

DATE: April 4, 2007

In Re:

[REDACTED]

Claimant

)
Claims Case No. 07032201

CLAIMS APPEALS BOARD
RECONSIDERATION DECISION

DIGEST

A member must prove his claim by clear and convincing evidence on the written record that the United States is liable to him for the amount claimed. Absent a final computation of the member's pay and allowances incident to the correction of his military records by the Defense Finance and Accounting Service (DFAS), the member's claim is premature.

DECISION

This is in response to a request for reconsideration of the appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 07010801, dated February 28, 2007. In that decision, our Office denied the member's claim for his pay and allowances without offset of civilian earnings incident to the correction of his military records.

Background

The member was to be involuntarily retired effective April 1, 2002. In anticipation of this, he obtained civilian employment effective September 4, 2001, and worked there until August 5, 2004. He then found other civilian employment and worked there until June 8, 2005. His employer paid for his children's tuition at the Department of Defense Dependents School (DoDDS). The tuition payments were treated as income for Federal income tax purposes.

On April 6, 2005, the member's record was corrected by the Air Force Board for the Correction of Military Records (AFBCMR). His involuntary retirement was reversed and he was restored to active duty as of April 1, 2002. This correction action entitled him to pay and allowances that would have been paid to him had he remained on active duty. The Defense Finance and Accounting Service (DFAS) has the responsibility to calculate the amount of pay and allowances to which the member was entitled. DFAS began computing the member's entitlements as a result of the correction of his records and requested copies of the member's IRS Forms W-2 and IRS Forms 1040 so that it could determine the proper offset of the member's civilian earnings during the period in question. On March 5, 2006, the member submitted a claim with DFAS for back pay and allowances without any offset for civilian earnings. DFAS denied payment and declined to compute his entitlement until the member provided unredacted copies of his 1040s for the period in question. The member refused to release such copies and appealed his claim to our Office. He claimed \$330,000 in back pay and allowances.

DFAS set forth its position in this case in an administrative report submitted to DOHA on November 27, 2006. In the administrative report, DFAS stated that it is proper to require unredacted copies of IRS Forms W-2 and IRS Forms 1040 for the purpose of determining the member's entitlement. Further, in determining the member's entitlement, it is proper to offset the member's pay and allowances as a result of correction of his military records by his civilian earnings. It appears that DFAS partially agrees with the member's position on the DoDDS school tuition. DFAS would require the

member to provide documentation from his employer reflecting the amount of tuition paid.

In the appeal decision, the DOHA adjudicator thoroughly discussed all issues raised by the member. The adjudicator determined that DOHA lacked jurisdiction to decide many of the issues raised by the member. However, the DOHA adjudicator concluded that DFAS had the authority under applicable law to offset the member's pay and allowances by the amount of his civilian earnings. The DOHA adjudicator also found that unredacted copies of the requested Federal income tax documents for the member's period of involuntary retirement are necessary so that DFAS has the best information available for its computation of the pay and allowances to be paid the member incident to the correction of his military records.

In his request for reconsideration, the member asserts that DFAS's intention of offsetting his civilian income earned after his retirement against his active duty pay for the period October 1, 1998, through April 1, 2002, is a violation of the spirit of DoD guidance in the matter. He requests that no offsets be authorized for this active duty period. In addition, he disagrees with DFAS's intention to count the DoDDS school tuition, household move allowances and temporary lodging allowances as income. He states that these items are benefits to active duty members and do not show up on military leave and earnings statements (LES) and W-2s as income. Therefore, they should not be allowed to be counted as income in DFAS's computation.

Discussion

DFAS settles claims incident to the correction of military records. Computation of the amount due the member is a function of DFAS. [\(U\)](#) Under paragraph E5.7 of DoD Instruction (Instruction) 1340.21, the claimant must prove the claim by clear and convincing evidence on the written record that the United States is liable to the claimant for the amount claimed.

According to the record, DFAS has yet to calculate the member's pay and allowances incident to the correction of military records. It appears that DFAS is unable to compute the member's entitlement because he has refused to submit the requested unredacted income tax documents. At this time, a decision by the Board on the issues raised by the member is inappropriate. The member can only guess what DFAS might do in computing his entitlement. He is essentially asking this Board to instruct DFAS on how to conduct its computation. Thus, any action by the Board in this case is premature. Once DFAS makes its final computation, the member may make a claim if he is not satisfied. At that point, he must prove that DFAS's interpretation or implementation of its authority was arbitrary, capricious or contrary to law.

Conclusion

The Board takes no action at this time on the member's request for reconsideration.

Signed: Michael D. Hipple

Michael D. Hipple

Chairman, Claims Appeals Board

Signed: Jean E. Smallin

Jean E. Smallin

Member, Claims Appeals Board

Signed: Catherine M. Engstrom

Catherine M. Engtrom

Member, Claims Appeals Board

1. *See* Air Force Instruction 36-2603, March 1, 1996, ¶ 7.2.2.