

KEYWORDS: waiver of indebtedness; VA disability compensation; Retired pay

DIGEST: Due to an administrative error, a member's retired pay was not reduced by the amount of the compensation he was receiving from the Department of Veterans Affairs (VA). When the member applied for VA compensation, he was considered to be on notice that when he became entitled to retired pay it would be reduced by the amount of his VA disability compensation. Under such circumstances, the member knew or should have known that he was not entitled to the full amount of his retired pay.

CASENO: 08091608

DATE: 9/23/2008

DATE: September 23, 2008

In Re:)
) [REDACTED])
)) Claims Case No.08091608
))
))
Claimant)

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

Due to an administrative error, a member's retired pay was not reduced by the amount of the compensation he was receiving from the Department of Veterans Affairs (VA). When the member applied for VA compensation, he was considered to be on notice that when he became entitled to retired pay it would be reduced by the amount of his VA disability compensation. Under such circumstances, the member knew or should have known that he was not entitled to the full amount of his retired pay.

DECISION

A retired member of the United States Army Reserves requests reconsideration of the August 21, 2008, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 08081104.

Background

On April 29, 1994, the member applied for disability compensation from the Department of Veterans Affairs (VA), and signed VA Form 21-526 (*Veteran's Application for Compensation or Pension*). Directly above the member's signature was a block stating, "NOTE: Filing of this application constitutes a waiver of military retired pay in the amount of any VA compensation to which you may be entitled." The member was subsequently awarded compensation from the VA. On December 25, 2001, the member reached sixty years of age and became entitled to receive reserve retired pay. Although the member indicated on the DD Form 2656 (*Data for Payment of Retired Personnel*) that he was receiving compensation from the VA, the Defense Finance and Accounting Service (DFAS) failed to reduce his retired pay by the amount of the compensation he was receiving from the VA. As a result, the member was overpaid \$17,171.60 from December 25, 2001, through October 31, 2003. The error was discovered in November 2003 and the member's retired pay was reduced in the amount of \$772.00 per month. However, the member's VA compensation had increased to \$839.00 in September 2003. DFAS did not take the increase into account during the period November 1, 2003, through March 31, 2004, causing an overpayment of \$403.00. In the appeal decision, the DOHA adjudicator waived the \$403.00. The adjudicator denied waiver of the \$17,171.60 on the basis that the member should have known that his retired pay was not being reduced by the amount of his VA disability.

In his request for reconsideration, the member argues that his case was not fully considered. He states that the DOHA adjudicator disregarded his completed DD Form 2656 which he encloses. This form shows his declaration of his VA disability payments. He states that his filing of this form on August 29, 2000, indicates that he understood his military retired pay to be processed correctly. He states that given the amount of similar cases cited by the adjudicator as legal precedent, DFAS will never be held accountable for gross payroll errors. The member questions how he can be held at fault when DFAS made the mistake. Finally, he requests waiver of at least the amount of the accumulated interest on his debt which he states totals \$2,389.98.

Discussion

Under 10 U.S.C. § 2774, we have the authority to waive collection of erroneous payments

to a member or former member of the uniformed service if repayment 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 the part of the member or former member. *See* Department of Defense Instruction 1340.23 (Instruction), ¶ E4.1.2 (February 14, 2006). Generally, persons who receive a payment erroneously from the Government acquire no right to the money. They are bound in equity and good conscience to make restitution. If a benefit is bestowed by mistake, no matter how careless the act of the Government may have been, the recipient must make restitution. In theory, restitution results in no loss to the recipient because the recipient received something for nothing. A waiver is not a matter of right. *See* ¶ E4.1.1 of the Instruction. Furthermore, the fact that an erroneous payment is solely the result of administrative error or mistake on the part of the government is not a sufficient basis by itself for granting waiver. *See* ¶ E4.1.3 of the Instruction. A waiver usually is not appropriate when a recipient knows, or reasonably should know, that a payment is erroneous. The recipient has a duty to notify an appropriate official and to set aside the funds for eventual repayment to the Government. *See* E4.1.4 of the Instruction.

Waiver is an equitable remedy, and it is not available to a party who shares part of the fault. *See* DOHA Claims Case No. 07091307 (September 17, 2007) and DOHA Claims Case No. 03101402 (October 20, 2003).¹ While there is no issue here of fraud, misrepresentation, or lack of good faith on the part of the member, the DOHA adjudicator properly concluded from the record evidence, which included the member's completed DD Form 2656, that the member was partially at fault. The member signed an application for disability compensation on April 29, 1994. Above his signature there is a block which reads as follows: "NOTE: Filing of this application constitutes a waiver of military retired pay in the amount of any VA compensation to which you may be entitled." Thus, the member is considered to have been on notice that when he became entitled to reserve retired pay it would be reduced by the amount of his VA disability compensation. *See* DOHA Claims Case No. 07020509 (February 8, 2007); DOHA Claims Case No. 04100402 (October 26, 2004); DOHA Claims Case No. 04061502 (June 17, 2004); DOHA Claims Case No. 02120917 (December 20, 2002); DOHA Claims Case No. 01070906 (August 7, 2001); DOHA Claims Case No. 00091208 (October 25, 2000); and DOHA Claims Case No. 99062120 (July 30, 1999). We acknowledge the fact that when the member filled out his DD Form 2656, he informed DFAS that he was receiving \$719.00 per month in disability compensation from the VA. However, when the member began receiving retired pay, and no deduction was listed on his retired pay account for VA disability compensation, he should have known that he was being overpaid. He did not acquire title to the amounts paid in excess of his entitlements, and he had a duty to bring the error to the attention of DFAS.

The member should address his concern about the interest on the debt to DFAS.

¹These cases were decided under 5 U.S.C. § 5584 because the claimants were civilian employees. However, the standards for waiver are the same for service members and civilian employees.

Conclusion

The member's request for relief is denied, and we affirm the August 21, 2008 decision to deny waiver in the amount of \$17,171.60. In accordance with Department of Defense Instruction 1340.23 ¶ E8.15, this is the final administrative action for 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