



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Chief Hospital Corpsman, William R. Brown, USN (Ret.)--Waiver Request

File: B-270349

Date: December 17, 1996

DIGEST

A Navy member was separated due to physical disability and was paid severance pay. The Board for Correction of Naval Records later corrected his record to show that he had been placed on the Temporary Disability Retired List rather than separated. The Department of Veterans Affairs (VA) awarded the member VA compensation, but has withheld payment setting off such amounts against the separation pay under 10 U.S.C. § 1212, which requires repayment of the amount of disability severance pay if the member becomes entitled to VA compensation for the same disability. The correction board's action entitled the member to retired pay but also rendered the disability severance pay payment erroneous and subject to collection, but also subject to consideration for waiver. Considering the purpose of the correction board action and to prevent the inequity of placing him in debt in the new status, the net amount of the member's debt, after deduction for retroactive retired pay entitlements, is waived pursuant to 10 U.S.C. § 2774. Whether VA compensation payments also may be begun is a matter within VA's jurisdiction to decide.

DECISION

This is in response to the request of Chief Hospital Corpsman, William R. Brown, USN (Retired), for waiver of a debt for repayment of disability severance pay which arose when the Board for Correction of Naval Records (Board) corrected his records to state that he was retired from the United States Navy rather than separated due to a physical disability. His waiver request is granted for the net amount of his debt.

BACKGROUND

On July 17, 1992, Chief Brown was medically discharged with a 20 percent disability rating and thereupon received \$45,525.60 in disability severance pay. Subsequently, he applied to the Board for Correction of his record to indicate that he was retired rather than discharged. The Board corrected his record to show that his name was placed on the Temporary Disability Retired List as of July 18, 1992, with a disability

rating of 30 percent. As of that date, Chief Brown became entitled to retired pay to be paid by the Defense Finance and Accounting Service (DFAS). Apparently concurrently, the Department of Veterans Affairs (VA) found him eligible for monthly disability compensation which he was entitled to receive upon filing a waiver with DFAS for an equivalent amount of retired pay.¹ However, since his record had been corrected to show that he had been retired rather than separated as of July 18, 1992, he also became indebted to the United States for the amount of disability severance pay he had received. To compute his net indebtedness, DFAS set off Chief Brown's retired pay entitlements for constructive time on the Temporary Disability Retired List from his disability severance pay to reach a net debt of \$20,475.24.

Both VA and DFAS have been withholding the entire monthly amount payable to Chief Brown in order to satisfy the debt, and he has requested waiver. DFAS denied Chief Brown's request on the grounds that when he requested the record correction, he was aware that he would be required to repay the disability severance pay and that therefore collection would not be against equity and good conscience. He has appealed, arguing that he was not aware that his entire monthly entitlement would be withheld until the severance pay was collected.

ANALYSIS

Under 10 U.S.C. § 1212, a member with less than 20 years of service who is separated with a disability under 10 U.S.C. § 1203 may be entitled to disability severance pay. However, the disability severance pay must be deducted from any other compensation due under a law administered by VA to which he becomes entitled based on the same disability. 10 U.S.C. § 1212(c). See also 41 Comp. Gen. 597 (1962).

Under 10 U.S.C. § 1552, the Secretary of a military department, acting through a civilian board, may correct a military record if he considers it necessary to correct an error or remove an injustice. Proper correction of a record under this statute is final and conclusive on all officers of the United States. 10 U.S.C. § 1552(a)(4).

Under 10 U.S.C. § 2774, the Comptroller General may waive in whole or in part a claim of the United States against a person arising out of an "erroneous payment" of pay or allowances to or on behalf of a member or former member of the uniformed services, the collection of which would be against equity and good conscience and

¹While the record does not specifically state that Chief Brown filed such a waiver, we assume that he did so, since the relevant statute requires the filing of such a waiver to receive veterans compensation. See 38 U.S.C. § 5304-5305.

not in the best interest of the United States.² Waiver is not appropriate if there is any indication of fraud, misrepresentation, fault, or lack of good faith on the part of the member.

Ordinarily, debts resulting from requirements to later collect payments which were proper when made are not considered "arising out of erroneous" payments so as to be subject to waiver consideration under 10 U.S.C. § 2774. See, e.g., Isaac L. Tillman, B-266193, Feb. 23, 1996. However, we have held differently where a record correction pursuant to 10 U.S.C. § 1552 has retroactively rendered what was originally a proper payment, improper. In this regard, in 56 Comp. Gen. 587 (1977), we dealt with the waiver request of officers who had received readjustment pay, which is similar to severance pay, when they were separated from the Army. A correction board later determined that they had been improperly separated, and their records were corrected to state that they had remained on active duty. We found that the record corrections retroactively restoring the officers to active duty rendered the readjustment pay payments erroneous and subject to consideration for waiver under 10 U.S.C. § 2774. We noted that since the purpose of record correction and payments resulting therefrom is to restore members as nearly as possible to the position they would have been in if an error had not been made, we viewed it appropriate to consider for waiver the net amount of debt which remained after all necessary set offs and adjustments had been made to their pay accounts so as to prevent their returning to active duty in debt.³

Chief Brown's situation is analogous to that of the officers in 56 Comp. Gen. at 587. When he was separated from the Navy, he received disability severance pay, which became an erroneous payment when the Board corrected his record to indicate that he was placed on the Temporary Disability Retired List rather than separated. While DFAS argues that waiver should be denied because Chief Brown was aware when his records were corrected that he would be required to repay his disability severance pay, at the time Chief Brown received disability severance pay, similar to the officers in 56 Comp. Gen. supra, when they received readjustment pay, he was not aware that he might have to repay it at some time in the future. Therefore, in

²Effective December 18, 1996, the Comptroller General's waiver authority, as it relates to military pay and allowances, is transferred to the Director of the Office of Management and Budget with authority to delegate it to any other agency or agencies. Pub. L. 104-316, §§ 101 and 105, 110 Stat. 3826 (1996).

³See also 64 Comp. Gen. 15 (1984); and B-166683, May 21, 1969, where similar results were reached concerning civilian employees separated with severance pay who were later found to be retroactively entitled to retirement.

order to place him as nearly as possible in the position he would have been in if he had been placed on the Temporary Disability Retired List in 1992, and to prevent the inequity of placing him in debt as a result thereof, the net amount of his debt (which the service has determined to be \$20,475.24) is hereby waived.

Concerning the effect this action may have on the withholding of Chief Brown's VA compensation, we recognize that VA has jurisdiction over such compensation, and thus this is a matter for VA to determine.⁴

/s/Seymour Efros
for Robert P. Murphy
General Counsel

⁴We trust that VA will give due consideration to our determination of today. Cf. Isaac L. Tillman, B-266193, Feb. 23, 1996.



United States
General Accounting Office
Washington, D.C. 20548

Office of the General Counsel

B-270349

December 17, 1996

The Honorable Dan Miller
Member, United States House
of Representatives
1751 Mound Street, Suite A-2
Sarasota, FL 34236

Dear Mr. Miller:

This is in further response to your letter of September 27, 1996, regarding the waiver request of Chief Hospital Corpsman William R. Brown, USN (Retired). Enclosed is a copy of our decision of today's date in which we grant Mr. Brown's request for waiver.

As we explained in our decision, Mr. Brown received disability severance pay when he was separated from the Navy due to physical disability. The Board for Correction of Naval Records later corrected his records to show that he had been placed on the Temporary Disability Retired List. While the disability severance pay statute, 10 U.S.C. § 1212, requires repayment of the amount of disability severance pay if a member becomes entitled to compensation for the same disability under any law administered by the Department of Veterans Affairs, the correction board's action entitled Mr. Brown to retired pay, but it also rendered the disability severance pay payment erroneous and subject to consideration for waiver. After deduction for retroactive retired pay entitlements, the net amount of Mr. Brown's debt is waived.

We trust this serves the purpose of your inquiry.

Sincerely yours,

/s/Seymour Efros
for Robert P. Murphy
General Counsel

Enclosure