

KEYWORDS: waiver of indebtedness-knowledge, mental/physical incapacity

DIGEST: When a member is aware or should be aware that he is receiving payments in excess of his entitlements, he does not acquire title to the excess amounts and has a duty to hold them for eventual repayment. If the member asserts that he could not have been aware of the receipt of excess entitlements because of his mental or physical condition at the time, he must demonstrate by clear and convincing evidence, in the form of medical records and other documentary proof, that during that time he was in such poor mental or physical health that it was unlikely that he knew or could have known of the overpayment, or that he was otherwise unable to attend to ordinary financial affairs.

CASENO: 07082707

DATE: 9/4/2007

DATE: September 4, 2007

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In Re:)	
[REDACTED])	Claims Case No. 07082707
)	
Claimant)	

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

When a member is aware or should be aware that he is receiving payments in excess of his entitlements, he does not acquire title to the excess amounts and has a duty to hold them for eventual repayment. If the member asserts that he could not have been aware of the receipt of excess entitlements because of his mental or physical condition at the time, he must demonstrate by clear and convincing evidence, in the form of medical records and other documentary proof, that during that time he was in such poor mental or physical health that it was unlikely that he knew or could have known of the overpayment, or that he was otherwise unable to attend to ordinary financial affairs.

DECISION

An Air Force officer requests reconsideration of the August 7, 2007, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 07051501. In that decision, DOHA's adjudicator considered the member's request that the government waive collection of an overpayment to him of pay and allowances in the amount of \$13,496. The adjudicator disagreed with the initial determination of the Defense Finance and Accounting Service (DFAS) and granted a partial waiver in the amount of \$ 2,772, but sustained DFAS's initial determination to the extent that it denied waiver for the balance of the debt, \$10,724. On reconsideration, the member asks for waiver of the entire debt.

Background

The record shows that on December 22, 2003, an AF Form 1042 (Medical Recommendation for Flying or Special Operational Pay) was issued which recommended that the member be medically disqualified for flight or special operation duty effective that day. As a result, he was no longer entitled to receive aviation career incentive pay (ACIP). However, due to administrative error, he erroneously received ACIP through September 15, 2005, causing the overpayment of \$13,496.00.

DOHA's adjudicator concluded that the member acted in good faith in accepting the overpayments of ACIP from December 22, 2003, through March 30, 2004. The waiver of the overpayments (totaling \$2,772) for that period of time is not in issue here. However, in explaining the basis for her conclusion that the member should have questioned his entitlement to ACIP by April 1, 2004, the adjudicator noted that the member had not presented any documentation that he was performing flight duties during that period. The adjudicator also considered: (a) the member's characterization of his conversations with pay officials: "I do not recall the exact conversations when I questioned the entitlement;" (b) the fact that by April 2004 the member was undergoing a medical evaluation board; and (c) the fact that the member was about to undergo surgery.

In his request for reconsideration, the member argues that the surgery was a traumatic experience for both him and his family. After the surgery, he was on convalescent leave at home until August 2004 and "remember[s] very little of what happened during this time period." The member asserts that he was in no condition to attend to such financial matters as the ACIP issue, during the period of time from April 2004 to April 2005. After being released from active duty, the member says that his attention was devoted to returning to normal life and his work, and he suggests that distance from his Reserve unit and other factors made it difficult for a part-time National Guard member, like himself, to keep up with all the things that needed to be done. In his request for reconsideration, the member provided additional information on his medical condition. One of the documents, the AF Form 348 (Line of Duty Determination), dated March 23, 2004, indicates that the member had been deployed in support of Iraqi Freedom in a non-

flying position and had been in a DNIF (duties not involving flying) status since December 2003.

Discussion

Under 10 U.S.C. § 2774 and 32 U.S.C. § 716, we have authority to waive a claim for an erroneous overpayment of pay or allowances if collection would be against equity and good conscience and not in the best interest of the United States, provided there is no evidence of fraud, fault, misrepresentation, or the lack of good faith on the part of the member. It is not against equity and good conscience to deny waiver when a reasonable person should have suspected that he was receiving payments in excess of his entitlement. *See* DOHA Claims Case No. 02030501 (April 18, 2002), which states this long-standing rule now codified in DoD Instruction 1340.23 ¶ E4.1.4 (February 14, 2006).

The record reasonably supports the adjudicator's conclusion that the member had a sufficient basis to question, and did question, his entitlement to ACIP before the surgery. As the additional evidence provided by the member indicates, he was in a DNIF status since December 2003. While the member demonstrated that in April 2004 he underwent surgery for a serious physical condition, he has failed to demonstrate by clear and convincing evidence, in the form of medical records and other documentary proof, that during the relevant period of time he was in such poor mental or physical health that it was unlikely that he knew or could have known of the overpayment, or that he was otherwise unable to attend to ordinary financial affairs. *See* DOHA Claims Case No. 04031001 (March 17, 2004). *See also* DOHA Claims Case No. 06070704 (July 17, 2006); DOHA Claims Case No. 04032919 (March 31, 2004); and DOHA Claims Case No. 03102401 (October 28, 2003). The existence of a serious medical condition, by itself, is not clear and convincing evidence that it was unlikely that he knew or could have known of the overpayment, or that he was otherwise unable to attend to ordinary financial affairs. *See* DOHA Claims Case No. 02052002 (August 27, 2002). While the member asserts that he was in no condition to deal with the ACIP issue between April 2004 and April 2005, he offers no documentary evidence to support this assertion, and the record demonstrates that he knew of a potential problem in this regard even before April 2004.

Conclusion

The member's request for relief is denied, and we affirm the August 7, 2007, appeal decision. In accordance with DoD 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: Christine M. Kopocis

Christine M. Kopocis
Member, Claims Appeals Board