

KEYWORDS: Waiver of Indebtedness, Concurrent VA payments and 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 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.

CASENO: 2017-WV-110702.2

DATE: 04/12/2018

DATE: April 12, 2018

)	
In Re:)	
[REDACTED])	Claims Case No. 2017-WV-110702.2
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 January 10, 2018, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2017-WV-110702. In that decision, DOHA sustained the Defense Finance and Accounting Service’s (DFAS) denial of the member’s application for waiver of a debt to the government in the amount of \$60,135.46, which arose when the member was erroneously overpaid retired pay.

Background

On November 1, 2013, the member applied for disability compensation from the Department of Veterans Affairs (VA), and 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 July 23, 2014, he was awarded compensation from the VA and began receiving it effective October 1, 2012. In the VA's letter awarding him compensation, the member was advised his VA disability payments would be affected by the receipt of retired pay, unless his retired pay is reduced by the amount of disability compensation. The member was advised that if this circumstance occurred, he must immediately call it to the VA's attention. He was also advised that failure to immediately call a change in any condition affecting his right to payments from the VA could result in a debt that he would be liable to repay.

On August 5, 2014, the member was granted a disability retirement from the Army with a disability rating of 100 percent effective September 9, 2014. On September 3, 2014, he completed 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 \$60,135.46 from September 9, 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 21-0819 and receiving the VA's letter granting him disability compensation that he was not entitled to receive both VA disability compensation and full retired pay. 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 the proper pay officials regarding his entitlements, and to continue to pursue the matter until he receives official documentation concerning his entitlements. Although the member asserted he contacted both DFAS and the VA, and was told that he was entitled to receive his full retired pay and VA compensation, the adjudicator noted that he did not provide any documentation, such as a signed statement from either DFAS or the VA, indicating that he questioned his entitlement and was advised by either that he was entitled to receive both concurrently.

In his request for reconsideration, the member states it is against equity and good conscience for the government to demand repayment of a debt that was not caused by him. He states that it is unfair for him to bear the burden of providing evidence as to why his debt should be forgiven. He states that this would require him to produce evidence that he has no ability to obtain. Since the proceedings in front of DOHA are not in a court of law, he states that he is unable to get sworn testimony by compelling unknown or reluctant witnesses to appear on his behalf. The member contends that he notified a DFAS Customer Service representative over the

telephone in September 2014 when he was approved to receive retired pay that he was in receipt of VA compensation. He further states that he was told by a VA representative that he was entitled to receive both. He provides her contact information for DOHA. The member also contests the version of the DD Form 2656 contained in the record. He submits an unsigned version of the form in which he indicated that he was in receipt of VA disability compensation effective October 1, 2012, in the monthly amount of \$2,858.24. He states that he submitted this form by email to his retirement service officer on August 14, 2014, without a signature because he was told not to sign it. He states that on September 3, 2014, he submitted the final, signed page as directed by the officer. He attaches emails from the officer supporting his version of events in the filing of his DD Form 2656. The member suggests that he is worried about the financial impact of the debt and its effect on his security clearance. He states his desire to submit a Freedom of Information Request (FOIA) in order to determine if DFAS is routinely denying waiver requests of members in the same circumstances in order to save face and protect their jobs. He further argues that he should not have to pay back interest on a debt caused by government error. He states that while he acknowledges he was erroneously overpaid, he continues to seek relief from the debt and believes that he is entitled to receive Concurrent Retired and Disability Pay (CRDP)

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.

Concerning the fact that DOHA is not a trial court, the member is correct. We do not hold trials or formal hearings on waiver requests, and have no authority to conduct investigations or subpoena witnesses. Waiver is an equitable remedy, and in deciding whether or not waiver is appropriate in this case, we are bound by legal precedent and an objective analysis of the record before us. Our decisions are made on the written record and those seeking waiver are entitled to

submit in writing any information or evidence they feel is pertinent and it will be considered along with other information including reports on the matter from the agencies involved.

Preliminarily, we have no reason to doubt the member's version of events concerning the filing of his DD Form 2656, and accept the fact that he indicated on the form that he was in receipt of VA disability compensation effective October 1, 2012, in the monthly amount of \$2,858.24. However, due to an administrative error, DFAS subsequently failed to reduce the member's retired pay by the amount of VA compensation he was receiving, causing the member to be overpaid. The fact that the resulting overpayments were made through DFAS's administrative error does not relieve a member of the responsibility to determine the true state of affairs in connection with the overpayments. *See* DOHA Claims Case No. 2012-WV-012401.4 (December 28, 2017); and DOHA Claims Case No. 2012-WV-011703.3 (April 13, 2012).

While there is no issue of fraud, misrepresentation or lack of good faith on the part of the member, the adjudicator properly denied waiver of the debt on the basis that he 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 21-0819 and by the VA award letter that his retired pay would be reduced by his VA compensation. The member states that he did inform both DFAS and the VA that he was receiving both his retired pay and VA compensation concurrently. In his initial waiver request, the member states that he called DFAS Customer Service in September 2014 and specifically asked if he would be receiving both payments. He states that he was then told by a representative that there was no indication in his record that he was receiving any VA benefits, so not to worry about it. Even though the member may have then been advised by a VA representative that he was entitled to receive concurrent payments because he was 100% disabled, he should have pursued the matter further considering the documentation he had been given and the fact that DFAS had no record of him receiving VA compensation. 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. 2015-WV-021801.2 (March 6, 2017); DOHA Claims Case No. 2012-WV-0110703.2, *supra*; DOHA Claims Case No. 04100402 (October 26, 2004); and DOHA Claims Case No. 00081601 (January 3, 2001).

We realize that if the member is entitled to receive CRDP retroactive to the period of the overpayment, adjustments will be made to his retired pay account and he may use any credits due him to reduce or eliminate the debt. However, the records supports the adjudicator's determination that the member knew or should have known that he was being overpaid. If the member wishes to claim the entitlement to CRDP, he should submit a written inquiry to DFAS to ascertain the reason he is not currently receiving CRDP. The member's claim should be sent to DFAS, U.S. Military Retired Pay, P.O. Box 7130, London, KY 40742-7130. *See* Department of Defense Financial Management Regulation (DoDFMR), Volume 7B, Chapter 64, found online at http://comptroller.defense.gov/Portals/45/documents/fmr/current/07b/07b_64.pdf.

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. Although DFAS has the authority to charge interest and penalties on the member's debt, DOHA has no

authority to waive them.¹ However, the member may find some relief under the DoDFMR. Paragraph A105 of Annex 1, Chapter 3, Volume 4 of the DoDFMR states that the head of a DoD component may promulgate regulations identifying circumstances appropriate to waive collection of interest, penalty and administrative charges in conformity with the Federal Claims Collection Standards.² Therefore, the member should contact DFAS or the Army for the process for applying for waiver of the charges on his debt.

Finally, any requests for documentation under FOIA should be made through DFAS, as we have no authority to order DFAS to produce records.

Conclusion

The member's request for reconsideration is denied, and we affirm the appeal decision dated January 10, 2018, 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

¹Under section 901.9 of Title 31, Code of Federal Regulations, agencies have the authority to assess interest, penalties and administrative costs on debts owed to the United States pursuant to 31 U.S.C. § 3717. See <https://www.gpo.gov/fdsys/pkg/CFR-2011-title31-vol3/pdf/CFR-2011-title31-vol3-sec901-9.pdf>.

²See http://comptroller.defense.gov/Portals/45/documents/fmr/Volume_04.pdf.