

DATE: January 17, 2012

In Re:)

[REDACTED])

Claimant)

) Claims Case No. 2011-WV-083001.2
)
)

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

A member's retired pay was not reduced by the amount of the compensation he was receiving from the Department of Veterans Affairs (VA). Upon signing an application for VA compensation, the member is considered to be on notice that when he became entitled to retired pay it would be reduced by the amount of his VA disability compensation. Therefore, waiver of the overpayment is not appropriate because he knew or should have known that he was not entitled to the full amount of his retired pay.

DECISION

A retired member of the United States Army Reserve requests reconsideration of the appeal decision dated November 29, 2011, of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2011-WV-083001. In that decision, this Office denied waiver of an overpayment of \$4,397.00.

Background

The record shows that on September 10, 1996, the member applied for disability compensation from the VA. He signed the VA Form 21-526, *Veterans Application for Compensation or Pension*, acknowledging that "filing of this application constitutes a waiver of military retired pay in the amount of any VA compensation to which you may be entitled." The member was subsequently awarded compensation from the VA.

The record further shows that on July 14, 2001, the member completed DD Form 2656, *Data for Payment of Retired Personnel*, applying for military retired pay, and he became eligible to receive it when he turned 60 years of age on July 31, 2003. The member indicated on the DD

Form 2656 that he was receiving disability compensation from the VA in the amount of \$841.00 per month. However, due to an administrative error when his retired pay was established, the Defense Finance and Accounting Service (DFAS) failed to reduce his military retired pay by the required amount. As a result, the member was overpaid \$13,327.00 from August 1, 2003, through October 31, 2004. DFAS applied credits due the member for Combat Related Special Compensation (CRSC) in the amount of \$8,930.00, reducing the debt to \$4,397.00.

In his request for reconsideration, the member again contends that although he may not have a right to the overpayment by the government under the strict interpretation of regulations, he believes he has such a right under generally accepted rules of equity. The member argues that it is clearly not equitable to allow DFAS to collect a debt that is seven years old. He points out that he notified DFAS and the VA in 2003 and 2004 about the overpayment, and they did not correct the situation. The member believes, based on his reading of VA guidelines, that they would be more lenient to his situation. He argues it is also not equitable to have different guidelines for different government agencies. The member includes in his submission an article relating to dual-pay violations found in an Air National Guard unit. His point regarding the article was that the investigator stated that pay recoupments from the officers involved would only date back to 2006 due to the statute of limitations. The member again argues that it is not equitable to have different standards. In his latest submission, he suggests that if not a complete waiver, potentially a 50/50 “cost sharing” or division of fault would be more equitable.

Discussion

Title 10, United States Code, § 2774, provides authority for waiving claims for erroneous payments of pay and certain allowances made to or on behalf of members or former members of the uniformed services, if collection of the claim 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 or any other person having an interest in obtaining a waiver of the claim. This statute is implemented within the Department of Defense under Department of Defense Instruction 1340.23 (February 14, 2006) (hereinafter Instruction). The following paragraphs of the Instruction are particularly relevant to the member’s situation:

¶ E4.1.1. Generally, persons who receive a payment erroneously from the Government acquire no right to the money. They are bound in equity and good conscience to make restitution. If a benefit is bestowed by mistake, no matter how careless the act of the Government may have been, the recipient must make restitution. In theory, restitution results in no loss to the recipient because the recipient received something for nothing. . . . A waiver is not a matter of right. It is available to provide relief as a matter of equity, if the circumstances warrant.

¶ E4.1.4. A waiver usually is not appropriate when a recipient knows, or reasonably should know, that a payment is erroneous. The recipient has a duty to notify an appropriate official and to set aside funds for eventual repayment to the Government, even if the Government fails to act after such notification.

The member did contact finance officials, as would be expected of a prudent person. Also, while an administrative error did occur, our Office has consistently held that the waiver statute does not automatically apply to relieve the debts of all members, who through no fault of their own, have received erroneous payments from the government. Waiver action under 10 U.S.C. § 2774 is a matter of grace or dispensation, and not a matter of right that arises solely by virtue of an erroneous payment being made by the government. If it were merely a matter of right, then virtually all erroneous payments made by the government to members would be excused from repayment.

The member argues that the overpayment was not based on fraud, misrepresentation, fault, or lack of good faith. The Board finds no indication of fraud, misrepresentation, or lack of good faith on the part of the member. The Board is unable to say that the member is entirely without fault. The standard we employ to determine fault is that of a reasonable person: if such a person knows or reasonably should know that he is receiving money to which he is not entitled, waiver is precluded. *See* Instruction, ¶ E4.1.4. However, the legal definition of “fault” does not imply any ethical lapse on the part of the member. It merely indicates that he is not entirely without some responsibility for any resulting overpayment and that therefore the equitable remedy of waiver is not available to him. The member argues that it is not equitable to collect a debt that has been owed for such a long period of time, in this case seven or eight years. However, the member has known for that entire time that the debt was outstanding. The member’s argument regarding statute of limitations has no bearing on this debt, as the member has been aware of the debt the entire time.

As to the member’s argument that there are possible differences in the VA regulations as compared to the DoD regulations, our authority in this matter is limited to review under the waiver statute, 10 U.S.C. § 2774. We have no authority to apply another agency’s regulations to the cases that we adjudicate. As to the member’s continuing argument that the collection of the debt is inequitable, the standards we employ indicate that collection of the erroneous payment is neither against equity and good conscience nor contrary to the interest of the United States. Waiver is not appropriate if a member knows for over seven years that he has received payments in excess of his entitlements. *See* DOHA Claims Case No. 07072501 (July 31, 2007); and DOHA Claims Case No. 98040113 (July 8, 1998), *aff’d* by the Deputy General Counsel (Fiscal) (February 14, 2001). In such a circumstance, he does not acquire title to the payments and should be prepared to return them. *See* DOHA Claims Case No. 03072812 (July 30, 2003). The member should be prepared to return all of the overpayment; there is no division of fault.

Conclusion

The member's request for reconsideration and waiver of overpayment in the amount of \$4,397.00 is denied. In accordance with the Instruction ¶ E8.15, this is the final administrative action of the Department of Defense in this matter.

Jean E. Smallin
Chairman, Claims Appeals Board

Gregg A. Cervi
Member, Claims Appeals Board

Natalie Lewis Bley
Member, Claims Appeals Board