

DATE: October 16, 2014

In Re:)
 [REDACTED]) Claims Case No. 2014-CL-062401.2
)
Claimant)

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

Claims against the government may be allowed only for expenses authorized by statute or regulation.

DECISION

A former member of the U.S. Marine Corps Reserve (USMCR) requests reconsideration of the September 12, 2014, appeal decision of the Defense Office of Hearings and Appeals (DOHA), in DOHA Claim No. 2014-CL-062401. In that decision, this office denied the member's claim for pay and allowances for the period August 1, 2012, through August 30, 2013.

Background

During the member's active duty (AD) tour for the period May 3, 2010, through July 10, 2011, he incurred an injury to his ankle. He was subsequently placed on medical hold and his AD tour was extended to August 11, 2011. In June 2011 the member was placed on limited duty status and his tour was extended to September 11, 2011. A DD Form 214, *Certificate of Release or Discharge from Active Duty*, dated September 11, 2011, discharged the member from AD effective that date. On July 26, 2012, the Physical Evaluation Board (PEB) issued a finding that the member's left ankle injury was disabling due to osteoarthritis and rendered him medically unfit for duty. The PEB's recommended disposition was that the member be separated from AD with severance pay. In the meantime, the member appealed his discharge from AD. On August 17, 2012, the Judge Advocate General of the Department of the Navy determined that the member's release from medical hold and discharge from AD on September 11, 2011,

had both been improper. As a result, on December 12, 2012, the Director, Reserve Affairs Division (HQMC-RA) ordered that the member's medical hold and AD status extended to August 1, 2012, his pay account was updated to credit pay and allowances to him from September 11, 2011, through August 1, 2012, and he was placed in the Inactive Ready Reserve (IRR). The Defense Finance and Accounting Service (DFAS) advised our office that HQMC-RA placed the member on IRR on August 2, 2012.

The member was also placed in a legal hold status pending an investigation and that legal hold status ended August 21, 2013. The member was released from the IRR on August 30, 2013. The member's DD Form 214 was corrected to change his date of separation from September 11, 2011, to August 1, 2012.

The member then claimed full pay and basic allowance for subsistence (BAS) for the period August 1, 2012, through August 30, 2013, on the grounds that he was separated on August 30, 2013. The member claimed that he was separated from the USMCR on August 30, 2013, with severance pay. The Defense Finance and Accounting Service (DFAS) denied the member's claim for pay and allowances on the grounds that he had not been mobilized in an AD status and there was no authority for payment of pay and allowances. The member appealed that denial, and the DOHA adjudicator upheld the denial. The adjudicator noted that military personnel matters are in the discretionary powers of the services and beyond DOHA's reviewing authority. Therefore, the adjudicator refused to disturb the member's date of transfer to the IRR on August 2, 2012. He therefore found that as of August 2, 2012, the member was not entitled to any pay since he was not performing any duties. Finally, he found that since the member was not entitled to any pay, he was not entitled to receive BAS under 37 U.S.C. 402(a).

In his request for reconsideration, the member states that there is nothing in the record referencing that he was placed on the IRR on August 2, 2012. He also cites the statute, 10 U.S.C. 1218, as authority for paying him pay and BAS. Finally, he contends that he was denied dental care.

Discussion

The burden of proving the existence of a valid claim against the United States is on the person asserting the claim. A member must prove 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. *See* DoD Instruction 1340.21 (Instruction) ¶ 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).

Preliminarily, we will address the member's claim that there is nothing in the record referencing his transfer to the IRR on August 2, 2012. As previously noted, the Director of HQMC-RA directed that the member's pay account be updated to reflect that the member was entitled to receive pay and allowances from September 12, 2011, through August 1, 2012. In addition, the HQMC-RA states in the memorandum that the member's release from AD date is

established as August 1, 2012. As explained by the adjudicator in the appeal decision, the member was also placed in IRR status at this time and once in IRR status, was not entitled to receive pay. DFAS also references this date in their administrative report. Since the member had received pay and allowances through August 1, 2012, and was released from AD on August 1, 2012, it was reasonable for the adjudicator to find that the member's IRR status began on August 2, 2012. We see no error in the determination that the member was placed on IRR on this date. Therefore, we will not disturb this determination, since military authority has broad discretion over these types of administrative matters. *See* DOHA Claims Case No. 2012-CL-101006.3 (March 20, 2014); DOHA Claims Case No. 00090820 (February 26, 2001); DOHA Claims Case No. 97111901 (December 12, 1997); and Comptroller General decision B-244598, Oct. 2, 1991. According to DFAS, the HQMC-RA determined the date of the member's placement on the IRR to be August 2, 2012. DFAS and HQMC-RA most likely based this date on the fact that the member was paid pay and allowances through August 2, 2012, and was released from AD on that date. There is nothing in the record to show that the HQMC-RA erred in its determination. Finally, as referenced by the adjudicator, the member's leave and earnings statement for December 2012 clearly shows that he was retroactively compensated pay and allowances through August 1, 2012. If the member wishes to pursue the matter as a record correction with the Board of Correction of Naval Records, he may do so by filing a DD Form 149, *Application for Correction of Military Record*.

The member was released from AD on August 1, 2012, and at no time after that was he on active duty. Rather, he was placed on the IRR on August 2, 2012, but this is not active duty within the definition of 10 U.S.C. § 101(d). Further, under 37 U.S.C. § 206, the reservist pay statute, a reservist must actually perform duties to be entitled to compensation.

The statute the member cites for authority for paying him pay and allowances is found in 10 U.S.C. §§ 1201-21. This section deals with military disability retirement benefits and severance pay based on a claim for disability. This section creates a substantive right for separated members to recover disability benefits. In this case, the record reflects that the member was discharged with severance pay. The member is seeking AD pay and BAS, not military disability retirement benefits or severance pay. Therefore, this section is not applicable to the member's claim.

Finally, the member cites the Department of Defense Directive 1241.01 (February 28, 2004, *Reserve Component Medical Care and Incapacitation Pay for Line of Duty Conditions*), to support his claim for AD dental care after his discharge. In reviewing that Directive, it appears that in order to continue receiving medical and dental care, determinations must be made that the injury, illness or disease was in the line of duty. Determinations as to how long a medical disability continues and whether it was incurred in the line of duty are left to the exercise of sound administrative judgment of a member's service, the Department of Veterans Affairs or the relevant agency concerned. They do not come within the purview of this office. *See* DOHA Claims Case No. 04022604 (March 8, 2004). The member may wish to contact the Assistant Secretary of Defense (Reserve Affairs), since he is responsible for the Reserve incapacitation system management policy and is authorized to issue instructions implementing the Directive.

Conclusion

The member's request for reconsideration is denied, and we affirm the January 31, 2013, appeal decision in DOHA Claim No. 2014-CL-06201 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