

October 3, 2005

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In Re:

[Redacted]

Claimant

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Claims Case No. 05083105

**CLAIMS APPEALS BOARD**  
**RECONSIDERATION DECISION**

**DIGEST**

Under the Uniformed Services Former Spouse Protection Act, state courts are permitted to treat disposable retired pay as marital property. The increase in a member's monthly retired pay resulting from its restoration under 10 U.S.C. § 1414 is subject to a state court divorce decree, and under the decree disposable retired pay is properly being distributed to the member's former wife at the percentage directed by the decree.

**DECISION**

The member requests reconsideration of the August 18, 2005, Appeal Decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 05070511.

**Background**

The member seeks reimbursement for the increase in his retired pay due to concurrent retirement and disability payments that have been and are being paid to his former wife.

On March 1, 1980, the member became entitled to military retired pay. The member had a service-related disability, determined by the Department of Veterans Affairs (VA) to be over 50%. As required by statute, 38 U.S.C. § 5305, he waived a portion of his retired pay to obtain VA compensation. On September 5, 1991, he was divorced. Under the divorce decree, his former wife was to receive 44.6% of his monthly disposable retired pay. Under the Uniformed Services Former Spouse Protection Act (USFSPA), 10 U.S.C § 1408, his former wife applied for direct deposit of the 44.6% of his retired pay. In December 1991 her application was granted. However, as stated in the divorce decree and as set for under 10 U.S.C. § 1408(a)(4), the portions of "disposable retired pay" paid to both his wife and the member were reduced by the amount waived for VA compensation. (1)

In 2004 Congress enacted new legislation, 10 U.S.C. § 1414, allowing a gradual restoration of retired pay currently being deducted from retirees' accounts due to concurrent receipt of VA compensation. This restoration of retired pay is commonly known as concurrent retirement and disability payments (CRDP), (2) and is applicable to all retirees who have a qualifying service-connected disability (a service-connected disability that is rated not less than 50% disabling by the VA). As a qualified retiree under 10 U.S.C. § 1414, restoration of the member's waived retired pay began in January 2004. Under USFSPA and the divorce decree, his wife was paid 44.6% of the increased amount of retired pay.

The member protested these increases in the amounts of his retired pay being paid to his former wife. The Defense Finance and Accounting Service (DFAS) denied the member's claim finding that the member's receipt of CRDP was a restoration of his retired pay and subject to division under the USFSPA. On appeal, our Office agreed with DFAS and denied the member's claim. In the member's request for reconsideration, he states that 10 U.S.C. § 1414 is not retroactive and does not apply to a court order dated 1991. Specifically, he cites the legislation's effective date and states

that since CRDP did not exist prior to January 1, 2004, it cannot be subject to a 1991 court order. He also argues that CRDP is excluded from disposable retired pay and therefore, has been improperly paid to his former wife. The member argues that DFAS is violating federal law and the terms of the divorce decree by making these payments to his former wife.

### Discussion

We find that DFAS is properly making payments to the member's former wife in compliance with federal law and the 1991 divorce decree. The issues in this case specifically revolve around the definition of "disposable retired pay." The member asserts that by the terms of the divorce decree and the USFSPA, his wife was entitled to retired pay less the amount of his VA allotment payments.

First, we examine the language contained in the divorce decree:

"The Wife is to receive 44.6 % of the monthly disposable retirement or retainer pay to which the Husband is entitled. Any subsequent increases to which the Husband is entitled each month are to be included in computing the amount to be paid to the Wife. Disposable retirement pay is as defined by 10 U.S.C. Section 1408, and for purposes of this Exhibit consists of the Husband's gross monthly retirement pay less all required tax withholdings, V.A. allotment payments and survivor benefit cost."

By the clear language contained in the divorce decree, the member's disposable retired pay, including any subsequent increases, are subject to division. In addition, the court states that disposable retired pay is as defined by the USFSPA. In addition, the court specifically states that the member's disposable retired pay is his gross monthly retired pay less **all required** VA allotment payments.

Prior to enactment of the USFSPA, because of constitutional law issues, there was no way a state court order could reach military retired pay for purposes of division in a divorce proceeding.<sup>(3)</sup> The USFSPA permits state courts to treat disposable retired pay as marital property. Under the USFSPA, specifically 10 U.S.C. § 1408(a)(4)(B), the term "disposable retired pay" is defined as the total monthly retired pay to which a member is entitled less amounts which are deducted from the retired pay as result of a waiver of retired pay required by law in order to receive compensation under title 38. Therefore, disability compensation is specifically exempt from the definition of "disposable retired pay." At the time the member applied for VA compensation, he was required under 38 U.S.C. § 5305, to waive receipt of his retired pay in an amount equal to any compensation he was otherwise eligible to receive from the VA as a condition precedent to receipt of VA compensation. Therefore, as set forth under 10 U.S.C. § 1408 and as stated in the divorce decree, the amount of retired pay that he and his wife were entitled to was reduced by the amount of VA compensation he received.

However, in 2004 the Department of Defense began a program to reduce the reduction of retired pay due to the receipt of VA compensation for certain disabled retirees. The statute sets forth a 10 year phase-out of the offset to military retired pay due to receipt of VA disability compensation. The statute's immediate effect is to increase the monthly payment of retired pay a qualifying retiree is being paid. Ultimately such a member will receive both the full amount of his retired pay and his VA disability compensation, unreduced by any VA waiver amount. We also note that to conform with this new legislation, 38 U.S.C. § 5305, the statute requiring deduction from retired pay of an amount equivalent to what the member was receiving in VA compensation, was amended.<sup>(4)</sup>

Within its inherent authority, Congress has legislated the phasing in of full concurrent receipt of retired pay and VA compensation. This, in turn, had an effect on the definition of "disposable retired pay" contained in the USFSPA because the amounts required to be deducted from retired pay due to receipt of VA compensation are gradually being reduced. In addition, as stated in the divorce decree, the subsequent increases in his monthly retired pay are to be included in computing the amount to be paid to his wife.

We also point to B-228790, B-228790.2, March 1, 1991, where the Comptroller General held that in the opposite situation, when VA compensation was increased retroactively, thereby decreasing a member's disposable retired pay, under the USFSPA, the resulting apportionment by court order should be adjusted downward retroactively to reflect the retroactive VA increase. This led to a collectible overpayment paid to the former spouse.

## Conclusion

For the reasons stated, the request for reconsideration is denied, and the appeal decision is sustained. In accordance with 32 C.F.R. Part 282, Appendix E, paragraph o(2), this is the final Department of Defense action in this matter.

\_\_\_\_\_/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. *See* 10 U.S.C. §1408(a)(4)(B), "The term 'disposable retired pay' means the total monthly retired pay to which a member is entitled less amounts which - . . . (B) are deducted from the retired pay of such member as a result of forfeiture of retired pay ordered by a court-martial or as a result of a waiver of retired pay required by law in order to receive compensation under title 5 or title 38;"
2. *See* the Defense Finance and Accounting Service (DFAS) website on Retired Pay at [www.dod.mil/dfas/mony/retired/condispay.htm](http://www.dod.mil/dfas/mony/retired/condispay.htm).
3. The USFSPA was enacted in response to the United States Supreme Court's decision in *McCarty v. McCarty*, 453 U.S. 210 (1981), which held that the Supremacy Clause precluded state courts from treating military retired pay as a divisible marital asset in divorce proceedings.
4. *See* Veterans Benefits Improvement Act of 2004, Pub. L. No. 108-454, § 308(b), 118 Stat. 3598, 3614 (in amending 38 U.S.C. § 5305, Congress struck out "Any person" and inserted "Except as provided in section 1414 of title 10, any person").