

DATE: April 26, 2016

In Re:)

[REDACTED])

) Claims Case No. 2015-WV-081701.2

Claimant)

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

A member separating from the service properly received separation pay. Subsequently, he applied for and began receiving retired pay. In this situation, recoupment of the separation pay is required by statute. Since the separation pay payment was proper when made, the claim resulting from the statutorily required recoupment is not subject to waiver under 10 U.S.C. § 2774.

DECISION

A retired member of the U.S. Army requests reconsideration of the March 11, 2016, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2015-WV-081701.

Background

On June 1, 1992, the member separated from the Army and received a Special Separation Benefit (SSB) payment in the amount of \$86,339.79. Effective July 1, 1992, the Department of Veterans Affairs (VA) awarded the member monthly disability compensation payments. As required by statute, the VA withheld a total of \$69,071.84 from the member's entitlement to the disability compensation from July 1, 1992, through March 1, 2007.¹ Effective July 22, 2014, the member was placed on the military retired rolls and became entitled to receive military retired pay. As a result, recoupment of the gross amount of the SSB payment received was required by

¹Under 10 U.S.C. § 1174(h)(2), the VA was required to deduct from the member's disability compensation an amount equal to the total amount of the SSB payment he received, less the amount of Federal income tax withheld from such pay.

monthly installment from the member's retired pay. *See* 10 U.S.C. 1174(h)(1). Since the VA had already recouped \$69,071.84, the member was indebted \$17,267.95. In the appeal decision, the DOHA adjudicator concluded that the \$17,267.95 could not be considered for waiver because it did not represent an erroneous payment. The adjudicator explained that a claim arising from a properly paid separation payment which later must be recouped because of a member's receipt of retired pay, is not a claim arising from an erroneous payment which may be considered for waiver under 10 U.S.C. § 2774.

In his request for reconsideration, the member states that he should not have to repay the gross amount of the debt. He states that to require him to repay money for taxes on an amount that he never received is a tax on a loan against his retirement. He states that this action is not authorized by the Code of Federal Regulations, specifically 29[26] C.F.R. § 1.72. He continues to assert that the VA properly only withheld disability compensation equal to the net amount he received for the SSB. He also states that DOHA Claims Case No. 2010-WV-071601.2 (January 19, 2011), cited by the adjudicator in the appeal decision, is distinguishable from his case because it involved a National Guard member, not an officer who transitioned to the Army Reserves with no break in service. He contends that once he became a drilling Reservist, the SSB became a debt. He states that the SSB became a loan against his subsequent retirement, and if the government had treated the SSB as a debt instead of income, the Internal Revenue Service (IRS) would not have required the collection of any taxes. The member requests a refund of the taxes paid in June 1992 on the SSB.

Discussion

Under 10 U.S.C. § 1174, separation pay is a contingency payment to ease the re-entry into civilian life by members of the armed services involuntarily separated prior to becoming entitled to retired pay. *See* Comptroller General decision B-266193, Feb. 23, 1996. The statute requires "coordination" when a member who has received a separation payment later qualifies for retired or retainer pay or VA disability compensation. *See* 10 U.S.C. § 1174(h). Regarding coordination with retired pay, 10 U.S.C. § 1174(h)(1) provides in pertinent part as follows:

A member who has received separation pay . . . based on service in the armed forces, and who later qualifies for retired or retainer pay . . . shall have deducted from each payment of such retired or retainer pay an amount, in such schedule of monthly installments as the Secretary of Defense shall specify, taking into account the financial ability of the member to pay and avoiding the imposition of undue financial hardship on the member and member's dependents, until the total amount deducted is equal to the total amount of separation pay . . . so paid.

Under the law, Congress clearly did not intend members to receive both separation pay and retired pay for the same period of service. Therefore, a member who receives separation pay is required to repay it if he later qualifies for and receives retired pay. As for the VA only withholding an amount equal to the net amount of the SSB from his disability compensation, we note that the statutory language contained in 10 U.S.C. § 1174(h)(2) regarding a member who receives a separation payment and then receives VA disability compensation, specifically limits

the withholding to the total amount of separation pay “less the amount of Federal income tax withheld from such pay (such withholding being at the flat withholding rate for Federal income tax withholding, as in effect pursuant to regulations prescribed under chapter 24 of the Internal Revenue Code of 1986).” There is no such language set forth in 10 U.S.C. § 1174(h)(1). In fact, the pertinent regulation contained in the Department of Defense Financial Management Regulation (DoDFMR), clearly states that if a member who has received an SSB payment later qualifies for retired pay, DFAS shall recoup the gross amount of the SSB received at a monthly installment from each payment of retired pay. *See* paragraph 040802 of Volume 7B of Chapter 4 of the DoDFMR.

Under 10 U.S.C. § 2774, we have the authority to waive a claim of the United States against members or former members of the uniformed services for erroneous payments of pay and allowances if collection would be against equity and good conscience and not in the best interests of the United States. A debt cannot be considered for waiver unless the payment was erroneous when made. Section 2774(a) of title 10 specifically requires “an erroneous payment of any pay or allowances made . . . to or on behalf of a member or former member of the uniformed services” as a condition for applying the statute. In this case, the separation pay payment was proper when made. Therefore, the claim resulting from the required recoupment of the separation pay payment because of receipt of retired pay cannot be considered for waiver under 10 U.S.C. § 2774, because the debt did not arise from an erroneous payment. *See* DOHA Claims Case No. 2010-WV-071601.2, *supra*; and DOHA Claims Case No. 09082801 (September 21, 2009).

As explained above, our authority in this case is restricted to a consideration of whether the member’s debt may be waived under 10 U.S.C. § 2774. The situation involved here is analogous with the case in DOHA Claims Case No. 2010-WV-071601.2, *supra*. In that case, as here, the member separated from service and properly received separation pay. He subsequently retired and began receiving retired pay. Recoupment of the separation pay was required by 10 U.S.C. 1174(h). Since the separation pay was proper when paid, the resulting recoupment was not subject to recoupment under 32 U.S.C. § 716, the waiver statute applicable to National Guard members. The standards for waiver are the same under 10 U.S.C. § 2774, the waiver statute applicable to active duty and reserve members of the Uniformed Services. *See also* B-266193, *supra* (involving an active duty Warrant Officer who received separation pay and then became entitled to VA disability compensation).

The C.F.R. section the member cites is a Treasury Regulation and has no effect on our decision under the waiver statute. Even if we were able to consider the debt under the waiver statute, we believe that waiver would not be appropriate since the member knew once he retired he was obligated to repay the SSB he received. Further, we have consistently held that application of the tax laws to a member’s pay is a matter solely within the jurisdiction of the taxing authority, and a member’s tax liability over an overpayment does not permit partial waiver of an amount not otherwise appropriate for waiver. Thus, a member is indebted for both the amount paid to him and any amount paid to the tax authorities on his behalf. *See* DOHA Claims Case No. 09031701 (March 26, 2009); DOHA Claims Case No. 03121101R (March 31, 2004); and DOHA Claims Case No. 97090808 (September 15, 1997) *aff’d* Deputy General Counsel (Fiscal) (February 16, 2001).

Conclusion

The member's request for relief is denied, and we affirm the March 11, 2016, 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