

December 8, 2004

In Re:

[Redacted]

Claimant

Claims Case No. 04090713

CLAIMS APPEALS BOARD DECISION

DIGEST

When a Correction Board merely recites facts already in a member's file and does not change any facts, no additional rights accrue as a result of the Board's action. A Service member was discharged with over 19 years of service. His record contained another two years of service which could have been included in his years of service, but were not. A Correction Board included the additional time in his years of service and retroactively awarded him retired pay without changing any facts in his record. The claim for retired pay, which was barred by the passage of time before the Board's action, remains barred.

DECISION

This is in response to an appeal of Defense Office of Hearings and Appeals (DOHA) Settlement, DOHA Claims File No. 04060803, dated July 8, 2004, which found that a claim for retroactive retired pay on behalf of a deceased member of the United States Navy is barred by the Statute of Limitations.

Background

The member was discharged in 1965 with 19 years, five months, and 13 days of service. He had two years of time as an Aviation Midshipman which could have been counted to increase his service to over 20 years. [\(1\)](#) The Navy did not count the two years, and the member did not question the calculation. According to the member's family, he was forced to accept a discharge for disciplinary reasons. The family states that he accepted the discharge short of retirement to avoid court martial and never questioned the omission of the additional two years of service. He died in 1985. In 2003, at the request of his son, the Board for Correction of Naval Records (BCNR) corrected his records to give him credit for the two years and thus to make him eligible for retroactive retired pay from 1965 until 1985. The Defense Finance and Accounting Service (DFAS) calculates the gross amount of retired pay to be \$192,684.43.

At the time of his discharge, the member was married. According to information provided by his son, the member's first wife obtained a Mexican divorce in 1970, but the member refused to recognize it. However, he remarried, or purported to do so. We have no record of a valid divorce, and we do not know when the second marriage occurred. The member's

second spouse died in 1998. The correction petition also contained a request for BCNR action which would grant a Survivor Benefit Plan (SBP) annuity to the member's surviving first spouse. The BCNR denied that action on the grounds that SBP was not established until 1972 and that the predecessor plan, the Retired Serviceman's Family Protection Plan (RSFPP), had no provision for former spouse coverage.

Discussion

To date, the claim has been treated as untimely. The Comptroller General issued a line of decisions that said that Correction Board actions did not give rise to a claim unless the Board actually changed a fact. In those decisions, if the Board merely recited a fact already in the record, the Board's action was treated as merely an attempt to evade the statute of limitations, and the claim was denied. *See* B-179467, May 2, 1974; and 39 Comp. Gen. 178 (1959). *See also* B-205111, Feb. 19, 1982; and B-191650, May 18, 1978. This Office follows the Comptroller General's interpretation of the law regarding corrections of military records. *See* DOHA Claims Case No. 96121102 (August 22, 1997). In this case, the member's time as an Aviation Midshipman was in his record when he was discharged. At the time of the member's discharge, he had ten years to file a claim for retired pay.⁽²⁾ For whatever reason, he chose not to contest the calculation of his creditable service in the years following his discharge. While his family credits his inaction to depression or other medical problems, the Barring Act does not contain exceptions for medical problems. *See* DOHA Claims Case No. 02082608 (March 26, 2003).

While a negative decision regarding the member's retired pay renders his surviving spouse's SBP claim moot, we will discuss that claim as well. We agree with the BCNR that the claim should not be allowed. First of all, as the BCNR noted, RSFPP had no provision for former spouse coverage. Thus, if RSFPP coverage were in effect and the member and his surviving spouse divorced, her coverage would have ended.⁽³⁾ More significantly, because SBP was not enacted until after the member left the Navy, he would have had to affirmatively elect SBP coverage; and if he elected an ineligible spouse, his election would have been void. *See* B-204367, Aug. 1, 1986; and 57 Comp. Gen. 426 (1978). Given his family situation as described now by his family, his election of his surviving first spouse in 1972 would be too questionable to allow.

Conclusion

We affirm DOHA Settlement 04060803, dated July 8, 2004.

/s/

Michael D. Hipple
Chairman, Claims Appeals Board

/s/

William S. Fields
Member, Claims Appeals Board

/s/

Jean E. Smallin
Member, Claims Appeals Board

1. In 1963, the Comptroller General ruled that unless a member was in receipt of retainer pay while he was an Aviation Midshipman, the time he spent as an Aviation Midshipman was active service creditable to qualify the member for retirement, but was not to be used in the calculation of retired pay. *See* 42 Comp. Gen. 669 (1963). Since there is no indication that the member in the case before us was in receipt of retainer pay as an Aviation Midshipman, the two years could have been included in his active duty time for retirement purposes.
2. The time limit for filing claims, known as the statute of limitations or Barring Act, is found in 31 U.S.C. § 3702(b), but was formerly contained in 31 U.S.C. § 71a.. The time limit now is six years, but at the time in question it was ten years.
3. SBP also did not provide coverage for former spouses until 1982. The Comptroller General explained the 1982 and 1983 amendments which provided for former spouse coverage in 66 Comp. Gen. 687 (1987).