

KEYWORDS: waiver of indebtedness-knowledge

DIGEST: Waiver of an indebtedness that accrued when the government failed to collect Survivor Benefit Plan (SBP) premiums from a member is not appropriate when the member had requested coverage for his spouse and therefore knew or had reason to know that his retired pay should have been reduced to cover the premiums for SBP participation.

CASENO: 07092705

DATE: 10/4/2007

DATE: October 4, 2007

In Re:)
 [REDACTED]) Claims Case No.07092705
)
Claimant)

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

Waiver of an indebtedness that accrued when the government failed to collect Survivor Benefit Plan (SBP) premiums from a member is not appropriate when the member had requested coverage for his spouse and therefore knew or had reason to know that his retired pay should have been reduced to cover the premiums for SBP participation.

DECISION

A retired Army service member requests reconsideration of the July 23, 2007, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 07051505. In that decision, DOHA sustained the initial determination of the Defense Finance and Accounting Service (DFAS) which concluded that waiver of the member's \$1,579.76 indebtedness under 10 U.S.C. § 2774 was not appropriate.

Background

The record shows that the member married on February 15, 2003. The member notified DFAS of the marriage, and on February 10, 2004, just prior to the first anniversary of his

marriage, he elected Survivor's Benefit Plan (SBP) coverage for his spouse. He completed a DD Form 2656-6 (Survivor Benefit Plan Election Change Certificate), which stated that a member who does not have a spouse at the time that he became eligible may provide SBP for the first spouse after retirement by electing coverage before the first anniversary of the marriage, and that "[c]overage and cost begin on the first anniversary of the marriage." Therefore, SBP premiums should have been withheld from the member's retired pay effective March 1, 2004, the first full month following the first anniversary after his marriage. However, due to administrative error, no SBP premiums were withheld from the member's retired pay through October 31, 2004.

DOHA's adjudicator noted the member's diligence in October 2004, when he questioned whether SBP premiums should have been deducted from his retired pay. But she concluded, as DFAS did, that waiver was not appropriate, despite the government's error, because the member knew or should have known that he was receiving pay in excess of his proper entitlement. DFAS had noted in its administrative report that if the member had died after the first anniversary but before DFAS had started collecting premiums, that the spouse would have been covered.

In his reconsideration request, the member rejects the government's premise that he obtained a benefit during the period of non-collection because his spouse would have received SBP. The member characterizes this argument as an "egregious violation of due process of law" and is "disingenuous" because the government is without any retrospective risk. The member distinguishes the prior decisions of this Board that the adjudicator and DFAS relied upon and claims that DOHA Claims Case Nos. 99091601 (November 29, 1999) and 97092914 (November 26, 1997) have greater precedential value. He contends that the language quoted from DD Form 2656-6 was in small print with nothing to call attention to it, and had previously stated that he had no prior experience with SBP. Finally, he contends that his rights to due process were violated and he was denied fundamental fairness because he was not "privy to DFAS's investigation" of his waiver request and was not provided copies of certain correspondence, *i.e.*, DFAS's letter of transmittal of his appeal to DOHA and DOHA's request for verification of the debt to DFAS.

Discussion

Under 10 U.S.C. § 2774, we may waive a claim by the government for the erroneous payment of pay and allowances to a member 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 lack of good faith on the part of the member. In this case, the central issue, as reasonably identified by DOHA's adjudicator, is whether the member knew or had reason to know that he was being overpaid. The member requested SBP coverage just before his first anniversary, and DOHA's adjudicator reasonably found that he should have expected his retired pay then to decrease to cover the premiums. The adjudicator reasonably concluded that waiver is not appropriate in such circumstances.

We disagree with the member to the extent that he argues that the two DOHA decisions

that he cites require the government to waive his debt. The decisions actually support the adjudicator's conclusion that waiver is inappropriate. For example, in DOHA Claims Case No. 99091601, the member's spouse became an eligible SBP beneficiary on March 13, 1995, but DOHA found that he did not realize until June 1997 that she was covered. The member called DFAS at that time and DFAS advised him that his spouse was covered. Due to administrative error, DFAS did not send SBP paperwork to the member until May 1998, and premium deductions did not begin until October 1998. In a proper exercise of their discretion, DFAS recommended, and DOHA agreed, that waiver of the premium debt through July 31, 1997, was appropriate because the member did not realize that his spouse was covered until June 1997. However, waiver of the balance of the debt was denied because the member, having just requested coverage, should have expected his retired pay to decrease to cover the SBP premiums no later than August 1997. When deductions did not occur, he should have pursued that matter with the proper officials. The member was not permitted to reap a windfall in the form of free SBP coverage for 14 months when he knew or should have known that he was being overpaid. The member's circumstances here are analogous to the August 1, 1997, to September 30, 1998, circumstances of the member in DOHA Claims Case No. 99091601.

Also in DOHA Claims Case No. 99091601, we explained that if the member had died prior to June 1997, before he notified DFAS of his marriage, his widow would have been covered as an SBP beneficiary under 10 U.S.C. § 1448(a)(2), one year after the marriage, since the member had not declined coverage. The widow would have had to pay the premiums not paid by her husband. For reasons of equity, this Board chose not to disturb the adjudicator's settlement which waived the indebtedness due on the SBP premiums the member owed in that case through July 31, 1997, because he was not aware that his spouse was covered. In not disturbing the settlement we indicated that we did not concur that waiver was required in such circumstances. We repeat here our discussion in that case that it is not inequitable for a member who receives a benefit of coverage to pay for it. *See* DOHA Claims Case No. 98060410 (September 30, 1998), and the following Comptroller General decisions cited therein: B-254265, Dec. 20, 1993; B-252123, Aug. 4, 1993; and 62 Comp. Gen. 608 (1983). It is our view that even if there had been no evidence in the current case that the member knew he was being overpaid, the receipt of the benefit itself would still preclude waiver.

The factual circumstances of the member in DOHA Claims Case No. 97092914 differ from those in the situation of the member here. In that case, SBP premiums were being deducted from the member's retired pay to pay for coverage that his children had received. The member believed he was paying premiums for his wife. As in DOHA Claims Case No. 99091601, we also explained that the member's spouse had the benefit of coverage during the period when deductions were not being made for her.

The member's claim that he had no prior experience with SBP and that the language in the DD Form 2656-6 was hidden from him in some way, is not persuasive. The member is a person of experience who retired in the rank of colonel and whose correspondence of record indicates good communication and advocacy skills. Accordingly, we can assume that he read and fully understood the DD Form 2656-6 and knew that premiums would be due no later than

March 2004.

The member's suggestion that we must approve his waiver request because he was denied "due process," in that he did not automatically receive a copy of every piece of record correspondence, is not persuasive. DoD Instruction 1340.23 (February 14, 2006) is the governing regulation on the procedures that must be followed in processing waiver applications, and the member does not indicate how the Instruction was violated and how he was injured by the violation. Our review of the record indicates that the member was provided a copy of the administrative report in accordance with ¶ E8.4.3 of the Instruction, and he submitted a rebuttal to it, as he had a right to do. The member's rebuttal does not suggest anything about not receiving documentation from DFAS. The adjudicator's decision was based on consideration of the debt as described in the administrative report that both the member and DOHA received.

For other reasons, our Office has no problem with providing the member a copy of the email correspondence between DOHA and DFAS. DOHA's adjudicator will provide that under separate cover. The correspondence attempted to confirm when the debt accrued, *i.e.*, February 15, 2004, or March 1, 2004. DFAS verified the date as reported in the administrative report, *i.e.*, March 1, 2004. Since the basis of DOHA's decision is unrelated to the time of the accrual of the debt, the availability of this correspondence to the member is not related to the outcome here. If the member desires a copy of DFAS's letter transmitting his waiver request to DOHA, he must request it from DFAS, but the basis of our decision is unrelated to that correspondence.

Conclusion

The member's request for relief is denied, and we affirm the July 23, 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: William S. Fields

William S. Fields
Member, Claims Appeals Board