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In Re:

[Redacted]

Claimant

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April 19, 1999

Claims Case No. 99032324

## CLAIMS APPEALS BOARD DECISION

### DIGEST

A member was placed on the Temporary Disability Retired List (TDRL) effective on March 2, 1996, but he was not aware of this action until September 1996. The member received his first disability retired pay payment of \$7,009.60 on October 1, 1996, for the period from March 3, 1996, through September 30, 1996. The member had also received \$11,233.35 for active duty pay and allowances for the period April 15, 1996, through September 15, 1996. The member was not legally entitled to active duty pay and allowances after March 2, 1996. DOHA correctly waived \$4,223.75 to avoid the inequity of placing the member in an indebtedness but denied waiver of \$7,009.60 to avoid a windfall. The \$7,009.60 that the member is entitled to receive was retired pay, and was subject to offset against compensation granted by the Department of Veterans Affairs (VA).

### DECISION

A retired member of the United States Army appeals the February 19, 1999, Settlement Certificate of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 99021616, which granted in part, and denied in part, his application for a waiver of the \$11,233.35 erroneously paid to him in active duty pay and allowances while he was on the Temporary Disability Retired List (TDRL). DOHA waived \$4,223.75 of the government's claim and denied waiver of \$7,009.60.

### Background

The record shows that the member was placed on the TDRL effective March 2, 1996, with a 100 percent disability. On October 1, 1996, the member received \$7,009.60 in military retired pay for the period March 3, 1996, through September 30, 1996, but he had also received active duty pay and allowances amounting to \$11,233.35 for the period April 15, 1996, through September 15, 1996. Because he was not aware that he was no longer eligible to receive active duty pay and allowances through September 15, 1996, DOHA allowed waiver of \$4,223.75, but denied waiver of \$7,009.60, an amount duplicated by the retired pay to which he was entitled to, and did receive, on October 1, 1996.

On appeal, the member contends that the Department of Veterans Affairs (VA) returned all of the money he had ever received as retired pay to the Defense Finance and Accounting Service (DFAS). Therefore, he argues that repayment of the \$7,009.60 from his pocket would be against equity and good conscience.

### Discussion

Under 10 U.S.C. § 2774, the government may waive collection of erroneous overpayments of pay or allowances to service members if collection would be against equity and good conscience and not in the best interest of the United States and if there is no indication of fraud, fault, misrepresentation, or lack of good faith. *See* Standards for Waiver, 4 C.F.R. § 91.5(b) (1996). The standard we employ to determine fault is whether a reasonably prudent person knew or should have known that he was receiving payments in excess of his entitlements.

There appears to be some confusion about the nature of the various payments, but we agree with DFAS's analysis in the administrative report. The \$7,009.60 involved a collection of part of the active duty pay to which the member was not entitled and which duplicated the amount of retired pay that the member received on October 1, 1996. The member received \$7,009.60 on October 1, 1996, as retired pay for a period in which he also had received active duty pay. The member was entitled to this retired pay, but he was not legally entitled to active duty pay and allowances for the period April 15, 1996, through September 15, 1996. Thus, the member should have known when he received the retired pay that he was unable to retain it plus the full amount of active duty pay and allowances because, in part, it duplicated payment of compensation for the same period. If DOHA had waived the \$7,009.60, the member would have received a windfall in that amount. Although the member had no legal entitlement to the additional \$4,223.75, waiver of the indebtedness of that amount prevented the inequity of placing him in an indebtedness situation merely because he had not received information concerning his retirement.

The member also applied for VA compensation, and VA awarded compensation based on a 100 percent disability. However, the VA advised the member that it was withholding compensation until January 1, 1997, to avoid double payment with military retired pay (not active duty pay). The VA compensation related back to April 1, 1996. In discussing the effect of the VA's withholding of compensation to avoid duplicate payments, the Comptroller General has stated that this is a matter under the VA's jurisdiction and that the Comptroller General, and DOHA as his successor, has no jurisdiction to review such matters. *See Chief Hospital Corpsman William R. Brown, USN (Ret.)*, B-270349, Dec. 17, 1996. We suggest that the member contact VA if he has any question about his account.

### **Conclusion**

We affirm the Settlement Certificate.

Signed: Michael D. Hipple

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Michael D. Hipple

Chairman, Claims Appeals Board

Signed: Christine M. Kopocis

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Christine M. Kopocis

Member, Claims Appeals Board

Signed: Jean E. Smallin

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Jean E. Smallin

Member, Claims Appeals Board