-L-7MJ

DECISION

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

1013

FILE: B-189360 DATE: DEC 30 1977

MATTER OF: Master Sergeant Edward O. King, NYANG

DIGEST: Payments of disability pay and allowances must be disapproved in the case of an Air National Guard member injured while en route to attend a unit training assembly, notwithstanding that when injured he was traveling in uniform directly to the assembly location during a portion of the scheduled training period from which he had been excused, since he had not yet reported for duty and the statute authorizing disability pay for members injured while employed in inactive duty performance does not cover members who are traveling to duty locations. 37 U.S.C. 204(h) (1970).

This action is in response to a letter dated August 16, 1977, with enclosures, from Lieutenant Colonel Peter W. Kraska, USAF, Chief, Accounting and Finance Division, Directorate of Resource Management, United States Air Force Accounting and Finance Center, Denver, Colorado, requesting an advance decision as to the propriety of making payment on a voucher in the gross amount of $4,405.87 to Master Sergeant Edward O. King, NYANG, [redacted], representing disability pay and allowances for the period December 12, 1976, through April 4, 1977, as a result of injuries he sustained while en route to attend a regularly scheduled inactive duty training assembly of his New York Air National Guard (ANG) unit. The request was forwarded to this Office by the Assistant Director of Accounting and Finance, Headquarters United States Air Force, by letter dated October 5, 1977 (AF/ACF), and has been assigned Control No. DO-AF-1274 by the Department of Defense Military Pay and Allowances Committee.

The primary issue in this case is whether Sergeant King was "employed" in ANG training at the time he was injured.

It is indicated that Sergeant King, a member of the 152nd Tactical Air Control Center Squadron, New York ANG, was under written orders to attend multiple unit training assemblies at the Roslyn ANG Station, Roslyn, New York, on the weekend of December 11 and 12, 1976, between the hours of 8 a.m. and 4:30 p.m. each day. On Saturday, December 11, he was required to remain at the ANG station until 10 p.m. to perform additional duty, however, and was dismissed at that time with orders to report back not later than 10 a.m.

the next day. He then returned to his home in Brooklyn, New York, for the night.

It is further indicated that the member was injured at about 8:30 a.m., December 12, in Brooklyn while in uniform and en route in his automobile from his home to the Roslyn ANG station. It appears that his injuries resulted from a beating he received from 2 civilians while his automobile was stopped at a traffic signal. Reportedly, the beating resulted from an altercation over a traffic violation by the civilians. The beating was such that he was rendered physically unable to resume his normal military duties until April 4, 1977. A formal investigation conducted by military authorities produced administrative findings that the member's injuries were sustained in the line of duty and were not the result of misconduct or neglect on his part.

It is questioned whether the member is eligible for disability pay in these particular circumstances, since his injuries were incurred while he was traveling to the ANG station but not while he was actually performing inactive duty training. The matter was forwarded to this Office in accordance with the instructions contained in decision 43 Comp. Gen. 412 (1963), concerning situations of this nature and the effect of the Court of Claims' judgment in Meister v. United States, 162 Ct. Cl. 667 (1963).

Subsection 204(h) of title 37, United States Code (1970), provides that a member of the National Guard is entitled to the pay and allowances provided by law or regulation for a member of the Regular Army or Regular Air Force of corresponding grade and length of service whenever he is called or ordered to perform training under 32 U.S.C. 502-505 for any period of time and "is disabled in line of duty from injury while so employed."

That statute, its predecessors, and other similar statutes applicable to other Reserve components have been given extensive consideration by this Office in the past. We have held consistently that the benefits of the statute are limited, insofar as personnel on inactive duty training are concerned, to injuries incurred during periods "while so employed," that is, beginning with muster or assembly and ending with dismissal from the particular drill or other training duty involved. See 38 Comp. Gen. 841, 843 (1959), and 52 Comp. Gen. 28

(1972). Such period does not include traveling to the assembly prior to mustering in or traveling from the assembly after dismissal. 32 Comp. Gen. 554 (1953).

In Meister v. United States, supra, decided July 12, 1963, the Court of Claims considered a case involving a member of the Naval Reserve who had been ordered by his executive officer to be at the training center no later than 7:20 p.m. and who had entered the training center compound when he slipped and fractured his ankle while proceeding toward the drill hall to report for inspection and duty. The court held that he was "within the scope of his assigned duties when he slipped" and therefore within the purview of 10 U.S.C. 6148(a), the pertinent provisions of which were identical to the above-cited provisions of law applicable to the National Guard.

In our decision 43 Comp. Gen. 412, supra, concerning the effect of the judgment in the Meister case, we noted that the court did not attempt to lay down a rule for general application, but limited its decision to the particular facts involved in that case. Hence, we said that the Meister case should not be used as a precedent for favorable administrative action in any similar cases and that such cases should be forwarded to this Office for direct settlement. We also stated our disagreement with the conclusion reached by the court and expressed the view that if Congress had intended to extend disability pay benefits to cover a member while traveling to the location of his inactive duty training, it doubtless would have used appropriate language to make that intention clear. See also in this regard Judge Whitaker's dissenting opinion in the Meister case at page 674.

Since the time of our 1963 decision, the applicable statutory language has not been altered or amended. In addition, we have specifically held that disability pay may not be allowed to a National Guard member injured on a public highway while he is authorized to be absent from the unit training area between the end of drills on the first day and the beginning of drills on the second day of scheduled weekend multiple unit training assemblies. See decision B-164204, July 12, 1968; compare 45 Comp. Gen. 740 (1966), construing statutory language authorizing a death gratuity when a member dies "while traveling directly to * * * inactive duty training."

In the present case the member was dismissed from duty at 10 p.m. on the evening of the first day of his unit's scheduled weekend inactive duty training assemblies for December 11 and 12, 1976. He was not required to remain overnight under military control at the ANG station, but was allowed to go home under instructions to report back for duty not later than 10 a.m. the next day. Before he was required to report for duty the next morning and before he had arrived at the ANG station, he was disabled in the incident previously described. It is our view, therefore, that he was not in a duty status and was not injured "while so employed," at the time of the incident. Thus, it is also our view that he is not entitled to disability pay and allowances under the provisions of 37 U.S.C. 204(h).

In arriving at this determination, we have given consideration to the facts that the member was in uniform traveling directly to the ANG station when injured and that an administrative finding was made that the injuries were incurred "in line of duty." We do not, however, view these matters as being pertinent to the issue of the member's entitlement to disability pay, since it is clear the injuries occurred prior to the time he was required to report for duty at the ANG station. For the same reason, we do not view as relevant the fact that other unit members may have been required to report for training at 8 a.m. that day or that a unit assembly was scheduled to commence prior to the time the incident occurred. See 43 Comp. Gen. 412, supra, answer to question (f).

We also note that the factual situation in this case is materially different from the Meister case. In the Meister case the member was injured after arrival in the training compound, although before mustering in; however, in this case the member was injured on a public street before arrival at the ANG station.

While we are naturally sympathetic towards the member, and regret his being injured, these circumstances do not afford a basis for the payment of disability pay and allowances to him under 37 U.S.C. 204(h).

Accordingly, the member is not entitled to payment, and the voucher is retained.

R. F. KELLER

Acting Comptroller General
of the United States

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