

August 7, 2001

In Re:

[Redacted]

Claimant

Claims Case No. 01070906

CLAIMS APPEALS BOARD DECISION

DIGEST

A member of the United States Army Reserve applied for disability compensation from the Department of Veterans Affairs (VA) in 1991. When he attained the age of sixty in 1999 and began receiving reserve retired pay, the retired pay should have been reduced by the amount of the VA compensation, but was not. Because the VA application form states that receipt of VA compensation constitutes a waiver of the same amount of retired pay, the member should have expected his retired pay to be reduced by the amount of the VA compensation. When the reduction was not made, he should have contacted the proper authorities to report the omission. Since he did not do so, he is partially at fault in the accrual of the debt, and waiver is not appropriate.

DECISION

This is in response to an appeal of Defense Office of Hearings and Appeals (DOHA) Settlement Certificate, DOHA Claim No. 01052905, dated June 19, 2001, which denied the waiver request of a retired member of the Army Reserve. The retired member's debt arose when his reserve retired pay was not reduced by the amount of his disability compensation from the Department of Veterans Affairs (VA).

Background

The retired member applied for VA disability compensation on December 12, 1991, and his application was approved. On July 2, 1999, he reached sixty years of age and became entitled to reserve retired pay. The reserve retired pay should have been reduced by the amount of his VA disability compensation, but from July 1999 through October 2000 no reduction was made. This error caused an overpayment of \$1,554.80. ⁽¹⁾ In our Settlement Certificate we said that the retired member should have known that his reserve retired pay should have been reduced by the amount of his VA disability compensation. The retired member argues that the Defense Finance and Accounting Service (DFAS) was

responsible for the overpayment and that he should not be punished for DFAS's error. He contends that he did not know that his reserve retired pay should have been reduced by the amount of his VA disability compensation.

Discussion

Under 10 U.S.C. § 2774, we have the authority to waive collection of erroneous payments to a military member 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. *See Standards for Waiver*, 4 C.F.R. § 91.5 (1996). In this context the legal definition of "fault" does not imply a moral lapse on the part of the member. It merely indicates that he is not entirely without responsibility in the accrual of the debt and therefore the equitable remedy of waiver is not available to him. The standard we employ to determine fault is whether a reasonable person would or should have known that he was receiving payments in excess of his entitlements. We consider fault to exist if, in light of all the circumstances, the member should have known that an error existed and taken action to have it corrected. Our decisions and those of the Comptroller General indicate that waiver is not appropriate when a member knew or should have known that he was being overpaid. *See* DOHA Claims Case No. 00091208 (October 25, 2000); and *Staff Sergeant James S. Gannon, USA, Retired*, B-200919, March 27, 1981. The fact that the debt occurred through administrative error does not entitle the member to waiver. *See* DOHA Claims Case No. 00091208, *supra*.

In the case before us, the member signed an application for VA compensation on December 12, 1991.⁽²⁾ Above the applicant's signature is a block which reads as follows: "NOTE: Filing of this application constitutes a waiver of military retired pay in the amount of any VA compensation to which you may be entitled..." Thus, the member is considered to have been on notice that when he became entitled to reserve retired pay it would be reduced by the amount of his VA disability compensation. In July 1999 he received a letter explaining the calculation of his gross monthly reserve retired pay and the amounts of all deductions to be made from it.⁽³⁾ When no deduction was listed for VA compensation, he should have known that he was being overpaid. He did not acquire title to the amounts paid in excess of his entitlements, and he had a duty to bring the error to the attention of DFAS. Since he did not do so, he is considered to be at least partially at fault in the accrual of the debt, and waiver cannot be granted. *Id.* The fact that DFAS was also at fault does not lessen the member's fault. *See* DOHA Claims Case No. 00091208, *supra*; and DOHA Claims Case No. 98112018 (January 11, 1999).⁽⁴⁾ While the member argues that he should not be punished for DFAS's error, we do not view the member's repayment to DFAS of money to which he was not entitled as a punishment. On the contrary, allowing the member to keep the overpayments would constitute an unwarranted windfall. *See* DOHA Claims Case No. 98112018, *supra*.

Conclusion

We affirm the Settlement Certificate.

/s/

Michael D. Hipple

Chairman, Claims Appeals Board

/s/

Jennifer I. Campbell

Member, Claims Appeals Board

/s/

Jean E. Smallin

Member, Claims Appeals Board

1. Due to a typographical error, the Settlement Certificate erroneously stated that the period of overpayment was July 1997 through October 2000. The amount of the overpayment stated in the Settlement was correct.
2. We enclose a copy of the application for the member.
3. We enclose a copy of the letter for the member.
4. DOHA Claims Case No. 98112018 involves a civilian employee who requested waiver under 5 U.S.C. § 5584. The waiver standards for civilian employees under 5 U.S.C. § 5584 are the same as for military members under 10 U.S.C. § 2774. While the employee's debt arose from a step increase, the analysis involves the same principles as the case before us.