

DATE: August 19, 2014

In Re:)
 [REDACTED]) Claims Case No. 2012-WV-071302.3
)
Claimant)

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

A member separating from service properly received separation pay. He subsequently applied for and began receiving retired pay. Under the circumstances, recoupment of the separation pay is required by statute. Since the separation payment was proper when made, the claim resulting from the statutorily required recoupment is not subject to waiver under 10 U.S.C. § 2774.

DECISION

A retired member of the U.S. Navy requests reconsideration of the July 14, 2014, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2012-WV-071302. In that decision, DOHA upheld the Defense Finance and Accounting Service's (DFAS) determination that the recoupment of the member's separation payment in the gross amount of \$28,875.78 cannot be considered for waiver.

Background

On September 30, 1986, the member separated from the Navy and received a separation payment in the amount of \$28,875.78. The member later re-entered military service. On September 26, 2011, he completed DD Form 2656, *Data for Payment of Retired Personnel*, to receive retired pay. On this form, the member indicated that he had received a separation payment in the amount of \$28,875.78. Under the remarks section of the form, the member stated the following:

[I] was awarded from VA above listed disability pay, but to date have received no compensation. While as an active duty reserv[ist] V[A] compensation was waived, as required. After being assigned to VIT Reserve unit [I] was informed that V[A] pay being used to offset repayment of the SEP-PAY. I am currently preparing waiver of indebtedness paper work for submittal.

The member later retired from military service and on March 11, 2012, when he turned 60 years old, became eligible to receive military retired pay. Since the member qualified for retired pay, recoupment of the separation payment in the amount of \$28,875.78 was required. Thus, the member became indebted to the United States in the amount of \$28,875.78.

In the appeal decision, the adjudicator determined that the \$28,875.78 could not be considered for waiver because it did not represent an erroneous payment. She explained that a claim arising from a properly paid separation payment which later must be recouped because of the member's receipt of retired pay, is not a claim arising from an erroneous payment which may be considered for waiver under 10 U.S.C. § 2774. In response to the member's assertion that he was never given a separation briefing, the adjudicator explained that the processing of separations and separation payments is governed by each service's administrative processes, over which our office has no authority.

In his reconsideration request, the member reiterates that he was not properly briefed at separation concerning the recoupment of his SSB if he became eligible for retired pay. He contends that his Personnel Support Detachment (PSD) is therefore responsible for the debt since they did not follow proper procedures in failing to brief him at separation.

Discussion

Over the years, Congress has specifically authorized separation incentives for particular agencies implementing radical reductions in staff. Under 10 U.S.C. § 1174, separation pay is a contingency payment to ease the re-entry into civilian life of members of the armed forces involuntarily separated prior to becoming entitled to retired pay. *See* Comptroller General decision B-266193, Feb. 23, 1996. The statute requires "coordination" when a member who has received a separation payment later qualifies for retired or retainer pay or VA disability compensation. *See* 10 U.S.C. § 1174(h). Regarding coordination with retired pay, 10 U.S.C. § 1174(f) provides in pertinent part as follows:

A member who has received separation pay . . . based on service in the armed forces, and who later qualifies for retired or retainer pay . . . shall have deducted from each payment of such retired or retainer pay an amount, in such a schedule of monthly installments as the Secretary of Defense shall specify, taking into account the financial ability of the member to pay and avoiding the imposition of undue financial hardship on the member and member's dependents, until the total amount deducted is equal to the total amount of separation pay . . . so paid.

Under the law, Congress clearly did not intend members to receive both separation pay and retired pay for the same period of service. Therefore, a member who receives separation pay is required to repay it if he later qualifies for and receives retired pay.

Under 10 U.S.C. § 2774, we have the authority to waive repayment of erroneous payments of military pay and allowances to members of the uniformed services if repayment would be against equity and good conscience and not in the best interests of the United States. A debt cannot be considered for waiver unless the payment was erroneous when made. In this case, the separation payment was proper when made. Therefore, the recoupment of the separation payment required because of receipt of retired pay cannot be considered for waiver under 10 U.S.C. § 2774, because the debt did not arise from an erroneous payment. *See* DOHA Claims Case No. 2010-WV-071601.2 (January 19, 2011); and B-266193, *supra*.

The fact that the member may not have received a debriefing at his separation does not change the nature of the payment. The separation payment was proper when made, and a waiver of indebtedness created afterwards due to the need to recoup the separation payment is not within the terms of 10 U.S.C. § 2774.

Conclusion

The member's request for relief is denied, and we affirm the July 14, 2014, appeal decision. In accordance with DoD Instruction 1340.23 ¶ E8.15, this is the final administrative action of the Department of Defense in this matter.

Signed: Jean E. Smallin

Jean E. Smallin
Chairman, Claims Appeals Board

Signed: Catherine M. Engstrom

Catherine M. Engstrom
Member, Claims Appeals Board

Signed: Natalie Lewis Bley

Natalie Lewis Bley
Member, Claims Appeals Board