

KEYWORDS: waiver of indebtedness

DIGEST: Due to administrative error, a member's retired pay was not reduced by the amount of the compensation he was receiving from the Department of Veterans Affairs (VA). When the member applied for VA compensation, he was 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. Under such circumstances, the member knew or should have known that he was not entitled to the full amount of his retired pay.

CASENO: 2011-WV-030806.2

DATE: 8/22/2011

DATE: August 22, 2011

In Re:)	
[REDACTED])	Claims Case No. 2011-WV-030806.2
Claimant)	

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

Due to administrative error, a member's retired pay was not reduced by the amount of the compensation he was receiving from the Department of Veterans Affairs (VA). When the member applied for VA compensation, he was 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. Under such circumstances, the member knew or should have known that he was not entitled to the full amount of his retired pay.

DECISION

A retired member of the U.S. Army requests reconsideration of the August 4, 2011, decision of the Defense Office of Hearings and Appeals (DOHA), in DOHA Claim No. 2011-WV-030806. In that decision, DOHA denied waiver of the government's claim in the amount of \$19,122.00.

Background

The record shows that the member retired from the U.S. Army on September 1, 1975. On April 14, 1997, the member filled out Department of Veterans Affairs (VA) Form 21-651, *Election of Compensation in Lieu of Retired Pay or Waiver of Retired Pay to Secure Compensation from Department of Veterans Affairs (38 U.S.C. , 3104(a) – 3105)*, electing to receive VA compensation in lieu of retired pay. On this form, the member listed that he was retired from the Army and was receiving \$1,441.00 per month in retired pay. The member was subsequently awarded compensation from the VA. The member's military pay should have been reduced by the amount of compensation he received from the VA. However, due to an administrative error, the Defense Finance and Accounting Service (DFAS) failed to reduce his retired pay by the amount of compensation he received from the VA. This was partially due to the fact that the member retired under an incorrect Social Security number. Thus, when compensation was granted from the VA under his correct Social Security number and DFAS was notified, the notification form did not match any retired pay account they had. Once the member's Social Security number was corrected, DFAS discovered numerous notifications from the VA that the member was in receipt of VA compensation. The member was overpaid \$24,425.00 from May 1, 1997, through July 31, 2007. The member was underpaid for Combat Related Special Compensation (CRSC) for the period January 1, 2004, through December 31, 2007, in the amount of \$5,303.00. This reduced the debt to the amount of \$19,122.00.

In his request for reconsideration, the member contends that when he filled out the VA Form 21-651, he trusted the VA Counselor to fill out Section 2 requesting waiver of a portion of his retired pay. He also contends that as a result of his illness due to two tours in Viet Nam he was not aware he was being overpaid. He argues that the VA has not been truthful about the information they provided him. He also states that the debt should be waived since it is a great financial hardship.

Discussion

Under 10 U.S.C. § 2774, we have the authority to waive collection of erroneous payments to a member or former member of the uniformed service if repayment would be against equity and good conscience and not in the best interest 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 former member. *See* Department of Defense Instruction 1340.23 (Instruction), ¶ E4.1.2 (February 14, 2006). Generally, persons who receive an erroneous payment 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. *See* ¶ E4.1.1 of the Instruction. Furthermore, the fact that an erroneous payment is solely the result of administrative error or mistake on the part of the Government is not sufficient basis in and of itself for granting waiver. *See* ¶ E4.1.3 of the Instruction. A waiver is usually 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 the funds for eventual repayment to the Government. See ¶ E4.1.4 of the Instruction.

While there is no issue here of fraud, misrepresentation, or lack of good faith on the part of the member, the DOHA adjudicator properly denied waiver on the basis that the member knew or should have known that he would not be permitted to receive full payment of retired pay while also receiving VA compensation. This is because the member is considered to be on notice by virtue of completing the application for VA compensation that when he became entitled to retired pay it would be reduced by the amount of VA disability compensation he received. The record reflects that Section I of the VA Form 21-526 that the member completed to apply for VA compensation, states:

I hereby elect to receive compensation from the Department of Veterans Affairs in lieu of the total amount of retired pay, or waive that portion of my retired pay which is equal in amount to the compensation which may be awarded by the Department of Veterans Affairs.

Therefore, when the member began receiving VA compensation in May 1997, he was on notice that his military retired pay would be reduced by the amount of his VA compensation. The member should have questioned the effect his VA compensation had on his military retired pay, and the fact that his military retired pay was not reduced to reflect compensation he received from the VA. When a member is aware or should be aware that he is being overpaid, he must be prepared to return the excess amount when requested to do so by the Government. See DOHA Claims Case No. 08091608 (September 23, 2008); DOHA Claims Case No. 07020509 (February 8, 2007); and DOHA Claims Case No. 04100402 (October 26, 2004).

There is no evidence in the record of untruthfulness on the part of the VA. Financial hardship is not a condition upon which we may grant waiver. The member should request more favorable repayment options from DFAS; however, whether to grant them is at the discretion of DFAS.

Conclusion

The member's request for reconsideration is denied, and we affirm the August 4, 2011, decision to deny waiver of the government's claim in the amount of \$19,122.00. In accordance with the Instruction, ¶ E8.15, this is the final administrative action of the Department of Defense in this matter.

///Original Signed///

William S. Fields
Acting Chairman, Claims Appeals Board

///Original Signed///

James B. Norman
Member, Claims Appeals Board

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Natalie Lewis Bley
Member, Claims Appeals Board