

DATE: January 27, 1997

In Re:

[Redacted]

Claimant

Claims Case No. 96070228

CLAIMS APPEALS BOARD DECISION

DIGEST

The administration of incapacitation pay is a matter within the jurisdiction of the reservist's Service. When an agency has such discretionary authority, this Office will not disturb the Service's determination unless it is clearly erroneous, arbitrary, or capricious.

DECISION

This is in response to an appeal of the U.S. General Accounting Office's (GAO) Settlement Certificate Z-2869857, March 12, 1996, which denied a service member's claim for incapacitation pay calculated per table 8-2-5 of the Department of Defense Military Pay and Allowances Entitlements Manual (DODMPM).

Background

While the retired member was on active duty with the United States Navy, his right knee, right humerus, and lower back were injured in the line-of duty (LOD) on April 10, 1974. He was discharged from the Navy on February 25, 1975. On August 29, 1976, he enlisted in the United States Air Force Reserve (USAFR), serving as an aircrew member and eventually attained the grade of Master Sergeant (MSgt.). On November 6, 1982, his unit's Flight Surgeon put him on restricted profile due to problems with his right knee. The member's right knee again was injured (LOD) in August 1984. He received incapacitation pay and was returned to flying status in January 1988.

On October 30, 1991, the member's right knee and back were injured when the AC-130 gunship aircraft he was riding in was forced to make a very hard emergency landing. The member was eventually grounded due to problems with the right knee. He requested incapacitation pay on September 11, 1992. By memorandum dated March 10, 1994, the Commander of the USAFR ruled that the October 30, 1991, knee injury was LOD. The member was honorably discharged for medical reasons on September 29, 1994.

The member claimed incapacitation pay in accordance with table 8-2-5 of the DODMPM for an LOD injury incurred before November 15, 1986, on the basis of the 1974 injury, which left him with a right knee that was vulnerable to later injury. The Service determined that he should be compensated under table 8-2-3. The claim was forwarded to the GAO by the Defense Finance & Accounting Service, Denver Center.

The GAO settlement states that the member's incapacitation during the period at issue was the result of the October 30, 1991, accident, which comes under the purview of table 8-2-3. GAO disallowed the member's claim stating that the Service's decision to pay incapacitation pay under table 8-2-3 was not clearly erroneous, arbitrary or capricious.

The member argues on reconsideration that the problems with his right knee (diagnosed as chondromalacia of the patella) are probably the result of the 1974 LOD injury. The member is seeking incapacitation pay from the date of the aggravation to his knee, October 30, 1991, under table 8-2-5.

Discussion

Title 37, United States Code, section 204(g) authorizes incapacitation pay. That section states that a reserve member is

entitled to the pay and allowances of a regular member of the same grade and service whenever the reserve member is physically disabled as a result of an LOD injury, illness, or disease incurred or aggravated during active duty, inactive duty for training, or direct travel to or from such duty or training. The DODMPM provides the implementing regulations for such pay and allowances in three related tables which reflect changes in the underlying statute over the years.

As the Comptroller General stated in the settlement, the administration of incapacitation pay is a matter within the jurisdiction of the reservist's Service. When an agency has such discretionary authority, GAO generally did not, nor will this Office, disturb its determination unless it is clearly erroneous, arbitrary, or capricious. The Service is attempting to compensate the member for the October 30, 1991, LOD injury. The Service used table 8-2-3 because the date of the aggravation to the knee that had been diagnosed with chondromalacia falls within the time period of this table.

Table 8-2-3 of the DODMPM provides for disability entitlement for the reserve forces for disabilities incurred or aggravated after September 29, 1988. Rule 1 of that table states that if a member is physically disabled in the line of duty while serving on ordered active duty and the member is not fit for military duty then the member is entitled to active duty pay and allowances for the period of the orders plus authorized travel time. If the disability continues beyond this period, or if there is a subsequent recurrence of this disability, entitlement exists to pay and allowances, less the full amount of all civilian earned income received for the disability period, for not more than a total of six months.

Table 8-2-5, which the member relies on, provides for disability entitlements for the reserve forces for disabilities incurred before November 15, 1986. In 1974, the member was not in the reserve forces but was a member of the Regular Navy, thus this table does not apply because it covers reservists only and because the incident being compensated occurred in 1991. As such, compensation for the 1974 injury was provided by the Navy at that time.

The member cites SP4 David R. Lepper ARNG, B-185439, Aug. 3, 1976, arguing that his rights to entitlements under table 8-2-5 were matured as a result of the nature of the disease. The specific facts in SP4 Lepper's case involved an original injury which occurred while he was a member of the reserves. He was then compensated by the reserves for a later aggravation of that injury. In the present case, the 1974 injury occurred before the member joined the reserve forces. The reserve Service is responsible for compensating him for an injury or aggravation which occurred while he was a member of the reserves only, not for an injury which occurred while he was in the Navy. The member also argues the date on which compensation should begin. This determination is based on the table used. The member should receive incapacitation pay according to table 8-2-3 for the October 30, 1991, injury.

Conclusion

We affirm the settlement.

Signed: Christine M. Kopocis

Christine M. Kopocis

Member, Claims Board of Appeals

Signed: Joyce N. Maguire _____

Joyce N. Maguire

Member, Claims Board of Appeals

Signed: Jean E. Smallin

Jean E. Smallin

Member, Claims Board of Appeals