

DATE: April 21, 1997

In Re:

[Redacted]

Claimant

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Claims Case No. 96103001

## CLAIMS APPEALS BOARD DECISION

### DIGEST

A military member was placed in confinement pursuant to a court-martial conviction. When his conviction was set aside, he became entitled to retroactive pay and allowances. He had received Social Security Disability Benefits, and the retroactive pay and allowances were offset by the amount of those benefits. Such an offset was not proper in the absence of a statute or regulation requiring it.

### DECISION

We have been asked to render a decision regarding the active-duty pay and allowances of a Marine Corps member who is now retired. He was convicted by court-martial and confined, but when his conviction was set aside, he received retroactive payment of pay and allowances for the period of his confinement. The retroactive payment was reduced by the amount of Social Security Disability Benefits he received during the same period, and he claims the amount of the offset. Because of questions regarding the propriety of the offset, the General Counsel of the Defense Finance and Accounting Service (DFAS) recommended that the member file a claim for the amount of the offset with the United States General Accounting Office (GAO). Pursuant to Public Law No. 104-316, October 19, 1996, 31 U.S.C. 3702, which provides for the settlement of claims against the United States, was amended to provide that the Secretary of Defense shall settle claims involving uniformed service members' pay, allowances, travel, transportation, retired pay, and survivor's benefits. The Secretary further delegated the authority to this Office.

### Background

According to the record before us, the member was placed in confinement on February 23, 1988, with total forfeiture of pay and allowances. He received psychiatric care while he was confined, and he began receiving Social Security Disability Benefits on June 1, 1989. On August 5, 1991, he was released from confinement and placed on appellate leave. On October 18, 1993, his court-martial conviction was set aside on the grounds that he was incompetent at the time of his trial. From October 1993 until May 4, 1994, he lived with relatives while awaiting orders, although he was hospitalized at least once during that period. He resumed active duty on May 5, 1994, and was placed on the Temporary Disability Retired List on April 1, 1995.

When the member's conviction was set aside without a rehearing or a new trial, he became entitled to the restoration of all rights, privileges, and property affected by the executed portion of his court-martial sentence. See 10 U.S.C. 875(a). From the record before us, it appears that he was paid military pay and allowances for the entire period in question. However, when DFAS calculated the amount of pay and allowances to which he was entitled, they subtracted the amount of Social Security Disability Benefits which he had received. The member's attorney calculates the amount of that offset to be \$37,843.80. He argues that the offset was not proper in the absence of a statute or regulation requiring offset of such amounts.

### Discussion

We have been unable to locate any prior decisions regarding the offset of military pay and allowances because of Social Security Disability Benefits. However, the Comptroller General has rendered decisions regarding retroactive payments

of pay and allowances to members who were continued on active duty after their records were corrected by Correction Boards to indicate that they had not been discharged. When their records were corrected, they became entitled to full military pay and allowances for the period involved because the entitlement arises from military status, not the duties performed. See 55 Comp. Gen. 507, 509 (1975). A series of such cases involved the offset of military pay and allowances by the amount of interim civilian compensation earned by the members. In general, the Comptroller General approved the offset of military pay by the amount of civilian earnings. One reason for that position was that failure to make such an offset would be a windfall to the members whose records had been corrected and would place them in a better position than members who had performed active duty for the entire period. See 48 Comp. Gen. 580 (1969). However, the Comptroller General ruled that such an offset could not be made in the absence of a statute or regulation mandating it. See Reynaldo Garcia, B-207299, Oct. 6, 1982.

When the member's court-martial conviction was set aside without a rehearing or a new trial, he became entitled to retroactive pay and allowances as if he had continued on active duty during the period of his confinement.<sup>(1)</sup> See 10 U.S.C. 875(a). It is our view that the retroactive payment should not have been reduced by the amount of Social Security Disability Benefits which he received in the absence of a statute or regulation which requires such a reduction. See Reynaldo Garcia, B-207299, supra. The fact that the member may have performed no military duties during the period in question does not diminish his entitlement to pay and allowances, since he is considered to have been on active duty, and status rather than the work performed determines a member's entitlement to pay and allowances. See 55 Comp. Gen. at 509.

The Comptroller General has approved a reduction in retroactive military pay to account for the amount of interim civilian earnings when the reduction is mandated by statute or regulation because a member on active duty generally would not have had an opportunity to pursue a civilian career. See 48 Comp. Gen. at 582. Failure to make such a reduction would allow a member to be paid for 2 careers simultaneously, and it is unlikely that a member would be able to earn significant civilian compensation while on active duty.<sup>(2)</sup>

In contrast, it is possible for a person to earn a salary while collecting Social Security Disability Benefits. The Commissioner of Social Security has full power and authority to determine eligibility for Social Security Disability Benefits. See 42 U.S.C. 405.<sup>(3)</sup> Eligibility is based not only on the individual's income, but also on the degree of his ability to engage in substantial gainful activity. See 42 U.S.C. 423(d)(4)(A). A disabled individual who begins working apparently does not begin to lose disability benefits for at least 3 months. See 42 U.S.C. 423(a)(1). Because disabled military members may receive full pay while on limited duty or in work therapy programs, their income is not necessarily indicative of their ability to engage in substantial gainful activity. A member's receipt of full pay therefore does not necessarily result in loss of all Social Security Disability Benefits. See Social Security Ruling 84-24.

We are aware of no statute or regulation which requires DFAS to reduce the member's pay and allowances by the amount of Social Security Disability Benefits he received; and in the absence of such a statute or regulation, reduction of his pay by that amount was not proper. Reynaldo Garcia, B-207299, supra. Moreover, title 42 of the United States Code gives the Commissioner of Social Security authority to make determinations regarding disability benefits.<sup>(4)</sup>

### **Conclusion**

Accordingly, we allow the member's claim for the amount offset from his military pay and allowances on account of the Social Security disability benefits he received, if otherwise correct.

\_\_\_\_\_/s/\_\_\_\_\_

Michael D. Hipple

Chairman, Claims Appeals Board

\_\_\_\_\_/s/\_\_\_\_\_

Christine M. Kopocis

Member, Claims Appeals Board

\_\_\_\_\_/s/\_\_\_\_\_  
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Jean E. Smallin

Member, Claims Appeals Board

1. A memo from DFAS discusses the member's entitlement to pay and allowances during that and subsequent time periods. We agree with DFAS's determination of entitlement to pay and allowances during the various time periods. The only issue before us is the propriety of the offset for Social Security Disability Benefits.

2. See B-152421, Feb. 18, 1964.

3. Authority formerly rested with the Secretary of Health and Human Services.

4. We take no position as to whether the member is entitled to the Social Security Disability Benefits in light of the retroactive pay and allowances he received. The Social Security Administration should be notified of the retroactive payments.