

Disability and Division of Benefits with Ex-Spouse

By Mark E. Sullivan²

5.1— Division of Military Benefits Upon Divorce

11.0—Veterans' Claims

Learning about Disability

When a servicemember leaves the armed forces (Army, Navy, Air Force, Marine Corps, Coast Guard), either through a discharge at the end of a term of service or by retirement, a physical at the local VA hospital may turn up one or more disabilities. These medical conditions are deemed to be service-connected if they were incurred or aggravated during the individual's term of military service, and the Department of Veterans Affairs is authorized to pay tax-free compensation to the servicemember (SM) or retiree.

The link between disability compensation and military retired pay is deep and difficult to understand. For a brief overview, however, it can be simplified into three concepts: **waive**, **restore**, and **reverse**.

- **Waive** – Retirees may only get disability compensation from the Department of Veterans Affairs if they waive an equivalent amount of their military retired pay. 38 U.S.C. § 5304(a).
- **Restore** – Effective in 2004, Congress authorized restoration of “waived retired pay” for those who have disability ratings of 50% or more. This is called Concurrent Retirement and Disability Pay, or CRDP. It was phased in over a ten-year period ending December 31, 2013. Now any retiree who has a VA disability rating of 50-100% can ignore the “waiver requirement” stated above, since his retired pay has been fully restored. 10 U.S.C. § 1414. The restoration was automatic; no application is needed.

¹I invite the reader's attention to www.roa.org/lawcenter. You will find more than 2000 “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), the Uniformed Services Former Spouse Protection Act (USFSPA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index, to facilitate finding articles about very specific topics. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997.

²Mr. Sullivan is a retired Army reserve JAG colonel and a life member of the Reserve Organization of America. He practices family law in Raleigh, NC and is the author of THE MILITARY DIVORCE HANDBOOK (Am. Bar Assn., 3rd Ed. 2019). A Fellow of the American Academy of Matrimonial Lawyers, Mr. Sullivan has been a broad-certified specialist in family law for over 30 years. He consults with lawyers nationwide on military divorce issues and in drafting military pension division orders. He can be reached at mark.sullivan@ncfamily.com and 919-832-8507.

- **Reverse** – The retiree can, however, reverse this restoration, meaning that there is still a possibility of waiver for those with a rating of 50% or above. The retiree may apply for a different type of disability payment, Combat-Related Special Compensation (CRSC) when his disability is related to combat. 10 U.S.C. § 1413a. The disability is considered to be combat-related under 10 U.S.C. § 1413a (e) if it—
 - (1) is attributable to an injury for which the member was awarded the Purple Heart; or
 - (2) was incurred (as determined under criteria prescribed by the Secretary of Defense)—
 - (A) as a direct result of armed conflict;
 - (B) while engaged in hazardous service;
 - (C) in the performance of duty under conditions simulating war; or
 - (D) through an instrumentality of war.

The receipt of CRSC is limited to those not receiving CRDP. A retiree cannot receive both CRDP and CRSC. 10 U.S.C. § 1413A (f) and 10 U.S.C. § 1414(d)(1). When a retiree whose full pension has been restored through CRDP makes the election of CRSC, his retired pay will once again shrink by the same dollar amount as his total VA payments. He is, in effect, transported back to “the bad old days” of dollar-for-dollar waiver before the advent of CRDP.

Options, Analysis and Advice

Waive Analysis and Comments: Accepting VA disability compensation is an election; it is not forced upon an individual. The retiree may choose or decline VA disability payments, although some reported cases state that the retiree didn’t know about the waiver taking place, or that “the military converted his retired pay to disability payments.” This is either the product of faulty research or fabrication.

Ordinarily the VA waiver works out fine, since a waiver of \$100 in taxable retired pay yields \$100 in tax-free disability compensation. The rub, however, comes when there is a divorce and an order dividing the military pension. The retired pay center will only divide “disposable retired pay,” and that is defined as excluding VA disability payments. 10 U.S.C. § 1408(a)(4). This means that a former spouse who is entitled to the maximum share of the pension, 50%, will only get 50% of a reduced amount instead of 50% of the total retired pay.

For example, if John Smith’s divorce decree gave Mary Smith 50% of John’s military pension, since they were married for his entire career, she would get \$1,000 a month for a pension that is paid at \$2,000 a month without a VA waiver. But if there were a \$600 deduction (for example) for John’s election of VA disability compensation, then the retired pay center will only divide \$1,400 between the parties, with Mary getting \$700 a month (50% X \$1,400) instead of \$1,000. John, of course, gets the remaining \$700 a month from the pension, plus an additional \$600 from the Department of Veterans Affairs.

Restore Analysis and Comments: The above scenario might occur if John's rating were 40%. But what if he were initially rated 50%? Or what if he returns to the VA hospital a year later for another evaluation, and it is found that the rating has now increased to 50%? Since CRDP is automatic, he does not need to apply for the restoration of retired pay, and his 50% rating means that he will now begin to receive all of his retired pay in addition to his monthly VA compensation of, say, \$800. Mary Smith now begins to receive half of \$1,000 once again, since John's full pension is restored, and John is getting \$1,000 from the pension and \$800 from the VA.

Reverse Analysis and Comments: If John Smith is getting CRDP (because he is rated at 50-100% by the VA), he applies to his branch of service for CRSC. Upon approval, he loses CRDP, and his VA disability payment will once again reduce the pension dollar-for-dollar. And he gets a new payment, CRSC. Thus, to continue with the example above, there is a deduction of \$800 (estimated for a 50% VA rating) from John's retired paycheck of \$2,000, meaning that the retired pay center will allocate only \$600 a month to Mary ($\$2,000 - \$800 = \$1,200$; $\$1,200 \times 50\% = \600). John gets the other \$600 of retired pay (which is taxable), plus \$800 nontaxable from the Department of Veterans Affairs, and – if his VA disability is entirely combat-related – another nontaxable payment of \$800 for CRSC. Thus John comes away with \$2,200, and Mary gets \$600 after the *restoration* and *reverse* due to CRDP and CRSC.

Looking Forward

Unless the court or the attorney for the non-military spouse anticipates these issues in the trial or settlement of a military pension division case, the results for the non-military spouse can be severe. Although some courts have found a duty of good faith and indemnification in state law or common-law principles, the safest course is to make sure that the military pension division order or settlement contains a specific indemnification clause.

Strategy for the Former Spouse – Indemnification

With this in mind, Mrs. Smith's attorney first must focus on prevention by prudent drafting if he or she is handling the case at the time of preparation of the settlement agreement or court order. The document should include a provision that states that the former spouse's share of military retired pay is based on *no disability waivers* or, if there is a disability waiver at the time of the pension division, the share is based only on the waiver currently in place. This clause has the effect of specifying the intent of the court and the underlying facts in existence at the time of the order or agreement. Such a clause might read:

At the time of this hearing, the Husband is receiving [*here state amount of pay, active duty or retired, plus any deductions*]. The Husband has not elected any VA disability compensation or other disability pay in lieu of retired pay [*or state the amount or percentage of retired pay presently waived if that is the case*]. The anticipated pension payment to the Wife is approximately \$ [—OR—*The court does not anticipate any further reduction in the share of Wife*]. The award herein is based on these facts.

In addition, the order or agreement should state that the court retains continuing jurisdiction over the issue of property division (in the event that the SM still elects to apply for a waiver). Such a clause would allow the judge to review the case in the future and adjust the retired pay amounts or percentages, or perhaps modify the division of other marital property, should the SM take actions that result in a reduced share for the ex-spouse.

Savings Clause

This above wording could be combined with a “savings clause” that specifically states that there shall be an adjustment of the former spouse’s share to pre-waiver levels by increasing his or her share of retired pay or requiring payments from other sources. Such a clause would benefit Mrs. Smith by clearly setting out the intent of the court if a review hearing is held, and this could be helpful if the judge assigned to the case is not the one who originally heard the pension division matter or signed the consent order. Such a clause might state:

The parties consent to the court’s retaining continuing jurisdiction to modify the pension division payments or the property division specified herein if Husband should waive military retired pay for an equivalent amount of VA disability compensation and this action reduces Wife’s share or amount of his retired pay as set out herein. This retention of jurisdiction is to allow the court to adjust the Wife’s share or amount to the pre-waiver level or to require payments or property transfers from Husband that would otherwise adjust the equities between the parties so as to carry out the intent of the court in this order.

Careful drafting of a marital settlement agreement or court order is the key to indemnifying the nonmilitary spouse when this type of retirement might occur in the future. A good example of this is found in *Owen v. Owen*, a Virginia Court of Appeals case.³ In that case, the property settlement agreement (PSA) contained an indemnification clause. The clause specified the level of payments that the ex-wife would receive, “one-half of the husband’s gross military retirement pay based on 25 years of service, including cost-of-living increases.”⁴ The PSA clause also stated that the husband would take no action to reduce this monthly payment and that he guaranteed this and agreed to indemnify the former wife against any breach by him and to hold her harmless therefrom.

³*Owen v. Owen*, 14 Va. App. 623, 419 S.E.2d 267 (1992). Other cases upholding the indemnification approach (either by agreement or imposed in the terms of the original court order) include *Scheidel v. Scheidel*, 129 N.M. 223, 4 P.3d 670 (2000), *Abernethy v. Fishkin*, 699 So. 2d 235 (Fla. 1997); *Strassner v. Strassner*, 895 S.W.2d 614 (Mo. Ct. App. 1995); and *McHugh v. McHugh*, 124 Idaho 543, 861 P.2d 113 (Idaho Ct. App. 1993). Cases that allow reimbursement for the former spouse in the absence of an indemnification clause include *Janovic v. Janovic*, 814 So. 2d 1096 (Fla. Dist. Ct. App. 2002), and *In re Marriage of Krempin*, 70 Cal. App. 4th 1008, 83 Cal. Rptr. 2d 134 (1999) (the latter utilized a resulting trust theory to achieve the intended result). In *Dexter v. Dexter*, 105 Md. App. 678, 661 A.2d 171 (1995), the court found that the SM breached an agreement to pay pension benefits and awarded damages to the former spouse in the amount of the sum waived for VA disability pay.

⁴*Owen*, 14 Va. App. At 627.

This language did not specify the source of the indemnification payments and was held not to violate federal law. The Virginia Court of Appeals recognized the danger inherent in allowing the husband to waive retired pay in favor of VA disability compensation after the final decree, stating:

If we adopted the husband's interpretation of the guarantee language, the guarantee would be rendered virtually meaningless, due to potentially large-scale conversion of retirement benefits to disability benefits. Conceivably, husband's disability payments could eliminate completely the wife's benefits. Such a result is irrational and does not comport with the clear intent expressed by the language of the PSA [property settlement agreement].⁵

Then the Court stated:

We hold that federal law does not prevent a husband and wife from entering into an agreement to provide a set level of payments, the amount of which is determined by considering disability benefits as well as retirement benefits.⁶

In passing, the Virginia Court of Appeals mentioned the alternative remedy of providing replacement spousal support in *Owen v. Owen*:

If the Wife's retirement income decreases because the husband receives disability pay in lieu of retirement, the court may consider this reduction in determining its award and may provide for an alternative payment as compensation for the wife's loss.

The guarantee/indemnification clause of the PSA constitutes consideration for the wife's agreement to waive spousal support. If this clause were found to be invalid, the consideration would fail, and we would be obliged to remand this cause for further proceedings to determine spousal support.⁷

Proper anticipation of the disability dilemma is important in protecting the former spouse. When an indemnification clause is part of the settlement, the courts will have the proper tools in the future to order reimbursement. When specifying remedies the drafting attorney should also make sure that the language includes expenses, costs consequential damages and interest at the statutory rate.⁸

⁵*Id.*

⁶*Id.* at 628

⁷*Id.*

⁸A judge in a contested case, however, cannot impose an indemnification requirement or "savings clause." For an explanation see Mark E. Sullivan, *Death of Indemnification?*, LEGAL ASSISTANCE FOR MILITARY PERSONNEL; SILENT PARTNER, <https://www.nclamp.gov/publications/silent-partners/the-death-of-indemnification/> (last visited Mar. 30 2022).