

DATE: March 30, 2017

---

In Re: )

[REDACTED] )

) Claims Case No. 2016-CL-092602.2

Claimant )

---

**CLAIMS APPEALS BOARD  
RECONSIDERATION DECISION**

**DIGEST**

The burden of proving the existence of a valid claim against the United States is on the person asserting the claim.

**DECISION**

A retired member of the U.S. Army requests reconsideration of the February 6, 2017, appeal decision of the Defense Office of Hearings and Appeals (DOHA), in DOHA Claim No. 2016-CL-0092602. In that decision, DOHA denied the member's claim for Concurrent Retirement and Disability Pay (CRDP).

**Background**

On August 7, 1944, the member was wounded by fire while engaged in combat. On July 15, 1945, the member retired due to physical disability with three years, three months and six days of service. The member subsequently applied for and began receiving disability compensation from the Department of Veterans Affairs (VA). The member was required to waive his retired pay in the amount of the disability compensation he was receiving from the VA. On August 1, 2004, his disability compensation exceeded his retired pay. Therefore, the member's retired pay account went into a suspended status. On August 1, 2008, the Army Human Resources Command, Combat-Related Special Compensation Division advised the member that he had a 70% Purple Heart disability and a 70% combat-related disability with Individual Unemployability (IU).

On July 15, 2015, the member made a claim with the Defense Finance and Accounting Service (DFAS) for CRDP. DFAS subsequently denied the member's claim. DFAS found the member ineligible for CRDP. DFAS concluded that under 38 U.S.C. § 5305, the member's retired pay had to be offset against the amount of VA disability compensation he was receiving. DFAS further determined that under 10 U.S.C. § 1413a, any Combat-Related Special Compensation (CRSC) that the member may be entitled to receive would also have to be reduced by the difference between (1) the retired pay that he would receive based on disability and (2) the retired pay that he would receive based on years of service.

The member appealed and the DOHA adjudicator upheld DFAS's determination. The adjudicator explained that under 38 U.S.C. § 5305, a retired member must waive receipt of his retired pay in an amount equal to any compensation he is otherwise eligible to receive from the VA as a condition precedent to receipt of VA disability compensation. However, in 2004 Congress enacted new legislation, 10 U.S.C. § 1414, allowing a gradual restoration of retired pay currently being deducted from retired pay accounts due to concurrent receipt of VA compensation. The adjudicator noted that this restoration of retired pay is commonly known as CRDP. The adjudicator concluded that the member was not entitled to CRDP under the provisions of 10 U.S.C. § 1414, because he retired due to disability in 1945 under what is now 10 U.S.C. chapter 61 with less than 20 years of service.

In his request for reconsideration, the member states that he did not retire under 10 U.S.C. chapter 61, he retired under the Act of 3 April 1939. He attaches documentation reflecting the effective date of his retirement. He contends that he is exempt from any compensation prohibitions because the disability on which his retirement was predicated was incurred in combat, and was the result of an explosion of an instrumentality of war in the line of duty. He attaches a letter from the VA dated July 28, 1945, which advised him his retired pay was not subject to any reduction as set forth under the Dual Compensation Act (DCA). He cites his exemption from the DCA as evidence that he is entitled to receive both disability compensation from the VA and his full, unreduced, retired pay.

### **Discussion**

There is no proper legal basis for payment of CRDP to the member. Effective July 15, 1945, the member became entitled to receive military retired pay. He subsequently was granted VA disability compensation. When his VA disability compensation exceeded his retired pay, his retired pay account went into a suspended status. He is not entitled to receive CRDP because he did not meet the 20-years of service statutory requirement under 10 U.S.C. § 1414(b).<sup>1</sup>

The member argues that he was not retired under 10 U.S.C. chapter 61. He therefore maintains that 10 U.S.C. § 1414(b) does not apply in his case. The authority to make

---

<sup>1</sup>10 U.S.C. § 1414(a) states that subject to subsection (b), a member who is entitled to retired pay and also entitled to VA disability compensation for a qualifying service-connected disability is entitled to receive both without regard to 38 U.S.C. § 5305. However, § 10 U.S.C. 1414(b) states that subsection (a) does not apply to a disability retired member with less than 20 years of service.

determinations as to whether disability exists and as to whether such disability was incurred in the line of duty, within the contemplation of the Act of April 3, 1939, was vested in the Secretary of War (now the Secretary of the Army) or his designee by Executive Order No. 8099, dated April 28, 1939. Disability retirement under the Act is in the nature of a pension predicated on disability. *See* 34 Comp. Gen. 90 (1954). The Secretary concerned's authority to retire a member because of physical disability is now set forth under 10 U.S.C. § 1201, which falls under chapter 61 of title 10. Therefore, the 20-years of service requirement under the CRDP statute applies to the member.

The member cites to evidence that he is not subject to the DCA, once codified under 5 U.S.C. § 5532,<sup>2</sup> in order to prove his entitlement to concurrent receipt of both his retired pay and his VA disability compensation. The DCA prescribed a formula for the reduction of retired pay for certain retired members subject to its provisions when employed in a civilian capacity by the federal government. The member is correct that his retired pay was not subject to the DCA. Under 5 U.S.C. § 5532, his retired pay was protected because it was calculated in whole or in part based on disability resulting from injury or disease received in line of duty as a result of armed conflict; or was caused by an instrumentality of war and incurred in line of duty during a period of war. However, the member's exemption from the now repealed DCA does not grant him entitlement to CRDP. The member has not proven his claim.

### **Conclusion**

The member's request for reconsideration is denied, and we affirm the February 6, 2017, appeal decision in DOHA Claim No. 2016-CL-092602 disallowing the claim. In accordance with DoD Instruction 1340.21 ¶ E7.15.2, 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

---

<sup>2</sup> Congress repealed 5 U.S.C. § 5532 in the National Defense Authorization Act for Fiscal Year 2000, Pub. L. No. 106-65, Div. A, Title VI, § 651, 113 Stat. 512, 664 (1999), effective October 1, 1999.