In Re:

[Redacted]

Claimant

DATE: August 22, 1997

Claims Case No. 96121102

CLAIMS APPEALS BOARD DECISION

DIGEST

1. A retired service member seeking irregular retired pay generally has the burden of proving that he met all of the conditions necessary to establish his claim for retired pay, including the burden of proving that he was not a Reserve of an armed force before August 16, 1945, under 10 U.S.C. § 12731(c) (formerly 10 U.S.C. § 1331(c)) when that issue is in dispute.

2. An attempt by a correction board to avoid application of the statute of limitations by recital or affirmation of facts already in a record, or by stating conclusions of law but changing no facts, does not constitute an effective correction action. Instead there must be an actual change to facts in a member's record that gives rise to a monetary entitlement that was not present before.

DECISION

[Redacted] , Army of the United States (Retired), appeals the decision of the Comptroller General[(1)] which denied him irregular retired pay for the period between his 60th birthday on October 1, 1970, and May 5, 1988, a period greater than six years before the date that he filed his May 6, 1994, application for irregular retirement. Under Section 211 of Public Law No. 104-53, 109 Stat. 514, 535, November 19, 1995, the GAO's authority to settle claims for military pay and allowances, including retired pay, was transferred to the Director of the Office of anagement and Budget (OMB). The Director of OMB delegated his authority to the Secretary of Defense effective June 30, 1996. The authority of the Secretary of Defense in this regard was later codified in Section 202(n) of Public Law No. 104-316, 110 Stat. 3826, October 19, 1996.[(2)]

Background

The Comptroller General's decision set forth the facts, which we summarize here for the convenience of the reader. The service member applied to the Army both in 1970 and in 1978 for retired pay based on his service in the Reserve components. Although he had been notified that he had completed the necessary 20-year service requirement mandated in the former Section 1331(a) of title 10 of the United States Code (10 U.S.C. § 1331(a)),[(3)] and reached age 60 on October 1, 1970, the Army rejected his applications for retired pay benefits on November 17, 1970, and again on November 27, 1978. His applications were denied because he had been a member of a Reserve component before August 16, 1945, but did not perform active duty during World Wars I or II, or during the Korean Conflict, as required by 10 U.S.C. § 1331(c).

Effective October 1, 1983, 10 U.S.C. § 1331(c) was amended by section 924(a) of Title IX, Pub. L. No. 98-94, Sept. 24, 1983, 97 Stat. 644, to add two additional active service periods during which a service member could have performed active duty and qualified for non-Regular retired pay. They were the periods of the Berlin Crisis and the Vietnam era. Since the service member performed active duty during the latter period,[(4)] he first became fully eligible for non-Regular retired pay on October 1, 1983. However, he did not reapply to the Army for that pay until May 6, 1994. The Army advised the service member on February 27, 1995, that he was entitled to retired pay, and as a result, he received retired pay for the period beginning on May 6, 1988, the sixth antecedent anniversary of the date he applied for retired

pay after he became eligible.

The service member believes that he is entitled to retired pay for the period between his 60th birthday on October 1, 1970, and May 5, 1988, and the member's claim was forwarded to the Comptroller General for an advance decision. The Comptroller General found that a Service's determination of wartime service under 10 U.S.C. § 1331(c) was a condition precedent to the accrual of a Reservist's claim for retired pay and that the statutory notice requirement in 10 U.S.C. § 1331(d) pertained only to notice of completion of 20 years of service, not to the wartime active duty requirement. Thus, the Comptroller General rejected the service member's argument that payment of non-Regular retired pay for periods before May 6, 1988 was not barred under the 6-year Barring Act, at 31 U.S.C. § 3702(b) (1994), because the Army had failed to notify him of his eligibility for retired pay in 1983.

After the Comptroller General's decision was released, the service member forwarded additional correspondence concerning his claim to the U.S. General Accounting Office (GAO), and on November 4, 1996, GAO advised him that it was not aware of the 1996 action taken by the Army Board of Correction of Military Records (ABCMR) before its decision. The GAO observed that the ABCMR had 'corrected' the service member's records to reflect that, since he served on active duty during a 7-day period in 1970, that he was entitled to retired pay effective October 1, 1970. GAO also noted that the Defense Finance & Accounting Service (DFAS) had recognized that the service member had served on active duty during the Vietnam era but believed that this did not entitle him to retired pay until the law changed in 1983. The GAO repeated its finding that the service member was not eligible for retired pay until 1983, but forwarded the matter to this Office on December 5, 1996, for further consideration because it no longer had jurisdiction as indicated above.

The claimant's current position is that his right to retired pay is not dependent on Public Law 98-94. He claims that his right to retired pay fully accrued in 1970, and the record shows that he had filed for non-Regular retired pay at that time. He contends that he was not subject to active duty requirement in 31 U.S.C. 1331(c)(1) because it is his understanding that his service in the New York National Guard from January 9, 1928, through February 6, 1929, was not as a Reserve of an armed force. He noted in correspondence to GAO that the ABCMR found that he had timely filed for irregular retired pay in 1970. The approved ABCMR recommendation was: "that all of the Department of the Army records related to this case be corrected by showing that the individual concerned is entitled to Reserve retired pay retroactive to 1 October 1970, the date of his 60th birthday."[(5)]

Our research into this matter also indicates that the service member was a member of the 105th Field Artillery of Brooklyn, New York during his 1928-1929 service. The *Official National Guard Register for 1928* indicates that several of the components of the 105th Field Artillery had Federal recognition during that period of time.[(6)] We also note that in its 1996 action, the ABCMR found that the service member had enlisted in the United States Army Reserve during his only other pre-World War II military service.[(7)]

Discussion

The scope of our review is limited to the effect, if any, of the 1996 ABCMR action and to the service member's claim that his 1928-1929 military service was not service in a Reserve component. We accept, and will not review, the findings and holdings of the Comptroller General's decision of October 8, 1996, both because the Deputy General Counsel (Fiscal), Department of Defense, has reconsideration authority and because the claimant has not demonstrated error with respect to any part of the Comptroller General's decision.

As a factual matter, the record does not support the claimant's contention that his 1928-1929 service in the New York Army National Guard was not service as a Reserve. First, the ABCMR noted that the service member was in the United States Army Reserve during his 1929-1935 service in the Army. Also, the *Official National Guard Register* shows that various components of the 105th Field Artillery were Federally recognized during 1928. The ABCMR's action noted that for pay purposes, the service member had been credited with 22 years, 7 months and 13 days of service, thus necessarily including the National Guard service of 1928-1929. In our view, the provision in 10 U.S.C. § 1332 (now 10 U.S.C. § 12732) for computation of years of service to determine eligibility for retired pay under Section 1331, must be read together with the concept of a "Reserve" of an armed force in Subsection 1331(c). If a member is credited under § 1332 with years of service for the service involved, either because he had a Federally recognized status before June 15,

1933 or because his service was in a Federally recognized unit before June 15, 1933, then he had to be a "Reserve" for Subsection 1331(c) purposes. The service member has not complained that he is being overpaid on current retired pay. The Comptroller General pointed out that except for the specific statutory duty imposed on a Service by 10 U.S.C. § 1331(d), the burden of showing that the individual met the other qualifying conditions entitling him to retired pay remains with the individual. Based on this record, we cannot conclude that the service member has shown by clear and convincing evidence that he was not "a Reserve of an armed force" before August 16, 1945.

The other issue involves the effect of the ABCMR's approved 1996 recommendation. A correction of a record under 10 U.S.C. § 1552 is final and conclusive on this Board, but the Comptroller General has held that in order for a correction of a military record to give rise to a right of payment, the action under Section 1552 must be, without exception, a change in the facts as set out in the original record; that is, an addition or deletion of facts. See First Lieutenant Paul L. Garmon, AUS (Retired), B-191650, May 18, 1978.[(8)] The approved recommendation that the service member is entitled to Reserve retired pay retroactive to 1 October 1970 is based on the finding that it was "unjust" to pay him retired pay for only the 6 years preceding his 1994 claim when he had timely filed for retired pay in 1970 and had been placed on the retired list with an effective date of 1970. Commenting on the ABCMR's action, the Director of DFAS stated in his administrative report to this Board:

"The Comptroller General has long held that an attempt by a correction board to avoid application of the statute of limitations by recital or affirmation of facts already in a record, or by stating conclusions of law but changing no facts, does not constitute an effective correction action. Instead there must be an actual change to facts in a member's record that gives rise to a monetary entitlement that was not present before."[(9)]

In this case, the ABCMR did not add or delete facts, and the recommendation does not give rise to a new monetary entitlement.

Conclusion

We disallow the service member's claim.

Signed: Michael D. Hipple

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Michael D. Hipple

Chairman, Claims Appeals Board

Signed: Michael H. Leonard

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Michael H. Leonard

Member, Claims Appeals Board

Signed: Jean E. Smallin

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Jean E. Smallin

Member, Claims Appeals Board.

1. See B-274195, Oct. 8, 1996.

2. See B-275605, Mar. 17, 1997, for a further explanation on this transfer.

3. Section 1331 is now codified at 10 U.S.C. § 12731. See B-274195, supra, footnote 2, for an explanation of the amended codification.

4. The member served seven days of active duty during the 1970 Postal Strike.

5. See Docket Number AC77-4202B, 14 February 1996, approved by the Deputy Assistant Secretary of the Army on 26 February 1996.

6. Militia Bureau, *Official National Guard Register for 1928*, Government Printing Office (1928), pp. 662-665.

7. This was service from 7 February 1929 to 6 February 1932 and from 19 March 1932 to 18 arch 1935. The service member did not engage in further military service until he enlisted in the Army National Guard in March 1955.

8. This is in accord with court decisions regarding correction board actions. See, for example, Haislip v. United States, 152 Ct. Cl. 339 (1961).

9. The Director cited B-186322, Aug. 20, 1976; 45 Comp. Gen. 538 (1966); and 39 Comp. Gen. 178 (1959) as examples of this practice in his June 25, 1997, correspondence.