

DATE: October 31, 2013

In Re:)

[REDACTED])

) Claims Case No. 2013-CL-062801.2

Claimant)

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

The interpretation of a statutory provision and implementing regulation by an agency charged with their execution, and the implementation of them by means of a consistent administrative practice, is to be sustained unless shown to be arbitrary, capricious or contrary to law.

DECISION

A retired member of the United States Air Force (USAF) requests reconsideration of the July 22, 2013, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2013-CL-062801.

Background

The member was married on July 30, 1986. Three children were born to the member and his wife in 1994, 1996 and 1998, respectively. On January 1, 2002, the member retired from the USAF. On July 19, 2005, the member and his wife separated. On October 6, 2009, the Defense Finance and Accounting Service (DFAS) received an Income Withholding Support order for child support dated October 1, 2009, from the Commonwealth of Virginia, acting as the State Disbursement Unit (SDU). The order was for withholding of a total of \$437.50 per month for child support from the member's retired pay. In a letter dated October 6, 2009, DFAS informed the member that it had received the child support order and that it was required by law to comply with the order. On July 16, 2012, a Final Decree of Divorce was issued in the Commonwealth of Virginia. The member and his wife (through her attorney) signed the divorce decree. The divorce decree ordered the member to pay child support in the amount of \$432.00 per month through June 2013, and then \$288.00 per month until the member's youngest child attained the

age of 18 years, married, died, became self-supporting or legally emancipated, whichever occurred first. In addition, the divorce decree provided:

It is further **ADJUDGED, ORDERED AND DECREED** that the Wife shall receive fifty percent (50%) of the marital share of the Husband's military pension. The marital share shall be defined as the number of months of creditable service earned from the date of marriage (July 30, 1986) through the date of retirement divided by the total months of creditable service at retirement.

The divorce decree also provided:

This cause is final for purposes of divorce; however, jurisdiction is hereby specifically reserved and this cause is continued for entry of a QDRO or similar order dividing the parties' pension/retirement accounts, or as otherwise needed to effect the terms of the court's ruling.

On July 16, 2012, the court issued a Qualifying Court Order (Military Pension). In the order, the court defined military share as the 184 months of creditable service from the member's marriage on July 30, 1986, through the member's separation on July 19, 2005, divided by his total months of creditable service at retirement.

Subsequently, the member's former spouse submitted an *Application for Former Spouse Payments*, DD Form 2993, to DFAS to have a portion of the member's retired pay paid directly to her under the Uniformed Services Former Spouses' Protection Act (USFSPA), 10 U.S.C. § 1408(c)(1). On August 29, 2012, DFAS informed the member that it had received the application for a portion of his retired pay and that it was required by law to pay the appropriate amount. The letter went on to explain:

If the enclosed court order has been amended, superseded, or set aside, it is your responsibility to notify us within 30 days of this letter and provide court-certified copies of the pertinent documentation. Submission of such documentation constitutes consent to the disclosure of such information to the former spouse or the former spouse's attorney. Unless we receive such notice within 30 days, we will honor your former spouse's application. This office is in receipt of your correspondence received, via fax, on August 7, 2012 concerning the Qualifying Court Order. Your correspondence did not include any court-certified documents which addressed changes to your concerns concerning the division of the retired military division. The most current orders are enclosed, any orders which amend the enclosed must be dated after July 16, 2012. This Center has no authority to suspend, modify, or terminate valid court orders without further order of the issuing court.

In accordance with the court order, direct payments to your former spouse should tentatively commence Sep 2012, with the first payment issued on the first of Oct 2012. Such payments cannot exceed 50 percent of a member's disposable retired/retainer pay.

DFAS began paying the former spouse the amount withheld from the member's retired pay effective October 1, 2012. DFAS calculated the former wife's share of the member's retired pay to be 38.016% ($184 \div 242 \times 50\%$).

The member protested DFAS's action. In an undated letter to DFAS, the member asserted that DFAS had erroneously overpaid his former spouse. He stated that DFAS's calculations of the division of his retired pay was not in compliance with the USFSPA. He stated that DFAS failed to subtract the amount of the prior child support order from his disposable retired pay before calculating the division of his retired pay. He requested that his appeal of DFAS's calculations be forwarded to our Office. In an undated letter, a DFAS attorney responded to the member. She explained that prior to forwarding his claim to DOHA, regulations required that it first be reviewed by an attorney and a written determination be issued by that attorney. She explained that the USFSPA permits DFAS to withhold a maximum of 65% of his disposable retired pay when served with both an income withhold order issued pursuant to 42 U.S.C. § 659, and an approved USFSPA application. On November 19, 2012, DFAS responded by email to the member's protest. DFAS explained to the member that the \$1,670.00 was the member's disposable retired pay. The maximum possible withholding was 65% of his disposable retired pay, \$1,085.50 per month. Withholding for child support was \$437.50 per month and withholding for his former spouse was 38.0165% of his disposable retired pay, \$634.87 per month. Therefore, the total withholding was \$1,072.37 per month ($\$437.50 + \634.87), which was within the \$1,085.00 per month limit. The member's net retired pay was \$597.63 per month ($\$1,670.00 - \$1,072.37$). The member responded to DFAS asserting that his disposable retired pay was \$1,232.50 in accordance with 10 U.S.C. § 1408(e)(2). He stated that this amount is the retired pay which remains after the satisfaction of the previous court order served for child support ($\$1,670.00 - \437.50). On November 25, 2012, the DFAS attorney again responded to the member. She explained that the child support income withholding order was served first and the former spouse community property order was served second. She explained that there was enough disposable retired pay to satisfy both obligations. She further explained that if there was not enough disposable retired pay available, DFAS would satisfy the child support obligation in full first, and then whatever remaining disposable retired pay would be used to satisfy the former spouse obligation. On November 27, 2012, the member responded by email. He stated that he is not saying that the statute or regulation authorizes DFAS to pay less than the court ordered obligation. He stated that his concern is that DFAS calculated the second court ordered obligation from the full amount of disposable retired pay without regard to the child support obligation previously being subtracted from the full amount of disposable retired pay.

On March 22, 2013, the member wrote to DFAS again requesting DFAS forward his claim to DOHA. He stated that:

The initial request that you forward my inquiry to the Defense Office of Hearings and Appeals (DOHA) stands in its entirety to all issues previously stated. On November 19, 2012 you personally reviewed my inquiry and a written determination was issued by you via email which prompted my decision to forward the inquiry to the Defense Office of Hearings and Appeals (DOHA) for

review and action. The most recent letter received from you is no more than a rehash of the email response dated November 19, 2012 and an unnecessary delay.

On June 24, 2013, DFAS responded to the member's March 22, 2013, correspondence. DFAS notified the member that they have accepted and consider his correspondence as a claim against DFAS. DFAS advised the member that their memorandum in response to his claim is being submitted to DOHA together with his claim. DFAS attached a copy of their memorandum as a courtesy. DFAS also advised the member that he may submit to DFAS a written rebuttal to their memorandum/administrative report within 30 days of the date of the administrative report. If submitted, DFAS would then forward the rebuttal to DOHA.

In the appeal decision, the DOHA adjudicator found that DFAS correctly followed the USFSPA. The adjudicator determined that child support payments are not among the four types of deductions listed and described in 10 U.S.C. § 1408(a)(4), and there is no provision in law to exempt child support payments from disposable retired pay. Therefore, the adjudicator determined that the member's child support payments, currently \$437.50 per month, may not be deducted from his total monthly retired pay when calculating his disposable retired pay. The adjudicator stated that the member's total retired pay and disposable retired pay are the same amount, currently \$1,698.00 per month. As to the member's argument that the first-come, first-served, rule limits the withholdings from his retired pay, the adjudicator determined that under 10 U.S.C. § 1408(e)(4) and its implementing regulations, amounts are to be withheld from the member's retired disposable retired pay to satisfy (1) the child support payments and (2) his former spouse's share of his retired pay, in that order and, combined, not to exceed 65% of his disposable retired pay. The adjudicator found that as calculated by DFAS, the total withholding of \$1,083.02 per month was within the 65% limit of \$1,103.70 per month ($0.65 \times \$1,698.00$), so there were no limits on payment due to the first come, first serve, rule. Finally, as to the member's argument that the total withholdings should total no more than 50% of his disposable retired pay, rather than 65% as applied by DFAS, the adjudicator found that the 50% limit applies if all of the withholdings are made pursuant only to court orders issued under the authority of the USFSPA.

In the member's reconsideration request, he asserts that the adjudicator erred in issuing his appeal decision without allowing the member the allotted 30 days to respond and/or identify material and relevant facts necessary for the adjudicator to reach a fair and equitable final decision. He states that he had 30 days from DFAS's June 24, 2013, letter to respond to DOHA. He states that he responded on July 23, 2013. However, DOHA issued the appeal decision on July 22, 2013. In addition, he states that DOHA accepted and used a Qualifying Court Order presented by DFAS from the former spouse's attorney which he never saw and never signed. He states that the Qualifying Court Order contradicts the Final Decree of Divorce. The member attaches his rebuttal to DFAS's administrative report dated July 23, 2013, and a supplemental rebuttal dated July 24, 2013. In his rebuttal, he asserts that DFAS should not have accepted the Final Decree of Divorce which states that his former spouse shall receive 50% of the marital share of his military pension. He contends that this language is not acceptable written language to execute a former spouse award and cites the Department of Defense Financial Management Regulation (FMR) 70000.14-R § 290901 B. He states that DFAS accepted and executed a Qualifying Court Order from his former spouse's attorney that had not been signed or seen by

him. He states that he faxed correspondence to DFAS on August 7, 2012, contesting the order and expressing his concern. He further states that DFAS failed to notify him in writing in accordance with 10 U.S.C. §1408(g) when an income withholding order was served. The member continues to maintain that his child support payments should be deducted from his disposable retired pay prior to the calculation of his former spouse's share of his retired pay, and that the first-come, first-served, rule limits the withholdings from his retired pay and that the withholdings should be limited to 50% of his disposable retired pay. Finally, in his supplemental rebuttal, he requests that since his date of retirement is December 31, 2001, that the December 2001 pay scale be used to calculate his disposable retired pay at the time of retirement.

Discussion

The burden of proving a valid claim against the United States is on the person asserting the claim. A member must prove his claim by clear and convincing evidence on the written record that the United States Department of Defense is liable under the law for the amount claimed. All relevant evidence to prove the claim should be presented when a claim is first submitted. In the absence of compelling circumstances, evidence that is presented at later stages of the administrative process will not be considered. *See* DoD Instruction 1340.21 ¶ E5.7 (May 12, 2004). Federal agencies and officials must act within the authority granted to them by statute in issuing regulations. Thus, the liability of the United States is limited to that provided by law (including implementing regulations).

The interpretation of a statutory provision and implementing regulation by those charged with their execution, and the implementation of them by means of a consistent administrative practice, is to be sustained unless shown to be arbitrary, capricious, or contrary to law. *See* DOHA Claims Case No. 05033105 (November 30, 2005); and DOHA Claims Case No. 05021409 (March 30, 2005). Thus, a member must prove that DFAS's interpretation or implementation of its authority was arbitrary, capricious, or contrary to law. *See* Instruction 1340.21 ¶ E7.3.4; and DOHA Claims Case No. 07032201 (April 4, 2007).

First, we will address the member's contention that he was denied his procedural due process rights. Under ¶ E7.4.3 of the Instruction, DFAS was required to prepare a recommendation and administrative report and send a copy of the administrative report to the member, with a notice that the claimant may submit a rebuttal to DFAS. Although the DOHA adjudicator may have issued his decision without reviewing the member's rebuttal, we see no failure of due process. The member states in his March 22, 2013, correspondence to DFAS, that he had initially requested his claim be forwarded to DOHA, that his initial request set forth all the issues he wished for DOHA to review in his claim's entirety and that DFAS continued to reiterate the same response to him. We note that DFAS's administrative report mirrored the written determination it gave the member. In addition, the member then had the opportunity to fully rebut DFAS's position in his reconsideration request.

However, some issues the member raised in his reconsideration request and his rebuttal are new arguments. The member argues that DOHA accepted and used a Qualifying Court Order presented to DFAS by the former spouse's attorney that the member states he never saw

and never signed. He states that the Qualifying Court Order contradicts the Final Decree of Divorce.

The USFSPA gives state courts the authority to treat a member's disposable retired pay either as property of the member or as the property of the member and his spouse, in accordance with the law of the jurisdiction of such court. *See* 10 U.S.C. § 1408(c)(1). The USFSPA also directs the government, subject to certain limitations, to withhold and make direct payments to the former spouse in the amount specified in the court order. Specifically, 10 U.S.C. § 1408(d)(1) provides that:

After effective service on the Secretary concerned of a court order providing for the payment of child support or alimony or, with respect to a division of property, specifically providing for the payment of an amount of the disposable retired pay from a member to spouse or former spouse of the member, the Secretary shall make payments (subject to the limitations of this section) from the disposable retired pay of the member to the spouse or former spouse . . .

The USFSPA also requires that notice be given to the affected member. We note that the Final Decree of Divorce stated that it was final for purposes of divorce but the court reserved jurisdiction for the entry of a subsequent order dividing the parties' pension/retirement accounts. Although the Final Decree of Divorce and the Qualifying Court Order were signed on July 16, 2012, by the same Circuit Court judge, apparently the Qualifying Court Order was entered subsequent to the Final Decree of Divorce.¹ On August 29, 2012, DFAS informed the member that it had received the application for a portion of his retired pay and that it was required by law to pay the appropriate amount. DFAS enclosed a copy of the court order submitted by the member's former spouse. DFAS also informed the member that if the enclosed court order was amended, superseded, or set aside, it was his responsibility to notify DFAS within 30 days of the letter and provide court-certified copies of the pertinent documentation. There is no evidence that the member submitted any conflicting court orders. Subsequently, DFAS began paying the member's former spouse the amount withheld from the member's retired pay effective October 1, 2012.

DFAS properly honored the member's former spouse's request to receive direct payment of a portion of the member's retired pay after determining that the court order which awarded her 38.016% of the member's retired pay was valid on its face. Absent anything on the face of the order indicating that it was issued without proper legal authority, DFAS is obligated to make payment. To the extent that the member takes issue with whether or not the Qualifying Court Order contradicts the Final Decree of Divorce or whether or not his signature was required on the Qualifying Court Order in the Virginia court system, those matters should be raised in that jurisdiction. Under the USFPA, DFAS has no obligation to go beyond the face of the court order.

¹The judge handwrote the words "*nunc pro tunc*" above his signature on the Qualifying Court Order. Therefore, the court exercised its power to enter the Qualifying Court Order which divided the member's retired pay.

The member also argues that DFAS immediately withheld his retired pay to pay the SDU for child support without affording him the right to contest the child support order. However, the record reflects that when DFAS received the child support order, DFAS promptly notified the member and told him that he would have to contact his attorney, the applicable support enforcement agency or the court if he had any questions regarding the order.

The member continues to maintain that his child support payments should be deducted from his disposable retired pay prior to the calculation of his former spouse's share of his retired pay. The issue in this case specifically revolves around the definition of "disposable retired pay." The term "disposable retired pay" as defined in 10 U.S.C. § 1408(a)(4), is the member's total monthly retired pay from which certain deductions have been made. The member asserts that his child support payments qualify as an amount to be deducted from his total monthly retired pay in calculation of his disposable retired pay. However, as explained by DFAS and the DOHA adjudicator, child support payments are not among the four types of deductions listed under 10 U.S.C. § 1408(a)(4).

The member also continues to assert that the first come, first served, rule limits the withholdings from his retired pay and that the withholdings should be limited to 50% of his disposable retired pay. As explained by the DOHA adjudicator, under 10 U.S.C. 1408(e)(4) and its implementing regulations, amounts are to be withheld from the member's disposable retired pay to satisfy (1) the child support payments in satisfaction of the legal process served by the SDU and (2) his former spouse's share of his retired pay, in that order, and combined, not to exceed 65% of his disposable retired pay. We note that the first-come, first-served, rule in 10 U.S.C. 1408 applies only to multiple former spouses, and the 50% limitation similar applies only to multiple former spouses.

Finally, the member did not explain why in his view DFAS should use the 2001 pay scale to calculate his disposable retired pay, and we see no reason to use it. As explained above, we find that DFAS is properly making payments to the member's former spouse in compliance with federal law and the divorce decree.

Conclusion

The member's request for reconsideration is denied, and we affirm the July 22, 2013, appeal decision in DOHA Claim No. 2013-CL-062801 disallowing the claim. In accordance with DoD Instruction 1340.21 ¶ E7.15.2, 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