

DATE: April 17, 2017

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In Re: )  
[REDACTED] ) Claims Case No. 2016-WV-120502.2  
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 February 10, 2017, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2016-WV-120502. 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 \$1,713.24, that arose when the member was erroneously overpaid retired pay.

**Background**

On January 14, 2006, the member applied for retired pay by completing the DD Form 2656, *Data for Payment of Retired Personnel*. He became eligible to receive it when he turned 60 years old on December 30, 2007. In November 2006 the member applied for disability compensation from the Department of Veterans Affairs (VA), and began receiving it effective December 1, 2006.

On December 30, 2007, the member retired from the Army and began receiving retired pay effective December 31, 2007. Although the member was receiving compensation from the VA, DFAS failed to reduce his retired pay by a portion of the compensation he was receiving from the VA. As a result, the member was overpaid \$6,266.93 during the period December 31, 2007, through November 30, 2008. DFAS subsequently updated the member's retired pay

account to reflect that he was receiving VA compensation. As a result, during the period December 1, 2008, through September 30, 2014, the proper amount of VA compensation was withheld from his retired pay.

On September 15, 2014, the member requested additional VA compensation. The VA approved his request which gave him a combined disability rating of 50% and granted him additional compensation retroactive to October 1, 2014. Due to his 50% disability rating, the member was entitled to receive Concurrent Retirement Disability Pay (CRDP). As a result, his retired pay was no longer required to be reduced by his VA compensation. However, due to an administrative error, both DFAS and the VA miscalculated his entitlements during the period October 2014 through February 2015, causing the member to be underpaid \$4,553.69. Since the member was previously overpaid \$6,266.93, DFAS applied the underpayment of \$4,553.69 to the overpayment reducing it to \$1,713.24.

The DOHA adjudicator upheld DFAS's denial of the overpayment. The adjudicator found that although the member did not provide his application for VA disability compensation, he would have been on notice when he filled out the VA Form 21-526, *Veteran's Application for Compensation and/or Pension*, in November 2006 that his retired pay would be reduced by the VA compensation he received. The adjudicator stated that the member did not provide any documentation, such as an official statement from the VA and/or DFAS, reflecting that he was entitled to receive both VA compensation and retired pay during the period of overpayment. The appeal decision was dated February 10, 2017, and the member requested an extension to file his reconsideration request. DOHA granted the request and advised him that he had until April 13, 2017, to file it.

In his request for reconsideration, the member states that he has filed another application for Combat Related Special Compensation (CRSC). He states that he has not received a determination. He states that since the decision on his CRSC would be his primary evidence, he is requesting DOHA allow him more time to present the documentation.

### **Discussion**

The member requests more time to file his reconsideration request. Under Department of Defense Instruction 1340.23 (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, we note that any determination effecting his CRSC entitlement during the period of overpayment would not change our decision in his case. Our authority in this matter pertains to the appropriateness for waiver under 10 U.S.C. § 2774. Under that statute, 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. *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 November 2008 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 December 2007 through November 2008. As the adjudicator pointed out, he was in receipt of his Retired Account Statements (RAS), and deductions were properly made beginning December 2008. In addition, the member has not articulated a reason why he thought he was entitled to full retired pay and VA compensation.

We realize that if the member is subsequently awarded CRSC retroactive to the period of overpayment, adjustments will be made to his retired pay account. He may use any credits due him to reduce or eliminate his debt. However, the record supports the DOHA adjudicator's finding that the member knew or should have known he was being overpaid. In such circumstances, the member receiving the money erroneously paid by the Government acquires no right to the money. Accordingly, it is not against equity and good conscience to collect the money. *See* DOHA Claims Case No. 2012-WV-101502.2 (February 27, 2013); and DOHA Claims Case No. 09092401 (October 16, 2009).

### **Conclusion**

The member's request for reconsideration is denied, and we affirm the February 10, 2017, appeal decision to deny waiver in the amount of \$1,713.24. 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: Natalie Lewis Bley

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Natalie Lewis Bley  
Member, Claims Appeals Board

Signed: Charles C. Hale

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Charles C. Hale  
Member, Claims Appeals Board