

KEYWORDS: waiver of indebtedness; military retired pay; VA compensation

DIGEST: A member's 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.

CASENO: 06012408

DATE: 2/7/2006

February 7, 2006

In Re:

[Redacted]

Claimant

Claims Case No. 06012408

CLAIMS APPEALS BOARD

APPEAL DECISION

DIGEST

A member's 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.

DECISION

A retired member of the United States Army Reserve appeals the October 19, 2005, Settlement Certificate of the Defense Office of Hearings and Appeals (DOHA), DOHA Claim No. 05100416, in which our Office waived in part a member's debt that arose when the member was erroneously overpaid retired pay.

Background

On February 3, 1993, 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 subsequently awarded compensation from the VA. On ay 25, 2000, the member applied for retired pay by completing DD Form 2656. On September 4, 2001, he reached sixty years of age and became entitled to receive reserve retired pay. Although the member indicated on the DD Form 2656 that he was receiving compensation from the VA, the Defense Finance and Accounting Service (DFAS) failed to reduce his retired pay by the amount of the compensation he was receiving from the VA. As a result, the member was overpaid \$8,901.00, from September 4, 2001, through October 31, 2003. In addition, in December 2003 the member's VA compensation was increased. However, DFAS did not withhold the higher amount from the member's retired pay during the period December 1, 2003, through January 31, 2004, causing the member to be overpaid \$14.00.⁽¹⁾ In the Settlement Certificate the DOHA adjudicator waived the \$14.00 and this is not an issue on appeal. The adjudicator denied waiver of the \$8,901.00 on the basis that the member should have know that his retired pay should have been reduced by the amount of his VA disability compensation.

In his appeal, the member cites three errors in the Settlement Certificate. He states that he was placed on the retired list effective September 4, 2001, not July 22, 1984. He also states that the overpayment was discovered on September 23, 2003, not November 2003. Finally, he states that the facts in his case are distinguishable from those in Comptroller General decision

B-200919, Mar. 27, 1981, cited by the adjudicator as authority for denying him waiver.

Discussion

Under 10 U.S.C. § 2774, we have the authority to waive collection of erroneous payments to a 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. In this context the legal definition of "fault" does not imply an ethical 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 knew or should have known that he was receiving payments in excess of his entitlements. It is well-established that a 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).

We understand that the member was placed on the retired list effective September 4, 2001, the day he turned sixty years old and became entitled to receive military retired pay. Further, according to the record, on September 23, 2003, the VA notified DFAS that the member's military retired pay had to be adjusted in conjunction with the amount of his VA compensation. The member believes that his February 2003 call to DFAS to inform them that the VA had granted his claim for additional disability compensation prompted DFAS's discovery of the overpayment. (2) Even so, the record evidence in this case indicates that the member should have been aware that he was not entitled to receive full military retired pay. The member states in his original appeal for waiver that he knew he was not entitled to receive the full amount of his military retired pay and VA compensation. In addition, a member is considered to be on notice by virtue of completing the application for VA compensation that when he becomes entitled to retired pay it will be reduced by the amount of VA disability compensation. Specifically, when the member applied for disability compensation he acknowledged 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." We have consistently held that 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. *See* DOHA Claims Case No. 04100402 (October 26, 2004).

Although the member states that once he submitted all the correct paperwork to the Army he assumed his pay would be correct, he did receive retired pay account statements that did not show a deduction for VA compensation. We believe a reasonable person in such circumstances would have immediately contacted the pay office when the VA compensation deduction did not show up on his retired pay statement. Under the waiver statute, the member is considered partially at fault for accepting these payments. The member did not acquire title to the money and should have held it for eventual repayment when asked to do so.

The member attempts to distinguish Comptroller General decision B-200919, *supra*, from his situation based on the fact that he did not waive his right to full military retired pay as the member in B-200919 did and that he did contact DFAS, and if checked, DFAS may have a record of his telephone inquiries. He also states that the overpayment in B-200919 occurred in 1973, 28 years before his overpayment occurred. Thus, he feels that changes and improvements to the processing of the military and annuity pay system over that time should make the case distinguishable. We feel that the adjudicator properly relied on B-200919 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. The case is applicable because the member here was specifically advised or alerted before he received any retired pay, by the VA Form 21-526, that his retired pay was affected by VA compensation. For more current decisions expounding this same principle, we direct the member's attention to DOHA Claims Case No. 04100402, *supra*, DOHA Claims Case No. 04061502 (June 17, 2004) and DOHA Claims Case No. 01070906 (August 7, 2001).

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. In December 2003 the member's VA compensation increased from \$347.00 to \$354.00. However, DFAS continued to

withhold \$347.00 from the member's military retired pay during the period December 1, 2003, through January 31, 2004, causing an overpayment of \$14.00.

2. On September 2, 2003, the VA notified the member that effective February 4, 2003, he was assigned a 10% disability rating for his tinnitus giving him an overall disability rating of 30%.