

DATE: May 14, 2013

In Re:)
 [REDACTED]) Claims Case No. 2012-WV-111401.2
)
Claimant)

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

Under 10 U.S.C. § 2774, the Defense Office of Hearings and Appeals (DOHA) has the authority to waive a claim for erroneous payments of pay and allowances made to members and former members, if collection of the claim would be against equity and good conscience and not in the best interests 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.

DECISION

A member of the U.S. Navy Reserve requests reconsideration of the February 21, 2013, decision of the DOHA in DOHA Claim No. 2012-WV-111401. In that decision, DOHA granted waiver in the amount of \$3,014.72,¹ and denied waiver of the overpayment in the amount of \$30,575.80.

Background

On December 11, 2006, the member began receiving BAH-D on behalf of his grandson, whom he had claimed as his dependent.² However, the Defense Finance and Accounting Service (DFAS) later determined that the member was not authorized BAH-D because his grandson did

¹This overpayment resulted from the member receiving an overpayment at separation and is not at issue in this reconsideration decision.

²Apparently, the member updated his NAVPERS 1070/602 *Dependency Application / Record of Emergency Data, i.e.*, his Page 2, to include his grandson as his dependent, and submitted it to his Personnel Support Detachment (PSD).

not qualify as his dependent.³ As a result, the member erroneously received BAH-D in the amount of \$151,465.50 during the period December 11, 2006, through September 30, 2011. However, DFAS determined that during this period, the member was due BAH at the single rate (BAH-S) in the amount of \$120,889.70, which was applied to the overpayment, reducing it to \$30,575.80 (\$151,465.50 - \$120,889.70).

In her decision, the DOHA adjudicator denied waiver of the member's \$30,575.80 debt on the basis that the member's official military personnel records did not reflect that his grandson was his dependent. The adjudicator therefore found that as a Senior Personnel Specialist, E-7, with 20 years of military service at the time the overpayment started, the member should have at least questioned his PSD and finance officials about receiving BAH-D for his grandson even though he states that he listed his grandson as his dependent on his Page 2.

In his request for reconsideration, the member states that although our office granted his extension to file his reconsideration request, he still did not have enough time to meet with Navy Legal. He states that he did not have enough time to request any discovery material in order to argue against the DOHA decision or to support his reconsideration request. He states that he never received DFAS's initial determination so he is not sure what was recommended or the rationale for their recommendation. He further states that the government has acknowledged that the overpayment resulted from administrative error on its part, and found no fraud, misrepresentation or lack of good faith on his part. He also states that he did not have access to the Defense Eligibility Enrollment Reporting System (DEERS). He states that the system for reviewing his official military record is the Navy Standard Integrated Personnel System (NSIPS) which he asserts reflects all information that is contained in his official military record and that which is on his Page 2. He states that once he was notified by his PSD that his grandson was never reflected in DEERS as his dependent, he corrected his Page 2 by removing his grandson's name. He further asserts that his length of service should have no relevance to his waiver request. He clarifies that 5 of his 20 years were spent in the Individual Ready Reserve (IRR), and not in an active capacity. He also takes issue with the adjudicator discounting the following statement he makes in his original waiver request, "I recognize that as a Personnel Specialist, one would assume that I should have known about the requirements for establishing a secondary dependent, however I submit that throughout my reserve career, I have never worked in a PSD or as a Navy Pay Clerk." He states that he complied with the prescribed checklist for starting Active Duty for Special Work (ADSW) orders, and absent any notification from his PSD or DFAS, he had no reason to know he was not in compliance with the regulations regarding his entitlement to BAH-D. He states that as a Personnel Specialist, his discipline is manpower, not pay. He states that his Page 2 reflected his grandson as his dependent, the NSIPS reflected his grandson as his dependent and his PSD processed, verified and certified for pay his grandson as his dependent on seven different occasions. He states that it was only DEERS, a system he asserts he did not have access to, where his grandson was not reflected as his dependent.

³For the Navy, determinations of dependency and relationships for secondary dependents are made by DFAS. See Volume 1 of the Joint Federal Travel Regulations (JFTR), 1 JFTR U10100.

Discussion

Under 10 U.S.C. § 2774, the Defense Office of Hearings and Appeals (DOHA) has the authority to waive a claim for erroneous payment of pay and allowances made to members and former members, if collection of the claim would be against equity and good conscience and not in the best interests 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. The waiver statute is implemented within the Department of Defense under Department of Defense Instruction 1340.23 (February 14, 2006). Generally, persons who receive a payment erroneously from the government acquire no right to the money. They are bound in equity and good conscience to make restitution. If a benefit is bestowed by mistake, no matter how careless the act of the government may have been, the recipient must make restitution. In theory, restitution results in no loss to the recipient because the recipient received something for nothing. *See* Instruction ¶ E4.1.1.

Waiver is not appropriate if there is any indication of fraud, fault, misrepresentation, or lack of good faith on the part of the member. *See* Instruction ¶ E4.1.2. 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 entitlement. When a member knows or reasonably could be expected to know he is receiving payments in excess of his entitlement, he has a duty to retain such amounts for subsequent refund to the government.

While an administrative error did occur in this case, our Office has consistently held that the waiver statute does not apply automatically to relieve the debts of all members who, through no fault of their own, have received erroneous payments from the government. Waiver action under 10 U.S.C. § 2774 is a matter of grace or dispensation, and not a matter of right. If it were merely a matter of right, then virtually all erroneous payments made by the government to members would be excused from repayment. *See* Instruction ¶ E4.1.1.

The statutory purpose of BAH-D is to help a member provide support for his dependents. As a senior enlisted member who had previously received BAH-D, the member should have been aware of the purpose of the entitlement.⁴ During the period of overpayment, the member received BAH-D for his grandson reflected on his leave and earnings statements (LES) as his child, when his grandson did not live with him and was never put into DEERS as his dependent. The member states that he had no access to DEERS. However, considering his rank and years of service, he should have verified that his grandson was in the system, especially since his grandson was never issued a military dependent ID card. Although the member may have submitted his Page 2 to his PSD reflecting his grandson as his dependent, and his PSD erroneously started BAH-D, we believe that a reasonably prudent person should not have believed he was actually entitled to such payments for a grandson who was not living with him,

⁴The adjudicator's consideration of the member's rank and years of service in her determination of whether the member knew or should have known he was receiving payments in excess of his entitlement was appropriate and consistent with our case law. *See* DOHA Claims Case No. 04050307 (June 7, 2004); DOHA Claims Case No. 04031001 (March 17, 2004); DOHA Claims Case No. 03022704 (March 5, 2003); DOHA Claims Case No. 03012711 (February 3, 2003); DOHA Claims Case No. 99052709 (June 9, 1999); and DOHA Claims Case No. 98040201 (May 15, 1998); Comptroller General Decisions B-214770, May 14, 1984; B-197801, Dec. 30, 1980; and B-194171, Sept. 13, 1979.

especially since there is no evidence that the member provided financial support to his grandson. In fact, as pointed out by the adjudicator, the member has not presented any evidence reflecting that his grandson was his dependent for military purposes.⁵ Since during the period of overpayment, the member had no other dependents, there is no indication that the funds were used for their intended purpose.⁶ Under the circumstances, this Office believes that collection of the overpayment would not be against equity and good conscience, nor would it be contrary to the best interests of the United States. *See* DOHA Claims Case No. 2012-WV-042406.2 (September 25, 2012); DOHA Claims Case No. 2010-WV-111508.2 (August 9, 2011); DOHA Claims Case No. 07032702 (April 6, 2007); DOHA Claims Case No. 01112801 (December 11, 2001); and DOHA Claims Case No. 02111801 (December 2, 2002).

Although the member contends that he did not have enough time to properly respond to the adjudicator's appeal decision, we note that on at least three separate occasions, he was told that he should submit financial and legal proof that his grandson was his dependent. First, on November 10, 2011, his PSD notified him by email that there was no supporting documentation on file for his dependent "son." His PSD requested that he forward the child's birth certificate or adoption papers to them by November 17, 2011. On November 16, 2011, responding to the member's apparent indication that he had been appointed his grandson's legal guardian, his PSD explained that he would have to submit documentation of a guardianship through a court system. As mentioned above, on May 31, 2012, DFAS requested that the member provide proof of his financial support for his grandson. In their letter to the member, DFAS stated the following:

In addition to the ABCMR results, please provide proof of your financial support for your grandson who you were claiming as a dependent in order to receive BAH during the period of indebtedness. We need to verify that the funds were used for their intended purpose. If you have legal documentation listing your grandson as your dependent, please provide this as well. Financial support documentation could include bank statements or other financial statements during this period which highlight any and all payments made that are directly related to the support of this claimed dependent. Please also provide documentation proving that the allotment that you discussed is going to your grandson. It is likely that we would only be able to approve waiver for the amount of documented, proven support for your grandson, so please provide as much as you have available.

Finally, the adjudicator also noted that the member was asked to provide such evidence.

⁵We note that DFAS previously requested financial and legal proof from the member that his grandson was a dependent "in order for a portion of the BAH debt to be approved for waiver." However, there is nothing in the record to show that he submitted such evidence.

⁶Waiver of an overpayment of BAH-D is appropriate only to the extent that the overpayment was spent for its intended purpose. *See* DOHA Claims Case No. 09042701 (May 1, 2009); DOHA Claims Case No. 08082501 (August 28, 2008); DOHA Claims Case No. 07032702 (April 6, 2007); and DOHA Claims Case No. 06110906 (November 27, 2006).

Conclusion

The request for reconsideration is denied, and the appeal decision of February 21, 2013, is affirmed. In accordance with the Instruction ¶ E8.15, this is the final administrative action of the Department of Defense in this matter.

Signed: Jean E. Smallin

Jean E. Smallin
Chairman, Claims Appeals Board

Signed: Catherine M. Engstrom

Catherine M. Engstrom
Member, Claims Appeals Board

Signed: Natalie Lewis Bley

Natalie Lewis Bley
Member, Claims Appeals Board