

KEYWORDS: waiver of indebtedness; FSGLI

DIGEST: A servicemember did not decline coverage in the Family Servicemember's Group Life Insurance (FSGLI). It is not against equity and good conscience to deny waiver of the total amount of the premiums because the member had the benefit of the coverage under FSGLI.

CASENO: 09091601

DATE: 9/30/2009

DATE: September 30, 2009

_____)
In Re:)
 [REDACTED]) Claims Case No. 09091601
)
Claimant _____)

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

A servicemember did not decline coverage in the Family Servicemember's Group Life Insurance (FSGLI). It is not against equity and good conscience to deny waiver of the total amount of the premiums because the member had the benefit of the coverage under FSGLI.

DECISION

A member of the United States Navy requests reconsideration of the August 17, 2009, appeal decision of the Defense Office of Hearings and Appeals (DOHA), in DOHA Claim No. 09072005.

Background

The record shows that in accordance with the provisions of 38 U.S.C. § 1967, all active

duty members were automatically enrolled in Family Servicemember's Group Life Insurance (FSGLI), effective November 1, 2001, unless they elected not to participate in the program. DFAS determined that this member did not decline coverage, so FSGLI premiums should have been withheld from her pay. Due to an administrative error, FSGLI premiums were not withheld from her pay from November 1, 2001, through November 30, 2007, resulting in an overpayment of \$957.00. The member was advised of the debt by memorandum dated January 15, 2008, from a Personnel Support Activity Detachment. The member submitted a DD Form 2789, *Waiver/Remission of Indebtedness Application* on August 14, 2008. DFAS denied waiver of the \$957.00 on January 30, 2009, and advised the member that she could request a reconsideration within 30 days, or request an extension of an additional 30 days. The member requested the 30-day extension for good cause, which was granted, and timely submitted her request for an appeal of the waiver decision on March 27, 2009. DFAS recommended the denial be sustained on July 16, 2009, and forwarded the record to DOHA for a decision. DOHA issued an appeal decision on August 17, 2009.

The adjudicator in her appeal decision sustaining DFAS's denial found that the member's October and November 2001 Leave and Earning Statements (LESs) notified the member that FSGLI coverage would become effective November 1, 2001. Further, the member's October 2001 LES advised that she should visit her personnel office in order to reduce or decline coverage. The member did not present documentary evidence that she declined coverage. The adjudicator found that since the member would have received the benefit of the coverage, waiver of repayment of the premiums was not appropriate. Additionally, the adjudicator found the member's version of events (that she was told by personnel officials she did not need to do anything) was not corroborated in the written record by pay or disbursing officials, with evidence of the member's statement(s) to them and their statement(s) to the member.

The member contends that she was not notified by DFAS of their decision regarding her appeal or provided with a copy of the administrative report in support of their decision. Additionally, she contends she was never advised of her right to submit rebuttal. The member requests the due process she believes she was denied, or in the alternative, she requests reconsideration. The member requests that the DoD General Counsel review her case because the adjudicator found that "we have consistently held that members have a duty to carefully examine their LES and report any errors. If the member fails to fulfill this obligation, we have held that waiver is precluded." The member contends that this is an inflexible position towards the waiver process and is inconsistent with DoD policy. Specifically, the member requests reconsideration of the issue that her myPay account provided adequate notice. She contends that DFAS's position that notice on her October 2001 LES of the FSGLI coverage was adequate is inequitable. The member contends that she met the standard for waiver when she sought the advice of personnel support detachment (PSD) officials and was told she needed to do nothing to decline coverage of FSGLI. The member disagrees that there is no corroborating evidence, as the events are corroborated in the member's statement. The member contends she did not elect FSGLI coverage and so is not obligated for the the premiums. The member asserts that the mistakes of the government have not been addressed, and she maintains that she did not receive a benefit. The member contends that equity and good conscience demand that the debt be waived.

Discussion

In her request for reconsideration, the member maintains that she was denied due process by DFAS because she was not advised she had the right to submit rebuttal evidence as her case was being considered. The record indicates that the member received an Administrative Report from DFAS dated January 30, 2009, which explained why DFAS denied her waiver request. The Administrative Report advised the member that she might request reconsideration of their determination. The member requested and received a 30-day extension to make her appeal. The Administrative Report advised her to present and explain the reasons for her appeal and to submit any evidence not already in the record to support her position. The report went on to say that DFAS would review the materials she submitted and forward them to DOHA along with the Administrative Report. The member submitted materials in rebuttal of DFAS's determination. DOHA received DFAS's Administrative Report and her submissions under cover letter dated July 16, 2009. She was advised of DOHA's Appeal Decision, dated August 17, 2009. In that decision, she was advised of her right to request reconsideration by DOHA's Claims Appeals Board and her right to submit documentation in support of that request. She submitted evidence prior to the Board's present reconsideration of her case. She has not demonstrated that she was not advised of her right to submit evidence, or was prevented from doing so, and has not presented any colorable evidence of harmful error in the denial of the due process anticipated in the applicable regulation, DoD Instruction 1340.23 (hereinafter Instruction) (February 14, 2006).

As to the member's request that the DoD General Counsel review this case, there is no issue of law that requires consultation with the DoD General Counsel's Office arising from this case. Citing precedent does not indicate inflexibility. As stated in ¶ E8.15 of the Instruction, a DOHA reconsideration decision is a final action.

Public Law 107-14 established FSGLI coverage for members of the uniformed services who are eligible for Servicemember's Group Life Insurance (SGLI) coverage.¹ Under this law, effective November 1, 2001, FSGLI automatically covers spouses and dependent children of members.² In order to decline coverage for a member's spouse, the member must elect to do so in writing.³ The member never states that she did not receive the LES or have access to it through myPay. She states that the "October 2001 LES notice that you reference in your report occurred less than 30 days after overseas military personnel like me were in an elevated force protection status, working extended hours, and focused on the threat of potential terrorist attacks. Reviewing electronic LESs at this time was not a priority for service members like me . . ." She also

¹Pub. L. No. 107-14, § 4, 115 Stat. 25, 26-30 (2001).

²See 38 U.S.C. § 1967 and ¶ 471201 of Chapter 47, Volume 7A of DoD 7000.14-R, the Department of Defense Financial Management Regulation (DoDFMR), Military Pay Policy and Procedures—Active Duty and Reserve Pay.

³See ¶ 471208 of Vol. 7A, DoDFMR.

contends that notice in the October and November 2001 LESs was not adequate, and it cannot be assumed that she consented to electronic LESs per the Policy for Electronic Wage and Tax Statements and Leave and Earning Statements, dated April 29, 2005. The April 29, 2005, policy regarding LESs is not proof that members did or did not have access to myPay; the website had been active for several years prior to that memorandum. It was a cost-savings measure that indicated that effective July 1, 2005, all members with a customized PIN to myPay were consenting to receiving only an electronic LES, unless they went into the system and elected to “turn on” hard copy delivery. LESs are available on myPay for a period of 12 months. The myPay system is not at issue here, and the member has not demonstrated that she did not have access to her LESs.

Section 2774 of title 10, United States Code, provides authority for waiving claims for erroneous payments of pay and certain allowances made to or on behalf of members or former members of the uniformed services, if collection of the claim 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 any other person having an interest in obtaining the waiver. Whether to grant waiver under 10 U.S.C. § 2774, as the statutory language indicates, is not decided as a matter of right whenever a member innocently receives pay to which she is not entitled, but is decided on the principles of equity and fairness presented in each case. Administrative error or mistake on the part of the Government is a factor for consideration in determining whether waiver is appropriate. However, administrative error or mistake on the part of the government is not, in and of itself, sufficient basis for granting waiver. In the present case, the member was notified in her October and November 2001 LESs “Family SGLI Eff 1 Nov 2001. Auto enrollment of spouses . . .” Her November 2001 LES stated “Family SGLI Eff 1 Nov 2001. Reduce or decline spouse’s coverage by 31 Dec to receive a refund of any Family SGLI premiums paid.” The member indicated that she reviewed her LESs electronically periodically, but at this time it was not a priority. As stated, LESs are available on myPay for up to 12 months. The LES is issued to members so that they can verify the accuracy of their pay. We cannot stress enough the importance of a careful review by each member of the LES provided by the agency. We have consistently held that members have a duty to carefully examine their LES and report any errors. If the member fails to fulfil this obligation, we have held that the member is at fault, and waiver is precluded. *See* DOHA Claims Case No. 97032501 (June 9, 1997); DOHA Claims Case No. 06111301 (November 15, 2006); and DOHA Claims Case No. 07031906 (March 27, 2007).

The member indicates that she tried to verify conflicting information about how to decline FSGLI coverage and was told by personnel officials that she did not need to do anything. Our decisions have consistently held that there is no basis for waiver unless the official(s) providing the advice is identified and the member’s version of the events is corroborated in the written record by pay or disbursing officials with evidence of the member’s statement(s) to them and their statement(s) to the member. *See* DOHA Claims Case No. 01010906 (March 8, 2001); DOHA Claims Case No. 02120917 (December 20, 2002); and DOHA Claims Case No. 09051302 (May 21, 2009). As the adjudicator pointed out, there is nothing in the file to corroborate the member’s version of events. The member contends that there is corroborating evidence in her waiver appeal

request to DFAS. Unfortunately, the only evidence in the record is that of the member. The member states her version of events. She states she was told certain things by the personnel detachments. She states she received written guidance supporting their advice and that she identifies one individual who gave her advice. However, there is no statement in the waiver appeal request to DFAS or in her request for reconsideration from any individual from those personnel detachments. She states the identity of the individual is a “senior supervisor,” but does not provide a name or any statement from him/her. She says there is written supporting guidance, but does not include it in the record. Corroborating evidence is evidence which strengthens, adds to, or confirms already existing evidence. We have consistently held that members cannot rely upon vague assertions of disbursing clerks that their pay is correct.⁴

As to the member’s contention that she did not provide consideration for the FSGLI benefit and therefore could not have received the benefit of the coverage, this is not a private or business arrangement settled under the rules of contract law. This is a government program covered by a federal statute that clearly states all members with spouses and dependent children will be covered by Family Servicemembers Group Life Insurance effective November 1, 2001, unless the individual member in writing declines the coverage of the program. There is no evidence that the member declined the program, and so the member was covered by FSGLI. If the member’s insured family member had died during the period in question, the beneficiary would have received the benefit of FSGLI coverage minus the uncollected premiums. The member received the benefit and, therefore, is liable for the premiums. *See* DOHA Claims Case No. 07031906, *supra*.

Conclusion

The member’s request for reconsideration is denied, and we affirm the August 17, 2009, appeal decision. In accordance with ¶ E8.15 of the Instruction, this is the final administrative action of the Department of Defense concerning the member’s waiver request under 10 U.S.C. § 2774.

⁴*See* DOHA Claims Case No. 09051302, *supra*. Waiver was granted in a case in which DOHA had the member’s statement that a named individual at the personnel support detachment (PSD) emailed DFAS with the error requesting correction. We have the member’s statement that the named individual at the PSD told him DFAS had answered his pay inquiry with the answer that his pay was correct. With this as evidence, the adjudicator only waived a portion of the debt. In his request for reconsideration, the member provided a sworn statement of the named individual at the PSD corroborating his statements. Such a statement is essential in this type of case.

///Original Signature///

Michael D. Hipple
Chairman, Claims Appeals Board

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Member, Claims Appeals Board

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