

DATE: April 27, 1999

In Re:

[Redacted]

Claimant

)

Claims Case No. 99020212

CLAIMS APPEALS BOARD DECISION

DIGEST

1. A service member who knows or should know that he received an erroneous payment is obliged to return that amount to the government when the error is corrected. A service member who retired effective July 31 and received a regular mid-month payment of active duty pay in August, reasonably should know that he is not entitled to such a payment. Waiver is denied.
2. Advance pay is not an erroneous payment and therefore may not be considered for waiver under the waiver statute.

DECISION

This is in response to an appeal of the Defense Office of Hearing and Appeals' (DOHA) June 4, 1998, Settlement Certificate, DOHA Claim No. 98041304, which sustained the Defense Finance and Accounting Service's (DFAS) denial of a Department of Defense (DoD) member's application for waiver of a debt of \$840.55.

Background

The record indicates that the member received advance pay in the amount of \$1,800 in September 1992. In October 1992, he began repaying the advance at the monthly rate of \$75. He retired effective July 31, 1994. At that time, an outstanding balance of \$225 was due for the advance pay. He was entitled to receive a final payment in the net amount of \$75.45. This amount was applied to the outstanding debt of \$225, reducing it to \$149.55. Additionally, the member erroneously received regular active duty pay on August 15, 1994, in the amount of \$691.

The Settlement Certificate denied waiver of the \$691, stating that the member should have questioned his entitlement to receive active duty pay subsequent to his retirement. The Settlement also stated that the \$149.55 may not be considered for waiver under the provisions of 10 U.S.C. § 2774 because the advance pay was an erroneous payment when made.

On appeal the member's wife, writing on his behalf, reiterates the member's claim that he was unaware that he was not entitled to the money when he received it. She explains the medical and psychological conditions from which the member has suffered since the late 1980's and asks for waiver under mental duress due to the member's medical condition.

Discussion

Under 10 U.S.C. § 2774, this Office may waive claims of the United States against service members or former members only when collection 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 former member or anyone else having an interest in obtaining the waiver. A member is considered to be at least partially at fault, and waiver is precluded, when he receives a significant unexplained increase, or otherwise knows, or reasonably should know, that an erroneous payment has occurred and fails to make inquiries or bring the matter to the attention of

the appropriate officials. *See Standards for Waiver*, 4 C.F.R. § 91.5(b) (1996); DOHA Claims Case No. 99010416 (February 18, 1999). In such circumstances, collection of the erroneous payment is neither against equity and good conscience nor contrary to the interest of the United States. *See* DOHA Claims Case No. 97011409 (June 6, 1997); *Dennis R. Nix--Reconsideration*, B-249371.2, April 30, 1993.

We understand the member in this case was suffering from extensive medical problems; however, he remained financially responsible. A reasonable person who has retired should be aware that he is not entitled to receive a regularly-scheduled, mid-month active duty payment after his retirement. We have consistently held that when a member knows or reasonably should know he is receiving pay in excess of his entitlement, he has a duty to retain such amounts for subsequent refund to the government. *See* DOHA Claims Case No. 97011403 (April 18, 1997). It is not against equity and good conscience to recover such an indebtedness.

Regarding the remaining debt of \$149.55 for the advance pay, we agree with the finding in the Settlement Certificate that the advance pay was an appropriate payment when made, and therefore the debt is not subject to waiver under 10 U.S.C. § 2774.

Conclusion

We affirm the Settlement Certificate.

Signed: Michael D. Hipple

Michael D. Hipple

Chairman, Claims Appeals Board

Signed: Christine M. Kopocis

Christine M. Kopocis

Member, Claims Appeals Board

Signed: Jean E. Smallin

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Member, Claims Appeals Board