

DATE: April 20, 2015

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In Re: )  
[REDACTED] ) Claims Case No. 2014-WV-090506.2  
Claimant )

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**CLAIMS APPEALS BOARD  
RECONSIDERATION DECISION**

**DIGEST**

Under 10 U.S.C. § 2774, the Defense Office of Hearings and Appeals (DOHA) has the authority to waive a claim arising from erroneous payments of pay and allowances made to members, if collection of the claim would be against equity and good conscience and not in the best interests of the United States, provided that there is no evidence of fraud, fault, misrepresentation or lack of good faith on the part of the member.

**DECISION**

A retired member of the U.S. Air Force requests reconsideration of the March 12, 2015, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2014-WV-090506. In that decision, DOHA denied waiver of an overpayment in the amount of \$5,819.58.

**Background**

On October 31, 1967, the member was placed on the Temporary Disability Retired List (TDRL). On August 17, 1970, the member was removed from the TDRL and permanently retired from the Air Force. In 1992 the retired member elected Survivor Benefit Plan (SBP) coverage for his spouse during an open season.<sup>1</sup> Effective September 1, 1992, he became

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<sup>1</sup>The SBP, 10 U.S.C. §§ 1447 – 1455, is an income maintenance program for surviving dependents of members of the uniformed services. For members who did not elect coverage at retirement or when they acquired dependents, Congress has occasionally provided an open season for member to elect coverage. One such open enrollment was for the period April 1, 1992, through March 31, 1993, authorized by Public Law 101-189, § 1405, 103 Stat. 1352, 1586 (1989), as amended by Public Law 101-510, § 631, 104 Stat. 1485, 1580.

eligible to participate in the SBP with his spouse as his beneficiary. Proper premiums were subsequently deducted from his retired pay, or he made direct SBP premium payments. The member's SBP coverage then went into a suspended status. On September 9, 2011, the member remarried. On October 7, 2011, he requested that SBP coverage be reinstated for his new spouse. The Defense Finance and Accounting Service (DFAS) later determined that the member was entitled to a SBP paid-up credit effective October 1, 2008.<sup>2</sup> As a result, the member was entitled to receive a refund in the amount of \$1,556.12 for the SBP premiums that he paid during the period October 1, 2012, through October 31, 2013. However, due to an administrative error, the member was erroneously issued a refund in the amount of \$7,375.70 on October 2, 2013. Since he was only entitled to receive \$1,556.12, he was overpaid \$5,819.58 (\$7,375.70 - \$1,556.12).

In the appeal decision, the DOHA adjudicator upheld DFAS's decision to deny waiver of the claim. The adjudicator examined the member's Retiree Account Statements (RAS) and his Retired Master Pay History (RMPH). The adjudicator found that during the period December 1, 2000, through September 30, 2013, the member's retired pay ranged from \$0 to \$1,006.00. The adjudicator found that although the member had been informed that he was paid up, there was no indication in the record that he questioned his entitlement to receive a \$7,375.70 retired military payment.

In his reconsideration request, the member states that it was through no fault on his part that the error occurred. He further states that he is a disabled veteran and he has no ability to repay this debt.

### **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). The fact that the erroneous payment is the result of administrative error is not sufficient basis, in and of itself, for granting waiver. Waiver is not appropriate when a recipient knows, or reasonably should know, that a payment is erroneous, or when a recipient of any unexplained payment of pay and allowances does not attempt to obtain a reasonable explanation from an appropriate official. The recipient has a duty to ascertain the reason for the payment and to set aside the funds for eventual repayment in the event repayment should be necessary. *See* Instruction ¶ E4.1.3 through ¶ E4.1.5.

In this case, we recognize that the erroneous payment was made by administrative error. However, that fact alone does not provide a basis for waiver of the overpayment. As pointed out in the appeal decision, the member received the payment of \$7,375.70 on October 2, 2013. His

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<sup>2</sup> In 2008, retired members who elected SBP coverage during the 1992-1993 open season and who had reached a paid-up status, were given retroactive proportional credit for the extra premium penalties that they paid since enrolling in SBP.

RAS and his RMPH indicate that the most the member had received in retired pay during the period December 1, 2000, through September 30, 2013, was \$1,006.00. In addition, his RAS reflecting the payment of \$7,375.70 gave no explanation for it. In addition, although the member may have been told that he was paid up on his SBP coverage, there is nothing in the file indicating that as a result he was told that he was due \$7,375.70. Under the circumstances, the member should have questioned pay officials regarding such a significant unexplained retired military payment. *See* DOHA Claims Case No. 01012202 (February 28, 2001); and DOHA Claims Case No. 99112916 (January 19, 2000). Under the circumstances, waiver is not appropriate.

While we are sympathetic to the member's situation, we note that financial hardship does not provide a basis for waiver. *See* DOHA Claims Case No. 02062402 (July 18, 2002). However, DFAS, at its own discretion, may take financial hardship into account in determining the monthly amount it collects from the member. The member may contact DFAS in that regard.

### **Conclusion**

The member's request for reconsideration is denied, and we affirm the March 12, 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

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Jean E. Smallin  
Chairman, Claims Appeals Board

Signed: Catherine M. Engstrom

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Catherine M. Engstrom  
Member, Claims Appeals Board

Signed: Natalie Lewis Bley

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Natalie Lewis Bley  
Member, Claims Appeals Board