

KEYWORDS: waiver of indebtedness

DIGEST: Under DoD Instruction 1340.23, ¶ E8.12 (February 14, 2006), the DOHA must receive a request for reconsideration within 30 days of the date of the appeal decision. The DOHA may extend this period for up to an additional 30 days for good cause shown, but no request for reconsideration may be accepted after this time has expired. A request for reconsideration must be sent to the DOHA at the address in ¶E8.5 of the Instruction.

CASENO: 2009-WV-072701.2

DATE: 9/09/2010

DATE: September 9, 2010

In Re:)
) REDACTED) Claims Case No. 2009-WV-072701.2
))
Claimant)

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

Under DoD Instruction 1340.23, ¶ E8.12 (February 14, 2006), the DOHA must receive a request for reconsideration within 30 days of the date of the appeal decision. The DOHA may extend this period for up to an additional 30 days for good cause shown, but no request for reconsideration may be accepted after this time has expired. A request for reconsideration must be sent to the DOHA at the address in ¶E8.5 of the Instruction.

DECISION

A retired member of the United States Army requests reconsideration of the January 21, 2010, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 09072701. In that decision, DOHA denied waiver of the indebtedness that the member

incurred when he was erroneously paid \$64,121.62 in Concurrent Retired Disability Pay (CRDP) from January 1, 2004, through June 30, 2007, and also was erroneously paid \$2,223.00 Combat Related Special Compensation (CRSC) from August 1, 2007, through August 31, 2007.

Background

The record indicates that the member had retired from the Army and was a civil service employee in another agency. He waived his military retired pay by the amount of disability compensation he was receiving from the Department of Veterans Affairs (VA). Since his VA disability compensation exceeded his military retired pay, he received no military retired pay. Effective in 2000, the member waived his military retired pay in order to qualify for or increase his Civil Service Annuity (CSA). The Defense Finance and Accounting Service (DFAS) failed to update the member's retired pay account to reflect that he had also waived his retired pay to qualify for or increase CSA benefits.

On January 1, 2004, the member was awarded CRDP due to his VA rating, but he was not entitled to CRDP because he had waived his retired pay for CSA. The DFAS's administrative error resulted in the erroneous payment of CRDP through June 30, 2007. For the same reason, the member did not qualify for CRSC which he applied for and was erroneously awarded on August 1, 2007.

In the appeal decision, DOHA's adjudicator considered the member's argument that he did not apply for CRDP. She also considered the DFAS finding that "all retirees who became eligible for CRDP on January 1, 2004, received a system-generated letter explaining eligibility requirements" and these requirements excluded "retirees who have combined their military time and civil service time to qualify for a civil service retirement." There is no indication that the member questioned his entitlement after this. In denying waiver of the erroneous CRSC payment, the adjudicator found that the member erred in filing his application for this entitlement because he answered question 11 ("Are you entitled to retired pay?") in the affirmative; the "no" response specifically included "members who have waived military retired pay in order to credit military service for purposes of a civil service retirement." For these reasons, the adjudicator concluded that the member knew, or should have known, that his entitlements to both benefits were questionable; and in such circumstances, waiver is not appropriate.

The appeal decision instructed the member to direct any reconsideration request to DOHA so that it is received within 30 days of the appeal decision, but the member sent his request to DFAS, not DOHA, by fax on February 23, 2010,¹ the 32nd day after the appeal decision. The request did not arrive at DOHA until September 3, 2010.

¹The 30th day was on a Sunday, but DOHA conducted normal business operations on Monday, February 22. Even if DOHA had received the correspondence instead of DFAS, the request was still one day late.

Discussion

Under DoD Instruction 1340.23, ¶ E8.12 (February 14, 2006) (the Instruction), the DOHA must receive a request for reconsideration within 30 days of the date of the appeal decision. The DOHA may extend this period for up to an additional 30 days for good cause shown, but no request for reconsideration may be accepted after this time has expired. A request for reconsideration must be sent to the DOHA at the address in ¶ E8.5 of the Instruction.² The January 21, 2010, appeal decision explained these requirements to the member in specific detail. More than 60 days passed between January 21, 2010, and September 3, 2010, and the Board no longer has authority under the Instruction to consider the member's request for reconsideration.³ While DFAS should have forwarded the member's reconsideration correspondence more promptly to DOHA, the direct cause of the member's untimely submission was his failure to follow the Instruction and the guidance that the DOHA provided him, not DFAS's tardy forwarding of what they received from him.

Conclusion

The member's request for reconsideration is untimely. In accordance with ¶ E8.10 of the Instruction, the January 21, 2010, appeal decision is the final decision of the Department of Defense on the member's waiver request.

Signed: Michael D. Hipple

Michael D. Hipple
Chairman, Claims Appeals Board

Signed: Jean E. Smallin

Jean E. Smallin
Member, Claims Appeals Board

²The address to which all requests for reconsideration must be sent is: Defense Office of Hearings and Appeals, Claims Division, P.O. Box 3656, Arlington, Virginia 22203-1995. To assist claimants or applicants in meeting the timely receipt requirement, all appeal decisions, including the member's decision, also contain guidance for submitting an advance fax copy, but the guidance directs the claimant/applicant to then mail the original request, by first class mail, to the above address. There is no indication that the member mailed the original.

³Even if we had substantively reviewed the member's submission, it is unlikely that he would have prevailed in his request for reconsideration. The adjudicator had plausible bases for concluding that the member should have questioned his entitlements to CRDP and CRSC, and therefore, waiver is not appropriate under ¶ E4.1.4 of the Instruction.

Signed: Catherine M. Engstrom

Catherine M. Engstrom
Member, Claims Appeals Board