

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

KEYWORDS: Waiver of Indebtedness

CLAIM NO: 2017-CL-082302.2

DATE: 03/01/2018

DATE: March 1, 2018

In Re:)
[REDACTED]) Claims Case No. 2017-WV-082302.2
Claimant)
_____)

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

Due to an administrative error, a member's retired pay was not reduced by the amount of disability compensation he was receiving from the Department of Veterans Affairs (VA). When the member applied for VA 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 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 October 11, 2017, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2017-WV-082302. In that decision, DOHA denied waiver of the debt of \$38,867.44 owed by the member resulting from erroneous payments of retired pay.

Background

The member completed a VA Form 21-526, *Department of Veterans Affairs Veteran's Application for Compensation and/or Pension*, on February 1, 2010. He requested VA disability compensation based upon a service-connected disability. The Form instructed him that filing the application indicated he wanted to receive VA compensation instead of military retired pay, and that any military retired pay received would be reduced by any VA compensation awarded. He also acknowledged on the Form that he was receiving or would receive military retired pay or retainer pay, but was unsure of the amount. He did not sign Section 21e of the VA Form 21-526 which asked if he wanted to receive retired pay instead of VA compensation. The member began receiving VA compensation retroactive to February 9, 2010.

On December 6, 2011, the Department of the Army issued an order placing the member on the Permanent Physical Disability Retirement List, effective January 12, 2012, with a 40% disability rating. He began receiving retired pay on January 24, 2012, retroactive to January 10, 2012. The receipt of VA compensation should have resulted in his retired pay being reduced by the amount of the VA payment. However, his retired pay account did not reflect the receipt of VA compensation when it was established. As a result, the member was overpaid \$40,188.00 in retired pay from January 10, 2012, through November 30, 2015. A credit for Survivor Benefit Plan (SBP) premiums in the amount of \$1,320.56 for the period February 2012 through November 2015 reduced the member's debt to \$38,867.44.

In the member's request for waiver, he claimed that he was told he was entitled to receive both VA compensation and his retired pay. The Defense Finance and Accounting Service (DFAS) initially denied the member's request for waiver. DFAS determined that the member was on notice of the required reduction of retired pay mandated for the receipt of VA compensation. DFAS concluded that such knowledge of the required reduction precluded waiver of the member's debt.

The member requested an extension to file his appeal and retained counsel. Through counsel, the member alleged that he had severe combat-related physical and mental disabilities and that his medical condition impaired his ability to review and comprehend financial paperwork. Based upon the evidence submitted by the member, DFAS recommended that the waiver be granted.

The DOHA adjudicator disagreed with DFAS's recommendation. The adjudicator noted the record was absent any official documentation from a qualified physician that the member lacked the mental capacity to attend to his finances or comprehend the pay documents he received before and during the period of overpayment. Moreover, the adjudicator noted the member acknowledged in his 2016 correspondence to his Senator that he was aware he was receiving both retired pay and VA compensation.

On November 8, 2017, the member requested an extension by e-mail to submit his reconsideration request, and DOHA granted the member an extension for an additional 30 days, contingent upon DOHA's receipt of the written reconsideration request by mail at the address noted in Department of Defense Instruction 1340.23 (Instruction) (February 14, 2006), on or

before December 12, 2017. The mailed request was received by DOHA on November 15, 2017. On December 12, 2017, the member requested a 180-day extension to obtain medical documentation. However, the member stated his position was that the underlying medical records requested by DOHA are not required because the evidence already submitted established that it is against equity and good conscience to require him to repay the debt. He stated that during the period of the overpayment, he lacked the ability to handle his finances or comprehend any pay documentation. DOHA subsequently denied the request for the 180-day extension.

Discussion

The member requests more time to file his reconsideration request. As explained by the DOHA adjudicator, under Instruction ¶ E8.12, DOHA must receive a request for reconsideration within 30 days of the date of the appeal decision, and that while DOHA may extend this period for up to an additional 30 days for good cause shown, no request for reconsideration may be accepted after this time has expired. Therefore, DOHA has no authority to extend the member's time to file more documentation.

Even though we cannot extend the time for the member to submit more documentation, the DOHA adjudicator properly denied waiver of the debt under 10 U.S.C. § 2774. Under that statute, we have the authority to waive a claim for an erroneous payment of pay and allowances to a member or former member of the uniformed services if repayment would be against equity and good conscience and not in the best interest of the United States, provided that there is no evidence of fraud, fault, misrepresentation, or lack of good faith on the part of the member or former 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.

In this case, the member was on notice by virtue of his application for VA compensation in February 2010 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 January 2012 through November 2015. *See* DOHA Claims Case No. 2016-WV-120502.2 (April 17, 2017); DOHA Claims Case No. 2012-WV-011703.3 (April 13, 2012); and DOHA Claims Case No. 04061502 (June 17, 2004).

The member states 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 member's mental condition is so impaired that it was unlikely that he knew or should have known of the overpayment, or that he was otherwise unable to attend to his ordinary financial affairs. *See* DOHA Claims Case No. 2016-WV-110301.2 (January 8, 2018); DOHA Claims Case No. 07041305 (May 10, 2007);

DOHA Claims Case No. 04061502, *supra*; and Comptroller General decision B-217914, June 25, 1986. The member has submitted some limited documentation, including a 2009 Line of Duty Determination, and VA rating decisions from 2010 and 2015. He contends that the documentation provided concerning a motorcycle accident, airborne school injuries, and injuries due to being punched in the face establish severe cognitive difficulties. However, there is no documentation that specifically attributes those factors with sufficient specificity to establish severe cognitive impairment. While the member may have experienced and suffers from medical problems, the documentation provided does not demonstrate by clear and convincing evidence that the member was in such poor condition that he was precluded from verifying or understanding the Form he signed, the pay he received, or that he was incapable of attending to his ordinary financial affairs. *See* DOHA Claims Case No. 2013-WV-030508.2 (September 17, 2013).

Conclusion

The member's request for reconsideration is denied and the appeal decision dated October 11, 2017, is affirmed. 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