

DATE: February 2, 2017

In Re:)

[REDACTED])

Claimant)

) Claims Case No. 2016-CL-112901.2
)
)

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

Arrears of pay representing unpaid retired pay at a member's death is subject to levy for delinquent federal taxes under 26 U.S.C. § 6321.

DECISION

The surviving spouse of a deceased member of the United States Army requests reconsideration of the December 28, 2016, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2016-CL-112901. In that case, this Office denied the surviving spouse's claim for the member's arrears of pay.

Background

The member retired on July 1, 1983, from the Army. The member designated that his arrears of pay be paid to his spouse. On January 19, 2016, the member died.

The member's surviving spouse claimed the arrears of pay. However, the Defense Finance and Accounting Service (DFAS) denied her claim because the member had an existing tax levy on his retired pay to satisfy his own tax burden. On March 2, 2015, the Internal Revenue Service (IRS) served a notice of levy for delinquent federal income taxes on the member's retired pay by notifying DFAS that the member had incurred a tax debt in the amount of \$55,140.44. On March 11, 2015, DFAS notified the member that the IRS had served a tax levy on his retired pay. DFAS established a monthly tax levy deduction in the amount of \$329.03 on the member's retired pay account effective April 1, 2015. During the period April 1,

2015, through December 31, 2015, deductions totaling \$3,290.30 were made from the member's retired pay to satisfy the tax levy. Therefore, when the member died there was a remaining balance of \$51,850.14 (\$55,140.44 - \$3,290.30) on the member's tax levy. DFAS subsequently determined that the amount of the member's arrears of pay for the period January 1, 2016, through January 19, 2016, was \$2,793.30. On March 16, 2016, DFAS issued payment to the IRS in the amount of \$2,793.30 to reduce the amount of the member's remaining tax levy.

The surviving spouse, through her attorney, appealed DFAS's decision to DOHA. The surviving spouse asserted that the arrears of pay was exempt from levy under 26 U.S.C. § 6334(a)(6) and (a)(10). She also alleged that the maximum levy on the arrears of pay was exceeded in violation of 26 U.S.C. § 6334(f). In the appeal decision, the DOHA adjudicator upheld DFAS's denial of the former spouse's claim for the arrears of pay. The adjudicator determined that § 6334(f) only applied to the monthly levy on the member's retired pay and not to the arrears of pay accruing upon the member's death. The adjudicator further explained that the member's retired pay was not exempt under § 6334(a)(6), because he was not a recipient of the Medal of Honor. The adjudicator found that the arrears of pay was not exempt under § 6334(a)(10). The adjudicator stated that this subsection made certain service-connected disability payments exempt from levy. However, the adjudicator noted that there was no evidence that the member had a service-connected disability.

In her reconsideration request, the surviving spouse claims the arrears of pay. She agrees that 26 U.S.C. § 6334(a)(1) makes certain service-connected disability payments exempt from levy. She states that her spouse did have a service-connected disability and attaches an April 16, 2007, letter from the Department of Veterans Affairs (VA) awarding the member full VA disability compensation because of his service-connected disabilities.

Discussion

It is a well-established rule that a claim may be allowed only for an expense authorized by statute or regulation. *See* DOHA Claims Case No. 2012-CL-070601.4 (August 31, 2015); and DOHA Claims Case No. 05021409 (March 30, 2005). When the language of a statute is clear on its face, the plain meaning of the statute will be given effect. *See* DOHA Claims Case No. 2011-CL-020701.2 (May 19, 2011); and DOHA Claims Case No. 05021409, *supra*. Statutory provisions with unambiguous and specific directions may not be interpreted in any manner that will alter or extend their meaning. The interpretation of a statutory provision, as expressed in the implementing regulations by the agency responsible for execution of the statute, is entitled to great deference and will be sustained and deemed consistent with Congressional intent unless found to be arbitrary, capricious, an abuse of discretion or contrary to the statutory purpose. *See* DOHA Claims Case No. 2011-CL-020701.2, *supra*; and DOHA Claims Case No. 2010-CL-071901.2 (August 31, 2010); and DOHA Claims Case No. 08020701 (February 28, 2008).

Under the relevant provisions of the Internal Revenue Code, to satisfy a tax deficiency, the Government may impose a lien on any "property" or "rights to property" belonging to the taxpayer. Section 6231 provides that if any person liable to pay any tax neglects or refuses to pay the same after demand, the amount shall be a lien in favor of the United States upon all

property and rights to property, whether real or personal belonging to the person. *See* 26 U.S.C. § 6321. A complementary provision, § 6331(a), states:

If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary [of the Treasury] to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property (except such property as is exempt under § 6334)) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax.

Section 6331(a) further provides that:

Levy may be made upon the accrued salary or wages of any officer, employee, or elected official, of the United States, the District of Columbia, or any agency or instrumentality of the United States or the District of Columbia, by serving a notice of levy on the employer (as defined in subsection 3401(d) of such officer, employee, or elected official.

Section 6334(a) exempts from levy certain property there enumerated. The list includes 13 categories of items. Subsection 6334(a)'s list is rendered exclusive by § 6334(c), which provides that no other "property or rights to property shall be exempt from levy . . ." The Supreme Court has determined that the language in §§ 6321 and 6331(a) is broad and reveals on its face that Congress meant to reach every interest in property that a taxpayer may have. *See Drye, v. United States*, 528 U.S.C. 49, at 56 (1999), *citing United States v. Nat'l Bank of Commerce*, 472 U.S.C. 713, 719-720 (1985).

The arrears of pay upon a member's death is not included in § 6334(a)'s list of exempt property. The member retired from the Army in 1983 and then began receiving retired pay. The IRS subsequently made assessments and in 2015 had a valid tax lien against all of the member's "property and rights to property" pursuant to 26 U.S.C. §§ 6321 and 6331. The IRS notified DFAS. Pursuant to applicable regulations, DFAS began deductions from the member's retired pay to satisfy the levy. *See* Volume 7B, Chapter 28 of the DoD Financial Management Regulation (DoDFMR). Although the VA awarded the member full disability compensation by decision dated March 26, 2007, any payments of disability compensation were made to the member by the VA. The member's retired pay was paid to him from the DoD Military Retirement Fund. The member's entitlement to retired pay terminated on the date of his death and his VA disability compensation terminated on the last day of the month before his death.¹ DFAS properly calculated the arrears of pay as the member's final prorated retired pay for the period January 1, 2016, through January 19, 2016. DFAS was required to collect any debt from his arrears of pay. *See* Volume 7B, Chapter 30 of the DoDFMR. DFAS properly made payment of the arrears of pay to the IRS. Therefore, under applicable law and regulations, there is no authority to allow payment to the member's spouse.

¹We note that the VA has recently announced immediate actions to identify and pay surviving spouses who are eligible to receive a deceased member's VA disability compensation for the month of the member's death. The surviving spouse should contact the VA in order to determine her eligibility. Any payments would be made by the VA. Information can be found on the VA's website at <https://www.va.gov/survivors/faqs.asp#FAQ6>.

Conclusion

For the reasons stated above, the claimant's request for reconsideration is denied. In accordance with Department of Defense Instruction 1340.21 ¶ E7.11, this is the final administrative action of the Department of Defense in this matter.

Signed: Catherine M. Engstrom

Catherine M. Engstrom
Chairman, Claims Appeals Board

Signed: William S. Fields

William S. Fields
Member, Claims Appeals Board

Signed: Ray T. Blank, Jr.

Ray T. Blank, Jr.
Member, Claims Appeals Board