

DATE: February 8, 2007

In Re:

[REDACTED]

Claimant

)
Claims Case No. 07020509

CLAIMS APPEALS BOARD

RECONSIDERATION 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 requests reconsideration of the February 7, 2006, decision of the Defense Office of Hearings and Appeals (DOHA) Claims Appeals Board in DOHA Claims Case No. 06012408. [\(1\)](#)

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, in bold print, 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 May 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. [\(2\)](#) In the Settlement Certificate the DOHA adjudicator waived the \$14.00, and this is not an issue.

The member directs his request for reconsideration to the Comptroller General of the United States and seeks waiver of an additional \$8,901.00. He claims that the Board made four errors in rendering its decision: the first three are errors of fact and the fourth is an error of law. The first error is that VA notified DFAS on September 23, 2003, that the member's pay had to be adjusted to reflect the VA compensation. The member states that this is error because "there was no adjustment made to [the member's] compensation level in Sept 2003." The second error cited by the member was the Board's statement that he called DFAS in February 2003 to advise them that VA had granted additional disability compensation. The member states that this is error because he contacted DFAS on September 16, 2003, to advise DFAS that he "might" be receiving an increase in his VA compensation. The third error cited is the incorrect suggestion in

Footnote 2 that the member obtained an additional 10 percent compensation from VA, raising his total compensation to 30 percent. The member states this is error because he was already receiving 30 percent compensation. The fourth error is the application of Comptroller General decision B-200919, Mar. 27, 1981, and DOHA decisions decided afterward. The member refers back to his appeal from DFAS in which he also explained why he thought two of the DOHA cases were not applicable to him. The member also suggests that our adjudicator's failure to refute the points he made with respect to these decisions now prevents us from asserting them.

Discussion

Preliminarily, the Comptroller General has not had the authority to waive debts owed to the United States by service members under title 10, United States Code, Section 2774

(10 U.S.C. § 2774) since 1996. Congress transferred this authority to the Director of the Office of Management and Budget in Section 105 of the General Accounting Office Act of 1996,⁽³⁾ and in turn, the Director further delegated authority to waive debts of uniformed service members to the Secretary of Defense.⁽⁴⁾ The Secretary of Defense gave DOHA, through the DoD General Counsel, authority to make final decisions on disputes involving waiver applications.⁽⁵⁾ Thus, it is inappropriate for our Office to honor the member's request that we forward his case to the Comptroller General.⁽⁶⁾

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).

The basis of the February 7, 2006, decision is that the member knew or should have known that he would not be permitted to receive full payment of retired pay (when he became eligible to receive it at age 60 in September 2001) while also receiving VA compensation. The primary reason for this is that 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 in 1993 he acknowledged that the "[f]iling of this application constitutes a waiver of military retired pay in the amount of any VA compensation to which you may be entitled." This note appeared in bold print just above the member's signature. The member was charged with knowledge of this limitation from that point in time. The February 7, 2006, decision cited several decisions, including the Comptroller General decision B-200919, Mar. 27, 1981, that support this position. The position of the Comptroller General and our Office has been consistent throughout the years, and we are not persuaded by the member's attempt to distinguish his situation from that of other service members who signed the same VA Form 21-526, with the same note in bold print above their signatures.

The member's argument that he successfully distinguished his case from the claimants in DOHA Claims Case No. 04061502 (June 17, 2004) and DOHA Claims Case No. 01070906 (August 7, 2001) is specious. In his August 25, 2005, correspondence to DFAS, the member contends that both decisions are based on the fact that the claimants in those cases "figured that they could collect both the retirement pay and the V.A. compensation and that they should have known that they couldn't. I have never made such a claim; therefore, both of those decisions are not comparable to my situation." The member goes on to claim that his September 16, 2003, telephone call to DFAS is what made them aware of their error and initiated the correction--"nothing else." The decisions were not based on the fact that the claimants believed that they could collect the full amount of both entitlements, but on the fact that they both signed the same VA Form 21-526 with the same note in bold print above their signatures as the member did in this case. Whatever the member may have told DFAS on September 16, 2003, such a conversation does not change the causality of the loss to the government here: advice to the member in 1993 that he could not collect the full entitlement to both benefits,

administrative error by DFAS in failing to reduce the member's retired pay when he started collecting it in 2001; the member's failure to report the error for two years even though he admits that he was not entitled to the full amount of both entitlements; and the member's allowing that situation to continue until at least September 2003. In such circumstances, the granting of equitable relief to this member is inappropriate.

Most of the member's claims of error are equally unpersuasive, and the first three have no effect on the outcome. The basis cited by the member for the first claim of error does not make sense because the VA would not be making an adjustment to compensation; any adjustment would have to be made by DFAS to the retired pay. The sentence in the Board's decision is entirely consistent with the member's statement in the second paragraph of page 3 of his reconsideration request.

The second claim of error has merit with respect to the February 2003 date, and we accept the member's statement that he contacted DFAS in September 2003, not in February 2003. Referring back to the member's November 24, 2004, correspondence with DFAS, the member said that he contacted DFAS on September 16, 2003, "to make them aware of the 10% compensation increase that I thought I was going to receive so they could make an adjustment to my retirement check." But the incorrect reference to February 2003 instead of September 2003 does not help the member because the relevant events had taken place in 1993 when the member signed his VA Form 21-526 and in September or October 2001 when he started to receive undiminished retired pay knowing that he was not entitled to it.

The third claim of error concerning Footnote 2 is not persuasive because the statement in the footnote was that the overall disability rating is stated as 30 percent and does not necessarily imply that it increased to reach that level. The fourth claim of error is discussed extensively above.

Conclusion

The member's request for reconsideration is denied, and we affirm our decision of February 7, 2006, to deny waiver relief in the amount of \$8,901.00. In accordance with DoD Instruction ¶ E8.15, this is the final administrative action of the Department of Defense in this matter.

Signed: Michael D. Hipple

Michael D. Hipple

Chairman, Claims Appeals Board

Signed: Jean E. Smallin

Jean E. Smallin

Member, Claims Appeals Board

Signed: William S. Fields

William S. Fields

Member, Claims Appeals Board

1. This case involved the member's appeal of DOHA's Settlement Certificate in DOHA Claim No. 05100416, October 19, 2005, in which our Office waived only \$14 of a member's total debt of \$8,915 that arose when the member was erroneously overpaid retired pay. The member had no legal entitlement to the excess amount.

2. 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.
3. Pub. L. No. 104-316, 110 Stat. 3826, 3830 (1996).
4. Determination with Respect to Transfer of Functions Pursuant to Public Law 104-316, Dec. 17, 1996.
5. *See* Department of Defense Directive 1340.22 (Jan. 8, 2005); and DoD Instruction 1340.23 (Feb. 14, 2006).
6. The member is free to correspond with the Comptroller General if he chooses to do so. The Comptroller General's address is 441 G Street, N.W., Washington, DC 20548.