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DECISION



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

[Payment of Additional Retired Pay]

FILE: B-197603

DATE: August 21, 1980

MATTER OF: Flight Officer Anthony Santomango, USAF,
Retired

- DIGEST:
1. A retired Air Force flight officer waived receipt of retired pay in 1950 in order to receive VA compensation, which was at that time greater than his retired pay. Through administrative error his retired pay account was never adjusted when statutory increases in retired pay caused it to be greater than VA compensation. On question as to whether waiver is a forfeiture of the right to further retired pay, 38 U.S.C. 26c (1946 ed.) authorized a person to waive a portion of retired pay equal to the VA payment. That statute applied to this member. Thus, regardless of the language of the waiver, conditional waiver is not authorized and member may not be denied portion of retired pay which exceeds VA entitlement. 28 Comp. Gen. 484 (1949).
 2. Payment of retired pay entitlements retroactively is subject to the 6-year statutory period from the date a claim for such pay bearing the claimant's, or his authorized agent's or attorney's signature, is received in the General Accounting Office. 31 U.S.C. 71a. A voucher submitted to the General Accounting Office by an Air Force Finance Officer without the appropriate signature of the claimant or his knowledge is not a claim for the purposes of 31 U.S.C. 71a. Payment may be made only for the period of 6 years before the date of payment.
 3. After the election periods for the Uniformed Services Contingency Option Act coverage and the Survivor Benefit Plan have expired for those members retired before enactment of

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those plans (180 days after August 8, 1953, and 18 months after September 21, 1973, respectively), even where a member was never informed of his rights to elect to participate in those plans, coverage would not be available to him in absence of a correction of his records under 10 U.S.C. 1552.

This action is in response to a request for advance decision from the Chief, Accounting and Finance Division, Air Force Accounting and Finance Center, concerning the propriety of making payment on a voucher in favor of Flight Officer Anthony Santomango, USAF, Retired, representing additional retired pay he may be due. This matter has been assigned Control No. DO-AF-1338 by the Department of Defense Military Pay and Allowance Committee.

Mr. Santomango was retired from the Army Air Corps for disability effective January 7, 1946, and became entitled to retired pay under the last proviso of the act of April 3, 1939, ch. 35, 53 Stat. 555, 557. Effective June 28, 1950, he was awarded Veterans Administration (VA) compensation for service-connected disability. Since the amount of the VA compensation exceeded his then current retired pay entitlement, payment of retired pay was discontinued, as required by law.

On March 16, 1953, the Department of the Army transferred his account to the Department of the Air Force, but apparently due to the fact that he was not due any retired pay, his account was never established on the Air Force Retired Pay Master File. As a result, it was only recently discovered that with the statutory increases authorized for retired pay, his retired pay entitlement has risen to the point where, at least since November 1973, it has exceeded his VA compensation and he may be due retired pay for the difference. It is noted that any claim for accrued retired pay would be subject to the 6-year statute of limitations.

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Doubt as to the propriety of payment of such retired pay is expressed because Mr. Santomango waived receipt of his retired pay for VA compensation purposes, rather than having waived only a portion thereof for that purpose. The submission also notes that he was never informed of nor briefed on his options to elect coverage under the Survivor Benefit Plan or the Retired Serviceman's Family Protection Plan, which, if he could elect to participate, might affect the amounts which may be otherwise due him.

The provisions of law governing waiver of military retired pay for VA compensation purposes which were in effect at the time Mr. Santomango began receiving VA compensation in lieu of retired pay were contained in the act of May 27, 1944, ch. 209, 58 Stat. 230 (38 U.S.C. 26c (1946 ed.)). Under that statute any person receiving pay pursuant to any provision of law relating to the retirement of persons in the Regular military or naval service, and who would be eligible to receive a pension or compensation under laws administered by the VA if he were not receiving such retired pay, shall be entitled to receive such pension or compensation upon filing with the department by which such retired pay is paid of a "waiver of so much of his retired pay and allowances as is equal in amount to such pension or compensation."

Although Mr. Santomango was a non-Regular member, he was receiving retired pay pursuant to the last proviso of section 5 of the act of April 3, 1939, which provides that such members shall be "in all respects" entitled to receive the same "pensions, compensation, retirement pay," etc., as Regular members. Similar language in the Career Compensation Act of 1949 was construed as authorizing waiver of so much of retired pay as is equal to VA compensation to which the member is entitled, pursuant to 38 U.S.C. 26c. See 30 Comp. Gen. 255 (1951). It is our view that that waiver provision would be equally applicable to Mr. Santomango.

In 28 Comp. Gen. 484 (1949), we held that in order for retired service members to be entitled to a pension

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or compensation otherwise payable, they must waive so much of their retired pay as is equal in amount to the amount of pension or compensation to which entitled. Further, it was held that the effect of the act of May 27, 1944 (38 U.S.C. 26c), was to permit otherwise eligible retired members to elect to receive veterans benefits without terminating the status giving rise to the right to retired pay. Since that provision was applicable to Mr. Santomango, it is our view that his waiver of retired pay for disability compensation was not a total waiver, but only a waiver of so much of his retired pay as was equal in amount to the compensation. Therefore, he is entitled to retired pay payments which are in excess of his otherwise proper VA compensation subject to the 6-year statutory period. 31 U.S.C. 71a.

Concerning the application of 31 U.S.C. 71a (1976), that statute provides in part:

"(1) Every claim or demand * * * against the United States cognizable by the General Accounting Office * * * shall be forever barred unless such claim, bearing the signature and address of the claimant or of an authorized agent or attorney, shall be received in said office within 6 years after the date such claim first accrued * * *."

In this case the Finance Officer has submitted a voucher covering retired pay for a 6-year retroactive period upon which he asks whether payment may be made. However, no claim has been submitted or otherwise received in our Office bearing the signature of Mr. Santomango or his authorized agent or attorney, as is required by 31 U.S.C. 71a, nor does it appear that he is aware that he has a potential claim. Accordingly, while Mr. Santomango's retired pay may be adjusted prospectively in accordance with this decision, payment may not be made retroactively on the voucher submitted.

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Accordingly, retired pay payments to Mr. Santomango should be begun in accordance with this decision. A retroactive payment may be made to him for the amount due from the date payment is made retroactively for six years. If it appears that there will be any substantial delay in making such payment, he should be promptly contacted and advised of the procedures for filing a claim for retroactive retired pay so as to toll the running of the barring act, 31 U.S.C. 71a.

On the matter of Retired Serviceman's Family Protection Plan--at that time entitled the Uniformed Services Contingency Option Act of 1953--and Survivor Benefit Plan coverages, the time for election by pre-effective date retirees has expired under both Plans. See section 3(b) of the Act of August 8, 1953, ch. 393, 67 Stat. 501, 502 (180 days after its enactment) and section 3(b) of Public Law 92-425, approved September 21, 1972, 86 Stat. 706, 711, as amended by section 804 of Public Law 93-155, approved November 16, 1973, 87 Stat. 605, 615 (18 months after its enactment). Therefore, in the absence of a correction of the member's records under the provisions of 10 U.S.C. 1552 by the Air Force Board for the Correction of Military Records survivor benefit coverage would not be available to him. Compare 53 Comp. Gen. 94, 99 (1973). However, Mr. Santomango should be advised by the Air Force of survivor coverage under those Plans and the financial implications should he desire to participate and choose to seek to have his records corrected to show that he elected into either or both Plans on or before the close of the before-mentioned periods. Compare 54 Comp. Gen. 116 (1974).

Henry R. Jones

For the Comptroller General
of the United States