

DECISION



THE COMPTROLLER GENERAL OF THE UNITED STATES WASHINGTON, D. C. 20548

FILE: B-186322

DATE:

AUG 20 1976

MATTER OF: Chief Warrant Officer Joseph E. Kelly

- DIGEST:
1. Where correction of military record created no new facts and gave member no new entitlement to retired pay, and such pay would have been paid if timely claim had been filed therefore, such action does not constitute correction of record within the purview of 10 U.S.C. 1552. The rule in 45 Comp. Gen. 538 will continue to be followed.
 2. Where claim for retired pay accrued more than 10 years before claim was filed with GAO, statute of limitations (31 U.S.C. 71a) bars payment, notwithstanding correction of military records to show that claim was made within time limit, since board of correction cannot amend GAO records to show timely filing that would have tolled statute of limitations.

This action is in response to a letter dated February 10, 1976, from R. P. Pilcher, Disbursing Officer, Consolidated Disbursing Office, Marine Corps Finance Center, Kansas City, Missouri, requesting an advance decision as to the propriety of payment of additional retired pay resulting from a correction of naval records in the case of Chief Warrant Officer Joseph E. Kelly, USMC, Retired. The request has been assigned Control Number DO-MC-1252 by the Department of Defense Military Pay and Allowance Committee.

The submission states that Mr. Kelly was transferred to the retired list on March 1, 1955, pursuant to the provisions of the Warrant Officer Act of 1954, May 29, 1954, ch. 249, 68 Stat. 1574. At that time he had completed 27 years, 9 months, and 4 days of service, of which 25 years, 9 months, and 11 days was active service. He was entitled to retirement pay computed under

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section 14(d) of the Warrant Officer Act of 1954, and section 202(a) of the Career Compensation Act of 1949, October 12, 1949, ch. 681, 63 Stat. 802, 807, on a basis of 28 years of total service.

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Through error, the computation of the retirement pay was based on 26 years of total service, resulting in underpayment. In April 1971, this error was discovered and Mr. Kelly's retired pay account was adjusted to credit him with the difference between the retired pay due him based on 28 years of total service and the retired pay actually credited him based on 26 years of service for the period between April 2, 1961, and March 31, 1971. The report advises that "We were prohibited from adjusting his retired pay account for the period prior to 2 April 1961 by the 10-year statute of limitations, Act of 9 October 1940, 31 U.S.C. 71a."

By memorandum dated March 31, 1975, the Board for Correction of Naval Records issued the following recommendation approved by the Assistant Secretary of the Navy:

"That Partitioner's naval record be corrected to show that on 1 March 1955 vice 1 April 1971, the Commandant of the Marine Corps recomputed his retired pay to reflect a 70% multiple vice a 65% multiple, and that on 1 March 1955 he submitted a claim for arrears in pay due as a result of the recomputation."

In view of the above action by the correction board an advance decision is requested concerning the propriety of payment of \$1,662.63 representing the difference in retired pay to which he was entitled and that actually received between March 1, 1955, and April 1, 1961. Thus, we address the question of whether the correction board's action constitutes a correction to remove an injustice within the purview of 10 U.S.C. 1552, which provides in part:

"The Secretary of a military department, under procedures established by him and approved by the Secretary of Defense, and acting through boards of civilians of the executive part of that military department, may correct any military record of that

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department when he considers it necessary to correct an error or remove an injustice. * * *

The submission clearly indicates that Mr. Kelly's records always showed that he was entitled to retirement pay based on 28 years of service, but that through error at the time of his retirement he had been given credit for only 26 years of service. The correction board made no change in facts which created new rights although the record was changed to show that the correct legal conclusion had been reached at the time the member retired.

As indicated in the submission we have consistently held that the correction boards, including the Board for the Correction of Naval Records, do not have authority to change erroneous conclusions of law in the records of members; their authority is limited to the alteration of facts which appear on those records. If the alteration of facts changes the member's legal entitlement to pay any additional amount legally due as a result of the changed facts may be paid even though the period covered by the payment would otherwise be barred by the statute of limitations since the cause of action arises at the time the correction board acts. Action by a board which merely deletes an erroneous legal conclusion and inserts the correct legal conclusion is not considered to furnish the basis for payment of an otherwise barred claim. Hainlip v. United States, 152 Ct. Cl. 339 (1961). As indicated in the submission we have not followed the decision in Gleson v. United States, 172 Ct. Cl. 9 (1965) to the extent that it is inconsistent with that rule. 45 Comp. Gen. 538 (1966). Our position has not changed and we are aware of no further action by the Court of Claims on the legal questions involved in the cited cases. Accordingly, the change in the legal conclusion in Mr. Kelly's record furnishes no basis for payment to him of the additional pay in question.

With regard to the board's action which changed the member's records to show that he submitted a claim for arrears of pay on March 1, 1953, we authorize payment of claims based on corrections of military records by applying pertinent laws and regulations to all material facts shown by the records as corrected. 34 Comp. Gen. 71 (1958). While the Board for the Correction of Naval Records "may correct any military record of that department" (10 U.S.C. 1552(a), emphasis added), the board is not authorized to correct

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the records of the General Accounting Office. Our records do not show, nor can they be corrected to show, a claim filed with this Office by Mr. Kelly in March of 1955.

The act of October 9, 1940, ch. 788, 54 Stat. 1061, as amended by section 801 of Public Law 93-604, approved January 2, 1975, §§ Stat. 1965, 31 U.S.C. 71a (Supp. IV, 1974), as applicable here, provides that unless a claim cognizable by this Office is received by our Office within 6 years (10 years prior to the 1975 amendment) after the claim first accrued, that claim "shall be forever barred." In order to satisfy the statute of limitations, a claim must be timely filed with this Office. The filing of a claim with any other agency or department of the Government such as the Department of the Navy does not satisfy the statute or extend the 10-year limitation period. Therefore, applying the law (the 10-year statute of limitations tolled only by a claim filed with this Office) to the facts as corrected (a claim filed in 1955 with the Navy alone), we must conclude that the payment of \$1,662.63 additional retired pay for the period of March 1, 1955, through April 1, 1961, is barred by the statute of limitations, 31 U.S.C. 71a.^x

Accordingly, payment of additional retired pay to Chief Warrant Officer Kelly on the basis of action taken by the Board for the Correction of Naval records is not authorized.

H. F. KELLER

Deputy Comptroller General
of the United States