

DATE: June 29, 2015

In Re:

[REDACTED]

Claimant

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Claims Case No. 2015-WV-040202.2

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

Due to an administrative error, a member's retired pay was not reduced by the amount of the compensation he was receiving from the Department of Veterans Affairs (VA). When the member applied for VA compensation, he was considered to be on notice that when he became entitled to retired pay it would be reduced by the amount of his VA disability compensation. Under such circumstances, the member knew or should have known that he was not entitled to the full amount of his retired pay.

DECISION

A retired reserve member of the United States Army (USA) requests reconsideration of the April 8, 2015, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claims No. 2015-WV-040202. In that case, this Office denied waiver of \$18,441.81 in overpayment of military retired pay.

Background

The member applied for disability compensation from the Department of Veterans Affairs (VA) on August 23, 1991, and signed the VA Form 21-526, *Veteran's Application for Compensation or Pension*, acknowledging that: "Filing of this application constitutes a waiver of military retired pay in the amount of any VA compensation to which you may be entitled." The VA subsequently granted the member's claim for disability compensation, and he began receiving it in 2007.

On July 18, 2011, the member completed the DD Form 2656, *Data for Payment of Retired Personnel*, applying for military retired pay, and he became eligible to receive it when he

turned 60 years of age on July 18, 2011. The member indicated on the DD Form 2656 that he was receiving disability compensation from the VA. However, he did not indicate the effective date he began receiving the compensation or the monthly amount of payment. Due to an administrative error, when the member's retired pay was established, the Defense Finance and Accounting Service (DFAS) failed to reduce his military retired pay by the amount of compensation he was receiving from the VA. Thus, the member was overpaid \$18,441.81 from July 18, 2011, through November 30, 2013.

Discussion

Section 2774 of title 10, United States Code, provides authority for waiving claims for erroneous payments of pay and certain allowances made to or on behalf of members or former members of the uniformed services, if collection of the claim would be against equity and good conscience and not in the best interests of the United States. Generally, these criteria are met by a finding that the claim arose from an administrative error with no indication of fraud, fault, misrepresentation, or lack of good faith on the part of the member or any other person having an interest in obtaining the waiver. *See* Department of Defense Instruction (hereinafter Instruction), *Waiver Procedures for Debts Resulting from Erroneous Pay and Allowances*, 1340.23 (February 14, 2006).

In his request for reconsideration, the member states he went to the military office to fill out his request for retired pay and he had no knowledge of the system. He states that he sat across the table from a military personnel individual who asked him questions. He answered them, and the individual filled in the form. The member states that he told him he had VA disability, but the individual didn't ask him how much he was receiving. Once the form was filled in, the member signed the form. The member states that he left the office thinking everything was correct. He states that no one explained to him that his military pay would be reduced by his VA compensation. He states that having to pay this debt would be a great hardship.

Generally, persons who receive an erroneous payment from the Government acquire no right to the money. They are bound in equity and good conscience to make restitution. If a benefit is bestowed by mistake, no matter how careless the act of the Government may have been, the recipient must make restitution. In theory, restitution results in no loss to the recipient because the recipient received something for nothing. A waiver is not a matter of right. It is available to provide relief as a matter of equity, if the circumstances warrant. *See* ¶ E4.1.1 of the Instruction. Furthermore, the fact that an erroneous payment is solely the result of administrative error or mistake on the part of the Government is not sufficient basis in and of itself for granting waiver. *See* ¶ E4.1.3 of the Instruction. A waiver is usually 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 funds for eventual repayment to the Government. *See* ¶ E4.1.4 of the Instruction.

While there is no issue here of fraud, misrepresentation, or lack of good faith on the part of the member, the DOHA adjudicator properly denied waiver on the basis that the member knew, or reasonably should have known, that he would not be permitted to receive full payment

of retired pay while also receiving VA compensation. The member completed the VA Form 21-526, which states: "Filing of this application constitutes a waiver of military retired pay in the amount of any VA compensation to which you may be entitled." Thus, the member is considered to be on notice by virtue of completing the application for VA compensation that when he became entitled to retired pay it would be reduced by the amount of VA disability compensation he received.

Therefore, when the member began receiving retired pay in July 2011 after being awarded VA compensation in 2007, he was on notice that his military retired pay would be reduced by the amount of his VA compensation. The member should have questioned the effect his VA compensation had on his military retired pay, and the fact that his military retired pay was not reduced to reflect compensation he received from the VA. When a member is aware or should be aware that he is being overpaid, he must be prepared to return the excess amount when requested by the Government. *See* DOHA Claims Case No. 09083102 (September 2, 2009); DOHA Claims Case No. 07020509 (February 8, 2007); and DOHA Claims Case No. 04100402 (October 26, 2004).

As to the member's claim of financial hardship, financial hardship is not a factor for consideration in determining whether a waiver is appropriate. *See* ¶ E4.1.7 of the Instruction.

Conclusion

The member's request for reconsideration is denied, and we affirm our appeal decision of April 8, 2015. In accordance with the Instruction ¶ E8.15, this is the final administrative action of the Department of Defense in this matter.

///Original Signed///

Jean E. Smallin
Chairman, Claims Appeals Board

///Original Signed///

Gregg A. Cervi
Member, Claims Appeals Board

///Original Signed///

Natalie Lewis Bley
Member, Claims Appeals Board