

KEYWORDS: waiver of indebtedness; VA compensation

DIGEST: A retired member of the United States Army Reserve applied for irregular retired pay in July 2000 without stating in his application that he was receiving compensation from the Department of Veterans Affairs (VA). Due to administrative error, no offset was taken against his retired pay as required by statute until after he had received \$22,809.39 in erroneous overpayments (for the period June 18, 1999, through November 30, 2001). The record also indicates that when the member applied for VA compensation in October 1997, he was conspicuously advised in writing in the application that the “[f]iling of this application constitutes a waiver of military retired pay in the amount of any VA compensation to which you may be entitled.” In these circumstances, the member should have known that his retired pay would be offset by the VA compensation to which he was entitled, and waiver is not appropriate.

CASENO: 03041804

DATE: 4/24/2003

DATE: April 24, 2003

)	
In Re:)	
[Redacted])	Claims Case No. 03041804
)	
Claimant)	

CLAIMS APPEALS BOARD DECISION

DIGEST

A retired member of the United States Army Reserve applied for irregular retired pay in July 2000 without stating in his application that he was receiving compensation from the Department of Veterans Affairs (VA). Due to administrative error, no offset was taken against his retired pay as required by statute until after he had received \$22,809.39 in erroneous overpayments (for the period June 18, 1999, through November 30, 2001). The record also indicates that when the member applied for VA compensation in October 1997, he was conspicuously advised in writing in the application that the “[f]iling of this application

constitutes a waiver of military retired pay in the amount of any VA compensation to which you may be entitled.” In these circumstances, the member should have known that his retired pay would be offset by the VA compensation to which he was entitled, and waiver is not appropriate.

DECISION

A retired member of the United States Army Reserve appeals the November 18, 2002, Settlement Certificate of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 02100707, in which DOHA sustained the decision of the Defense Finance and Accounting Service (DFAS) to deny waiver of an erroneous overpayment of \$22,809.39 of retired pay to the member.

Background

The record shows that on October 20, 1997, the member applied for disability compensation from the Department of Veterans Affairs (VA). He signed VA Form 21-526 which noted in large print just above the certification and signature blocks that the “[f]iling of this application constitutes a waiver of military retired pay in the amount of any VA compensation to which you may be entitled.” The member stated that he received a favorable compensation decision from VA dated April 16, 1998. The member also indicated that he separated from the service on October 20, 1997.

On July 6, 2000, the member applied for irregular retired pay and signed DD Form 2656.¹ The member did not complete Block 12 of this form, which applied to members or former members of the Reserve components not on active duty retiring at age 60, and which specifically asked the member whether he was receiving VA compensation. During the period June 18, 1999, through November 30, 2001, the member was not entitled to receive military retired pay because his VA compensation was greater than his military retired pay.² Due to administrative error, the member erroneously received military retired pay during this period.

The Settlement Certificate notes that the member had stated that he was not aware of the VA offset requirements and suggested that waiver should be granted because the erroneous overpayment was the result of administrative error. On appeal, the member attempts to

¹The member reached his 60th birthday on June 18, 1999, and he was placed on the retired list as of that date.

²Under 38 U.S.C. § 5305, a retired member of the Uniformed Services must waive receipt of his retired pay in an amount equal to any compensation he is otherwise eligible to receive from the Secretary of Veterans Affairs as a condition precedent to receipt of VA compensation.

distinguish between his situation and the situations set forth in prior decisions cited in DOHA Claims Case No. 01070906 (August 7, 2001), an authority cited in the Settlement Certificate. He contends that his case is distinguishable from DOHA Claims Case No. 00091208 (October 25, 2000) and Comptroller General decision B-200919, Mar. 27, 1981, because he did not know he was receiving erroneous payments and had received counseling from a named individual VA state representative who advised him to file for retired pay. He distinguishes his situation from DOHA Claims Case No. 98112018 (January 11, 1999), *aff'd* by the Deputy General Counsel (Fiscal) on April 4, 2001, in that the employee in 98112018 was notified of the error prior to overpayment, while he was not notified until well after the erroneous overpayment was made.

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). As the Settlement Certificate indicates, by itself, the fact that erroneous payments were made due to administrative error does not entitle the member to waiver. 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. *See DOHA Claims Case No. 00091208, supra*. Here, the member specifically admits in his appeal "to being partly at fault," and the record supports such a finding.

For purposes of this appeal, we assume that the government (the Army, DFAS and/or VA) did not properly process information about the member that may have prevented the occurrences of erroneous overpayments. For example, it appears to us that the Army should have returned the member's DD Form 2656 and directed him to complete Block 12 because he was no longer on active duty. On the other hand, the member declined to fill in Block 12 of the DD Form 2656 despite its obvious relevance to his situation. The Settlement Certificate finding that the member may have avoided the erroneous overpayment if he had responded to Block 12 appears to be reasonable because completion of Block 12 would have triggered procedures to limit his retired pay. Moreover, as explained above, VA Form 21-526 noted, in prominent type just above the signature and certification blocks, that this application constitutes a waiver of military retired pay in the amount of any VA compensation. The member's denial of knowledge cannot overcome such objective contrary evidence. Based on this record, the member should have questioned his right to receive the retired pay involved here, and he should have brought this concern to the attention of the proper authority. As the member agrees, he shares some of the fault in this matter. Where a member is partially at fault, we cannot grant a waiver. *See B-200919, Mar. 27, 1981, which is cited in DOHA Claims Case No. 00091208, supra*.

The member says that he did bring this to the attention of his state VA representative, and

he names that representative. He says that the representative advised him to file for the retired pay. Assuming, without deciding, that the representative advised him, the member has not adequately supported a basis for waiver. Our decisions and those of the Comptroller General have consistently held that there is no basis for waiver based on reliance on incorrect advice unless the official(s) providing the advice are identified and the member's version of the events is corroborated in the written record by pay and disbursing officials with evidence of his statement(s) to them and their statement(s) to him. *See* DOHA Claims Case No. 02120917 (December 20, 2002) and the decisions cited therein. Such a record does not exist here. The VA representative is not a pay or disbursing official; his advice is not binding on the Department of Defense; and even if it was, we do not know what the member told him and what he told the member.³

In this case the member named the individual who gave him erroneous advice, otherwise the facts here are essentially indistinguishable from B-200919, *supra*. The member's position in DOHA Claims Case No. 00091208, *supra*, may be even more meritorious than the member's position here because the member in that case advised the Army of his VA compensation when he filed his application for retired pay. DOHA Claims Case No. 98112018 is generally supportive of the Settlement Certificate in that it finds that a member or employee is deemed to know the contents of official documents pertaining to him like the Notification of Personnel Action (Standard Form 50) in that claim and the DD Form 2656 and VA Form 21-256 in this case. As in each of these three decisions, the member here was specifically advised or alerted before he received any retired pay, via the DD Form 2656 and the VA Form 21-256, that his retired pay was affected by VA compensation.

Conclusion

We affirm the Settlement Certificate.

Signed: Michael D. Hipple

Michael D. Hipple
Chairman, Claims Appeals Board

³Although it is speculation on our part, there are valid reasons to file an application for retired pay even though the total amount of retired pay is offset by current VA compensation. At some future point, retired pay may exceed VA compensation and presumably the member would be entitled to the difference. Perhaps this is the reason why the representative may have advised the member to file his application for retired pay, but, if so, this should not be misunderstood to mean that the member's retired pay is free from offset by any VA compensation to which the member is entitled.

Signed: William S. Fields

William S. Fields
Member, Claims Appeals Board

Signed: Catherine M. Engstrom

Catherine M. Engstrom
Member, Claims Appeals Board