

In Re:

[Redacted]

Claimant

DATE: February 20, 1997

Claims Case No. 96100201

CLAIMS APPEALS BOARD DECISION

DIGEST

Section 12738 of title 10 of the United States Code states that once a Reservist is granted retired pay, his eligibility for such pay may not be revoked "on the basis of any error, miscalculation, misinformation, or administrative determination of years of service performed as required by section 12731(a)(2)" (i.e., 20 years of service). However, the administrative determination concerning "years of service" does not include the determination concerning whether a service member meets any additional conditions precedent for retired pay, such as the requirements that he must have served during certain periods of conflict as required by 10 U.S.C. 12731(c).

DECISION

[Redacted], who retired from the Puerto Rico National Guard in 1971, appeals the Army's denial of his claim for retired pay and requests reconsideration of the decision of the Comptroller General to waive only part of a debt for erroneous payment of the retired pay.⁽¹⁾ The U.S. General Accounting Office (GAO) transferred the claim for retired pay to the Defense Office of Hearings and Appeals on September 13, 1996, and the issues related to the waiver on December 19, 1996.

Jurisdiction

Pursuant to Public Law No. 104-53, 211, November 19, 1995, the GAO's authority to settle claims for military pay and allowances, including retired pay, was transferred to the Director of the Office of Management and Budget. The Director of OMB delegated his authority to the Secretary of Defense effective June 30, 1996. Under Public Law No. 104-316, October 19, 1996, Congress codified the OMB Director's delegation of claims settlement authority by transferring it directly to the Secretary of Defense. Simultaneously, Public Law No. 104-316 transferred to the Director of OMB the GAO's authority to consider applications from service members for waiver of a debt to the government resulting from the erroneous overpayment of pay. The OMB Director delegated this authority to the Secretary of Defense effective December 18, 1996. The Defense Office of Hearings and Appeals now exercises all of the authority transferred or delegated to the Secretary of Defense through this Board, which is part of DOHA. The Board can entertain both the legal claim for retirement and any matter related to the waiver of the debt created by the erroneous payment of retired pay.

Background

The factual background is set forth in the Comptroller General's decision which partially waived the claimant's debt⁽²⁾; we substantially repeat it here for the convenience of the reader.

The claimant was a member of the Puerto Rico National Guard with over 29 years of service when he reached age 60 in January 1971. At that time he applied for retired pay pursuant to 10 U.S.C. 1331-1337, which at that time included the provisions authorizing non-regular retired pay for qualified members of the National Guard. However, in a letter dated September 27, 1971, the U.S. Army Reserve Personnel Center (ARPERCEN) notified the claimant that he was not entitled to retired pay because he had not performed active duty during any of the periods of war specified in 10 U.S.C. 1331(c), a requirement for members in his situation.⁽³⁾ The claimant disputed that determination. He indicates he made

several attempts to persuade the service of his entitlement to retired pay at various times but without success until 1989, when in March he again made application for retired pay. As a result of that application, by order dated October 4, 1989, ARPERCEN notified him that he was certified for retired pay effective January 29, 1971, the date of his 60th birthday, and monthly payments to him were begun. He was also paid a lump sum for retired pay retroactive 6 years, and he was advised that the statute of limitations, 31 U.S.C. 3702 (b), prohibited further retroactive payment beyond that 6 years (to January 1971).

The claimant disputed the application of the 6-year limitations period to his claim because he had first applied for retired pay in January 1971. Although he was unsuccessful in convincing the service that his claim was not subject to the statute of limitations, his current retired pay continued to be paid monthly through March 1991. As a result of the claimant's continuing efforts to recover retired pay for the additional retroactive period, ARPERCEN advised him in April 1991 that their review of his entitlement indicated that he had been erroneously certified to receive retired pay. Accordingly, ARPERCEN advised him that he owed the government \$37,167.65 for the retired pay he had been paid. He also was advised that he could request waiver of the debt.

The claimant filed a waiver request dated May 16, 1991, with the Defense Finance and Accounting Service (DFAS) which was responsible for collecting the debt. He also followed up with a letter dated June 27, 1991, pointing out that in view of his age (at that time he was 80 years old), DFAS should expedite a "positive solution" to the matter. Apparently the next communication the claimant received from DFAS was notice in September 1991 that his retired pay had been reestablished retroactive to April 1991, when it had been revoked. He received a lump sum payment for the retroactive period, and his current monthly retired pay was paid but with a monthly deduction of \$71 to collect the previous debt. Apparently no further explanation was provided to him at that time. By letter dated November 11, 1991, to DFAS, the claimant referred to both the retroactive payment and the current payments he had received and stated that based on the resumption of his retired pay, he assumed that the response to his prior request had been positive and that he would continue to receive his monthly retired pay. He requested confirmation of this and indicated that he would assume that his position was correct unless he received information to the contrary.

The record does not show that the claimant received a direct response to his November 11 letter. However, on December 10, 1991, DFAS responded to his waiver request, stating that he should have questioned his entitlement to retired pay when it was established for him in 1989 since his application for it had been previously denied in 1971. Therefore, DFAS stated, waiver of his debt would not be appropriate since he was not without fault in the matter. However, his retired pay payments continued, as reestablished in September 1991 with the deductions for collection of the prior debt, until February 1994, when DFAS again discovered that he was receiving retired pay erroneously and stopped the payments. DFAS then calculated the claimant's total debt for such payments to be \$53,836.81, consisting of the \$37,167.65 he had been paid for the period prior to April 1991, and \$16,669.16 for the period from April 1991 to February 1994.

DFAS submitted the matter to GAO for waiver consideration. In doing so, DFAS indicated that it had changed its previous position on waiver of the portion of the debt related to the first period of erroneous payments, \$37,167.65, and recommended waiver of that amount. The reason given for this recommendation was that although the claimant initially had been advised in 1971 that he was not entitled to retired pay, it appeared that he was convinced at all times he was entitled to it, and when it was established for him in 1989, he had no reason to question the payments he then began to receive. DFAS, however, recommended against waiver of the \$16,669.16 the claimant received during the second period of overpayments on the grounds that after being notified in April 1991 that he was not entitled to retired pay, he should have questioned the reestablishment of the payments in September 1991.

Adjudicators at GAO accepted the DFAS recommendations, waived the \$37,167.65, and denied waiver of the \$16,669.16. The claimant appealed the partial denial of waiver, arguing that it is against equity and good conscience to revoke his retired pay at his advanced age, and indicating that he continues to believe that he is entitled to such pay. On appeal, the Comptroller General modified GAO's prior settlement and waived collection of an additional \$4,138.41 of the claimant's debt paid for the period from April 1991 through December 1991, leaving the balance of the debt at \$12,530.75. The Comptroller General did not address the legal basis of the claimant's claim because jurisdiction had passed to the Executive Branch at the time of the decision.

Discussion

The Claim for Retired Pay

There is no proper legal basis for payment of the claimant's claim for retired pay. As the Comptroller General indicated, while the claimant met the general requirements for age and length of service, he did not meet an additional statutory requirement that he perform active duty during World War II.⁽⁴⁾ This requirement was imposed on service members who participated in the Reserves before August 16, 1945. The record here indicates that the claimant served in the National Guard from February 23, 1930 to January 21, 1935,⁽⁵⁾ and therefore would have to meet this additional requirement.

The claimant's legal counsel now contends that, right or wrong, ARPERCEN did grant his claim for retired pay in 1989, and because there was no fraud or misrepresentation involved, the government must pay him under 10 U.S.C. 12738. Section 12738 states that once a person is granted retired pay, his eligibility for such pay may not be revoked "on the basis of any error, miscalculation, misinformation, or administrative determination of years of service performed as required by section 12731(a)(2)" (i.e., 20 years of service). Counsel's argument is misplaced. Section 12738 involves the determination concerning "years of service performed," but, as the Comptroller General noted, the claimant's retired pay was revoked because he did not serve during a certain specified period, not because the government erred in determining the number of years of service under 12731 (a)(2). See Master Sergeant Henry W. Schuchardt, USAR (Retired), B-274195, Oct. 8, 1996; 51 Comp. Gen. 91 (1971). In accord, see Bock v. United States, 650 F. 2d 287 (Ct. Cl. 1980).

Reconsideration of the Comptroller General's Partial Debt Waiver

To prevail on reconsideration, a claimant must demonstrate an error in fact or law in the prior decision. Neither disagreement with a decision nor restatement of arguments already made establishes that the decision was based on an error of fact or law. See DOHA Claims Case No. 96070201 (September 5, 1996); Eck Miller Transportation Corporation-Reconsideration,

B-245385 & B-245385.2, May 20, 1992. Counsel for the claimant rebuts the Comptroller General's rationale in not waiving the debt created by the erroneous payment of retired pay received after December 1991; otherwise he repeats his prior arguments concerning the claimant's age and financial resources. Counsel argues that the claimant obtained a favorable decision in 1989, and the Comptroller General should not have relied upon the December 1991 DFAS letter which, he says, pertains only to an "alleged existing overpayment related to a previous period" (through April 1991) to adjudicate's right to a waiver of his debt for the period after 1991.

The Comptroller General's decision had a reasonable basis. As we interpret his decision, he acknowledged that the claimant was justified (for purposes of waiver) in relying on the 1989 determination that he was entitled to retired pay. But in April of 1991, ARPERCEN reversed this determination. Thereafter, the claimant initiated his request for waiver of the erroneous payments made to him through April 1991, but before his waiver request was granted, the retired pay was erroneously resumed. The claimant tried to obtain a definitive determination concerning his waiver and entitlement to retired pay, but no direct response was forthcoming. Finally, in December 1991, DFAS sent the claimant a letter, which, among other things, stated that he was not entitled to retired pay, notwithstanding the September reinstatement. The comments on the entitlement to the retired pay transcend any period of payments involved here. It is at this point that the Comptroller General found that a reasonable person should have questioned whether he was entitled to retired pay.

Conclusion

We deny the claim for retired pay, and affirm the Comptroller General's decision with respect to the waiver of the erroneous payment of retired pay.

/s/ Michael D. Hipple

Michael D. Hipple

Chairman, Claims Appeals Board

/s/ Jean E. Smallin

Jean E. Smallin

Member, Claims Appeals Board

/s/ Joyce N. Maguire

Joyce N. Maguire

Member, Claims Appeals Board

1. The claimant is represented in this matter by Juan Cruz-Cruz, Esq.
2. See B-271426, Nov. 4, 1996.
3. Service members who entered the Reserves prior to August 16, 1945 had to have performed active duty during World War I or World War II.
4. See 10 U.S.C. 12731(c), the content of which was contained in 10 U.S.C. 1331(c) when the claimant initially applied for retired pay.
5. The statute also allows credit for wartime service if such a Reservist later served on active duty (other than for training) during the Korean conflict, the Berlin crisis or the Vietnam era, but counsel has not demonstrated, and the record does not indicate, such service.