, through January 31, 2015. As a result, the member was overpaid \$46,229.94.

In the appeal decision, the DOHA adjudicator did not agree with the USPHS's recommendation of partial waiver of the debt. The USPHS based its recommendation on the lack of documents showing the member was briefed on the dollar for dollar offset of VA compensation when he submitted his retirement packet in 2007. The DOHA adjudicator found the member was placed on notice when he completed the VA Form 21-526 on September 25, 2008, that his retired pay would be reduced by the VA compensation he received. Therefore, the member should have known that his retired pay from November 1, 2008, through May 31, 2015, was not being reduced by the amount of his VA disability compensation.

In his request for reconsideration, the member states that his statement in his appeal that he was not aware that VA compensation offsets were not being deducted automatically from his monthly retired pay was a typographical error and that he meant to say he was unaware VA compensation offsets were *supposed to be* deducted automatically from his monthly retired pay. He states that when he filled out the VA Form 21-526 he thought by not signing 21e he was indicating his intent to apply for VA disability compensation. He admits he did not read the fine print in Section VII pertaining to 21e. He states that the government never reached out to veterans to explain the details of the law and that he was not properly briefed in his out-processing. He further states that the error was not caused by him but by the lack of coordination between the USPHS and the Defense Manpower Data Center.

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. Regardless of the completeness of his retirement briefing in 2007, the member was on notice in September 2008 when he completed his VA Form 21-526, that his retired pay would be reduced by his VA compensation. When he began receiving his VA compensation in November 2008, but continued to receive the full amount of his monthly retired pay, he should have questioned the accuracy of it. 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).

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. It is well established that members receiving money erroneously paid by the government acquire no right to the money and are bound in equity and good conscience to make restitution. *See* DOHA Claims Case No. 2015-WV-040202.2 (June 29, 2015); and DOHA Claims Case No. 2013-WV-011807.2 (February 28, 2013).

Finally, while financial hardship does not provide a basis for waiver, the USPHS at its own discretion may arrange a repayment plan which takes any hardship appropriately into account.

Conclusion

The member's request for reconsideration is denied, and we affirm the February 22, 2019, decision to deny waiver in the amount of \$46,224.94. 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