

DATE: December 22, 2014

In Re:)

[REDACTED])

Claimant)

) Claims Case No. 2014-WV-022504.2
)
)

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

Under 10 U.S.C. § 2774, waiver is not appropriate when a member was aware or should have been aware that he was being overpaid.

DECISION

A member of the United States Marine Corps Reserve (USMCR) requests reconsideration of the November 10, 2014, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2014-WV-022504.

Background

On January 1, 2002, the member completed a period of active duty with the USMCR. On January 14, 2002, he was paid a gross payment for 30.5 days of lump sum leave (LSL) in the amount of \$3,690.50. On May 1, 2006, the member was called to active duty. However, when he received his end-of-month pay for May 2006, he was erroneously paid 33 days of LSL in the gross amount of \$3,993.00. As a result, the member was overpaid \$3,993.00.

In the appeal decision, the DOHA adjudicator based her determination on the general rule that a member is obliged to be aware of his approximate leave balance. Since the member should have known his approximate leave balance, which was zero, he should have known that an error existed when he received payment for 33 days of LSL. In addition, this error should have been apparent to the member because he had been paid for 30.5 days of LSL in January 2002, and his May 2006 leave and earnings statement (LES) reflected that his career leave sold

was 63.5 days which exceeded the maximum of 60 days of lifetime payment for LSL members are authorized to receive.

In his reconsideration request, the member requests three pieces of documentation. First, he requests documentation reflecting that he was actually paid LSL in January 2002. Second, he requests the statute and regulations regarding the government's ability to garnish wages from previous overpayments. Third, he requests the regulations for the process he is to follow to obtain proof in any future case of possible overpayment. The member further states that at the time of the overpayment, he had only eight years of active duty service. He states that he spent none of that time as an administrative officer and had no experience in how the pay system worked. Finally, he states that between January 2002 and May 2006 he had not been on active duty. Therefore, he states that during those four years, it was not unreasonable for him to not know what his leave balance was.

Discussion

Under 10 U.S.C. § 2774, we have the authority to waive erroneous payments of pay and allowances if collection would be against equity and good conscience and not in the best interest of the United States. 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 in and of itself for granting waiver. *See* Department of Defense Instruction 1340.23 (Instruction) ¶ E4.1.3. Waiver 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 the funds for eventual repayment to the government, even if the government fails to act after such notification. *See* Instruction ¶ E4.1.4.

In this case, the member should have been aware that he received payment for 30.5 days of LSL in the amount of \$3,690.50 in January 2002. This was reflected on his January 2002 LES. When the member returned to active duty in May 2006, after four years of not serving on active duty, he should have known that he was not entitled to receive payment for 33 days of LSL. Therefore, when he received payment for 33 days of LSL in the amount of \$3,993.00, he should have questioned the payment. Although he may have been erroneously advised that he was entitled to that amount, we have consistently held that a member is obliged to be aware of his approximate leave balance. *See* DOHA Claims Case No. 08020105 (February 12, 2008); DOHA Claims Case No. 06091506 (October 4, 2006); DOHA Claims Case No. 01091310 (October 5, 2001); and Comptroller General decisions B-247744, Mar. 16, 1992; B-231476, July 12, 1998; and B-184436, Jan. 22, 1976. Under the circumstances, the member should have continued to question his entitlement to the leave he was paid in May 2006. The member did not acquire title to the money and should have held it for eventual repayment to the government. Therefore, waiver is not appropriate in this case.

Finally, the member should contact the Defense Finance and Accounting Service to obtain his LES and for information on collection of overpayments. As for the regulations concerning the necessary documentation a waiver applicant should submit with their waiver request, we direct the member's attention to our Instruction, which can be found online at

<http://www.dtic.mil/whs/directives/corres/pdf/134023p.pdf>. The process for submitting a waiver application and the format of the waiver application can be found under ¶ E5.3.

Conclusion

The member's request for relief is denied, and we affirm the November 10, 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: Natalie Lewis Bley

Natalie Lewis Bley
Member, Claims Appeals Board