

Date: July 30, 1999

In Re:

[Redacted]

Claimant

)

Claims Case No. 99062120

CLAIMS APPEALS BOARD DECISION

DIGEST

Due to an administrative error, a member's retired pay was not reduced by the amount of the compensation he was receiving from the Veterans Administration. The member's waiver request is denied although he requested an accounting of his retired pay but did not immediately receive documentation of the calculation and he did not pursue the issue with his pay office.

DECISION

This is in response to an appeal of the Defense Office of Hearings and Appeals (DOHA) April 20, 1999, Settlement Certificate, DOHA Claim No. 99030218, in which we disallowed the member's application for a waiver of an indebtedness of \$2,330.17. The member became indebted in this amount as a result of erroneous payments of retired pay from October 6, 1997, through October 31, 1998.

Background

The member was separated from the U.S. Naval Reserve on May 31, 1994. In July 1994, he was awarded \$179 per month compensation from the Veterans Administration (VA) for a 20- percent service connected disability. He began to receive monthly payments of military retired pay after he attained the age of 60 years on October 6, 1997. In April 1997 the member attached to his application for retired pay (DD Form 2656) a notarized copy of a memorandum which acknowledged his disability check and his salary as an employee of the VA, with a notation that he was unsure what his retired pay should be. In this memorandum, the member requested contact advising him of the projected amount of his retirement as soon as it had been calculated.

Due to an administrative error, the member's retired pay was not reduced by the amount of the compensation he was receiving from the VA. As a result, he was overpaid \$2,330.17 from October 6, 1997, through October 31, 1998.

The Settlement Certificate denied the member's waiver request stating that although the member stated he requested a computation of his retired pay and never received this documentation, he should have pursued the matter further. The Settlement cited the VA Form 21-4138, which the member signed waving a portion of his military retired pay, and 38 U.S.C. § 3105, which prevents duplication of payments to an individual who retires and is receiving VA compensation.

On appeal, the member contends that he should not be penalized for the administrative error when he requested in advance an estimate of what amount of retired pay to expect and the government did not respond to his request.

Discussion

Under 10 U.S.C. § 2274, we have the authority to waive a claim for an erroneous payment of pay and allowances to a member or former member of the Uniformed Services if payment would be against equity and good conscience and not in the best interest of the United States, provided that there is no evidence of fraud, fault, misrepresentation, or lack of

good faith on the part of the member or former member. The legal definition of "fault" does not imply any ethical lapse on the part of the member or former member. It merely indicates that he is not entirely without responsibility for any resulting overpayment and that therefore the equitable remedy of waiver is not available to him. The standard we employ to determine fault is that of a reasonable person; if such a person knows or should know that he is receiving money to which he is not entitled, he is at fault if he fails to bring the excess payment to the attention of the appropriate authorities. In such a situation, waiver is precluded. *See Standards for Waiver*, 4 C.F.R. § 91.5(b) (1996).

In this case, the member was aware when he completed his application for VA compensation that he was waiving that portion of his retired pay which equaled the amount of the compensation he was awarded by VA. He stated from the beginning that he was not able to calculate what amount he expected to receive in retired pay, but does not dispute that the amount of retired pay he would receive would have to be reduced to reflect VA compensation. When he first received retired pay, he apparently received no documentation which gave him an accounting of how it was calculated. He states that he assumed the amount he received to be correct because on his Form DD 2656 he had asked for such an accounting and had never received it. We believe a reasonable person in such a circumstance would have pursued the issue with the pay office, seeking a complete explanation of his entitlement. Under the waiver statute, the member is considered partially at fault for accepting these payments and not continuing to question their calculation.

A service member is not entitled to waiver as a matter of right whenever he receives an overpayment as a result of an administrative error. *See DOHA Claims Case No. 97012103* (June 26, 1997). The member argues that he should not be penalized for DFAS's error. We note, however, that he had been informed that \$179 would be deducted from his retired pay. If that was not done, a reasonable person would not expect to keep the excess payments. Moreover, we point out that the member should not receive a windfall due to DFAS's error, as would be the case if he were allowed to retain the overpayments. *See DOHA Claims Case No. 98112018* (January 11, 1999).

Conclusion

We affirm the Settlement Certificate.

/s/

Michael D. Hipple

Chairman, Claims Appeals Board

/s/

Christine M. Kopocis

Member, Claims Appeals Board

/s/

Jean E. Smallin

Member, Claims Appeals Board