

DATE: January 11, 2011

In Re:)

[REDACTED])

) Claims Case No. 2009-WV-051801.3

Claimant)

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

Title 10, United States Code (U.S.C.), § 2774 provides authority for waiving claims for erroneous payments of pay and allowances made to or on behalf of former members of the uniformed services, if collection of the claim would be against equity and good conscience and not in the best interest of the United States. This authority may not be exercised without the existence of a debt.

DECISION

A retired U.S. Army member requests reconsideration of the October 29, 2010, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2009-WV-051801.2. In that decision, the member's request for waiver of a debt of \$767.16 could not be considered.

Background

The record shows that the member applied for disability compensation from the Department of Veterans Affairs (VA), and that he was subsequently awarded compensation from the VA. The record further shows that the member applied for and was granted military retired pay, and that he elected to have Survivor Benefit Plan (SBP) premium payments deducted from his military retired pay. The member also elected to waive his military retired pay in the amount of any VA compensation he received. Therefore, when his retired pay was suspended because it was equal to, or was exceeded by, the amount of VA compensation he received, the member elected to remit SBP premium payments directly to the Retired Pay Office beginning in July 1974. Initially, the Defense Finance and Accounting Service (DFAS) notified the member in

December 2008 that he was indebted in the amount of \$2,592.52 for non-payment or insufficient payments of SBP premiums, which included interest charges for the period July 1974 through January 2009. The record further shows that after a review and audit of the debt, the Retired Pay Office waived the interest that accrued on the debt through December 1995, which reduced the debt to \$767.16. Therefore, the member is being held liable for the non-payment or insufficient payment of SBP premiums during the period July 1974 through December 2008. This \$767.16 amount represents \$232.28 for unpaid premiums and \$534.88 for interest after 1995. Our Office has no authority to consider waiver of interest. Thus, in the absence of DFAS's November 10, 2010, letter, described below, we would have been limited to a consideration of the \$232.28, which represents the amount of unpaid SBP premiums.

The member argues that DFAS has failed to prove the debt. He states there are three accounting reports over the time period that do not coincide with each other, nor do they match up with his pay stubs and the VA's accounting of their payments to DFAS on his behalf for SBP. He argues that while DFAS states he elected to submit SBP premium payments directly to the Retired Pay Office beginning in July 1974, DFAS failed to inform our Office that the member also submitted a form to the VA authorizing them to automatically deduct SBP payments from his disability pay. He states that title 10, United States Code, § 2774 provides authority for waiver of claims if collection would be against equity and good conscience and not in the best interest of the United States. He argues the claim arose from accounting errors and has not been proven by DFAS. He argues there is no indication of fraud or fault on his behalf. The member states he has repeatedly requested an accounting from DFAS. He disputes that he owes the \$767.16.

Discussion

Our Office has the authority to consider certain claims of the United States for waiver under the provision of 10 U.S.C. § 2774. This statute, however, specifically limits our authority only to claims which arose from an erroneous payment of pay and allowances. The SBP, 10 U.S.C. § 1447-1460b, is an income maintenance program for the survivors of deceased members of the uniformed services. The adjudicator indicated in the appeal decision that our Office has consistently held that a debt which arises due to non-deduction of SBP premiums may not be waived if the member received the benefit of coverage. Regarding the \$534.88 in interest owed, the adjudicator noted that under title 4, Code of Federal Regulations (C.F.R.), § 102.13, agencies have the authority to assess interest and penalties on debts owed the United States pursuant to 31 U.S.C. § 3717, and this Office has no authority under 10 U.S.C. § 2774 to waive these charges.¹ The adjudicator directed the member to contact DFAS regarding the question of interest. Regarding the member's request for a "complete history of payment and non-payment" of his SBP account, the adjudicator noted that the establishment of a debt amount is a matter primarily for administrative determination, and our Office ordinarily will not question a service's determination in the absence of clear error. The adjudicator again directed the member to contact DFAS.

¹ The proper citation should be 31 C.F.R. § 901.9. The debt collection standards were transferred to title 31 after the jurisdiction in this area was transferred from the Government Accountability Office.

When the member requested reconsideration from our Office, he also requested assistance from his Congressional Representative. In the packet of information from his Representative, dated November 23, 2010, requesting that our Office provide information to the Representative's office relating to the progress of the member's appeal, there was a letter from DFAS to the Representative. In that letter, dated November 10, 2010, DFAS outlined the status of the member's appeal, indicated that the member had received the appeal decision from our Office dated October 29, 2010, and explained that his appeal was denied and he had a debt of \$747.16. DFAS mentioned that when the Army military retired pay accounts were transferred from Indiana to Ohio in 1995, there was an outstanding balance carried forward on the member's account of \$1,212.17. Because of missing records, DFAS stated they were unable to provide a breakdown of the balance of \$1,212.17 (as of December 1995). DFAS continued to explain that based on records obtained for the period of July 1974 through December 1995 (to include up-to-date information), they reconciled the member's account. Significantly, DFAS also indicated that they had terminated the collection of all interest on the account, leaving a balance of \$232.28. The November 10 letter was addressed to the member's Representative, with no indication that a copy was provided to the member.²

DFAS also recognized in the November 10 letter that the member has met the criteria for "paid up" status. Effective October 1, 2008, members participating in the SBP who are age 70 or older, and who have paid SBP and the Retired Serviceman's Family Protection Plan for a period of 30 years (360 months) or more, will no longer have to pay premium costs for continued SBP annuity coverage. The member's monthly premium obligations were satisfied, effective November 1, 2009, and his SBP annuity coverage will remain, at no further cost to him.³

After the Representative's office notified the member that DFAS had indicated his final debt was now \$232.28, the member still insisted that he was not indebted for his SBP premium payments. As the member pointed out in his request for reconsideration, the accountings provided by DFAS do not coincide with each other. DFAS initially told the member that he was indebted for unpaid SBP premiums in the amount of \$2,592.52. Then they told him that due to the transfer of military retired pay accounts from Indiana to Ohio in 1995, many records were either lost or destroyed, and they could not prove that any debt existed prior to December 1995. They provided him an accounting of his payments since December 1995. Then DFAS told the member that microfiche records were obtained to support the initial portion of the debt, and a computation was created for the period July 1974 through December 1995. Another monthly accounting audit sheet was prepared for the member, this one covering July 1974 through December 2008. As a gesture of good will, the Retired Pay Office waived all the interest accrued on the debt through December 1995. DFAS then reported to the member that his debt was \$767.17 (\$232.28 for unpaid premiums and \$534.88 for interest). Finally, DFAS has told the member's Congressman that they will terminate the remaining interest debt, and the final debt amount is \$232.28.

² The member's Representative notified the member of the contents of the letter. Our Office also was not made aware of DFAS's decision on the interest until the Representative provided this letter to us. We will now consider this as a part of the record.

³ This Office notes that the member actually paid premiums for November and December 2009.

Throughout this process, the member questioned the accounting of DFAS and provided them documentation. Additionally, he requested documentation from DFAS, such as the microfiche (when its existence became known), but it was not provided to him. The member has offered clear and convincing record evidence, to which DFAS previously had access, and evidence which the member has provided to this Board when he requested reconsideration, that contradicts DFAS's position that there is a debt.

First, there are a number of months on the Direct Remittance Account Computation Audit Sheet (spreadsheet) when DFAS records the member's payment for SBP premiums as zero, and lists that a direct remittance payment was required. This is in the timeframe of July 1974 through June 1975.⁴ In the member's request for reconsideration, he provides copies of his Statement of Retired Pay: January 1974 lists a deduction for SBP premiums as \$10.32; February 1974, \$10.32; October 1974, \$12.42; and February 1975, \$14.93. This is inconsistent with DFAS' accounting of no payment, but also with DFAS noting the required payment for each of those months as \$12.42. DFAS did not have copies of the member's Statements of Retired Pay; those were just recently provided in the request for reconsideration. DFAS did have in its possession the June 23, 2009, letter from the VA Regional Office, Roanoke, Virginia, but those payments have never been reflected on the spreadsheet. The VA states that "[r]eview of the veteran's claims folder indicates the first available deductions are confirmed as being forwarded to Retired Pay Operations April 30, 1976.⁵ The amount was \$49.68 covering March 1975, April 1975, May 1975, and June 1975 deductions at \$12.42 monthly." The Retired Pay Office has waived the interest on the debt through December 1995; however, evidence from the member received by this Office and evidence already available in the file provided by the VA (but never taken into account) undermines the existence of that interest, as there is clear and convincing evidence there was no actual debt.

On August 8, 1974, the member signed USAFSA (U.S. Army Finance Support Agency) Form 20-179A FL, 1 May 74, *Authorization For Retired Serviceman's Family Protection Plan And/Or Survivor Benefit Plan Costs Deduction Under Provisions Of 10 U.S. Code 1438 Or 1452*. The form authorized the VA to deduct \$12.42, starting in August 1974, from any compensation or pension payments due the member. It also stated: "I also authorize cost deductions to be increased based on cost-of-living increases or other changes that effect [sic] my cost upon notification by USAFSA." The first page of the form stated:

If a member who has elected to participate in the RSFPP [Retired Serviceman's Family Protection Plan] or SBP waives retired pay for VA payments, he is required by Federal statute to maintain premium payments on a current basis. Payments should be made by check, bank draft or money order drawn payable to Retired Pay Operations. **If you prefer, you may authorize the VA to withhold the monthly premiums from your compensation and forward the payments to this office.** (Emphasis added)

⁴ This was the second set of spreadsheets that DFAS provided the member. The initial ones began in December 1995, as DFAS stated they had no records prior to that date.

⁵ The letter also stated: "Complete information was not available in our file given the age of the data. However, we are providing the best available information. Any missing information is simply not available."

In response to a question from the adjudicator of this office, DFAS responded by email dated October 14, 2010:

At the time the claimant initially elected to participate in the SBP, the U.S. Army Finance Support Agency (USAFSA) was responsible for the collection of his premiums. In July 1974, when the claimant's VA compensation exceeded his retired pay, he was sent USAFSA Form 20-179-FL. Page one of this form stated the requirement that he maintain premium payments on a current basis and went on to state that he could submit premiums directly to the USAFSA or he could authorize the VA to withhold premiums from his VA compensation and forward them on his behalf. . . . This authorization, in and of itself, does not impact his debt at all. It merely allows the VA to pay the premium bill on the claimant's behalf. While the authorization was a convenient method to pay premiums, the imperfect communication between the VA and USAFSA, and subsequently the VA and DFAS, when the responsibility for SBP administration was delegated to the Defense Finance and Accounting Service Retired Pay Office in December 1995, made it a less than perfect method. For unknown reasons, premiums [sic] payments were not forwarded to the USAFSA until August 1975. Also, premium payments were frequently submitted in an amount that did not reflect the current monthly premium. I am not certain, but I believe that the claimant was initially required to notify the VA of any premium changes. This would add another possibility for imperfect communication. In addition to the above, other failures in the system contributed to the accumulation of debt. Due to an administrative error, the VA did not forward premiums for the period of April 1978 through March 1979. Since we do not have access to VA's records, we cannot state whether premiums were withheld from his VA compensation, but we can state that the claimant was notified that the premiums were not being posted to this SBP account via his JUMPS-Army Retired/Annuitant pay statements[.]

Thus, it was DFAS' position either that VA did not deduct SBP premiums from the member's compensation for the full period in question, or that the funds were deducted from the member's compensation but did not reach the appropriate destination at DFAS. When DFAS informed the member that it had not been receiving his premiums, he immediately submitted clear evidence that the premiums had been deducted from his VA compensation during the months in question.⁶ DFAS therefore should not have continued to pursue collection of the premiums or interest based on nonpayment of the premiums, since the member had satisfied his obligation to pay the premiums when the amounts were deducted from his VA compensation as authorized by the Army.⁷

As previously stated in the appeal decision, the establishment of a debt amount is a matter primarily for administrative determination, and this Office ordinarily will not question a service's determination of debt in the absence of clear error. In this case, we have been

⁶ The record does include two notices of costs due the SBP program in 1993 and 1994. The member has return receipts that were addressed to the Directorate for Retired Pay denying owing the debt and requesting an accounting of his payments, neither of which were sent at that time. Later, when this portion of the debt was presented for payment again, initially no records could be found to support the debt.

⁷ In this regard, in its June 23, 2009, letter to the member's Representative the VA identified the specific account number and address to which the SBP premiums were sent.

presented with a number of instances of clear error. This Office does not find a debt of \$232.28 for underpayment of SBP to be supported by substantial record evidence.

Although the record shows that VA regularly increased the amount of the premiums (as the member had directed when he completed USAFSA Form 20-179FL), it also shows that there was occasionally a short delay in the implementation of the increase at first notification, (e.g., DFAS-IN Retired/Annuitant Pay Statement of the member for December 1992 shows “could not deduct \$1.04”, and December 1993 shows “could not deduct \$1.50”). Considering the small amounts involved, the number of years which this case covers, and the widely disparate amounts of alleged debt and interest charged against the member over many years, we do not consider this to be of significance. If they had been properly calculated and submitted to this Office as a debt, it is likely that we would have waived them.⁸

Furthermore, in the November 10, 2010, letter from DFAS to the member’s Representative, DFAS acknowledges that the member has met the criteria for SBP “paid-up” status. The letter indicates that the member’s SBP premium obligations ended on November 1, 2009. The record reflects that the member actually paid a SBP payment for November 2009 and December 2009 of \$89.34 each month, for a total of \$178.68. This Office normally will not consider a claim made by a person in his waiver application which has not been submitted to the agency involved for development and an administrative report. However, in this case, we believe the record has already been fully developed, particularly in light of DFAS’ agreement that the member made two payments after he was in “paid-up” SBP status. Therefore, we allow the member a claim in the amount of \$178.68.⁹ The member is to be commended for his excellent record-keeping, which is atypical of the waiver requests we receive, and for his patience and persistence.

Conclusion

We modify the adjudicator’s decision for the reasons stated above. We agree that we cannot consider waiver here, but for the reason that, viewed in its totality, the record contains no substantial evidence that the member owes the government \$232.28 on account of underpayment of SBP premiums. Additionally, we allow \$178.68 for overpayment of SBP payments, if otherwise payable. In accordance with Department of Defense Instruction 1340.23, ¶ E8.15, this is the final administrative action of the Department of Defense.

///Original Signed///

Michael D. Hipple
Chairman, Claims Appeals Board

⁸ In addition, there are numerous instances on the pay statements that the member submitted for reconsideration that indicate not only SBP deductions from his pay, but also SBP collections. These amounts range from \$00.14 to \$52.45, and there appears to be no accounting of these amounts anywhere in the record in favor of the member.

⁹ The member asserts an additional \$89.34 overpayment for the month of January 2010. This is not currently supported by the record, but if the member is able to provide the evidence to support this overpayment, he should be allowed this additional amount.

///Original Signed///

Jean E. Smallin
Member, Claims Appeals Board

///Original Signed///

Natalie Lewis Bley
Member, Claims Appeals Board