

DATE: October 25, 2000

In Re:

[Redacted]

Claims Case No. 00091208

CLAIMS APPEALS BOARD DECISION

DIGEST

A retired member of the United States Army Reserve applied for irregular retired pay and stated in his application that he was receiving compensation from the Department of Veterans Affairs (VA). However, the Defense Finance and Accounting Service erroneously failed to deduct an amount equivalent to the amount the member was receiving in VA compensation as required under 38 U.S.C. § 3105. Thereafter, VA granted a significant increase in compensation from \$87 per month to \$298 per month after several months of fluctuations above and below this latter amount. The member admits that he did not pay much attention to these changes and assumed that the proper adjustments would be made in accordance with his experience during Reserve service. The record indicates that the member had received VA compensation for a number of years and knew that he was not permitted to receive the full amount of both military pay and VA compensation for the same period of time. In these circumstances, the member had a duty to question the amount of retired pay he was receiving; waiver is not appropriate.

DECISION

A retired member of the United States Army Reserve (USAR) appeals the March 19, 1998, Settlement Certificate of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 97091523, in which DOHA sustained the Defense Finance and Accounting Service's (DFAS) denial of the member's waiver application with respect to the erroneous overpayment of retired pay.

Background

The record indicates that on October 15, 1954, the member enlisted in the United States Army. He was discharged on

October 6, 1956. The member subsequently served in the United States Army Reserve from October 6, 1957, through February 1, 1990. In December 1967, the member applied for and was awarded compensation from the Veterans Administration, now the Department of Veterans Affairs (VA). On June 21, 1995, the member attained the age of 60, and became eligible to receive irregular retired pay. However, due to administrative error, DFAS failed to reduce the member's retired pay to reflect the VA compensation.⁽¹⁾ In the Settlement Certificate, our Office pointed out, among other things, that the member was aware that his military pay was subject to reduction by the amount of compensation he was receiving from VA, and in this regard, the member had waived his VA compensation during periods he had performed military duty. Our Office also noted that the member was receiving retirement account statements showing that no deductions were being made to reflect VA compensation.

The member believes that he is the victim of someone else's mistake and that reimbursement is causing hardship to him and his family. The member explains that many years ago he had advised the Army of his VA compensation and that prior to his retirement his military pay had been adjusted to reflect the VA compensation. The member also points out that he had declared his VA disability compensation on his retirement application. He also states that after he learned about his debt from DFAS he telephoned a VA representative and was advised that his Army retirement was not noted in its electronic database. He explains that in May 1996, he received notice from VA that his disability annuity was changed to \$292 per month, retroactively to March 1, 1995, and \$298 per month retroactively to December 1, 1995. Then in June 1996, the member states that he received another letter from VA that changed his annuity to \$342 per month retroactive to October 1, 1995, \$349 per month retroactive to December 1, 1995, then \$298 per month effective July 1, 1996. The member then explains that he did not pay much attention to the award changes because it was his experience that during his military and civil service careers finance officials made monthly withholding deductions automatically with only minor errors.

Discussion

Under 10 U.S.C. § 2774, we have the authority to waive collection of erroneous payments of pay or allowances from members of the Uniformed Services if collection 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 or former member. *See Standards for Waiver*, 4 C.F.R. § 91.5(b) (1996). By itself, the fact that erroneous payments were made due to administrative error does not entitle the member to waiver. *See DOHA Claims Case No. 99033117* (April 15, 1999); and *Lieutenant (JG) Larry L. Butler, USN (Retired)*, B-196548, Jan. 23, 1980. The legal definition of "fault" does not imply any ethical lapse on the part of the member or former member. It merely indicates that he is not entirely without responsibility for the resulting overpayment and that therefore the equitable remedy of waiver is not available to him. The standard we employ to determine fault is that of a reasonable person; if such a person knows or should know that he is receiving money to which he is not entitled, he is at fault if he fails to bring the excess payment to the attention of the appropriate authorities. In such a situation, the member does not acquire title to the excess amounts and has a duty to hold the excess for eventual repayment to the government. *See DOHA Claims Case No. 99012606* (March 31, 1999).

We accept for purposes of this appeal that the government (the Army, DFAS and/or VA) did not properly process information about the member's retirement that may have prevented the occurrences of erroneous overpayments; *i.e.*, payment of the full amount of the retired pay without reduction to reflect the VA compensation during the same period of time. However, in the present case, the member was aware of the limitation preventing receipt of both military pay and VA compensation up to the amount of the VA compensation. The member pointed out that he had advised the Army of his VA compensation when he filed his application for retired pay. Our Settlement Certificate noted that his retired pay account statements failed to indicate any offset for the VA compensation. The member knew that he had experienced a substantial increase and fluctuations in his VA compensation, and he admits that he never paid much attention to them.⁽²⁾ Based on this record, we believe that the member should have questioned his right to the full,

unreduced amount of retired pay, and brought this concern to the attention of the proper authority. He shares some of the fault in this matter. For reasons mentioned above, where a member is partially at fault, he cannot be granted a waiver. *See Staff Sergeant James S. Gannon, USA, Retired, B-200919, Mar. 27, 1981, which our Office cited in its Settlement Certificate. Compare also Petty Officer Harvey B. Lease, USN, Retired, B-209306, ar. 24, 1983.*

Finally it is well-established that personal or family financial hardship is not a basis for waiver. *See DOHA Claims Case No. 00082301 (October 4, 2000); DOHA Claims Case No. 97071007 (July 21, 1997); and Staff Sergeant James S. Gannon, USA, Retired, supra.* We note, however, that DFAS has the authority to adjust the member's repayment schedule if the member requests the adjustment and provides sufficient justification.

Conclusion

We affirm the Settlement Certificate.

Signed: Michael D. Hipple

Michael D. Hipple

Chairman, Claims Appeals Board

Signed: Christine M. Kopocis

Christine M. Kopocis

Member, Claims Appeals Board

Signed: Jean E. Smallin

Jean E. Smallin

Member, Claims Appeals Board

1. 38 U.S.C. § 3105 provides that a member who receives service retired pay, and who would be eligible to receive VA compensation except for his retired pay, shall be entitled to receive the VA compensation upon the filing by the member of a waiver of so much of his retired pay as is equal to the amount of VA compensation. The military department shall notify VA of the receipt of the waiver, the amount of waiver, and the effective date of the reduction in retired pay.

2. As indicated above, the member's VA compensation jumped from \$87 per month to a final amount of \$298 after the fluctuations.