

DATE: March 6, 2017

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In Re: )

[REDACTED] )

Claimant )

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) Claims Case No. 2015-WV-021801.2  
)  
)

**CLAIMS APPEALS BOARD  
RECONSIDERATION DECISION**

**DIGEST**

When a member is aware or should be aware that he is being overpaid, he does not acquire title to the excess amounts and has a duty to hold them for eventual repayment to the government.

**DECISION**

A retired member of the U.S. Army requests reconsideration of the November 30, 2016, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2015-WV-021801. In that decision, DOHA waived \$11,297.20, and denied the remaining \$122,742.17 of the total indebtedness in the amount of \$134,039.37.

**Background**

On June 15, 1993, the Army advised the member that he had completed the required years of service making him eligible for retired pay upon his application at age 60. After proceedings conducted in January 1998, the Army Physical Evaluation Board (PEB) recommended the member be placed on the temporary disability retired list (TDRL). The PEB informed the member that he could be retained on the TDRL for five years. On February 11, 1998, the Army advised the member that he was released from duty effective May 9, 1998, and effective May 10, 1998, he was placed on the temporary disability retired list (TDRL). On April 1, 1998, the member completed the DD Form 2656, *Data for Payment of Retired Personnel*, applying for military retired pay. He submitted the DD Form 2656 even though he was not eligible to receive it until June 8, 2008, when he reached age 60.

On May 12, 1998, the member applied for disability compensation from the Department of Veterans Affairs. He was subsequently awarded VA disability compensation. The Army Reserve Personnel Command discharged the member from the USAR effective April 3, 2001. By orders dated May 27, 2003, from the Army Physical Disability Agency (APDA), the member was found fit for duty and removed from the TDRL effective March 5, 2003. The orders reflected that the member was not eligible for a disability retirement. Another letter from the APDA also dated May 27, 2003, changed his date of removal from the TDRL to June 17, 2003.

Even though the member had been found fit for duty and removed from the TDRL, he subsequently completed the DD Form 2860, *Application for Combat Related Special Compensation (CRSC)* on August 29, 2003. The member was granted CRSC retroactive to June 1, 2003. However, since the member was not in a retired pay status entitling him to receipt of military retired pay, he was not eligible to receive CRSC. As a result, the member received erroneous payments of CRSC in the amount of \$126,318.17 from June 1, 2003, through June 7, 2008.

On June 8, 2008, when the member turned 60 years old, he became entitled to receive CRSC. However, due to an administrative error, his CRSC was miscalculated from June 8, 2008, through December 31, 2009, causing an overpayment of \$11,297.20. Therefore, his debt increased to \$137,615.37 (\$126,318.17 + \$11,297.20). The Defense Finance and Accounting Service (DFAS) subsequently determined that the member was entitled to receive CRSC in the amount of \$3,576.00 for the period January 1, 2010, through February 28, 2010. DFAS properly applied this amount to the debt, reducing it to \$134,039.37.

The member requested waiver of the indebtedness. DFAS subsequently denied waiver. In the appeal decision, the DOHA adjudicator disagreed with DFAS that waiver of entire debt should be denied. The adjudicator upheld DFAS's denial of the portion of the debt in the amount of \$126,318.17<sup>1</sup> for the period June 1, 2003, through June 7, 2008. However, the adjudicator waived the portion of the debt in the amount of \$11,297.20 for the period June 8, 2008, through December 31, 2009. The \$11,297.20 is not at issue in the member's reconsideration request.

The member requests reconsideration of the appeal decision through his attorney. He states that he was not privy to documents submitted to DOHA by DFAS. He states that he should have never been found fit for duty. He argues that he was mistreated during the PEB process, and should have been found medically retired and begun receiving his retired pay on June 1, 2003, and not have had to wait until June 7, 2008, when he reached the age of 60. Therefore, he contends that DOHA should right the wrong and waive the indebtedness.

## Discussion

Under 10 U.S.C. § 2774, we have the authority to waive claims for erroneous payments of pay and certain allowances made to or on behalf of members or former members of the

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<sup>1</sup> This portion of the debt was reduced by the \$3,576.00 that the member was entitled to receive in CRSC for the period January 1, 2010, through February 28, 2010.

uniformed services, if repayment would be against equity and good conscience and not in the best interests of the United States, provided there is no indication of fraud, fault, misrepresentation, or lack of good faith on the part of the member. Waiver is not appropriate when the member knows, or reasonably should know, that a payment is erroneous, or when a member receiving any unexplained payment of pay or allowances does not attempt to obtain a reasonable explanation from an appropriate official. The member has a duty to ascertain the reason for the payment and to set aside the funds in event that repayment should be necessary. *See* Department of Defense Instruction 1340.23 (Instruction) ¶¶ E4.1.1 through E4.1.5.

In this case, the member acknowledges that he received the APDA letter advising him of his removal for the TDRL and that he was found fit for duty. He states that he appealed this decision but never heard anything more. Despite the fact that the member was found fit for duty, he applied for CRSC by filling out DD Form 2860 on August 29, 2003. Section II of the application specifically stated that the member must meet all criteria of the section or his application will be denied. Under this section, the member answered “Yes” to the following item:

**10. ARE YOU IN A RETIRED STATUS** (i.e., are you on the retired rolls, or have you been transferred to the Fleet Reserve or Fleet Marine Reserve)?  
Members recalled to, or retained on, active duty are not in a retired status during the period of such recall or retention.

At the time he filled out the DD Form 2860, the member knew that he was not in a retired status, that he was not entitled to a disability retirement, that he had been removed from the TDRL and been found fit for duty. Although the member states that he appealed this determination, he acknowledges he never received a response concerning his appeal. Thus, he should have at least made an effort to follow up on the matter and get a definite determination of his status and entitlement to CRSC. When a member has information that would halt the continuation of overpayments but (in this case, the fact that he had been found fit for duty) and does not question the payments, he is at least partially at fault for the accumulation of the debt, and waiver is therefore precluded. *See* DOHA Claims Case No. 00121101 (January 29, 2001).

Waiver is an equitable remedy, and is not available to a party who shares part of the fault. *See* DOHA Claims Case No. 2013-WV-011807.2 (February 28, 2013). Although it is unfortunate that the member may have felt mistreated during the PEB process, DOHA has no authority to waive the indebtedness. The record supports the DOHA adjudicator’s finding that that the member knew or should have known he was being overpaid. In such circumstances, the member receiving the money erroneously paid by the Government acquires no right to the money. Accordingly, it is not against equity and good conscience to collect the money. *See* DOHA Claims Case No. 2012-WV-101502.2 (February 27, 2013); and DOHA Claims Case No. 09092401 (October 16, 2009).

As for any additional documentation DOHA received from DFAS, DOHA is an appellate organization and only deals with the written record as submitted to us by the component concerned, in this case, DFAS, and the waiver applicant. The record in this case reflects that DOHA, prior to issuing the appeal decision, requested further documentation from the member

through DFAS. The member was granted multiple extensions to provide the documentation. DOHA then issued the appeal decision on the written record as presented to us by DFAS and the waiver applicant. If the member wishes to obtain any documentation mentioned in the appeal decision, he should contact DFAS.

### **Conclusion**

The member's request for reconsideration is denied, and we affirm the November 30, 2016, appeal decision to deny waiver in the amount of \$122,742.17. In accordance with the Instruction ¶ E8.15, this is the final administrative action of the Department of Defense in this matter.

Signed: Catherine M. Engstrom

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Catherine M. Engstrom  
Chairman, Claims Appeals Board

Signed: Natalie Lewis Bley

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Natalie Lewis Bley  
Member, Claims Appeals Board

Signed: Charles C. Hale

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Charles C. Hale  
Member, Claims Appeals Board