

DATE: March 18, 2014

In Re:)

[REDACTED])

) Claims Case No. 2013-WV-013102.2

Claimant)

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

Under 10 U.S.C. § 2274, the Defense Office of Hearings and Appeals (DOHA) has the authority to waive a claim for repayment of an erroneous payment of pay and allowances made to a military member and former member, if collection of the claim would be against equity and good conscience and not in the best interest of the United States, provided that there is no evidence of fraud, fault, misrepresentation or lack of good faith on the part of the member.

DECISION

A retired member of the United States Navy requests reconsideration of the January 9, 2014, appeal decision of the Defense Office of Hearings and Appeals (DOHA), in DOHA Claim No. 2013-WV-013102. In that decision, DOHA denied waiver of an overpayment in the amount of \$8,500.00.

Background

The member was married to an active duty military member and was geographically separated by military orders from his family. As a result, he received family separation allowance at the restricted rate (FSA-R) on behalf of his dependents. However, on July 1, 2009, his spouse retired from active duty service. At that time, his spouse became his dependent, and his dependents would have been subject to a government move. Since his dependents were subject to a government move, the member was no longer separated from his dependents due to government orders, and he was no longer entitled to receive FSA-R.¹ During the period July 1,

¹FSA-R is payable when the transportation of dependents, including dependents acquired after the effective date of orders is not authorized at government expense and the dependents do not live in the vicinity of the

2009, through April 30, 2012, the member erroneously received FSA-R in the amount of \$8,500.00.

In the appeal decision, in upholding the Defense Finance and Accounting Service's (DFAS) denial of waiver, the DOHA adjudicator explained that the member did not present any documentation supporting the fact that during the period of overpayment, he was separated from his dependents due to his active duty assignment and not for personal reasons. The adjudicator noted that although the member stated that he believed his orders were unaccompanied and he submitted the proper paperwork in April 2009 to receive FSA-R, the orders were not in the record. In addition, the adjudicator noted that the member stated that he made the decision that his final tour would be unaccompanied in order to maintain his residence in Virginia and keep his children in their school, their environment and home. Finally, although the member stated that he was told in July 2009 by finance officials that he was still entitled to continue to receive FSA-R even though his spouse had retired, the adjudicator explained that the record did not contain signed official statements from the officials the member named detailing their discussions.

In his reconsideration request, the member does not provide any new documentation. He contends that the facts concerning his case have consistently been ignored or misrepresented. He argues that a disbursing officer and DFAS were prejudiced against him because they did not accept the fact that he changed his personnel documents, known as Page 2, in July 2009 to reflect his wife's retirement.

Discussion

A member's entitlement to FSA is set forth in 37 U.S.C. § 427. The purpose for the allowance is to compensate a member for the added household expenses that arise by reason of his separation from his dependents as a result of his military assignments. The extra expenses include such matters as home and automobile maintenance, increased child care costs, etc. *See* DOHA Claims Case No. 2012-WV-100403.3 (February 12, 2013); DOHA Claims Case No. 09042401 (May 19, 2009); 60 Comp. Gen. 154 (1981); and B-199233, Dec. 27, 1983.

Under 10 U.S.C. § 2774, we have the authority to waive a claim for erroneous payment of pay and allowances made to a member or former member, if collection would be against equity and good conscience and not in the best interest of the United States, provided there is no evidence of fraud, fault, misrepresentation, or lack of good faith on the part of the member. In this case, the erroneous payments of FSA-R were made as a result of administrative error with no indication of fraud, misrepresentation, or lack of good faith on the part of the member. However, as a senior enlisted member with seventeen years of service at the time the overpayment began, the member should have been aware of the purpose of the FSA entitlement. As pointed out by the adjudicator, in prior filings the member stated that he made the decision that his final tour would be unaccompanied since he knew his wife was retiring and he wanted his children to remain in his home at their school. We find it significant that the member stated

member's duty station. *See* ¶ 270103 of Chapter 27, Volume 7A of the Department of Defense Financial Management Regulation (DoDFMR), Military Pay Policy and Procedures – Active Duty and Reserve Pay.

in his original waiver request that he specifically requested geographical bachelor status because his wife was completing her final tour before retirement. He stated that since they knew it was time for him to rotate, he would have to execute his orders unaccompanied. Therefore, it was the member's personal choice not to move his dependents. *See* DOHA Claims Case No. 2012-WV-100403.3, *supra*; and B-221521, May 22, 1987.

The member stated that he was assured by finance officials that he was entitled to receive FSA-R after his wife retired. We have consistently held that there is no basis for waiver based on reliance on incorrect advice unless the official(s) providing the faulty advice indicating that the member was entitled to what he received are identified, and the member's version of events is corroborated in the written record. *See* DOHA Claims Case No. 2012-WV-042406.2 (September 25, 2012); DOHA Claims Case No. 02120917 (December 20, 2002); and DOHA Claims Case No. 01010906 (March 8, 2001). In the appeal decision, the adjudicator explained to the member that he had not provided any signed officials statements or documentation stating his statement(s) to them and their statement(s) to him. All information upon which this Office may decide whether to grant waiver must be within the confines of the record. The member has not submitted any new information which would justify overturning the adjudicator's decision.

As for the member's concern that the facts were misrepresented in his case, we note that the written record contains the member's updated Page 2 which he signed on July 7, 2009, reflecting that his wife was no longer a military member. In addition, DFAS advised DOHA that in error, they originally indicated that the member did not update his Page 2 to reflect his wife's military status, when he did so on July 7, 2009. The adjudicator accepted this as fact in the appeal decision. The member should raise any concerns about the conduct of the disbursing officer and DFAS with the Navy and DFAS. *See* DOHA Claims Case No. 97120901 (January 15, 1998).

Conclusion

The member's request for relief is denied, and we affirm the January 9, 2014, appeal decision. In accordance with DoD Instruction 1340.23 ¶ E8.15, this is the final administrative action of the Department of Defense.

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