

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

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

CASENO: 09083102

DATE: 9/02/2009

DATE: September 2, 2009

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In Re: )  
          [REDACTED] ) Claims Case No. 09083102  
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Claimant )

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**CLAIMS APPEALS BOARD  
RECONSIDERATION DECISION**

**DIGEST**

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

**DECISION**

A retired member of the United States Army Reserve requests reconsideration of the August 10, 2009, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 09062901.

### **Background**

The record shows that on August 2, 2007, the member applied for disability compensation from the Department of Veterans Affairs (VA), and signed VA Form 21-526 (*Veteran's Application for Compensation and/or Pension*). In February 2008, the member was awarded compensation from the VA.

On October 18, 2007, the member completed DD Form 2656 (*Data for Payment of Retired Personnel*) applying for military retired pay. She thus became eligible to receive military retired pay when she turned 60 years old on June 3, 2008. Once the member received military retired pay, her military retired pay should have been reduced by the amount of compensation she was receiving from the VA. However, due to an administrative error, the Defense Finance and Accounting Service (DFAS) failed to reduce her retired pay by the amount of compensation she was receiving from the VA. As a result, the member was overpaid \$4,660.87 from June 3, 2008, through February 28, 2009. In the appeal decision, the DOHA adjudicator denied waiver of the \$4,660.87 because the member should have known that her retired pay was not being reduced by the amount of her VA disability compensation.

In her request for reconsideration, the member states that her unit afforded her no opportunity for formal indoctrination of the process for retirement. Throughout the application process for both VA disability compensation and military retirement, the member sought assistance from experts and relied on their expertise. She states that although her completed VA Form 21-526 did not reflect her discharge from active duty to reserve status, VA officials knew of her return to reserve status because they had a copy of her orders. In addition, the VA was in contact with her reserve unit to obtain needed medical records to support her disability claim. She attaches a letter from her VA service officer attesting to the fact that she is not at fault for overpayment, but that it was a result of the failure of the VA to provide timely notification to DFAS of her award of disability compensation in February 2008.

### **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 an erroneous payment 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. It is available to provide relief as a matter of equity, if the circumstances warrant. *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 sufficient basis in and of itself for granting waiver. *See* ¶ E4.1.3 of the Instruction. A waiver is usually 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.

While there is no issue here of fraud, misrepresentation, or lack of good faith on the part of the member, the DOHA adjudicator properly denied waiver on the basis that the member knew or should have known that she would not be permitted to receive full payment of retired pay (when she became eligible to receive it at age 60 in June 2008) while also receiving VA compensation. This is because the member is considered to be on notice by virtue of completing the application for VA compensation that when she became entitled to retired pay it would be reduced by the amount of VA disability compensation she received. The record reflects that Section VII of the VA Form 21-526 that the member completed to apply for VA compensation, states:

When you file this application, you are telling us that you want to get VA compensation instead of military retired pay. If you currently receive military retired pay, you should be aware that we will reduce your retired pay by the . . . amount of any compensation that you are awarded.

Therefore, when the member began receiving retired pay in June 2008, after being awarded VA compensation in February 2008, she was on notice that her military retired pay would be reduced by the amount of her VA compensation. The member should have questioned the effect her VA compensation had on her military retired pay, and the fact that her military retired pay was not reduced to reflect compensation she received from the VA. When a member is aware or should be aware that she is being overpaid, she must be prepared to return the excess amount when requested to do so by the Government. *See* DOHA Claims Case No. 08091608 (September 23, 2008); DOHA Claims Case No. 07020509 (February 8, 2007); and DOHA Claims Case No. 04100402 (October 26, 2004).

### **Conclusion**

The member's request for relief is denied, and we affirm the August 10, 2009, appeal decision to deny waiver in the amount of \$4,660.87.

Signed: Michael D. Hipple

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Michael D. Hipple

Chairman, Claims Appeals Board

Signed: Jean E. Smallin

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Jean E. Smallin  
Member, Claims Appeals Board

Signed: Catherine M. Engstrom

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Catherine M. Engstrom  
Member, Claims Appeals Board