

KEYWORDS: Overpayment of retired pay, Military 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.

CASENO: 2017-WV-091803.2

DATE: 09/20/2018

DATE: September 20, 2018

)	
In Re:)	
[REDACTED])	Claims Case No. 2017-WV-091803.2
)	
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-091803, dated August 3, 2018. 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 \$32,395.27 that arose when the member was erroneously overpaid retired pay.

Background

On August 25, 2010, the member applied for disability compensation from the Department of Veterans Affairs (VA), and signed VA Form 21-526, *Veteran’s Application for*

*Compensation and/or Pension.*¹ On June 7, 2011, the member was awarded disability compensation retroactive to September 21, 2009. The member was advised by the VA that his disability compensation would be affected by receipt of military retired pay unless his retired pay had been reduced by his receipt of VA disability compensation. The member was advised if this did not occur, he should promptly call the matter to the attention of the VA.

On January 28, 2014, the member completed VA Form 21-0819, *VA/DOD Joint Disability Evaluation Board Claim*. Section IV under the heading “Military Retired Pay” of that form stated:

IMPORTANT – Unless you check the box in Item 13 below, you are telling us that you are choosing to receive VA compensation instead of military retired pay, if it is determined you are entitled to both benefits. If you are awarded military retired pay prior to compensation, we will reduce your retired pay by the amount of any compensation that you are awarded. VA will notify the Military Retired Pay Center of all benefit changes. If you receive both military retired pay and VA compensation, some of the amount you get may be recouped by VA, or in the case of Voluntary Separation Incentive (VSI), by the Department of Defense.

The member did not mark the box in Item 13.

By order dated November 4, 2014, the Army granted the member a disability retirement with a 70 percent disability rating effective December 9, 2014. On April 4, 2016, the member completed VA Form 21-526EZ, *Application for Disability Compensation and Related Compensation Benefits*, and requested to be paid military retired pay instead of VA disability compensation. However, since the member was receiving disability compensation from the VA, when he began receiving military retired pay in 2014, his retired pay should have been reduced by the amount of compensation he was receiving from the VA. Due to an administrative error, the Defense Finance and Accounting Service (DFAS) failed to reduce the member’s retired pay during the period December 9, 2014, through August 31, 2016, causing the member to be overpaid \$32,395.27.

DFAS denied the member’s request for waiver of the overpayment. The DOHA adjudicator upheld DFAS’s denial. The adjudicator found that the member was on notice when he filled out the VA Form 21-526 in 2010 and 2011, and the VA Form 21-0819, that if and when he began receiving military retired pay it would be reduced by the VA compensation he received. Although the member alleged that he filled out the forms prior to his retirement and should not be held liable for the information contained on the forms, the adjudicator determined that the member had received enough information reflecting that he was not entitled to receive both his retired pay and disability compensation. Therefore, once he began receiving retired pay, if he

¹The member filled out another VA Form 21-526 on June 30, 2011.

had any questions, he should have at least questioned his entitlements, since he waived his right to retired pay in an amount equal to the compensation he was receiving from the VA.

In his request for reconsideration, the member states that in 2017 DFAS and the Pentagon waived overpayments in over 17,000 cases because of Government error. Therefore, he suggests that his debt should also be waived. He further states that he did not question his entitlements because he had no reason to question DFAS or their set policies for payments.

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. *See* Department of Defense Instruction 1340.23 (February 14, 2006) ¶¶ E4.1.1 through E4.1.5.

In this case, the member was on notice by virtue of his application and award of VA compensation in 2011 and his submission of the VA Form 21-0819, that his retired pay would be reduced by his VA compensation. He should have questioned the fact that deductions were not being made from his retired pay during the period December 2014 through August 2016. In addition, the member has not submitted any evidence or articulated a reason why he believed he was entitled to full retired pay and VA compensation. The record supports the DOHA adjudicator's finding that that the member knew or should have known he was being overpaid. In such circumstances, the member receiving the money erroneously paid by the Government acquires no right to the money. Accordingly, it is not against equity and good conscience to collect the money. *See* DOHA Claims Case No. 2012-WV-0111703.3 (April 13, 2012); and DOHA Claims Case No. 2012-WV-021004.2 (March 30, 2012).

Conclusion

The member's request for reconsideration is denied, and we affirm the August 3, 2018, appeal decision to deny waiver in the amount of \$32,395.27. 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