

13555 PLM-27



DECISION

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

[Request for Reconsideration of Debt Waiver Denial]

FILE: B-197633

DATE: April 25, 1980

MATTER OF: William J. Pritchard

DIGEST: Service member who continued to receive retired pay subsequent to orders removing him from Temporary Disability Retired List should have been aware of the strong possibility that the payments were erroneous and should have made appropriate inquiry concerning their continuation. Since he did not do so, he is partially at fault, and he may not have his debt waived.

By letter dated November 23, 1979, Mr. Henry S. Shaw, attorney for William J. Pritchard, requests reconsideration of the Claims Division's denial of his application for waiver of his debt to the United States in the amount of \$2,358.82 incident to his service in the United States Army. The debt arose from erroneous payment of retired pay for the period from August 1, 1974, through November 30, 1975. Upon review, the action of the Claims Division is sustained.

The record shows that effective November 14, 1970, Mr. Pritchard, then a private E-2, was placed on the Temporary Disability Retired List (TDRL) with a temporary disability rating of 100 percent. By Letter Order No. D6-441, dated July 1, 1974, Mr. Pritchard was removed from the TDRL, to be effective July 31, 1974, on the basis that he had been found physically fit for duty. Upon removal from the TDRL he was no longer entitled to retired pay.

However, through administrative error, Mr. Pritchard continued to receive retired pay for the period August 1, 1974, through November 30, 1975, in monthly amounts ranging from \$138.67 to \$156.23 which resulted in a total overpayment in the amount of \$2,358.82.

Mr. Pritchard in his original request for waiver asserted that he did not know that he was being overpaid as he thought that his continued retired pay was due to

~~009998~~ 112164

B-197633

"the final and best answer" in response to his letter of May 23, 1974, wherein he rebutted the findings of the Army with regard to his physical condition.

The Claims Division denied waiver on the basis that in view of his orders dated July 1, 1974, which advised that he would be removed from the TDRL effective July 31, 1974, he should have questioned the continued receipt of retired pay.

On appeal, Mr. Shaw argues that given the equitable nature of waiver, Mr. Pritchard was an innocent bystander in this matter. He urges that as the overpayments resulted in the "U.S. Army's own failure", at the minimum, a partial waiver should be granted.

Section 2774 of title 10, United States Code (1976), provides our authority to waive debts arising out of erroneous payments of military pay when collection would be against equity and good conscience and not in the best interests of the United States. However, subsection 2774(b) precludes waiver if, in the opinion of the Comptroller General--

"* * * there exists, in connection with the claim, an indication of fraud, misrepresentation, fault, or lack of good faith on the part of the member * * *."

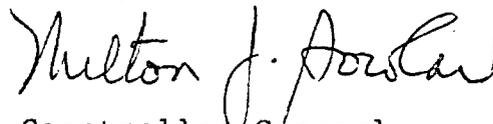
We interpret the word "fault," as used in 10 U.S.C. 2774, as including something more than a proven overt act or omission by the member. Thus, we consider fault to exist if under the circumstances it is determined that the member should have known that an error existed and taken action to have it corrected. The standard we employ is to determine whether a reasonable person should have been aware that he was receiving payments in excess of his proper entitlements. See Paul G. Kiewert, B-185535, April 21, 1976, and John J. Carson, Jr., B-184514, September 10, 1975.

B-197633

In the present case, in view of the letter order dated July 1, 1974, Mr. Pritchard should have expected his retired pay to terminate effective July 31, 1974. While he indicates that he believed the retired pay was continued as a result of his letter dated May 23, 1974, appealing his physical evaluation, we do not believe that he could have reasonably relied on such letter to explain his continued receipt of retired pay since he received the letter order over a month after appealing the evaluation. In view of his orders which stated that he would be removed from the TDRL effective July 31, 1974, we believe that, at the very least, Mr. Pritchard was put on notice of the strong possibility of error and should have made appropriate inquiry concerning the propriety of the continued payments. The fact that the overpayments were made through administrative error did not relieve his responsibility to determine the state of affairs in connection with the overpayments. See Ronald W. Phoebus, B-197275, March 21, 1980.

In the above circumstances, we are unable to conclude that Mr. Pritchard is free from fault, and collection action is not against equity and good conscience nor contrary to the best interests of the United States.

Accordingly, the action of the Claims Division denying waiver is sustained.



Acting Comptroller General
of the United States