

KEYWORDS: Waiver of Indebtedness

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.

CASENO: 2016-WV-090604.2

DATE: 12/29/2016

DATE: December 29, 2016

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| |) | |
| In Re: |) | |
| [REDACTED] |) | Claims Case No. 2016-WV-090604.2 |
| |) | |
| Claimant |) | |

**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 November 18, 2016, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claims No. 2016-WV-090604. In that case, this Office denied waiver of \$36,637.13 in overpayment of military retired pay.

Background

The member applied for disability compensation from the Department of Veterans Affairs (VA), and signed the VA Form 21-526, *Veteran's Application for Compensation or Pension*. Section VII of the VA Form 21-536 states the following:

When you file this application, you are telling us that you want to get VA compensation instead of military retired pay. If you currently receive military retired pay, you should be aware that we will reduce your retired pay by the amount of any compensation that you are awarded.

The member was subsequently awarded compensation from the VA, and began receiving it in September 2008.

On May 24, 2012, the member was placed in a retired military pay status effective February 14, 2012. Once the member received military retired pay, his military retired pay should have been reduced by the amount of compensation he was receiving from the VA. However, due to an administrative error, the Defense Finance and Accounting Service (DFAS) failed to reduce the member's retired pay by the amount of compensation he was receiving from the VA. As a result, the member was overpaid \$36,637.13 from February 14, 2012, through September 30, 2014.¹

In the appeal decision, the DOHA adjudicator denied waiver of \$36,637.13 because the member should have known that his retired pay was not being reduced by the amount of his VA disability compensation.

In his request for reconsideration, through his attorney, the member states that his situation is distinguishable from the case precedent cited by the adjudicator. He states that he did not have the information that would normally create a presumption that he should have known he was overpaid. He states that he does not have a copy of the VA Form 21-526. He states that he was told that some people are entitled to receive both disability compensation and retired pay. However, he does not have any written statements or other documentation reflecting that he was entitled to receive both. He asserts that the administrative delay in detecting the error strengthens his argument that it was reasonable for him to believe he was entitled to receive both. He contends that DFAS's delay in detecting the error makes it inequitable to collect the debt because the debt became much bigger than if it was detected much earlier and the review system was obviously not working to detect the error. Finally, he requests a copy of the VA Form 21-526.

Discussion

¹Specifically, on June 1, 2012, the member erroneously retroactively received retired pay in the amount of \$4,073.13 for the period February 14, 2012, through May 31, 2012. In addition, he erroneously received \$32,564.00 in retired pay during the period June 1, 2012, through September 30, 2014.

Under 10 U.S.C. § 2774, we have the authority to waive collection of erroneous payments to a member or former member of the uniformed services if repayment would be against equity and good conscience and not in the best interest of the United States, provided there is no indication of fraud, fault, misrepresentation, or lack of good faith on the part of the member. *See* Department of Defense Instruction 1340.23 (February 14, 2006). 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* Instruction ¶ E4.1.1. 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* Instruction ¶ E4.1.3. 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 the funds for eventual repayment to the Government. *See* Instruction ¶ E4.1.4.

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 should have known that he would not be permitted to receive full payment of retired pay while also receiving VA compensation. This is because 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 2012 after being awarded VA compensation in 2008, he was on notice that his military retired pay would be reduced by the amount of his VA compensation. We note that he should have verified his entitlement beginning with the issuance of the first retroactive payment of retired pay he received in June 2012 for the period February 2012 through May 2012. He 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. 2015-WV-040202.2 (June 29, 2015); DOHA Claims Case No. 2012-WV-021004.2 (March 30, 2012); and DOHA Claims Case No. 09083102 (September 2, 2009). While we recognize that there was an administrative delay in detecting the error, this does not change the fact that the member was on notice that when he began receiving retired pay, it would be reduced by the amount of disability compensation he was receiving. Although the member may have been given general assurances that he was entitled to receive both, as he acknowledges, he has nothing in writing detailing his entitlement to receive unreduced retired pay. Under the circumstances, he should have requested a detailed explanation of his entitlement and held the excess funds for eventual repayment until he received such explanation.

Finally, the member should request a copy of the VA Form 21-526 from the DFAS. DOHA is an appellate organization and receives its files from DFAS. DFAS maintains ownership of all records contained in waiver files.

Conclusion

The member's request for reconsideration is denied, and we affirm our appeal decision of November 18, 2016. In accordance with the Instruction ¶ E8.15, this is the final administrative action of the Department of Defense in this matter.

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