

KEYWORDS: waiver of indebtedness; Selective Reenlistment Bonus

DIGEST: The unearned portion of a Selective Reenlistment Bonus may not be considered for waiver under 32 U.S.C. § 716 because payment was proper when made.

CASENO: 09082801

DATE: 9/21/2009

DATE: September 21, 2009

)	
In Re:)	
[REDACTED])	
)	Claims Case No.09082801
)	
Claimant)	

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

The unearned portion of a Selective Reenlistment Bonus may not be considered for waiver under 32 U.S.C. § 716 because payment was proper when made.

DECISION

A former member of the Army National Guard requests reconsideration of the August 20, 2009, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 09031301. In that decision, DOHA waived \$89.81 of the \$14,166.67 claim against the member. DOHA determined that the balance (\$14,076.86) could not be considered for waiver. The member requests, through a representative, reconsideration of DOHA’s determination that the \$14,076.86, which represents the unearned portion of his Selective Reenlistment Bonus (SRB), cannot be considered for waiver.

Background

On March 27, 2007, the member reenlisted in the Army National Guard for a period of six years. As a result, he was entitled to receive SRB payments in the gross amount of \$15,000.00, which he subsequently received. On September 15, 2007, the member was discharged prior to completing his term of enlistment. Because the member was discharged more than five years before the end of his term of enlistment, the Army National Guard was required to recoup from him a pro rata portion of the SRB in the amount of \$14,166.67.

At the time of his discharge, the member was entitled to receive drill pay in the amount of \$89.81. This amount was properly applied to the indebtedness in the amount of \$14,166.67, reducing it to \$14,076.86. However, due to an administrative error, the Defense Finance and Accounting Service (DFAS), erroneously paid the member \$89.81 on September 26, 2007. Therefore, the member's debt remained at \$14,166.67.

In the appeal decision, our Office waived the erroneous payment the member received on September 26, 2007, in the amount of \$89.81. However, our Office concluded that the \$14,166.67 could not be considered for waiver because it did not represent an erroneous payment. The DOHA adjudicator explained that a claim arising from a properly paid SRB, which later must be recouped because of a member's early separation, is not a claim arising from an erroneous payment which may be considered for waiver under 32 U.S.C. § 716.

On appeal, the member's representative submits new evidence reflecting that the Department of Veterans Affairs granted the member a 100 percent service-connected disability for paranoid schizophrenia effective March 19, 2008. The member's representative asserts that the member was not of sound mind and should not have been offered the option to re-enlist.¹

Discussion

Under 32 U.S.C. § 716, we have the authority to waive a claim of the United States against a member or former member of the National Guard for erroneous payments of pay and allowances if collection would be against equity and good conscience and not in the best interests of the United States. A debt cannot be considered for waiver unless the payment was erroneous when made, and we have held that a debt arising from the unearned portion of an SRB does not

¹This argument will not be addressed because it is not supported by the record. The member must prove by clear and convincing evidence, in the form of medical records and other documentary proof, that he was in such poor physical or mental health at the time of re-enlistment that it was unlikely that he knew or could have known that he was not eligible for re-enlistment, or that he was otherwise unable to attend to ordinary financial affairs. *See* DOHA Claims Case No. 07082707 (September 4, 2007) and decisions cited therein. A determination of mental incapacity at the time of re-enlistment has to be made by competent authority, not our Office. The VA's rating decision of September 16, 2008, indicates the member is competent.

arise from an erroneous payment, since the payment was proper when made. *See* DOHA Claims Case No. 08092602 (October 23, 2008); DOHA Claims Case No. 07103007 (November 15, 2007); DOHA Claims Case No. 06053038 (June 2, 2006); Comptroller General decisions B-261958, Nov. 8, 1995; B-259696, Jan. 25, 1995; and B-254196, Dec. 23, 1993.²

The member seeks relief under 32 U.S.C. § 716, and 32 U.S.C. § 716(a) specifically requires “an erroneous payment of any pay or allowances . . . to or on behalf of a member or former member of the National Guard” as a condition for applying the statute. In this case, the SRB payment was proper when made. Therefore, the unearned portion of the member’s SRB cannot be considered for waiver under 32 U.S.C. § 716, because the debt did not arise from an erroneous payment. *See* DOHA Claims Case No. 08092602, *supra*.

Although we have no authority to consider the unearned portion of an SRB for waiver because it does not constitute an erroneous payment, our decision does not preclude the member from seeking other available remedies. We note that under 37 U.S.C. § 303a(e), the Secretary concerned (in this case, the Secretary of the Army), has the discretion to determine if the member’s repayment of the unearned portion of the SRB is appropriate based on whether repayment would be contrary to a personnel policy or management objective, would be against equity and good conscience, or would be contrary to the best interests of the United States.³ The member may wish to pursue this remedy with the Secretary of the Army through his state’s Army National Guard chain of command.

Conclusion

The member’s request for relief is denied, and we affirm the August 20, 2009, appeal decision. In accordance with DoD Instruction 1340.23, ¶ E8.15, this is the final administrative action of the Department of Defense concerning the member’s waiver request under 32 U.S.C. § 716.

²These decisions involved consideration for waiver under 10 U.S.C. § 2774 (the waiver statute applicable to active duty and reserve members of the Uniformed Services). The standards for waiver are the same under 32 U.S.C. § 716 (the waiver statute applicable to National Guard members).

³Repayment of the SRB is currently covered by Volume 7A of the DoD Financial Management Regulation - *Military Pay Policy and Procedures - Active Duty and Reserve Pay*, DoD 7000.14R (DoDFMR). Chapter 2 sets forth conditions under which repayment of the SRB will not be sought. For example, paragraph 020201 states: “As a general rule, repayment will not be sought in situations in which the member’s inability to fulfill specified service conditions related to a pay or benefit is due to circumstances determined reasonably beyond the member’s control.”

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