

DATE: May 30, 2017

_____)
In Re:)
 [REDACTED]) Claims Case No. 2016-CL-101801.2
)
Claimant)
_____)

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

The Barring Act, 31 U.S.C. § 3702(b), is applicable to increases in a member's monthly retired pay resulting from its restoration under 10 U.S.C. § 1414. The burden of proving the existence of a valid claim against the United States is on those asserting the claim. The claim must also be filed within the time limit specified by law.

DECISION

The beneficiaries of a deceased member of the U.S. Army request reconsideration of the March 14, 2017, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2016-CL-101801. In that decision, DOHA sustained the Defense Finance and Accounting Service's (DFAS's) application of the Barring Act, 31 U.S.C. § 3702(b), to the beneficiaries' claim for the member's arrears of retired pay (AOP).

Background

The beneficiaries seek arrears of retired pay due their late father in the amount of \$59,274.08. The member retired on May 1, 1969. He had a 100% disability rating from the Department of Veterans Affairs (VA). As required by statute, 38 U.S.C. § 5305, he waived his retired pay to obtain VA disability compensation. In 2004 Congress enacted new legislation, 10 U.S.C. § 1414, allowing a gradual restoration of retired pay currently being deducted from retired members' accounts due to the concurrent receipt of VA disability compensation. This restoration of retired pay is commonly known as Concurrent Retirement and Disability Pay (CRDP), and is applicable to all retired members who have a qualifying service-connected

disability (a service-connected disability that is rated not less than 50% disabling by the VA). As a qualified retired member under 10 U.S.C. § 1414, the member was eligible for restoration of retired pay. DFAS required the member or a guardian to certify the account, in order to reestablish the member's retired pay account. DFAS states it did not receive a certification. Therefore, DFAS did not pay the member CRDP. The member passed away on August 29, 2015. Upon the member's death, an SF 1174, *Claim for Unpaid Compensation for Deceased Member of the Uniform Services*, was submitted to DFAS, along with the death certificate claiming any AOP. A deceased member's AOP is divided in order of precedence. Since the member's spouse had predeceased him, his three children would each take an equal share of the AOP.

DFAS determined the member was entitled to receive retroactive CRDP payments beginning November 1, 2005. However, DFAS, pursuant to 31 U.S.C. § 3702(b)(1), was barred by the statute of limitations from paying any portion of the retired pay accrued between November 1, 2005, and August 29, 2009. Under 31 U.S.C. § 3702 (b), also referred to as the Barring Act, the administrative statute of limitations, jurisdiction to consider claims is limited to those that are filed within 6 years after they accrue. DFAS paid the member's beneficiaries \$34,791.68, \$34,791.68, and \$34,791.67 respectively for the pay accrued between August 30, 2009, and August 30, 2015, and barred payment of \$19,758.03, \$19,758.03, and \$19,758.02 respectively for the pay accrued between November 1, 2005, and August 29, 2009. Under 31 U.S.C. § 3702(e), upon request of the Secretary concerned, the Secretary of Defense may waive the time limitations established by 31 U.S.C. § 3702(b) for claims involving a uniformed service member's pay, allowances, or survivor benefits. The member or the member's claimants may claim any amount due, but waiver can be granted so as to allow payment up to a maximum of \$25,000.00, which is divided equally amongst the beneficiaries.

In the appeal decision, the DOHA adjudicator agreed with DFAS's application of the Barring Act to the beneficiaries' claim for the period November 1, 2005, through August 29, 2009. The adjudicator advised the beneficiaries that they have the right to seek waiver of the time limitations of the Barring Act through the Assistant Secretary of the Army. However, since waiver is granted based on the member's claim, up to the amount of \$25,000.00, payment of the claim would be limited to \$25,000.00, divided into three equal shares to the beneficiaries.

In their reconsideration request, the member's beneficiaries assert that the member did have legal guardians during the time he was entitled to receive retired pay. The beneficiaries argue that DFAS never notified them or his guardians of their father's eligibility to have his retired pay restored pursuant to CRDP. They request information concerning DFAS's attempts to contact their father's guardians. They also request waiver of the Barring Act in order for each of them to be paid the full barred amount.

Discussion

DFAS's application of the Barring Act is proper in this case. Under 31 U.S.C. § 3702(b), jurisdiction to consider claims is limited to those that are filed within 6 years after they accrue. The member was entitled to restoration of his retired pay effective November 2005. After the

member's death on August 29, 2015, his family submitted the SF 1174 to DFAS. Prior to the member's death, there is no evidence that a claim was filed concerning the restoration of the member's retired pay. Although the member's family indicates that a fiduciary was appointed in 2008, and a legal guardian was appointed in 2011, 10 U.S.C. § 1414, only establishes CRDP qualification requirements for members and does not reference a statutory duty to notify a member of his eligibility. *See* Comp. Gen. B-274195, (Oct. 8, 1996). Since claims are adjudicated on the written record on the basis of facts as established by the agency concerned and by evidence submitted by the claimant, the submission of the SF-1174 is the only evidence of filing of a claim in this case. *See* Department of Defense (DoD) Instruction 1340.21 (May 12, 2004) ¶¶ E5.3 and E5.7. Therefore, the member's beneficiaries' request for the AOP accrued between November 1, 2005, and August 29, 2009, is barred. *See* Claims Case No. 96101002 (March 11, 1997).

The member's beneficiaries should contact DFAS regarding DFAS's attempts to contact their father. Further, as explained in the appeal decision, the member's beneficiaries have the right to seek waiver of the Barring Act through the Assistant Secretary of the Army.

Conclusion

The claimant's request for relief is denied and we affirm the appeal decision dated March 14, 2017, upholding the application of the Barring Act to 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: Ray T. Blank, Jr.

Ray T. Blank, Jr.
Member, Claims Appeals Board

Signed: Charles C. Hale

Charles C. Hale
Member, Claims Appeals Board