

March 17, 2004

In Re:

[Redacted]

Claimant

Claims Case No. 04031001

CLAIMS APPEALS BOARD DECISION

DIGEST

When a service member is aware or should be aware that he is receiving payments in excess of his entitlements, he does not acquire title to the excess amounts and has a duty to hold them for eventual repayment.

DECISION

This decision responds to an appeal of Defense Office of Hearings and Appeals (DOHA) Settlement Certificate, DOHA Claim No. 03121905, dated January 14, 2004, which granted in part and denied in part a service member's application for waiver of an erroneous overpayment of active duty pay.

Background

The record shows that the claimant is a member of the United States Air Force who retired on November 12, 2002. At that time, he was entitled to receive a final separation payment in the net amount of \$949.40. However, he did not receive that final separation payment, but instead received active duty pay on November 15, 2002, in the amount of \$3,003.37. Therefore, because the member was only entitled to receive \$949.40, he was overpaid \$2,053.97.

The record further shows that the member was not removed from the active duty pay system until December 2002. As a result, he erroneously received active duty pay through December 30, 2002, causing an additional overpayment of \$8,530.01. Thus, the total claim against the member was \$10,583.98. When the member received active duty pay on December 15, 2002, he made a verbal inquiry to appropriate officials and was advised that they were in the process of balancing the books. He did not pursue the matter further or request any written documentation as to his entitlements.

In the Settlement Certificate, our Office determined that the member acted in good faith in accepting the first overpayment resulting from his erroneously receipt of active duty pay on November 15, 2002, and waived \$2,053.97 of his debt. We denied waiver with respect to the \$8,530.01 overpayment resulting from the erroneous payment of active duty pay from November 16, 2002, through December 30, 2002, because the member knew or should have known that he was not entitled to that pay and should have pursued the matter. In the meantime, he should have retained the overpayment for refund to the government. As part of the determination, our Office rejected the member's claim that he was unable to handle his financial affairs due to medical incapacity during the period of the overpayment (November 2002 through December 2002) because the member did not provide any documentation in support of that assertion.

On appeal, the former member seeks reversal of the Settlement Certificate based on his claim that he was unable to handle his financial affairs due to medical incapacity during the period of overpayment and provides medical documentation for our review.

Discussion

Under 10 U.S.C. § 2774, this Office may waive collection of overpayments of pay and allowances to a member of the uniformed services, when collection would be against equity and good conscience and not in the best interest of the United States. *See Standards for Waiver*, 4 C.F.R. § 91.5(b) (1996). However, a waiver cannot be granted if there is any indication of fraud, misrepresentation, fault or lack of good faith on the part of the member, or any other person having an interest in obtaining the waiver. In our decisions, we must apply the reasonable person standard. In other words, if a member knows or should have known 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. Further, the member is obligated to hold erroneous payments for eventual repayment to the government. *See DOHA Claims Case No. 03102401* (October 28, 2003) citing *DOHA Claims Case No. 01111311* (November 30, 2001) and *B-217914*, June 25, 1986. While we recognize that the erroneous payments in the instant case were made due to an administrative error, that fact, by itself, does not entitle a former member to waiver. *Id.*

A reasonable person of the member's rank and years of service would not expect to receive active duty pay from a military service after retirement. However, we have previously held that waiver may be appropriate where the member can establish by clear and convincing evidence, in the form of medical records or other proof, that he was in such poor health that it was unlikely that he knew or could have known of the overpayment, or that he was otherwise unable to attend to ordinary financial affairs. *See id.* In this case, the member has not met that burden.

The medical documentation which the former member has submitted with his appeal shows that during the period of the overpayment (November 2002 through December 2002), the former member was suffering from multiple sclerosis (MS). However, that evidence is contradictory in so far as it relates to the issue in this case.

There is a December 15, 2003, letter from one physician which indicated that the member was not competent to make decisions about his personal and financial affairs, that a guardian should be appointed for him, and that he has not been competent to make those decisions since at least January 2002. But that latter conclusion appears to be in conflict with earlier progress notes from that same physician: (1) a February 26, 2002, report which noted that the member continued to work full-time, and that he had been doing well and had not experienced any relapses of his MS; (2) an August 30, 2002, report which noted that the member had regained some sensibility, alertness and short-term memory skills, and that his symptoms were stable; (3) an October 29, 2002, report which noted that the member's MS had been stable and that he was alert and oriented with fluent speech; and (4) a February 3, 2003, report which noted the member had declined slightly but not much. Additionally, the documentation included an October 1, 2003, medical evaluation from a different physician which stated that the member had no disorders of thought form or thought content; that his insight and judgment appeared to be fair; and that his level of service connected disability was 50%. There was no evidence in the record that a guardian had ever been sought or appointed for the member, that he had had prolonged periods of hospitalization, or that he had neglected or failed to attend to other financial responsibilities he might have had.

In light of the foregoing, we conclude that the records which the member has submitted are insufficient to establish by clear and convincing evidence that during the period in question he was in such poor mental or physical health that it

was unlikely that he knew or could have known of the overpayment, or that he was otherwise unable to attend to ordinary financial affairs. *Compare* B-217914, June 25, 1986.⁽¹⁾ On the contrary, the record shows that the member both knew about the overpayment and, in fact, was sufficiently alert and healthy to verbally bring it to the attention of appropriate authorities in December 2002. Even if his medical condition had subsequently deteriorated to the point where he could no longer follow-up on his initial inquiry, he had a duty to retain the overpayment for repayment to the government pending final resolution of the matter.

Conclusion

We affirm the Settlement Certificate.

/s/
Michael D. Hipple
Chairman, Claims Appeals Board

/s/
William S. Fields
Member, Claims Appeals Board

/s/
Jean E. Smallin
Member, Claims Appeals Board

1. In that case, the evidence established that the waiver applicant had been ill since before the erroneous payments began, and that his illness and the medications prescribed for him had "seriously affected him physically and mentally over the years." During the period of the overpayments he had also suffered "blackouts, strange behavior, memory loss and severe depression," had been hospitalized twice for mental problems, and had been rated by the Veterans Administration as "100 percent disabled due to physical and nervous disorders."