

KEYWORDS: Claim-burden of proof

DIGEST: Even though a claim is not barred by the Barring Act, the burden is still on the claimant to prove his claim by clear and convincing evidence.

CASENO: 07071703

DATE: 7/19/2007

DATE: July 19, 2007

In Re:)	
[REDACTED])	Claims Case No.07071703
Claimant)	

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

Even though a claim is not barred by the Barring Act, the burden is still on the claimant to prove his claim by clear and convincing evidence.

DECISION

A former member of the Army requests reconsideration of the June 20, 2007, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Case No. 07052909. In that decision, DOHA concluded that the member's claim for any back pay and leave incident to his August 21, 1970, discharge is barred under 31 U.S.C. 3702(b).

Background

The record shows that on August 21, 1970, the member, then in the rank of private first class, received a general discharge under honorable conditions from the Regular Army. The member later requested that his discharge be upgraded to an honorable discharge, and by letter dated October 11, 1976, the Adjutant General advised him that the Secretary of the Army had reviewed the Army Discharge Review Board's findings and conclusions in regard to his petition and that the Secretary had directed that his records be changed to show an honorable discharge. The member contends without documentary proof that he presented a claim for back pay and leave to the General Accounting Office in 1979, but our adjudicators found that the earliest documented receipt of the member's claim is a letter from the Defense Finance and Accounting Service to the member dated August 25, 1993, denying the claim on the grounds that it was barred under the Barring Act¹ because his claim accrued in 1970. While acknowledging the possibility that an upgraded discharge may increase some entitlements that would not accrue until the higher discharge becomes effective, our adjudicator found nothing in the record that would change the accrual date of the entitlements the member was claiming from 1970.² In any event, 1993 was more than six years after either 1970 or 1976, and the adjudicators concluded that DFAS properly barred the claim in its initial determination in 1993.

In his reconsideration request, the member offers a number of disjointed comments and contentions. Some are confusing; some are not directly related to a claim for back pay and leave; and some are clearly beyond the scope of authority of our Office, such as the member's claim that we recognize that the member was promoted to general officer (no particular rank specified). We construe the member's reconsideration request as a request to us to waive the Barring Act, to the extent it applies, and find that he is owed back pay (and any accrued leave) predicated on some theory that he was restored to duty in a reserve component and earned sufficient points to qualify for an irregular retirement, presumably in one of the general officer pay grades.

Discussion

Our Office has no authority to consider a request to waive the Barring Act in the absence of a written secretarial recommendation to the Secretary of Defense, through our Office, requesting such action. *See* DoD Instruction 1340.21, codified at title 32 Code of Federal Regulations (C.F.R.) Part 282, Appendix D, paragraph (d). There is no secretarial recommendation in this case. However, even if the Secretary might consider such a recommendation or the Barring Act did not otherwise apply, the member's claim could not be approved because he failed to prove his claim as required by 32 C.F.R. Part 282, Appendix C, paragraph (g): clear and convincing evidence on the written record that the United States is liable for the amount claimed with all relevant evidence presented when the claim is first submitted. The record contains no documentary support for anything other than an upgrade to an honorable discharge. The Adjutant General's letter of October 1976 still indicates that the member was

¹Title 31, United States Code, Section 3702.

²DOHA's adjudicators provided a thorough explanation to the member of the changes in the Barring Act as well as a legal analysis on dates of accrual of claims.

separated from the Army. There is no indication that the member was restored to active duty through corrective action by the Army Board for Correction of Military Records or otherwise. There is no documentation indicating that the member was accessed into a reserve component and that the proper authority in the component issued a "twenty-year" letter certifying that the member had accumulated sufficient retirement points for 20 years so as to be eligible for irregular retired pay in any grade. There is no documentation demonstrating how the member calculates his claim for unpaid pay or leave.

Conclusion

The member's request for reconsideration is denied, and we affirm the June 20, 2007, appeal decision in DOHA Claim No. 07052909. In accordance with 32 C.F.R. Part 282, Appendix E, paragraph (o)(2), 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