

DATE: December 28, 2017

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In Re: )  
          [REDACTED] ) Claims Case No. 2012-WV-012401.4  
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Claimant )

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**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. 2012-WV-012401.3, dated August 21, 2017. 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, arising from when the member was erroneously overpaid retired pay totaling \$6,856.40.

**Background**

On May 5, 2003, 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 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 U.S. Army Reserve and would draw retired pay at age sixty. Section VII of the form specified the member had to formally elect to receive retired pay by signing block 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 you want to keep getting military retired pay instead of VA compensation.” The member did not

sign section 21e. Effective May 12, 2003, the member began receiving VA disability compensation with a 60% service-connected disability rating.

On June 25, 2006, the member turned 60 years old and became eligible to receive military retired pay. Once the member began receiving military retired pay, his military retired pay should have been reduced by the amount of compensation he was receiving from the VA. However, due to an administrative error, DFAS failed to reduce his retired pay by the amount of compensation he was receiving from the VA from June 25, 2006, through November 30, 2007. As a result, the member was overpaid \$6,856.40.

In the appeal decision, the DOHA adjudicator upheld DFAS's denial of the overpayment. The adjudicator found the member was placed on notice when he filled out the VA Form 21-526 that his retired pay would be reduced by the VA compensation he received. Therefore, the member should have known that his retired pay from June 25, 2006, through November 30, 2007, was not being reduced by the amount of his VA disability compensation.

In his request for reconsideration, the member states that he was not aware of the fine points of the law and did not know he was being overpaid. He states that the government never reached out to veterans to explain the details of the law. He maintains that DFAS should be held accountable for their error, not him.

### **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 (when he became eligible to receive it at age 60 in June 2006) while also receiving VA compensation. The member was on notice in May 2003 when he completed his VA Form 21-526, 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 June 2006 through November 2007. In addition, the member has not articulated a reason why he thought he was entitled to full retired pay and VA compensation at the same time. Pay statements are issued to members in order that they may verify the accuracy of their pay. The member should have

questioned the amount he was receiving in retired pay until a definite determination and statement had been made to him fully explaining his entitlement. 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. 09031702 (March 24, 2009); DOHA Claims Case No. 08091608 (September 23, 2008); DOHA Claims Case No. 04100402 (October 26, 2004); DOHA Claims Case No. 00100332 (December 28, 2000); and DOHA Claims Case No. 99112916 (January 19, 2000).

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 persons 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).

### **Conclusion**

The member's request for reconsideration is denied, and we affirm the August 21, 2017, appeal decision to deny waiver in the amount of \$6,856.40. 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

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Catherine M. Engstrom  
Chairman, Claims Appeals Board

SIGNED: Charles C. Hale

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Charles C. Hale  
Member, Claims Appeals Board

SIGNED: Ray T. Blank

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Ray T. Blank Jr.  
Member, Claims Appeals Board