

December 28, 2000

In Re:

[Redacted]

Claimant

Claims Case No. 00100332

CLAIMS APPEALS BOARD DECISION

DIGEST

A retired member of the Air Force elected participation in Reserve Component Survivor Benefit Plan (RCSBP), but deductions from his retired pay were not made for over six years. The member should have been alerted to the error because no deduction for RCSBP premiums was shown on his retired pay statement. Further, he should have made inquiries regarding the language contained on his retired pay statement stating that no RCSBP election had been made. Since the member is thus not without "fault," waiver may not be granted. In addition, if the member died within the six years when premiums were not being deducted, his widow would have received an RCSBP annuity. Since the member received the benefit of RCSBP coverage for those six years, repayment of the unpaid premiums may not be waived.

DECISION

This is in response to an appeal of Defense Office of Hearings and Appeals (DOHA) Settlement Certificate 00080111, dated August 15, 2000, which denied the waiver request of a retired Air Force Reserve member. The member's debt arose when the Defense Finance and Accounting Service (DFAS), failed to deduct Reserve Component Survivor Benefit Plan (RCSBP) premiums from his retired pay.

Background

In 1978, the member received a Notification of Eligibility for Retired Pay at Age 60, notifying him that he was eligible to make an election under RCSBP.⁽¹⁾ His election form had to be submitted to the Air Reserve Personnel Center before October 1, 1979.⁽²⁾ He elected dependent coverage in the RCSBP on December 29, 1978.⁽³⁾ When the member received his letter of pending retirement at age sixty, the letter acknowledged that he had enrolled in the program and if he wanted to make any changes to his election, he could. Otherwise, his election would continue. He turned sixty years

old and became eligible to receive military retired pay on April 3, 1993. Due to an administrative error, the Retired Pay Division, DFAS, failed to deduct premiums from the member's retired pay during the period May 1, 1993, through December 31, 1999. The member's retired pay statements did not show a deduction for the RCSBP premiums. In addition, the member states that his monthly retired pay statements did state that no SBP election was reflected on the his account. The member admits in his waiver request that this should have been a "flashing red light." However, it was not until 1999, that the member contacted the Directorate of Retired Pay to confirm that the RCSBP coverage was established on his retired pay account. The Directorate of Retired Pay told him that there was no record that he had elected coverage under the program. The member enrolled in RCSBP during open enrollment and paid \$15,580.00 for "buy in" coverage. When the member discovered that there was a two-year waiting period for his wife to become an eligible beneficiary under the "buy-in" provisions, he searched his records and found the original RCSBP election form. When the member submitted this form to Retired Pay, they assessed the amount of the RCSBP costs that should have been deducted from his retired pay to be \$20,747.45. When the member's payment of \$15,580.00 was applied to this amount, the amount of his debt became \$5,167.45.

The member argues that the debt should be waived because he is not convinced that his wife would have been protected if he had died. He does not believe it is fair to charge him for coverage he labels as "non-existent."

Discussion

We have the authority under 10 U.S.C. § 2774 to waive collection of overpayments of pay and allowances to a member or former member of the uniformed services, the collection of which would be against equity and good conscience and not in the best interest of the United States. Waiver may not be granted if there is any indication of fault on the part of the member or former member in the accrual of the debt. The standard we employ to determine fault is whether a reasonable person, under the specific circumstances of the case, would or should know that he is receiving erroneous payments. If he knows or should know that he is being overpaid and fails to bring such overpayments to the attention of the proper authorities, he is at fault, and waiver is precluded. *See Standards for Waiver*, 4 C.F.R. § 91.5(b) (1996).

In the present case, the member elected full, immediate coverage for his dependent on December 29, 1978. He states that when he enrolled in the program, he knew there would be a cost to be paid when he retired. Prior to the member turning age 60, he received a letter acknowledging his election of RCSBP and notifying him that if he wanted to make any changes to his election, he had to submit the form at that time. He did not submit a change request because he did not wish to make any changes. The member also acknowledges receiving retired pay statements and noticing that they stated that no SBP election had been made. The member states that he did not question whether or not coverage was in effect because he thought the language in his retired pay statements meant that there was no request as to how his surviving spouse wished to be paid. We note that the annuity under RCSBP may only be paid in one way, in monthly payments to the beneficiary. *See* 10 U.S.C. § 1450. In addition, the language contained in his retired pay statements concerned "election," not payment of RCSBP. More importantly, his pay statements did not reflect that deductions were being made for RCSBP premiums. That should have alerted the member to the fact that he was being overpaid. Our decisions and those of the Comptroller General have stressed the importance of the payee's monitoring of his pay statements. *See* DOHA Claims Case No. 00032801 (April 21, 2000); DOHA Claims Case No. 98120401 (March 4, 1999); *John P. Rieder*, B-259199, Feb. 22, 1995; and *Roosevelt W. Royals*, B-188822, June 1, 1977. If the payee is provided information on his pay statement that would indicate an error, waiver of the resulting overpayment is precluded because he is at least partially at fault for not taking action to correct the error. *See John P. Rieder*, B-259199, *supra*. In this case, the member knew that he would have to start paying the costs of the RCSBP when he retired and that the cost would be deducted from his retired pay. The information contained in his retired pay statement should have alerted the member that an error existed. The member should have contacted DFAS in that regard. Since he did not do so, he is not without fault in the accrual of the debt, and therefore, waiver of the resulting debt is not appropriate. *See* DOHA Claims Case No. 99112916 (January 19, 2000).

In addition, we note that once a member has made the election to participate in RCSBP, participation is irrevocable and cannot be waived by the member. *See* 10 U.S.C. §1448(a)(4)(B). Therefore, even though due to an administrative error deductions were not made from the member's retired pay, the member benefitted from continued participation in the program. Under similar circumstances, we have held that it is not against equity and good conscience to require an employee to pay for benefit received or protection provided. ⁽⁴⁾ *See Colonel Alfred F. Streck, USAF (Retired)*, B-254265, Dec. 20, 1993; *Major Kenneth C. Krenek, USAF (Retired)*, B-251519, March 18, 1993; and cases cited therein.

Conclusion

We affirm the Settlement Certificate.

_____/s/_____

Michael D. Hipple

Chairman, Claims Appeals Board

_____/s/_____

Jean E. Smallin

Member, Claims Appeals Board

_____/s/_____

Catherine M. Engstrom

Member, Claims Appeals Board

1. Participation in the Survivor Benefit Plan (SBP) program is automatic for members of an active component who are married at the time they retired, unless they affirmatively elect not to participate prior to that time. *See* 10 U.S.C. § 1448(a)(2)(A). However, in the case of the reserve-component annuity, the married member must affirmatively elect to participate in the program. *See* 10 U.S.C. § 1448(a)(2)(B). If the reservist does not elect RCSBP, he has another opportunity to elect an annuity (SBP) at age sixty. At that point, participation is automatic unless he affirmatively elects,

with spousal concurrence, not to participate. *See* 10 U.S.C. § 1448(a)(2).

2. The pamphlet the member received to help him with his election stated: "Failure to return the application indicates you wish to defer making your election until age 60. If you decline coverage upon initial eligibility, another application will be forwarded to you approximately six months prior to the effective date of retired pay. If a married individual fails to submit the second application (age 60), by law the cost of maximum SBP participation will automatically be withheld from the monthly retired pay."

3. The member elected coverage under Option C on his SBP Election Certificate, DD Form 1883, which provided full and immediate, spouse-only coverage. This coverage provided an annuity beginning on the day after his date of death, whether before or after age 60.

4. If the member had died before he turned sixty, his spouse would have received RCSBP if she had provided proof of his election or if the Air Reserve Personnel Center had located such proof.