

KEYWORDS: waiver of indebtedness; SBP premiums

DIGEST: A Reserve component member chose to protect his family by participating in the Reserve Component Survivor Benefit Program (RCSBP) after reaching 20 years of service, but before he was old enough to collect retired pay. Prior to collecting retired pay, the member was awarded disability compensation from the Department of Veterans Affairs (VA). When he started collecting retired pay, the Defense Finance and Accounting Service (DFAS) withheld premiums for RCSBP, but stopped the deductions when VA compensation began to exceed retired pay, and no retired pay was due. At a later point, the member became eligible again to receive retired pay, but due to administrative errors, DFAS had concluded that the member had not elected RCSBP, and it failed to withhold RCSBP premiums. Whether or not the member could have reasonably known that RCSBP was still available to him, the member had chosen RCSBP, and his coverage remained in effect even during the period when DFAS failed to deduct premiums. Since the member received the benefit of SBP coverage, collection of the overpayment of retired pay from the failure to withhold the premiums cannot be waived under 10 U.S.C. § 2774.

CASENO: 08012801

DATE: 2/04/2008

DATE: February 4, 2008

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In Re:)
 [REDACTED]) Claims Case No. 08012801
)
Claimant)
_____)

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

A Reserve component member chose to protect his family by participating in the Reserve Component Survivor Benefit Program (RCSBP) after reaching 20 years of service, but before he

was old enough to collect retired pay. Prior to collecting retired pay, the member was awarded disability compensation from the Department of Veterans Affairs (VA). When he started collecting retired pay, the Defense Finance and Accounting Service (DFAS) withheld premiums for RCSBP, but stopped the deductions when VA compensation began to exceed retired pay, and no retired pay was due. At a later point, the member became eligible again to receive retired pay, but due to administrative errors, DFAS had concluded that the member had not elected RCSBP, and it failed to withhold RCSBP premiums. Whether or not the member could have reasonably known that RCSBP was still available to him, the member had chosen RCSBP, and his coverage remained in effect even during the period when DFAS failed to deduct premiums. Since the member received the benefit of SBP coverage, collection of the overpayment of retired pay from the failure to withhold the premiums cannot be waived under 10 U.S.C. § 2774.

DECISION

A retired member of the United States Marine Corps Reserve requests reconsideration of the January 11, 2008, Appeal Decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 07112603. In that decision DOHA sustained the initial determination of the Defense Finance and Accounting Service (DFAS) which concluded that the member owed the United States \$4,624.35, and that no part of this debt should be waived under 10 U.S.C. § 2774, either because it was inappropriate to do so (\$3,778.24) or an erroneous payment was not involved (\$846.11).

Background

The record indicates that the member had elected Reserve Component Survivor Benefit Plan (RCSBP) coverage when he reached 20 years of service in January 1992. Later, he applied for and was awarded disability compensation from the Department of Veterans Affairs (VA). In 2004, the member applied for irregular retirement and became eligible to receive it when he became 60 on September 29, 2004. He began receiving military retired pay, and deductions for RCSBP were withheld from his retired pay through November 30, 2004. DFAS miscalculated the member's RCSBP deductions from October 1, 2004, through November 30, 2004, causing an overpayment of \$66.94. That amount is not in issue in this reconsideration request.

The record further shows that in December 2004 the member's disability compensation from the VA exceeded the amount of his military retired pay. As a result, his military retired pay was suspended, requiring the member to remit direct payments for RCSBP to DFAS's United States Military Retirement Pay Office (DFAS/USMRP) effective December 1, 2004. Although the member was required to submit RCSBP payments to the DFAS/USMRP in the amount of \$845.25 for the period December 1, 2004, through April 30, 2005, DFAS advised us that he remitted payment in the amount of \$844.39, a difference of \$.86. As a result, he became indebted to the United States in the amount of \$.86. Additionally, DFAS advised us that the member failed to remit RCSBP payments during the period May 1, 2005, through September 30, 2005, causing him to become indebted to the United States in the amount of \$845.25.

The record also shows that in October 2005 the member became eligible to receive Concurrent Retirement and Disability Payments (CRDP). As a result, his military retired pay was reinstated effective October 2005, and RCSBP premium deductions should have resumed effective October 1, 2005. However, DFAS failed to deduct RCSBP from his military retired pay from October 1, 2005, through July 31, 2007, causing an overpayment of \$3,778.24. Thus, the total claim against the member was \$4,691.29.

As we understand the member's position, he believes that it is inequitable for him to have to repay RCSBP premiums for the period from May 1, 2005, through July 31, 2007. The member did not reasonably believe that he was still enrolled in SBP and cites the following as examples of facts that support this position: DFAS admits that it erroneously withdrew the member from RCSBP effective May 1, 2005; leave and earnings statements between that time and the end of July 2007 stated that "no SBP election is reflected on your account;" on February 2, 2006, a pay representative informed the member that no SBP is taken out because he has concurrent receipt; and two other representatives told him that he had no deduction taken out and that he is withdrawn from SBP as long as he continues to have a 100 percent disability. These are supported by 44 exhibits that the member provided in support of his waiver. DOHA's adjudicator stated while it is unfortunate that a pay representative may have misinformed the member, the government is not liable for the erroneous or negligent acts of its officers, agents or employees, even if committed in performance of their official duties. The member believes that this is contrary to the basic principles of American jurisprudence and cites, as an example, the government's liability if a Forest Service employee causes a motor vehicle accident. The member also challenges the legal liability for the debt.

In general, the member's 44 exhibits also demonstrate his belief that he had, in fact, properly elected RCSBP coverage; nothing indicates that he ever intended to waive his RCSBP coverage; the member contacted DFAS several times to try to restore his coverage, and eventually sought assistance from his Congressional representative to correct the error; and DFAS admitted to the representative, and apologized to the member for, the unsatisfactory customer service he experienced.

Discussion

The record establishes that the government erred in withdrawing the member from RCSBP participation in May 2005, and in not collecting RCSBP premiums from retired pay once he became eligible for CRDP starting in October 2005. The member was properly enrolled in RCSBP from the time he made his election in 1992 to participate and cover his family. DFAS's payment of retired pay without deducting RCSBP premiums each month starting in October 2005 resulted in erroneous payments of pay and allowances to the member. The error was that his net payment was too much. In this regard, the government produced substantial evidence of an indebtedness. The real issue is whether we should waive collection of these overpayments under 10 U.S.C. § 2774, and whether we can waive payments for the months in 2005 when no retired

pay proceeds were available from DFAS to cover the RCSBP premiums.

Under 10 U.S.C. § 2774, we have authority to waive repayment of erroneous payments of military pay and allowances to members of the uniformed services if repayment would be against equity and good conscience and not in the best interest of the United States. In applying for a waiver, a member is not disputing his legal obligation to pay an indebtedness, but he is arguing that as a matter of equity it would be inappropriate for the government to pursue collection in the circumstances of the case. Given the equitable nature of the statute, analogies to government liability where its driver causes a traffic accident are inapposite. The fact that an erroneous payment is solely the result of administrative error or mistake on the part of the government is not sufficient basis, in and of itself, for granting waiver. *See* Department of Defense Instruction (Instruction) 1340.23, ¶ E4.1.3.

Generally, it is not against equity and good conscience to deny waiver when a reasonable person would have suspected that he was receiving payments in excess of his entitlements. *See* Instruction, ¶ E4.1.4. DOHA's adjudicator did not agree with the member that he would not have reasonably known that RCSBP was still available to him. While the member could reasonably point to contrary evidence, we believe that the record contains enough substantial evidence for the adjudicator to draw such a conclusion. For example, an exhibit labeled Exhibit 12, a letter from the member to DFAS's Military Retirement Pay office in London, KY, on October 19, 2005, the member states that while the current retiree account statement (RAS) indicates no SBP, he elected SBP for his wife many years ago and requested that it be re-instated on the RAS. The member also challenged DFAS's erroneous non-election advice in a letter to the same office dated February 3, 2006 (Exhibit 16), a day after one of his verbal discussions with a DFAS pay representative. Several other exhibits also demonstrate that the member simply did not accept the incorrect advice he received about no longer being enrolled in RCSBP and was determined to correct this error to protect his spouse.

Separately, the member participated in RCSBP from 1992,¹ and as discussed in the Appeal Decision, his spouse would have been covered under RCSBP, despite DFAS's errors, if the member had died between May 2005 and July 2007. Accordingly, even if it was reasonable for the member to believe that he was no longer covered by RCSBP, the member still received the benefit of RCSBP coverage during that period, and premiums are due on the benefit received. Since the member received the benefit of SBP coverage, collection of the overpayment of retired pay from October 2005 through July 2007 would not be against equity and good conscience, nor would it be contrary to the best interests of the United States. *See* DOHA Claims Case No. 07022009 (February 28, 2007), and DOHA Claims Case No. 07030508 (March 13, 2007). *See also* the discussion in DOHA Claims Case No. 07092705 (October 4, 2007), which indicates that waiver is not appropriate for uncollected SBP premiums, whether or not the member knew he was being overpaid, because it is not inequitable for a member who receives a benefit of

¹ The member's exhibits indicate he chose Option C which allows immediate coverage for his family from time of election, even though it would be more than 12 years until he would begin to collect retired pay.

coverage to pay for it.

Finally, 10 U.S.C. § 2774 cannot be applied to relieve the member from liability for uncollected RCSBP premiums during the period from May 1, 2005, through September 30, 2005. As the adjudicator explained, there was no overpayment involved in this portion of the indebtedness for uncollected RCSBP. The language in 10 U.S.C. § 2774(a) specifically requires an “erroneous payment” as a precondition to application. In this portion of the debt, no retired pay was due the member; therefore, there was no overpayment. *Cf.* DOHA Claims Case No. 99042101 (June 24, 1999), and DOHA Claims Case No. 07091401 (September 17, 2007).

While DFAS’s admitted customer service failures are unfortunate, we cannot grant the member waiver relief in this case for the reasons explained above.

Conclusion

The member’s request for relief is denied, and we affirm the January 11, 2008, Appeal Decision. In accordance with Instruction, ¶ 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