

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). The member was receiving disability compensation from the VA, and acknowledges that he was informed 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 reasonably should have known, that he was not entitled to the full amount of his retired pay.

CASENO: 2013-WV-011807.2

DATE: 02/28/2013

DATE: February 28, 2013

In Re:)
[REDACTED]) Claims Case No. 2013-WV-011807.2
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). The member was receiving disability compensation from the VA, and acknowledges that he was informed 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 reasonably should have known, that he was not entitled to the full amount of his retired pay.

DECISION

A retired member of the Florida Army National Guard requests reconsideration of the February 7, 2013, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2013-WV-011807.

Background

On December 12, 1986, the member applied for disability compensation from the VA, and signed the VA Form 21-526 (*Veteran's Application for Compensation or Pension*). Directly above the member's signature was a block stating, "NOTE: Filing of this application constitutes a waiver of military retired pay in the amount of any VA compensation to which you may be entitled." The member was subsequently awarded compensation from the VA. On January 1, 2005, the member reached sixty years of age and became entitled to receive reserve retired pay. Although the member indicated on the DD Form 2656 (*Data for Payment of Retired Personnel*), dated July 23, 2004, that he was receiving compensation from the VA, the Defense Finance and Accounting Service (DFAS) failed to reduce his retired pay by the amount of the compensation he was receiving from the VA. As a result, the member was overpaid \$9,964.73 from January 1, 2005, through November 30, 2005. A credit due the member in the amount of \$2,667.80 was applied to the debt because of his eligibility for Concurrent Retirement and Disability Pay (CRDP)¹ making the total overpayment \$7,296.93. DFAS has advised that payments for the debt have been collected; however, we will consider the amount of \$7,296.93 for waiver.²

Discussion

Title 10, U.S.C., § 2774, provides authority for waiving claims for erroneous payments of pay and certain allowances made to or on behalf of members or former members of the uniformed services, if collection of the claim would be against equity and good conscience and not in the best interests of the United States. Generally, these criteria are met by a finding that the claim arose from an administrative error with no indication of fraud, fault, misrepresentation, or lack of good faith on the part of the member or any other persons having an interest in obtaining a waiver. *See* Department of Defense Instruction 1340.23 (hereinafter Instruction), ¶ E4.1.2 (February 14, 2006).

Generally, persons who receive a payment erroneously 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. *See* Instruction ¶ E4.1.1. Furthermore, the fact that an erroneous payment is solely the result of administrative error or mistake on the part of the government is not a sufficient basis by itself for granting waiver. *See* Instruction ¶ E4.1.3. A waiver usually is 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 funds for eventual repayment to the Government. *See* Instruction ¶ E4.1.4.

Waiver is an equitable remedy, and it is not available to a party who shares part of the fault. *See* DOHA Claims Case No. 07091307 (September 17, 2007) and DOHA Claims Case

¹ Previously, the claimant was informed that the credit was due to his eligibility for Combat-Related Special Compensation (CRSC). The debt computation in the record, dated February 1, 2013, is clearly for CRDP.

² This is consideration of the amount for waiver, and not another charge for the debt already paid.

No. 03101402 (October 20, 2003).³ While there is no issue of fraud, misrepresentation, or lack of good faith on the part of the member, the DOHA adjudicator properly concluded from the record evidence, which included the member's completed DD Form 2656, that the member was partially at fault. The member signed an application for disability compensation on December 12, 1986. Above the member's signature was a block stating, "NOTE: Filing of this application constitutes a waiver of military retired pay by the amount of any VA compensation to which you may be entitled." Thus, the member is considered to have been on notice that when he became entitled to reserve retired pay it would be reduced by the amount of his VA disability compensation. *See* DOHA Claims Case No. 07020509 (February 8, 2007); DOHA Claims Case No. 04100402 (October 26, 2004); DOHA Claims Case No. 04061502 (June 17, 2004); DOHA Claims Case No. 02120917 (December 20, 2002); and DOHA Claims Case No. 01070906 (August 7, 2001). This Office acknowledges the fact that when the member filled out his DD Form 2656, he informed DFAS that he was receiving disability compensation. However, when the member began receiving retired pay, and no deduction was listed on his retired pay account for VA disability compensation, he should have known that he was being overpaid. He did not acquire title to the amounts paid in excess of his entitlements, and he had a duty to bring the error to the attention of DFAS.

A member may waive his right to receive retired pay in order to receive disability compensation. *See* 38 U.S.C. § 5305. Certain retired military members may also be entitled to CRDP if they have 50% or more VA disability and are also entitled to receive retired pay for a "years of service" retirement. *See* 10 U.S.C. § 1414. The CRDP amount paid is determined by statute and reflects in most cases a partial restoration of the retired pay that is offset under 38 U.S.C. § 5305.⁴ The debt at issue in this case is due to the member's receipt of full VA compensation and full military retired pay and not whether he is eligible for CRDP.

Conclusion

The member's request for reconsideration is denied, and we affirm the February 7, 2013, decision to deny waiver in the amount of \$7,296.93. In accordance with the Instruction ¶ E8.15, this is the final administrative action of the Department of Defense in this matter.

///Original Signed///

Jean E. Smallin
Chairman, Claims Appeals Board

³ These cases were decided under 5 U.S.C. § 5584 because the claimants were civilian employees. However, the standards for waiver are the same for service members and civilian employees.

⁴ Concurrent Receipt means receiving both military retirement benefits and VA disability compensation, and up until 2004 this was forbidden by law. To receive VA disability compensation, disabled military retirees had to waive all or part of their military pay. As of 2004, this law changed so that qualified disabled military retirees will now receive both their full military retirement pay and their VA disability compensation. This recently-passed law phases out (over 9 years) the VA disability offset, which means that military retirees with 20 or more years of service and a 50% (or higher) VA-rated disability will no longer have their military retired pay reduced by the amount of their VA disability compensation.

/// Original Signed///

Catherine M. Engstrom
Member, Claims Appeals Board

/// Original Signed ///

Natalie Lewis Bley
Member, Claims Appeals Board