

October 26, 2004

In Re:

[Redacted]

Claimant

Claims Case No. 04100402

CLAIMS APPEALS BOARD DECISION

DIGEST

A member's reserve retired pay was not reduced by the amount of the compensation he was receiving from the Department of Veterans Affairs (VA). Upon signing an application for VA Compensation, the member is considered to be on notice that when he became entitled to retired pay it would be reduced by the amount of his VA disability compensation. Therefore, waiver of the overpayment is not appropriate because he knew or should have known that he was not entitled to the full amount of his retired pay, and therefore, had the responsibility to bring the matter to the attention of the appropriate officials, and to persist in questioning them until he received a thorough explanation of his entitlement.

DECISION

A retired member of the United States Air Force Reserve appeals the July 16, 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 in the amount of \$7,597.40, that arose when the member was erroneously overpaid reserve retired pay.

Background

On February 19, 1998, the member applied for disability compensation from the Department of Veterans Affairs (VA), and signed VA Form 21-526 (*Veteran's Application for Compensation or Pension*). Directly above the member's

signature was a note stating, "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 November 6, 2002, the member applied for reserve retired pay by completing DD Form 2656. He became eligible to receive it when he turned 60 years old on February 19, 2003. Although the member indicated on the DD Form 2656 that he was receiving compensation from the VA, DFAS failed to reduce his reserve retired pay by the amount of the compensation he was receiving from the VA. As a result, the member was overpaid \$7,597.40, from February 19, 2003, through February 29, 2004.

The member asserts on appeal that he signed VA Form 21-526 five years ago and did not remember the form's reference to retired pay being subject to reduction by the amount of his VA compensation. He states that even if he had recently seen the note, he would have followed the same process he went through to ascertain if it applied to his reserve retired pay. He mentions that there are frequent changes that may amend a five-year old document, and cites as an example the congressional phasing out of the VA waiver. In addition, he does not understand why the adjudicator wrote in the Settlement Certificate that he should have pursued the matter further when he alerted the appropriate officials at both DFAS and the VA a total of five times regarding the offset of his reserve retired pay and was assured that his VA compensation had no effect on his retired pay. Therefore, he believes his situation to be distinguishable from DOHA Claims Case No. 01070906 (August 7, 2001), because he states that he did "contact the proper authorities."

Discussion

Under 10 U.S.C. § 2774, we have the authority to waive collection of erroneous payments to a member or former member of the uniformed service 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. 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 or former member should have known that an error existed and taken action to have it corrected. In such situations, waiver is precluded.

In this case, the member was aware or should have been aware when he completed his application for VA compensation in 1998 that he was waiving that portion of his retired pay which equaled the amount of the compensation he was awarded by VA. Although the member states that he did not know that he could not receive the full amount of his reserve retired pay concurrently with VA compensation because he forgot what he signed, the record indicates that on February 19, 1998, 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." Therefore, the member is considered to have been on notice that when he became entitled to retired pay it would be reduced by the amount of his VA disability compensation. When a member is aware or should be aware that he is being overpaid, he must be prepared to return the excess amount when requested to do so by the government. The record evidence in this case indicates that the member should have been aware that he was not entitled to full reserve retired pay.

Even though, as the member states in his appeal, he signed VA Form 21-526 in 1998, five years before he began receiving his reserve retired pay, he actually applied for reserve retired pay in November 2002 by completing DD Form 2656. At that time, he states that he immediately called a regional office of the Department of Veterans Affairs to inquire how his VA compensation would be affected by his receipt of reserve retired pay. He was told that it would be automatically affected when his reserve retired pay started. When his reserve retired pay started, the member states that he began contacting personnel at DFAS. In February 2003 the member suspected an error when he received a letter from DFAS, detailing his gross monthly reserve retired pay and the amounts of deductions to be made from it, because no deduction was listed for VA compensation. He immediately called the DFAS Retirement Contact Center and was told by a customer service person, sounding "somewhat unsure," that VA compensation was not taken out of reserve retired pay. Therefore, he called again and was told that any action would be automatic. However, the member states that no VA compensation deduction occurred as evidenced on his retired pay statement and thus, he assumed that the

amount he received was correct. The member's actions in calling both the VA and DFAS on at least three different occasions (during the period November 2002 to April 2003) show that he suspected an error with regard to his reserve retired pay. We believe a reasonable person in such circumstances would have continued to pursue the matter with the pay office, especially since the VA compensation deduction did not show up on his reserve retired pay statement until nine months after he began receiving the pay. It was not until November 2003 when his reserve retired pay statement first indicated a pay deduction for VA Waiver. ⁽¹⁾ The member states that he again contacted DFAS and the VA. ⁽²⁾ However, the member maintains that he did not become aware he was overpaid until he received the debt letter from DFAS in March 2004.

Under the waiver statute, the member is considered partially at fault for accepting these payments and not continuing to question their calculation. The member did not acquire title to the money and should have held it for eventual repayment once responsible officials finally became aware of the problem. 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) are identified and the member's version of the events is corroborated by pay and disbursing officials with evidence of what he told them and what they told him. *See* DOHA Claims Case No. 02120917 (December 20, 2002), and decisions cited therein. The record here does not support waiver relief on this basis.

As for the member's attempt to distinguish DOHA Claims Case No. 01070906 (August 7, 2001), from his situation based on the fact that he did contact individuals at DFAS and the VA, we find that from our reading of the Settlement Certificate the adjudicator properly relied on this case. The adjudicator cited DOHA Claims Case No. 01070906, *supra*, along with DOHA Claims Case No. 04061502 (June 17, 2004), and Comptroller General decision B-200919, ar. 27, 1981, to show that a member is deemed to be on notice upon signing his application for VA compensation that when he becomes entitled to retired pay it will be reduced by the amount of his VA disability compensation. Therefore, DOHA Claims Case 01070906 is applicable because the member here was specifically advised or alerted before he received any retired pay, by the VA Form 21-256, that his retired pay was affected by VA compensation. In addition, the member's situation in B-200919, *supra*, is analogous to the member's situation here in that the member alerted officials at the finance center on four occasions concerning his continued receipt of retired pay along with his VA compensation and on each occasion was given verbal assurances that the payments were proper. However, the Comptroller General found that he was not without fault because he should have known that he was being overpaid and pursued his inquiries until a definite determination and complete explanation of his entitlement was made.

Finally, the member asserts that the laws are always changing that may affect his retired pay, and he cites the new legislation concerning the concurrent receipt of both retired pay and VA compensation. Under 10 U.S.C. §1414, members eligible for retired pay are also eligible for veterans' disability compensation for disabilities rated 50 percent or higher. Restoration of retired pay currently being deducted from these retirees' accounts due to their receipt of VA compensation became effective January 1, 2004, the first payments arriving February 2, 2004. ⁽³⁾

However, this restoration will be phased-in over a ten-year period ending December 31, 2013. ⁽⁴⁾ The member alluded to the fact that he may be eligible to be phased-in to full concurrent receipt of his retired pay. We reiterate the fact that the effective date of the legislation is January 1, 2004, and it is not retroactive. We do note that the period of the member's overpayment did extend into February 2004. The member must contact DFAS in this regard to find out about his eligibility under the statute. The burden will be on the member to prove that he falls within the parameters of the statute and implementing regulations allowing concurrent receipt.

Conclusion

We affirm the Settlement Certificate.

/s/

Michael D. Hipple
Chairman, Claims Appeals Board

/s/

Jean E. Smallin
Member, Claims Appeals Board

/s/

Catherine M. Engstrom
Member, Claims Appeals Board

1. It does appear that in November 2003 DFAS actually began reducing the member's retired pay but by an incorrect amount of VA compensation, causing the overpayment to continue.
2. The member states in his original waiver request that he contacted DFAS in November 2003 to inquire whether the amount of the deduction for his VA compensation was the gross or the net. He was referred to the VA; he contacted them and was told that his question would be noted and that he would either receive a call back or a letter in response.
3. See the Defense Finance and Accounting Service's website for more information on concurrent disability pay at www.dfas.mil/money/retired/cdpinfo.htm.
4. See section (c) of 10 U.S.C. §1414, concerning the schedule for the phase-in of full concurrent receipt.