

KEYWORDS: waiver of indebtedness

DIGEST: A member was receiving basic allowance for housing (BAH) when she was medically evacuated and subsequently hospitalized. When she was released from the hospital, she was assigned government quarters. The overpayment arose when she continued to receive BAH. This Office waived a portion of the member's debt. When the member moved into government quarters, she should not have expected to receive BAH. In addition, she did not spend the erroneous payments on current housing expenses, because quarters were provided to her. In the absence of a clear and unambiguous written opinion allowing such payments, she cannot be said to have reasonably relied on erroneous advice regarding her entitlement to BAH and furthermore did not spend the amount received on its intended purpose. Therefore, waiver under 10 U.S.C. § 2774 is not appropriate.

CASENO: 07041305

DATE: 5/10/2007

DATE: May 10, 2007

In Re:)	
[REDACTED])	
)	
)	Claims Case No. 07041305
)	
Claimant)	

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

A member was receiving basic allowance for housing (BAH) when she was medically evacuated and subsequently hospitalized. When she was released from the hospital, she was assigned government quarters. The overpayment arose when she continued to receive BAH.

This Office waived a portion of the member's debt. When the member moved into government quarters, she should not have expected to receive BAH. In addition, she did not spend the erroneous payments on current housing expenses, because quarters were provided to her. In the absence of a clear and unambiguous written opinion allowing such payments, she cannot be said to have reasonably relied on erroneous advice regarding her entitlement to BAH and furthermore did not spend the amount received on its intended purpose. Therefore, waiver under 10 U.S.C. § 2774 is not appropriate.

DECISION

The member requests reconsideration of the February 12, 2007, decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 06101906. In that decision, DOHA waived \$10,080.16 and denied waiver of the remaining \$17,443.12.

Background

The record shows that the member was a Captain in the United States Army. On November 25, 2003, the member was medically evacuated from Germany to Walter Reed Army Medical Center in Washington, D.C. On December 16, 2003, the member was issued permanent change of station orders transferring her from Germany to Walter Reed, effective November 25, 2003. Since the member had left Germany she was no longer entitled to receive overseas housing allowance (OHA). Due to an administrative error, she erroneously received OHA from November 25, 2003, through February 24, 2004, causing an overpayment of \$2,951.36.

On December 6, 2003, the member was released from Walter Reed and assigned government quarters. As a result, she was no longer entitled to receive basic allowance for housing (BAH). However, due to an administrative error, she erroneously continued to receive BAH from December 6, 2003, through November 30, 2004, causing an overpayment of \$22,740.00.

On December 22, 2004, the member was discharged from active duty. At separation she was entitled to receive a final separation payment in the net amount of \$2,379.79, which represents seven days of pay and allowances and 34 days of accrued leave. However, on December 20, 2004, due to an administrative error, the member erroneously received a payment in the amount of \$4,211.71, causing an overpayment of \$1,831.92 (\$4,211.71 - \$2,379.79). The total claim against the member was \$27,523.28.

Our Office waived collection of the portion of the overpayment resulting from the payment she received on December 20, 2004. In addition, our Office waived collection of the portion of the overpayment resulting from the member erroneously receiving OHA from November 25, 2003, through February 24, 2004, and BAH from December 6, 2003, through

February 24, 2004. However, our Office found that it was not against equity and good conscience to deny the remaining portion of the overpayment resulting from the member erroneously receiving BAH from February 25, 2004, through November 30, 2004, because the member did not provide evidence that the overpayment was used for its intended purpose.

On March 6, 2007, the member requested a 30-day extension to file her request for reconsideration because she was in the process of obtaining BAH documents in her file from the Department of Veterans Affairs (VA). Our Office subsequently granted her request and extended the time period for her to file her reconsideration request to April 13, 2007. On April 12, 2007, the member submitted her request for reconsideration. In her reconsideration request, she requested additional time to submit documents from the VA, specifically the Authorization to Start, Stop, or Change Basic Allowance for Quarters (BAQ) and/or Variable Housing Allowance (VHA), DA Form 5960. A letter from the member's congressional representative accompanying her reconsideration request stated that these documents might be in the possession of the Army. Our Office subsequently advised the member that we would hold her file until May 3, 2007, at which time we would adjudicate her case with or without the documents. On May 4, 2007, our Office received a faxed letter from the member stating the records she requested were in a holding area and that a process had to take place in order for her to obtain them.¹

In her request for reconsideration, the member states that her situation was not normal: At the time the overpayment occurred, she had been medically evacuated from Germany and was dealing with major depression, post traumatic stress disorder (PTSD) and the process of being medically evaluated for release from the Army. When she was released from medical care at Walter Reed in December 2003 she was assigned to live in an apartment. She states that she had no choice concerning her residence. In addition, she states that the BAH she received was authorized by her Commander three times within a year; the Personnel Actions Office at the Medical Holding Company processed the DA Form 5960 three times within a year; and the DA Form 5960 was processed through the Finance Office three times within a year. She was never told that she had to find another place to reside or change her BAH status.

Discussion

Under 10 U.S.C. § 2774, we have the authority to waive collection of a claim for erroneous overpayments of pay or allowances against a member of the Uniformed Services 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

¹On May 8, 2007, our Office received a fax from the member's Congressional Representative requesting a further extension of time for the member to obtain the records. We do not have the authority to grant the requested extension. However, as noted in this reconsideration decision, we accept as fact that the member submitted the DA Forms 5960 on three occasions at the direction of her Commander and Personnel Actions Office.

the part of the member. However, if a reasonable person is aware, or should be aware, that she is receiving an erroneous payment, waiver is not appropriate.

As of the date of this decision, we have not received the DA Forms 5960 that the member was attempting to obtain. However, we accept as fact solely for the purpose of adjudicating this case that the member on three occasions during her assignment with the Medical Holding Company submitted at the direction from her Commander and Personnel Actions Office the DA Form 5960: (1) she submitted the form in December 2003 during her in-processing with the Medical Holding Company; (2) she submitted the form in May 2004 when her divorce was finalized; and (3) she submitted the form in August 2004 when her son was born.

We have consistently held that the purpose of BAH is to help a member offset the cost of her housing expenses. *See* DOHA Claims Case No. 03022704 (March 5, 2003); DOHA Claims Case No. 03012711 (February 3, 2003); and 02122602 (January 13, 2003). A member is expected to know that she is not entitled to BAH while living in government quarters. *See* B-256417, July 22, 1994. Here, after release from the hospital, the member was assigned government quarters. While the member occupied those quarters, her leave and earnings statements indicated that she was receiving BAH. Although she filed her DA Forms on three occasions at the direction of her Commander and Personnel Actions Office, she should have questioned her entitlement to it. She should have requested a formal determination of her entitlement to BAH. She did not acquire title to the questionable overpayments and should have held them until a final determination was made concerning her entitlement or until the government asked for repayment. *See* DOHA Claims Case No. 03012711, *supra*.

While the record indicates that the member was hospitalized from November 2003 to December 2003, she was discharged as of December 6, 2003. In prior decisions by our Office and the Comptroller General, we have recognized that waiver may be granted in extraordinary situations when the waiver applicant's mental condition was so impaired as to render her unable to attend to her ordinary financial affairs or when any type of guardianship was thought necessary. *See* DOHA Claims Case No. 04061502 (June 17, 2004); DOHA Claims Case No. 03102401 (October 28, 2003); B-217914, June 25, 1986; and B-217914, Dec. 2, 1985. There is no indication from the record here that the member's medical condition would have prevented her from attending to her financial affairs or that any type of guardianship was necessary.

Generally the government is neither bound nor estopped by the erroneous advice or unauthorized acts of its officers, agents or employees, even though committed in the performance of their official duties. However, in the case of erroneous payments such as this, waiver may only be appropriate to the extent that the overpayments were spent for the purpose intended. *See* DOHA Claims Case No. 06110906 (November 27, 2006); and DOHA Claims 03022704, *supra*. Here, the BAH paid to the member was not spent for her housing expenses because her housing was provided to her.

Conclusion

The member's request for relief is denied, and we affirm the March 7, 2007, decision to deny waiver in the amount of \$17,443.12. In accordance with Department of Defense Instruction 1340.23, ¶ 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: Catherine M. Engstrom

Catherine M. Engstrom
Member, Claims Appeals Board