
In Re:

[Redacted]

Claimant

DATE: August 26, 1997

Claims Case No. 97072111

CLAIMS APPEALS BOARD DECISION

DIGEST

Irrespective of the Barring Act, now codified at 31 U.S.C. § 3702, a service member claiming additional pay and allowances which accrued during World War II has the burden of proving that he was not paid the pay and allowances claimed. The claim is disallowed where government records necessary to either justify or refute it have been destroyed or become unavailable due to lapse of time, and there is no other documentation available from any source to establish the liability of the United States.

DECISION

[Redacted], the service member, claims additional pay and allowances from his service during World War II. We find that the service member failed to support his claim for both legal and factual reasons, notwithstanding the general time limitation on payment in the Barring Act, now codified in 31 U.S.C. § 3702(b).⁽¹⁾

Background

The service member was held by the Japanese as a prisoner of war (PW) sometime following an enemy attack against his vessel, [Redacted] in February 1942. The service member was in a missing or PW status until August 1945. The member says that after repatriation he was paid for his time in captivity but that the amounts he received reflected neither his promotion to Chief Petty Officer (pay grade E-7) on December 4, 1944, nor payment for food and housing during captivity. The service member offered no documentary evidence to show what he had been paid upon repatriation. He indicates that he was not certain about the amounts he was paid but says that he received \$200 when he arrived in Calcutta, \$600 when he arrived in New York and another \$200 after he returned home. He also indicates that he never received a pay voucher which showed how the amounts were calculated. In his submission to the Board for Correction of Naval Records, he indicates that he received payments due to his former PW status under 50 U.S.C. App. § 2005, an entitlement separate from the ones claimed here. The service member was discharged from the Navy in May 1953.

The Defense Finance and Accounting Service (DFAS) - Cleveland Center reports that there are no means now available to the government to verify what the service member was paid. Payment records would have been destroyed 10 years after he left active duty, and DFAS indicates that it is highly unlikely that payment for advancement in grade would not have been paid upon repatriation. DFAS also notes that the Department of Defense Authorization Act for Fiscal Year 1996 authorized payment of the amount of quarters and subsistence allowance which had accrued to individuals in a specific group, but which had not been paid. That group is composed only of individuals who were members of the armed forces captured on the island of Corregidor and the peninsula of Bataan by Japanese forces, who participated in the Bataan Death March, who escaped from captivity and who served as guerrillas during the period from January 1942 through February 1945.⁽²⁾ The service member was not a member of that group.

Discussion

Based on the minimal information available, there are several problems with the claim. First, even if the service member

had timely presented his claim to the GAO and had proved that he was not paid, it is not clear that GAO would have reviewed the Navy's payments for military pay for reasons presented below. Additionally, the service member was not entitled to quarters and subsistence merely because of his missing in action or PW status, and there is no evidence that he was in a duty status entitling him to the allowances or that he was otherwise eligible to receive such allowances at the beginning of the missing/PW status.

The service member's military pay claim presumably would have been grounded in the Missing Persons Act of 1942, 56 Stat. 143, as amended, 50 U.S.C. App. § 1001, et seq. (1946), and the Department of the Navy had authority to consider and settle claims under that Act. The service member's present claim appears to be a request for review of the action taken at that time by the Department of the Navy. The Comptroller General has held that under Section 9 of the Missing Persons Act the GAO was not authorized to change or modify an administrative settlement under the Act by the department involved because that Act made such administrative settlements final and conclusive on GAO. See, for example, B-165722, Mar. 27, 1969; and B-164245, June 27, 1968. The courts have adopted a similar rule with respect to judicial review. Compare Espartero v. United States, 152 Ct.Cl. 789 (1961); and Moreno v. United States, 93 F.Supp. 607 (1950), cert. denied, 342 U.S. 814.

The claim for quarters and subsistence is a little more complex. First, the Comptroller General found that in light of the statutory provisions in effect prior to Sections 301 and 302 of the Career Compensation Act of 1949, ch. 681, 63 Stat. 812, 812-813, effective October 1, 1949, it was his view that unless a member without dependents was entitled to receive a quarters and subsistence allowance at the time he entered a missing status, there was no authority for payment of such allowances. See B-175190, Dec. 8, 1972, and 52 Comp. Gen. 23 (1972), which distinguished and explained 23 Comp. Gen. 207 and 23 Comp. Gen. 360 (1943). In 23 Comp. Gen. 207, the Comptroller General held that an enlisted member of the Navy without dependents who was absent from his ship in a missing status (under the Missing Persons Act of March 7, 1942, 56 Stat. 143) was not entitled to quarters and subsistence allowances authorized by Section 10 of the Pay Readjustment Act of 1942, 56 Stat. 363. There are no records indicating that the current service member had eligible dependents or had some other basis for entitlement to quarters and subsistence when he came under the purview of the Missing Person's Act. If he did, then the Navy's settlement of this after the war may not be reviewable because of Section 9 of the Act. If he did not, he had no entitlement for the reasons stated in 23 Comp. Gen. 207.

The service member does not meet his burden of proof even if the types of pay and allowances claimed here were generally available and are reviewable. The burden is on the claimant to establish the liability of the United States and his right to payment. A claim settlement is based on the written record only. See 4 C.F.R. § 31.7. The claimant states that he was not paid the pay and allowances in question, but he has offered no firm evidence to support his right to them. Moreover, he admits that his memory is hazy concerning the very amounts he states he received. While we recognize that the service member made a tremendous personal sacrifice in service to his country, this is not a legal basis on which we can settle his claim. The member did nothing about this matter for more than 50 years, and he cannot reasonably expect the government to maintain the necessary records to verify his claim. The Comptroller General has denied a claim where government records necessary to either justify or refute it have been destroyed or become unavailable due to lapse of time, and there is no other documentation available from any source to establish the liability of the United States. In such a situation, the claim must be disallowed. See Customs Service, B-241592, Mar. 13, 1991; Hai-Tha Truong, B-215118, Dec. 18, 1984, aff'd on reconsideration, May 7, 1987; B-107211, Mar. 17, 1987; Charles E. Hopkins, B-217652, Mar. 18, 1985; and Major Roger W. Loder, USAR, B-213498, May 14, 1984.

The claimant is aware that 31 U.S.C. § 3702 was amended by Section 608 of Public Law 104-201⁽³⁾ to add a new subsection (e) which permits the Secretary of the Navy, not this Board, to request the Comptroller General to waive the 6-year time limitation in subsection 3702(b) within certain limitations. Accordingly, this Office applied the time limitation that existed when the claim accrued. But 31 U.S.C. § 3702(e) is not a consideration where a claimant has not maintained his burden of proof.

Conclusion

The claim is disallowed.

Signed: Michael D. Hipple

Michael D. Hipple

Chairman, Claims Appeals Board

Signed: Christine M. Kopocis

Christine M. Kopocis

Member, Claims Appeals Board

Signed: Jean E. Smallin

Jean E. Smallin

Member, Claims Appeals Board

1. The Act of October 9, 1940, ch. 788, 54 Stat. 1061, was originally codified at 31 U.S.C. 71a. At the time of the service member's discharge, a claim had to be received at the General Accounting Office within 10 years of when it accrued. The date of accrual was postponed until the service member was released from active duty. Settlement of claims for uniformed service pay and allowances was transferred to the Secretary of Defense in 1996.

2. See Pub. L. No. 104-106, Div. A, § 634, 110 Stat. 186, 366 (1996), as amended by National Defense Authorization Act for Fiscal Year 1997, Pub. L. No. 104-201, § 655, 110 Stat. 2422, 2583 (1996).

3. National Defense Authorization Act for Fiscal Year 1997, Pub. L. No. 104-201, Div. A, § 608, 110 Stat. 2422, 2542-2543 (1996).