

KEYWORDS: waiver of indebtedness; timeliness; VA disability compensation; retired pay

DIGEST: 1. Due to an administrative error, a member's retired pay was not reduced by the amount of compensation he was receiving from the Department of Veterans Affairs (VA). The member was receiving disability compensation from the VA, and admits he was informed that the disability compensation would offset his retired pay. Under these circumstances, the member knew or should have known that he was not entitled to the full amount of his retired pay.
2. Under Department of Defense Instruction 1340.21, ¶ E7.13, DOHA must receive a request for reconsideration within 30 days of the appeal decision. The DOHA may extend this period for up to an additional 30 days for good cause shown.

CASENO: 09031702

DATE: 3/24/2009

DATE: March 24, 2009

_____)	
In Re:)	
(REDACTED))	Claims Case No.09031702
_____)	
Claimant)	

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGESTS

1. Due to an administrative error, a member's retired pay was not reduced by the amount of compensation he was receiving from the Department of Veterans Affairs (VA). The member was receiving disability compensation from the VA, and admits he was informed that the disability compensation would offset his retired pay. Under these circumstances, the member knew or should have known that he was not entitled to the full amount of his retired pay.

2. Under Department of Defense Instruction 1340.21, ¶ E7.13, DOHA must receive a

request for reconsideration within 30 days of the appeal decision. The DOHA may extend this period for up to an additional 30 days for good cause shown.

DECISION

A retired member of the Florida Army National Guard requests reconsideration of the February 4, 2009, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 08120503.

Background

The record shows that on December 29, 1969, the member applied for disability from the Veterans Administrator (now Department of Veterans Affairs or VA), and signed VA Form 21-526e (*Veteran's Application for Compensation or Pension*). The member was subsequently awarded compensation from the VA. On January 25, 2005, the member reached sixty years of age and became entitled to receive reserve retired pay for non-regular service under 10 U.S.C. § 12731. Although the member indicated on 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 compensation he was receiving from the VA. As a result the member was overpaid \$10,781.40 from January 25, 2005 through November 30, 2005. Credits for Concurrent Retirement and Disability Payments in the amount of \$84.14 and Combat-Related Special Compensation in the amount of \$4,332.58 reduced the overpayment to \$6,364.68. A credit for Survivor Benefit Plan (SBP) premiums in the amount of \$1,073.80 (\$107.38 per month) for the period February 2005 through November 2005 further reduced the overpayment to \$5,290.88, which is the amount DOHA's adjudicator considered for waiver.

In his request for reconsideration, the member does not specifically request an extension of the 30 days for requesting reconsideration from the date of appeal period. However, his filing is late, and the first issue that he raises in his reconsideration request is that DOHA's appeal decision was addressed to the wrong zip code. He also notes that the middle initial of his name was incorrect on the envelope and letter. He states that the overpayment was an admitted DFAS error, and he did not discover the error. He argues that his assumption that the amount paid was properly offset should be considered a reasonable one. He states that he has provided all the documentation requested, including the DD Form 21-526e dated and signed by him on December 29, 2009, which contrary to the statement in the DFAS letter of August 8, 2008, contains no mention that his "retired pay would be reduced by any amount of VA compensation that [he is] awarded." He also provided DD Form 2656 where he clearly discloses that he was receiving

VA compensation when he applied for his retirement benefits. He states that since the disclosure was made, he assumed the retirement pay was reduced by the amount of VA compensation.

Discussion

Preliminarily, as to the issue of the timeliness of the appeal, we find there is good cause shown to extend the original appeal time an additional 30 days, thereby making this appeal timely. This is due to the misaddressed appeal decision that had an incorrect zip code.¹

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 interests 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 an 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.

Because waiver is an equitable remedy, it is not available to a party who shares part of the fault. *See* DOHA Claims Case No. 06012408 (February 7, 2006) and DOHA Claims Case No. 08091608 (September 23, 2008). While there is no issue of fraud, misrepresentation, or lack of good faith on the part of the member, the DOHA adjudicator properly concluded from the record that the member was partially at fault. While the member is correct that the DD Form 21-526e that he completed in 1969 did not have the now familiar notice regarding waiver of retired pay for any amount of VA disability compensation received, the issue is whether the member was on notice. In the Authorization Form completed on February 26, 2008, the member states, "I have submitted to DFAS that when I filed for my Army National Guard retirement pay, I disclosed to the State of Florida the fact that I was receiving VA disability payments. They informed me that my retirement pay would be offset by some amount due to this. I assumed that between the State

¹We note that the middle initial "K" and the zip code "36629" were obtained from Block 1 and Block 6d of the DD Form 2656 (*Data for Payment of Retired Personnel*) that the member submitted and certified December 1, 2004. The incorrect middle initial is harmless error.

of Florida and DFAS, that this was handled correctly. Apparently they made an error.” The member knew there would be an offset, but chose to assume that it would be handled correctly. Pay statements are issued to members in order that they may verify the accuracy of their pay, and we have consistently held that a member who receives such documentation has a duty to carefully examine it and report any errors. The member has made it clear that he knew he would have an offset in his retirement pay, and he clearly abrogated his responsibility to verify the accuracy of his pay. His failure to do so makes him partially at fault in the matter, which statutorily precludes waiver of the debt. *See* DOHA Claims Case No. 99062120 (July 30, 1999), and Comptroller General Decisions B-200919, Mar 27, 1981, and B-209306, Mar 24, 1983.

Conclusion

Under Department of Defense Instruction 1340.21, E7.13, DOHA must receive a request for reconsideration within 30 days of the appeal decision. The DOHA may extend this period for up to an additional 30 days for good cause shown. We consider good cause has been shown and therefore extend the period to appeal. Having done that, the member’s request for relief is denied, and we affirm the February 4, 2009, decision to deny waiver in the amount of \$5,290.88. In accordance with Department of Defense 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: Natalie Lewis Bley

Natalie Lewis Bley
Member, Claims Appeals Board