

KEYWORDS: military member claim; USFSPA

DIGEST: In the absence of a specific statutory grant, attorney fees, interest and similar ancillary expenses incurred by a claimant are not reimbursable as a part of an administrative claim cognizable under title 31, United States Code, Section 3702 (31 U.S.C. § 3702), whether incurred as part of the presentation, and proof of a claim, or separately.

CASENO: 2010-CL-042001.2

DATE: 8/30/2010

DATE: August 30, 2010

_____)
In Re:)
 [REDACTED]) Claims Case No. 2010-CL-042001.2
))
Claimant)
_____)

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

In the absence of a specific statutory grant, attorney fees, interest and similar ancillary expenses incurred by a claimant are not reimbursable as a part of an administrative claim cognizable under title 31, United States Code, Section 3702 (31 U.S.C. § 3702), whether incurred as part of the presentation, and proof of a claim, or separately.

DECISION

A retired Air Force officer requests reconsideration of the June 25, 2010, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2010-CL-042001. In that decision, DOHA's adjudicators disallowed the member's claim for reimbursement of the interest he paid on 1991-2001 retired pay allotments paid to his former spouse and reimbursement of the legal expenses incident to her state litigation for those allotments.

Background

In May 1987, the member and his former spouse divorced. Under the terms of the divorce settlement, she was to be paid 23.84 percent of his retired pay. The member retired in January 1991, and the member's former spouse applied for her share of his retired pay under the Uniformed Services Former Spouses' Protection Act (USFSPA), 10 U.S.C. § 1408. During the establishment of her account, the Defense Finance and Accounting Service (DFAS) mistakenly set up the spouse's payment as a fixed amount of \$512.56 per month, instead of 23.84 percent. This amount was paid to the former spouse from March 1991 until the discovery of the error following inquiry from the former spouse in February 2007. DFAS then corrected the pay system to begin withholding and remitting 23.84 percent of the member's retired pay, with annual cost of living adjustments (COLA).

DFAS then audited the account for the prior six years to determine the amount of underpayment to the former spouse. The six-year limitation is based on the Barring Act of 1940 (as amended), 31 U.S.C. § 3702, which limits reimbursement of a claim to a maximum of six years prior to the accrual of the claim. The audit was completed and both parties were notified of the results in June 2007. The audit determined that the former spouse had been underpaid \$15,607.12 for the six years between 2001 and 2007. The former spouse then initiated litigation in state court against the member for the COLA she failed to receive between 1991 and 2001, and was awarded a judgment against him which included interest and her attorney's fees. The member seeks recovery of interest and legal fee expenses that were adjudged against him, or incurred by him, in the total amount of \$33,108.

In his reconsideration request, the member states that DOHA's adjudicators misunderstood the nature of his claim. The member argues that their disallowance of his claim was based on a determination that there is no statutory provision for reimbursement of any interest paid or for any legal expenses incurred or assessed incident to the USFSPA. However, he claims that he is not seeking interest and legal fees *per se*, but for payment of damages he sustained as a result of the DFAS's mistake. The member states that "case law is replete with examples of the Government paying for negligent damage to property associated with a move," as well as other types of damages, including legal fees and expenses resulting from government errors,¹ and expenses under 5 U.S.C. § 504. He specifically requests the Board to reconsider his claim "on the basis that authority exists to compensate members for damages incurred due to Government actions" in accordance with 31 U.S.C. § 3702 (a)(1).

¹As an example, the member cites DoDDS Case No. E-99-001(February 8, 2000), an appeal considered by the DOHA Appeal Board from a due process hearing that considered the issue of whether an overseas dependent received a Free Appropriate Public Education from DoD. That proceeding occurred under the Individual With Disabilities Education Act, 20 U.S.C. §1400 *et seq.* and, at that time, under DoD Instruction 1342.12, *Provision of Early Intervention and Special Education Services to Eligible DoD Dependents in Overseas Areas* (March 12, 1996). Such proceedings are not cognizable by the DOHA Claims Appeals Board under 31 U.S.C. § 3702 (a)(1).

Discussion

In relevant part, our Office has authority to settle administrative claims for retired pay cognizable under title 31, United States Code, Section 3702 (a)(1) (31 U.S.C. § 3702 (a)(1)). The dispute in this case emerged from a USFSPA claim that affects comparative amounts of payments from the member's retired pay account. Accordingly, the government's liability to the member and his former spouse is governed by the USFSPA statute, 10 U.S.C. § 3702, possibly other applicable statutes, and regulations that implement these statutes. The member does not claim that the damages he seeks are payable under USFSPA, and does not claim that a third statute authorizes payment of such damages.² In fact, he clearly predicates recovery for his damages on our authority under 31 U.S.C. § 3702 (a)(1). Accordingly, our discussion here will focus on our authority under Section 3702.

Although the member suggests that there are plenty of examples of authority to reimburse him for the damages adjudicated against him in state court, he has cited no precedent which holds or suggests that administrative settlements by us (or the Comptroller General as our predecessor) under 31 U.S.C. § 3702 (a)(1) could include such damages. Our research on the history of Section 3702 and its predecessors indicates that the long-standing rule on administrative settlements is that, in the absence of statutory authority, or an agreement based on statutory authority, federal appropriations are generally not available to reimburse a claimant for the employment and compensation of an attorney. *Compare* the decision in 67 Comp. Gen. 574, 576 (1988), a claim cognizable under Section 3702, in which the Comptroller General concluded that expert witness fee expenses that a claimant incurred were not reimbursable even though the agency concerned admitted that a hearing in which the expert was scheduled to appear for the claimant was cancelled for the agency's benefit. That decision specifically referenced earlier precedent denying reimbursement of attorney's fees despite the fact that principles of fairness may have suggested a different result. *See* 57 Comp. Gen. 856, 861 (1978).³

Similarly, with respect to the payment of interest, it is a well-settled rule of law that the payment of interest on claims against the government of the United States may be made only under an express statutory or contractual authorization. *See, e.g.,* 70 Comp. Gen. 571, 573 (1991) where the Comptroller General concluded that interest was not available on a civilian

²Although he cites 5 U.S.C. § 504, the Equal Access to Justice Act (EAJA), the member is not suggesting that EAJA directly applies to his claim or to claims cognizable under 31 U.S.C. § 3702(a)(1). EAJA sets forth policy on reimbursement of costs and fees to a prevailing party, other than the government, involved in an adversary adjudication covered by EAJA. For various reasons, claims cognizable under 31 U.S.C. § 3702 are not adversary adjudications under EAJA. *Compare* the Comptroller General's decision in 62 Comp. Gen. 86 (1982), 82-2 CPD ¶ 529. We construe the reference to EAJA by the member in his reconsideration brief as being illustrative of the types of things we should consider under 31 U.S.C. § 3702(a)(1).

³As a secondary reference, see the Government Accountability Office (GAO)'s more extended explanation for the general policy against reimbursement of attorney and similar fees in GAO, Principles of Federal Appropriations Law: Second Edition, at 12-24 and 12-25 (GAO/OGC-94-33 Appropriations Law - Vol. III), and at 4-43 and 4-44 (GAO/OGC-91-5 Appropriations law -Vol.1), which is available through the GAO website.

employee travel claim then cognizable by the Comptroller General under 31 U.S.C. § 3702.

The member's reconsideration brief does not suggest that his expenses (or damages) fit within any recognized exceptions to the general rule against reimbursement of these types of fees. As 67 Comp. Gen. 574, *supra*, indicates, it makes no difference that the claimant incurred the fee as a damage from the government's failure to fulfill its responsibilities under USFSPA, or due to a failure to hold a hearing; in both instances the agency's failure to act cost the claimant some expense that was beyond the control of the claimant but still not reimbursable.

The member refers to the provision in 31 U.S.C. § 3702 (a)(1)(B) that allows for recovery by transit carriers of loss and damage assessed against them, but such claims are not supportive of reimbursement for the member's claimed damages. That provision is contained in Section 3702 to give carriers a mechanism to appeal the transit damage assessed against them when property is shipped at government expense. Like claims cognizable under 31 U.S.C. § 3702 (a)(1)(A), interest, attorney fees, or other similar types of ancillary damages or costs are not recoverable by carriers making such claims for the same reason explained earlier in this discussion.

Conclusion

For the reasons stated above, the June 25, 2010, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2010-CL-042001 is affirmed. In accordance with Department of Defense Instruction 1340.21, ¶ E7.15.2, this is the final administrative action of the Department of Defense in this matter.

Signed: Michael D. Hipple

Michael D. Hipple
Chairman, Claims Appeals Board

Signed: Jean E. Smallin

Jean E. Smallin
Member, Claims Appeals Board

Signed: Natalie Lewis Bley

Natalie Lewis Bley
Member, Claims Appeals Board