
In Re:

[Redacted]

Claimant

DATE: October 24, 1997

Claims Case No. 97101601

CLAIMS APPEALS BOARD DECISION

DIGEST

A service member who had been placed on the Temporary Disability Retired List with a 50 percent disability received written orders transferring him to the Permanent Disability Retired List with a 40 percent disability. However, the service member continued to receive retired pay at the 50 percent rate. The service member states that he had expected a written explanation of how his retired pay was calculated, but that he did not receive it. He contends that he telephoned pay officials and was assured that he was to receive pay at the 50 percent rate, but there is nothing in the record to corroborate the member's version of the events; namely, that officials told him that he was still entitled to 50 percent. In the absence of clear proof to the contrary, the service member is at least partially at fault for not questioning his receipt of pay at the 50 percent rate after he received written orders indicating that he was retired at a 40 percent disability. The collection of erroneous payments of pay in such circumstances would not be against equity and good conscience and would be in the best interest of the United States.

DECISION

[Redacted], appeals the September 8, 1997, Settlement Certificate of the Defense Office of Hearings and Appeals in Claim No. 97082109, disallowing his request for waiver of indebtedness to the government resulting from the erroneous overpayment of disability retired pay in the amount of \$4,555.83.

Background

The record indicates that the service member was placed on the Temporary Disability Retired List (TDRL) with a disability rating of 50 percent on June 5, 1986. By Orders dated April 3, 1987,⁽¹⁾ the service member was removed from the TDRL and was placed on the Permanent Disability Retired List (PDRL) effective April 18, 1987, but the orders specifically noted a 40 percent disability instead of a 50 percent disability. The effect of this action was that the service member's entitlement to retired pay was reduced by 10 percent, resulting in an overpayment between April 18, 1987 and May 31, 1991.⁽²⁾ DFAS reports that it was not aware of the error, nor of the service member's transfer to the PDRL, until the service member's pay account was automatically suspended in June 1991, as a result of being carried on the TDRL for five years. In response to the suspension, in July 1991, the service member provided copies of his 1987 orders.

In August 1991, the service member requested a waiver of his indebtedness. He stated that he could not afford to repay the debt and that it was not his fault that the Retired Pay Operations officials in what is now DFAS did not receive a copy of the 1987 orders from the Army Personnel Center. He contended that there was no indication on his earnings statement that he was on the TDRL or PDRL and that he did not know that Retired Pay Operations did not know that he was on the PDRL. The service member also contends that while he had the 1987 PDRL orders showing a 40 percent disability, he was told to expect a letter from finance officials explaining his retired pay, and that when he did not receive the letter, he contacted them and was told verbally that his retired pay would remain at 50 percent. Finally, in the most recent correspondence through his Congressional representative, the service member contends that our Settlement Certificate was in error because it did not address his "almost 20 years" of service and that DFAS still has not explained the basis for amount of his proper retired pay payment. He also indicates that some of his retired pay is tax free.

DFAS contends that the 1987 PDRL orders indicated that the service member's disability was 40 percent and that he knew or should have known that this was inconsistent with the 50 percent disability assumed in his pay while he was on the TDRL.

Discussion

Our waiver authority, 10 U.S.C. § 2774, applies to a claim against a person arising out of the erroneous payment of pay and allowances, the collection of which would be against equity and good conscience and not in the best interest of the United States. The statute further provides that waiver cannot be granted if there is any indication of fraud, fault, misrepresentation, or lack of good faith on the part of the member, former member or other person receiving the overpayment. See Standards for Waiver, 4 C.F.R. §91.5(b). The standard employed to determine whether a person was at fault in accepting an overpayment is whether, under the particular circumstances involved, a reasonable person should have known or suspected that he was receiving more than his entitlement. See Petty Officer Ricky Johnson, USN, B-256417, July 22, 1994; Captain Douglas K. Basiger, USAF, B-256600, July 14, 1994; Bryan E. Lippman, B-201816, July 8, 1981.

There is no indication of fraud, misrepresentation or lack of good faith by the service member with respect to his debt, but GAO and DFAS correctly found that the service member was at least partially at fault because a reasonable person in the service member's circumstances would have questioned, and continued to question, his pay entitlement once he had received the 1987 orders indicating that he may be entitled to something less than the amount he had been receiving. The service member indicates that he telephoned finance officials about a possible error or at least a question about his pay. But as in Petty Officer Ricky Johnson, B-256417, *supra*, there is nothing in the record to corroborate the member's version of the events; namely, that officials told him that he was still entitled to 50 percent. There are no statements from any of the pay and disbursing officials to whom the service member says he directed his questions, and there is no proof of what he told them and what they told him. This is not a sufficient basis to grant a waiver. See DOHA Claims Case No. 97041401 (June 26, 1997) and compare James A. Jamiel, B-235158, Feb. 6, 1990. Also, the service member's recent suggestions that he could have reasonably expected about the same amount of retired pay at 40 percent disability as he had received when he was on the TDRL is ambiguous and unsupported. Finally, personal or family financial hardships are not a proper basis for waiver. See DOHA Claims Case No. 9704140, *supra*; Major James P. Burton, USAF, B-265873, Feb. 29, 1996; and Timothy Piekarski, B-261958, Nov. 8, 1995.

This matter was referred to us as an appeal of a denial of waiver, and it is inappropriate for us to address the service member's questions concerning how his retired pay was calculated. We remand this matter to DFAS so that it can respond to the service member's long-standing concerns in this regard. It may be appropriate for us to address such issues later if the service member has a factual or legal basis for disagreeing with the DFAS calculation.

Conclusion

We affirm the Settlement Certificate.

Signed: Michael D. Hipple

Michael D. Hipple

Chairman, Claims Appeals Board

Signed: Jean E. Smallin

Jean E. Smallin

Member, Claims Appeals Board

Signed: Michael H. Leonard

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Member, Claims Appeals Board

1. U.S. Army Military Personnel Center (DAPC-PDT-A) D68-16.
2. The service member's retired pay for May 1991 was the last payment he received before the suspension of the service member's pay account and subsequent discovery of the error by Defense Finance and Accounting Service (DFAS).