

DATE: April 24, 2015

In Re:)

[REDACTED])

Claimant)

) Claims Case No. 2013-WV-091002.3
)
)

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

When a member is aware or should be aware that he is receiving payments in excess of his entitlements, he does not acquire title to the excess amounts and has a duty to hold them for eventual repayment.

DECISION

A retired member of the U.S. Coast Guard requests reconsideration of the March 13, 2015, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2013-WV-091002.2. In that decision, DOHA denied waiver of an overpayment of retired pay in the amount of \$16,458.00.

Background

On October 1, 2004, the member retired from the Coast Guard as an E-6 and was entitled to receive retired pay based on 21 years of active duty service. Due to an administrative error, the member's retired pay was erroneously based on 23 years of active duty service during the period October 1, 2004, through March 31, 2013, causing an overpayment of \$16,458.00.

In the appeal decision, the DOHA adjudicator sustained the Coast Guard's denial of waiver of the overpayment on the basis that the member was provided information in the form of his Statement of Creditable Service Worksheet (SCSW), his leave and earnings statements (LES) and his retired pay application which reflected his Active Duty Base Date (ADBDB) as October 21, 1982, and the period of active duty service as 21 years. Therefore, the adjudicator found that

when the member received his retired pay computation reflecting his service time for retirement as 23 years, 11 months and 10 days and his service time for pay as 23 years, 11 months and 10 days, he should have at least questioned the active duty service time discrepancy.

In his reconsideration request, the member continues to assert that waiver should be granted because the erroneous calculation of his years of active duty service was made by the government. He states that the adjudicator excused the government agents who made the administrative error. However, he states that any error he made was not excused. He states that the government employees processing the paperwork knew what they were doing better than he did. He also attaches a statement by a certifying officer stating that the member would not have had a thorough knowledge of the multiplier computation of his retired pay which was incorrectly established.

Discussion

Under 10 U.S.C. § 2774, we have the authority to waive collection of erroneous payments of military pay and allowances if repayment would be against equity and good conscience and not in the best interests of the United States, provided that there is no indication of fraud, fault, misrepresentation, or lack of good faith on the part of the member. *See* DoD Instruction (hereinafter Instruction) 1340.23 (February 14, 2006). In this case, the erroneous payments were made as a result of administrative error and there is no indication of fraud, misrepresentation or lack of good faith on the member's part. However, the fact that the erroneous payment is the result of administrative error is not sufficient basis, in and of itself, for granting waiver. *See* Instruction ¶ E4.1.3. Waiver is not appropriate when a recipient knows, or reasonably should know, that a payment is erroneous. *See* Instruction ¶ E4.1.5. A member is considered to be at least partially at fault, and waiver is precluded, if it is determined that he should have known that he was being overpaid. Therefore, if a member is furnished with documentary records or information which, if reviewed, would cause a reasonably prudent person of the same rank and experience to be aware of or suspect the existence of error, but the member fails to review the documents carefully or otherwise fails to take corrective action, the member is not without fault, and waiver is precluded. *See* DOHA Claims Case No. 08121001 (December 23, 2008); DOHA Claims Case No. 97101601 (October 24, 1997); and Comptroller General decisions B-219004, Dec. 17, 1985; B-216951, April 12, 1985; B-195706, Sept. 12, 1979; and B-187713, Jan. 4, 1977.

In this case, the member knew or should have known from his own personnel records and other information available to him that he had completed only 21 years of active duty service at the time of his retirement. However, his retired pay computation erroneously indicated he had completed 23 years of active duty service. Specifically, the member's retired pay computation reflected the following:

Service time for retirement (multiplier):	23-11-10
Service time for pay (pay scale):	23-11-11

As explained by the adjudicator in the appeal decision, the service time for retirement was erroneously reflected as 23 years, eleven months and ten days. As for the statement by the certifying officer, we note that the multiplier was not the issue in this case. The main issue is that the multiplier was clearly based on an incorrect computation of the member's total active duty time. Therefore, the certifying officer's statement is not relevant in determining whether the member knew or should have known there was an error in the establishment of his retired pay. Since the member had information that would lead a reasonably prudent person of his rank and experience to conclude there was an error in the computation of his retired pay, waiver is not appropriate. Under these circumstances, he does not acquire title to the excess amounts and has a duty to hold them for eventual repayment.

Conclusion

The member's request for reconsideration is denied, and we affirm the March 13, 2015, appeal decision. In accordance with the 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