

DECISION

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**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-209306**DATE:** March 24, 1983**MATTER OF:** Petty Officer Harvey B. Lease, USN,
Retired

- DIGEST:**
1. Retired member of Navy waived entitlement to retired pay in order to receive Veterans Administration (VA) compensation as required by 38 U.S.C. § 3105. He received notice from Navy stating that his retired pay would be reduced and the amount of the reduction but a form he later received informing him of changes to his retirement account did not reflect the amount that would be withheld because he was receiving VA compensation. He continued to receive his full retired pay due to an administrative error. Since he should have been aware that he was being overpaid, especially considering that the overpayments were substantial, and should have pursued inquiries, he is at "fault" under 10 U.S.C. § 2774 and his indebtedness may not be waived. Financial hardship resulting from collection is not in itself a basis to authorize waiver.
 2. Where a member is indebted to the Government for an overpayment and is survived by his wife, the member's wife is not responsible for the unpaid portion and may not have monies deducted from her Survivor Benefit Plan.

Petty Officer Harvey B. Lease, USN, Retired, requests reconsideration of our Claims Group's denial of his request for waiver of his debt to the United States in the amount of \$18,361. The debt arose from erroneous payments of retired pay made to him after he waived his entitlement to that pay in order to receive compensation from the Veterans Administration, as is required by 38 U.S.C. § 3105 (1976). Since we find that he was not without fault in the matter, the denial of waiver is sustained.

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In order to receive compensation from the Veterans Administration for his service-incurred disability, Mr. Lease waived his entitlement to that portion of his Navy retired pay equal in amount to his veterans compensation, effective January 1, 1973, by signing VA Form 21-651. The waiver was a statutory prerequisite to receiving the compensation. Mr. Lease was then notified by the Naval Finance Center by letter dated January 5, 1973, that his retired pay would be reduced due to his veterans compensation, and that the initial monthly amount to be deducted from his retired paycheck, effective January 30, 1973, would be \$143. The Navy indicates that during this period whenever a change occurred in his retired pay account, Mr. Lease received his statement of retired/retainer pay account card (NFC 7220/149), and that these statements did not reflect that an amount of retired pay was waived to receive veterans compensation. However, Mr. Lease made no inquiry concerning the matter and he continued to receive full retired pay until July 31, 1979, when the error was discovered by the Navy. As a result, the record shows that \$18,361 in retired pay in monthly amounts ranging from \$143 to \$292 was erroneously paid to him while he was receiving similar amounts from the Veterans Administration.

Mr. Lease requested that his indebtedness be waived. However, the Navy Family Allowance Activity denied his request for waiver on June 17, 1982. Mr. Lease appealed this denial to the General Accounting Office, and the Claims Group denied the application on August 25, 1982. Essentially, it was held that Mr. Lease knew he was not entitled to retired pay in the amount equal to his veterans compensation when he waived his right to it in order to receive the compensation and when he received the notice from the Navy that his retired pay would be reduced. The Claims Group concluded that he should have been aware of the erroneous payments and should have pursued resolution of the administrative error with appropriate officials. Thus, he was determined to be at fault, which statutorily precludes favorable action on an application for waiver.

Mr. Lease now requests reconsideration of the determination made by our Claims Group. He states that

he accepted the overpayments without knowledge and in good faith, and that any fault lies entirely with the Navy. He also claims that the collection schedule recommended to him by the Navy would pose financial hardship to him by reducing his income below his fixed costs.

The Comptroller General may waive a claim of the United States arising out of an erroneous payment to a service member if its collection would be against equity and good conscience and not be in the best interest of the United States. 10 U.S.C. § 2774 (1976). This authority may not be exercised if there exists, in connection with the claim, an indication of fraud, misrepresentation, fault, or lack of good faith on the part of the member. 10 U.S.C. § 2774(b)(1).

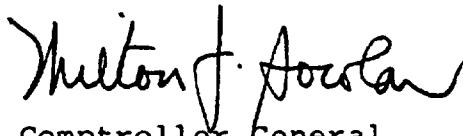
"Fault," as used in this section, has been interpreted as including something more than a proven overt act or omission by the member. Thus, we consider fault to exist if in light of all the facts it is determined that the member should have known that an error existed and taken action to have it corrected. The standard we use is to determine whether a reasonable person should have been aware that he was receiving payment in excess of his proper entitlement. Matter of Gannon, B-200919, March 27, 1981.

It appears from the record that the erroneous payments of retired pay were made due to administrative error. However, Mr. Lease should have been aware at the time he received them that they were erroneous, since he was clearly notified to expect a reduction in his retired pay, and especially due to the substantial amounts involved. See Gannon, cited above, and Matter of Hillery, B-193015, November 1, 1978. Since Mr. Lease should have been aware of the erroneous payments and did not pursue inquiries as to the accuracy of the payments, he is at "fault" within the meaning of 10 U.S.C. § 2774.

Further, financial hardship resulting from collection is not a factor we may properly consider in determining whether an individual is without "fault" and eligible for waiver under 10 U.S.C. § 2774. Gannon, cited above.

Accordingly, we sustain the Claims Group's denial of Mr. Lease's request for waiver.

In addition, Mr. Lease requests our opinion as to whether, assuming his request for waiver is denied and his wife survives him, his wife would be responsible for any uncollected portion of the erroneous payments and would have monies deducted from her Survivor Benefit Plan for that reason. We held in 54 Comp. Gen. 439, 497 (1974), that no part of a Survivor Benefit Plan annuity payable to a beneficiary could be involuntarily withheld to pay a general debt owed by the beneficiary's husband and for which the beneficiary was not responsible. And as a general rule of law, the personal debts of the deceased are charged against his estate and not his heirs. See 97 C.J.S. Wills § 1312. Therefore, under current law it appears that Mr. Lease's wife would not be responsible for Mr. Lease's indebtedness in the circumstances cited.

for 
Comptroller General
of the United States