

DATE: June 17, 2004

In Re:

[REDACTED]

Claimant

Claims Case No. 04061502

CLAIMS APPEALS BOARD DECISION

DIGEST

Due to administrative error, a member's retired pay was not reduced by the amount of the compensation he was receiving from the Department of Veterans Affairs(VA). When he applied for VA compensation, the member was advised in his written application that the filing of that application constituted a waiver of military retired pay in the amount of any VA compensation to which he may be entitled. Under such circumstances, the member knew or should have known that he was not entitled to the full amount of his retired pay.

DECISION

A retired member of the United States Army National Guard appeals the May 18, 2004, Settlement Certificate of the Defense Office of Hearings and Appeals (DOHA) that sustained the Defense Finance and Accounting Service's (DFAS) denial of the member's application for waiver of a debt to the government that arose when the member was erroneously overpaid retired pay.

Background

The record shows that on September 1, 1993, the member applied for disability compensation from the Department of Veterans Affairs (VA), and he signed VA Form 21-525 (*Veterans Application for Compensation or Pension*) stating that "filing 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 was awarded compensation from the VA. On September 10, 2001, the member completed DD Form 2656 applying for irregular military retired pay, and he became eligible to receive it when he reached his 60th birthday on November 21, 2001. Although the member indicated on the DD Form 2656 that he was receiving compensation from the VA, DFAS failed to reduce his military retired pay by the amount of the compensation

he was receiving from the VA. As a result, the member was overpaid \$24,806.67 from November 21, 2001, through December 31, 2003.

In asking DFAS to reconsider its decision, the member noted that in his application for retired pay he had properly advised them that he was receiving VA compensation. He also stated that he was not aware that he could not receive both VA compensation and full retired pay at the same time. Finally, he argued that DFAS should bear the burden of the mistake due to administrative error.

In his appeal of the Settlement Certificate, the member stated that he was not aware of VA Form "21526" at the time that he retired as an employee from the VA Hospital at the end of 1999. The member also stated that he contacted his local National Guard headquarters and was advised by a named official to apply for retired pay even if he was then receiving VA compensation based on 50 percent disability because "the worst that the Guard would say would be no." Again, the member states that he did not try to commit fraud or lie on his retired pay application. He also indicates that he is now "a 100 percent Service Connected Veteran" who holds a Bronze Star, a Purple Heart and various other combat awards. The member included correspondence from the VA Hospital where the member had been employed until the end of 1999 and continues to be a patient. A staff psychologist notes that the member is 100 percent disabled due to a combination of Posttraumatic Stress Disorder (PTSD), hearing loss, tinnitus, and unemployability. The member ceased working due to a gradual escalation of his chronic symptoms and erosion of positive coping despite on-going medication management and therapeutic support.

Discussion

Under 32 U.S.C. § 716, we have the authority to waive a claim for an erroneous payment of pay and allowances to a member or former member of the Service if payment would be against equity and good conscience and not in the best interest of the United States, provided that there is no evidence of fraud, fault, misrepresentation, or lack of good faith on the part of the member or former member. 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 any 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, waiver is precluded. *See Standards for Waiver*, 4 C.F.R. § 91.5(b) (1996).

Preliminarily, neither our Office nor DFAS (so far as we can determine from the record), has suggested that the service member was at any time less than honest with the government. We have no reason to doubt the member's version of the facts, and for purposes of this appeal, we accept his statements at face value. We commend his service to the United States. However, in deciding matters of this nature, we are bound by legal precedent and an objective evaluation of the record evidence.

While we accept the member's position that the government erred in paying the full amount of retired pay, it is well-established that a service member is not entitled to waiver as a matter of right whenever he receives an overpayment as a result of an administrative error. *See DOHA Claims Case No. 97012103* (June 26, 1997). When a member is aware or should be aware that he is not entitled to payment, he must be prepared to return such a payment when requested by the government. An objective analysis of the record evidence in this case indicates that the member should have been aware that he was not entitled to full retired pay.

The member was aware (or should have been) when he completed his application for VA compensation in 1993 that he was waiving that portion of his retired pay which equaled the amount of the compensation he was awarded by the VA. The member may honestly believe that he did not know that he could not receive the full amount of his military retired pay concurrently with VA compensation, perhaps because he may have forgotten what he had signed, but the record indicates that on September 1, 1993, he applied for disability compensation acknowledging that the "filing of this application constitutes a waiver of military retired pay in the amount of any VA compensation to which you may be entitled." In his appeal, the member described a discussion he had with the National Guard official with respect to his

right to retired pay, which would have suggested to a reasonable person that there was at least some uncertainty about his retired pay entitlement. We believe a reasonable person in such a circumstance would have pursued the issue with the pay office, seeking a complete explanation of his entitlement. Under the waiver statute, the member is considered partially at fault for accepting these payments and not continuing to question their calculation.

The appeal suggests that the member was under a disability during the period he received the overpayments. In prior decisions by our Office and the Comptroller General, we have recognized that waiver may be granted in extraordinary situations when the waiver applicant's mental condition was so impaired as to render him unable to attend to his ordinary financial affairs or when any type of guardianship was thought necessary. *See, e.g.*, B-217914, June 25, 1986. The record here is very sparse, but based on what is provided it does not demonstrate by clear and convincing evidence that the member was in such poor health that it was unlikely that he knew or could have known of the overpayments, or that he was otherwise unable to attend to ordinary financial affairs. *See, e.g.*, DOHA Claims Case No. 03102401, October 28, 2003.

Finally, while the member's appeal confuses aspects of his military and civilian employee service, the record indicates that he is under a 100 percent disability for military service purposes. Accordingly, he was advised by DFAS on February 23, 2004, that he was eligible prospectively, starting this year, for a restoration of the waived portion of retired pay to obtain VA compensation. *See* DFAS's web site explaining Concurrent Disability Pay (CRDP) information at www.dfas.mil/money/retired/cdpinfo.htm. The member's entitlement to CRDP would have the practical effect of offsetting some of the negative financial impact of repayment of this debt, and the member may wish to examine his possible eligibility for other entitlements on a retrospective basis. ⁽¹⁾ Our Office has no jurisdiction to determine the member's eligibility to these entitlements, and he should seek competent assistance to explain how these benefits may impact him.

Conclusion

We affirm the Settlement Certificate.

Signed: Michael D. Hipple

Michael D. Hipple
Chairman, Claims Appeals Board

Signed: William S. Fields

William S. Fields
Member, Claims Appeals Board

Signed: Jean E. Smallin

Jean E. Smallin
Member, Claims Appeals Board

1. The member's circumstances suggest that he should consult the Army's web site for Combat Related Special Compensation www.crsc.army.mil. Generally, a member must have a disability that is considered to be combat-related, and if he is a Reserve component member, he must have 7,200 retirement points. Other requirements apply. Additional entitlements may be available to the member.