

DATE: May 21, 2015

In Re:)
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 [REDACTED]) Claims Case No. 2014-CL-100601.2
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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 Air National Guard (ANG) requests reconsideration of the February 27, 2015, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2014-CL-100601.

Background

On September 3, 1971, the member was married. On September 30, 1971, the member entered active duty with the U.S. Air Force and served on active duty until April 1977. Beginning in May 1977 the member served in the ANG. Effective June 10, 1992, the member was transferred to the Retired Reserve. On September 20, 1994, the member petitioned for divorce. The divorce decree provided:

That pursuant to a Property Settlement Agreement which is in accordance with Neb. Rev. Stat. §42-366 (Reissue 1988) Respondent is awarded one-half of the value of Petitioner's Nebraska Air National Guard Retirement Plan. Respondent shall be responsible for and will pay any penalties associated with the withdrawal of said money from the retirement plan.

The Property Settlement Agreement provided the following:

Petitioner's Air National Guard retirement fund shall be divided equally between petitioner and respondent pursuant to a "Qualified Domestic Relations Order" to be made part of the final Decree to be entered herein.

The Qualified Domestic Relations Order (QDRO) contained in the divorce decree provided in part that the former spouse shall be entitled to one-half of the accrued benefits under the member's retirement plan.

The member's former spouse subsequently submitted a claim for her share of the member's retired pay pursuant to the Uniformed Services Former Spouses' Protection Act (USFSPA). On October 27, 1995, the Air Reserve Personnel Center (ARPC) confirmed their receipt of the divorce decree and property settlement agreement. The ARPC advised the member's former spouse that once he reached 60 years of age and became eligible for retired pay, the divorce decree would be forwarded to the Defense Finance and Accounting Service (DFAS) for action and that the member's retired pay would be divided and paid in accordance with the decree. On March 19, 1996, the ARPC notified the member that they received a copy of the divorce decree. On March 26, 2011, the ARPC advised the member that he might be eligible for retired pay when he reached 60 years of age. On February 25, 2012, the member reached 60 years of age and retired. On February 27, 2012, DFAS advised the member that he retired in the rank of a Major with 40 years, four months and 25 days of service for basic pay purposes. DFAS advised him that his gross monthly pay was \$1,620.00 and that his net monthly pay was \$1,438.92.

In March 2013 the member's former spouse contacted DFAS regarding her payments under the USFSPA. On March 7, 2013, the member's former spouse filed a DD Form 2293, *Application for Former Spouse Payments from Retired Pay*, with the DFAS requesting direct payment from the member's retired pay in the amount specified in the divorce decree under the USFSPA. In the application, the former spouse attached a copy of the October 27, 1995, letter from ARPC. On April 11, 2013, DFAS informed the member that it had received the application for a portion of his retired military pay and that it was required by law to pay the member's former spouse a portion of his retired pay pursuant to the final court order. DFAS specifically advised the member:

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.

On June 1, 2013, DFAS began paying the member's former spouse her USFSPA award of 50 % of his disposable retired pay. DFAS determined that the USFSPA payments should have started on May 1, 2012, and that she had been entitled to a total of \$9,787.50 during the period May 1, 2012, through May 1, 2013. Since the member had been paid 100% of his

disposable retired pay during that period, the overpayment of \$9,787.50 had to be collected from the member. On September 23, 2013, DFAS paid the member's former spouse a lump sum payment of \$9,787.50.

On April 19, 2014, the member wrote DFAS stating that he wished to appeal DFAS's recent decisions that adversely affected his retired pay. He stated that his monthly retired pay decreased from \$1,363.00 to \$352.00 in 2013 because his former spouse requested direct payment of 50% of his retired pay. He argued that since the divorce occurred in 1994, his former spouse should receive 50% of his retired pay based on his retirement point value at that time. He argued that he should be refunded any resulting overpayment made to his former spouse. He also claimed that there should be no retroactive USFSPA payments made to his former spouse for the period between his retirement and the first payment made to her because she was not paid USFSPA payments during that period due to poor record-keeping by DFAS.

On June 12, 2014, DFAS responded to the member. DFAS advised the member that any legal objections that he has with the divorce decree should be addressed with the state court that issued the decree. DFAS noted that the divorce decree did not establish his former spouse's USFSPA payment as 50% of his retired pay as of 1994, nor as a fixed amount. DFAS directed the member's attention to the Department of Defense Financial Management Regulation (DoDFMR), paragraph 290601.C of Chapter 29, Volume 7B, Military Pay Policy – Retired Pay, which reflects that a USFSPA award that is established as a percentage of the member's retired pay will automatically receive cost of living adjustments. DFAS also cited 10 U.S.C. §1408(d)(1), which states that the USFSPA payments to a former spouse must be started within 90 days of either the receipt of the court order or the member's retirement. Since the member's former spouse applied for USFSPA payments in 1995, she was entitled to USFSPA payments starting within 90 days of the date of the member's retirement. Since the USFSPA payments did not start at that time, the former spouse was entitled to receive arrears of the USFSPA payments from that time to when the payments did start.

The DOHA appeal decision upheld DFAS's denial of the member's claim. In the member's reconsideration request, he asserts that the language contained in the QDRO is controlling. He acknowledges that he and his former spouse signed the Property Settlement Agreement in the divorce. However, he states that the Property Settlement Agreement states that his retirement fund shall be divided equally between himself and his former spouse pursuant to a QDRO. He also contends that there is no proof that his former spouse applied for direct payment of a portion of his retired pay or submitted a copy of the divorce decree to the ARPC in 1995.

Discussion

Under DoD Instruction 1340.21 (May 12, 2004), the claimant must prove, by clear and convincing evidence, on the written record that the United States is liable to the claimant for the amount claimed. 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 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.

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. All valid court orders directing payment of a portion of retired pay to the former spouse must be honored if the divorcing couple was married for at least 10 years during which the member was in service. Absent facial invalidity of the court order, the government is not liable with respect to any payments made in conformity with a state court order under authority of the USFSPA. *See* DOHA Claims Case No. 2013-CL-110501.2 (July 17, 2014); DOHA Claims Case No. 2013-CL-062801.2 (October 31, 2013); and Comptroller General decision B-221190, Feb. 11, 1986.

The main issue in this case revolves around the language contained in the QDRO. The member argues that the language in the QDRO is controlling. DFAS contends that the section titled Qualified Domestic Relations Order does not apply because the Employee Income Security Act (ERISA) applies to privately established pension plans and not to military retired pay. DFAS notes that the first sentence under the section title Qualified Domestic Relations Order states:

The following terms are intended to comply with the provision of the Employment Retirement Income Security Act of 1974, as amended ("ERISA").

DFAS concludes that since the member is receiving military retired pay, which is not considered a retirement plan governed by ERISA, the whole section does not apply. DFAS also notes that applying this section to a member's military retirement, which has no present value, and which does not vest until a member has completed 20 satisfactory years toward retirement credit, or in the case of a reservist, as in this case, does not vest until the member has completed 20 years of service in which the member has completed at least 50 points in the each of the 20 qualifying years, is problematic. DFAS states that the member's argument that DFAS use the value of his retirement points fails because his reserve retirement points had no value in 1994. DFAS notes that a reservist's points have no value until the member has completed 20 satisfactory years. DFAS further states that the member must also attain the age of 60 before he is eligible to receive retired pay.

After reviewing the language in the divorce decree which incorporated the Property Settlement Agreement and the QDRO, we find that even if the language in the QDRO section applies, the member's retirement plan did not vest until he retired in February 2012. Therefore, absent anything on the face of the order indicating that it was issued without proper legal authority, DFAS is obligated to make payment under 10 U.S.C. § 1408(b)(1)(D). DFAS determined the divorce decree was regular on its face and determined payment should be made in accordance with the decree. We find no error with DFAS's actions.

As for the member's argument that there was no evidence that his former spouse applied for direct payment of a portion of his retired pay or submitted a copy of the divorce decree to the ARPC in 1995, DFAS has provided sufficient evidence to the contrary.

Conclusion

The member's request for reconsideration is denied, and we affirm the February 27, 2015, appeal decision in DOHA Claim No. 2013-CL-100601 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