

KEYWORDS: Waiver of Indebtedness

DIGEST: When a member is aware or should be aware that he is being overpaid, he does not acquire title to the excess amounts and has a duty to hold them for eventual repayment to the government.

CASENO: 2012-WV-101502.2

DATE: 02/27/2013

DATE: February 27, 2013

)	
In Re:)	
[REDACTED])	Claims Case No. 2012-WV-101502.2
)	
Claimant)	

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

When a member is aware or should be aware that he is being overpaid, he does not acquire title to the excess amounts and has a duty to hold them for eventual repayment to the government.

DECISION

A retired member of the United States Army Reserve requests reconsideration of the November 27, 2012, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2012-WV-101502. In that decision, this Office denied waiver of an overpayment of \$12,970.80.

Background

The record shows that the member was receiving disability compensation from the Department of Veterans Affairs (VA). He was placed on the Temporary Disability Retirement List (TDRL), and his disability retirement was effective June 22, 2008. 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 of VA compensation. As a result, the member was overpaid \$17,082.80 from June 23, 2008, through August 31, 2009. DFAS applied credits due the member for Combat Related Special Compensation (CRSC) in the amount of \$4,112.00, reducing the debt to \$12,970.80.

In the member's October 9, 2012, submission to DFAS through his congressional representative, the member requests waiver of the indebtedness because it was caused by DFAS's administrative error, with no fault on his part. He states that at the time of his disability retirement from the Army, he was receiving VA disability compensation. He notified the VA of his active duty status and his pending retirement. He states that during his retirement out-processing, he was advised that he might be eligible for "concurrent receipt" of his VA disability compensation and his retired pay. He states that he was told the determination would come from either the VA or DFAS once his retirement paperwork was submitted. He states that in August 2008 he received his first payment of retired pay in addition to his monthly VA disability without offset. He states that in October 2008 he received a VA disability increase that also acknowledged his retirement status. Therefore, he states that he concluded that he was eligible for concurrent receipt of his VA disability compensation and his retired pay. He states that from October 2008 through August 2009, he continued to receive both his VA disability compensation and his retired pay without interruption or any written notification that he was being overpaid. He states that when the offset began, he was not notified as to why his retired pay was reduced. He assumed that a determination was finally made and he was found ineligible for concurrent receipt. He states that it was not until December 2011 that DFAS notified him of the overpayment.

Discussion

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. The fact that the erroneous payment is the result of administrative error is not sufficient basis, in and of itself, for granting a waiver. Waiver is not appropriate when a recipient knows, or reasonably should know, that a payment is erroneous, or when a recipient of any unexplained payment of pay or allowances does not attempt to obtain a reasonable explanation from an appropriate official. The recipient has the duty to ascertain the reason for the payment and to set aside the funds for eventual repayment in the event that repayment should be necessary. See Department of Defense Instruction 1340.23 (Instruction) ¶ E4.1.3 through ¶ E4.1.5.

In this case, the member states that he was informed that he might be entitled to receive both his VA disability compensation and his unreduced retired pay. He states that he was told that he would receive a final determination either from the VA or DFAS. Therefore, when the member received his full amount of retired pay and his monthly VA compensation in August

2008, he should have at least questioned his entitlement, especially since he never received anything in writing from the VA or DFAS granting him concurrent receipt of both. Since the member failed to verify his entitlement, waiver is not appropriate. *See* DOHA Claims Case No. 08071601 (July 17, 2008); DOHA Claims Case No. 98020428 (March 12, 1998) and DOHA Claims Case No. 97101601 (October 24, 1997).

Conclusion

The member's request for reconsideration is denied, and we affirm the November 27, 2012, appeal decision to deny waiver of the government's claim in the amount of \$12,970.80. In accordance with the Instruction ¶ 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: Gregg A. Cervi

Gregg A. Cervi
Member, Claims Appeals Board