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DECISION



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

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FILE: B-212920

DATE: November 30, 1983

MATTER OF: Major Gordon F. Lederman, USAF

DIGEST: Military officer who was not assigned by orders to demolition of explosives as his primary duty and whose work with explosives is not shown to have come within the meaning of "duty involving demolition of explosives" under applicable regulations is not entitled to hazardous duty incentive pay on the basis of working with explosives.

Major Gordon F. Lederman, United States Air Force, appeals the April 20, 1983 settlement of the Claims Group by which his claim for hazardous duty pay was denied. Upon review of this case, we conclude that Major Lederman was not entitled to hazardous duty pay during the period covered by his claim.

Background

Major Lederman claims hazardous duty pay for duty involving the demolition of explosives from October 1, 1974, through May 31, 1980, in the total amount of \$7,480. During this period he was assigned to the Los Alamos, New Mexico, Scientific Laboratory and Kirkland Air Force Base, New Mexico. He has submitted copies of reports he prepared on his work during this period and copies of effectiveness reports on his performance which indicate that he was engaged in research, analysis and testing of rocket propellants and explosives during the period. He states that during this period he worked continually with explosives and experimental ordnance including "hands-on" work with explosives involving cutting, trimming, assembling, arming and detonating various explosives systems.

Major Lederman states that during the period covered by his claim, he was not an "EOD" (explosive ordnance disposal) officer and he had not been authorized demolition duty pay. He states he was not aware that he was entitled to such pay until June 1980, when he learned that other members performing similar work were receiving the pay. He indicates that at about that time safety

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requirements and a need to train explosive ordnance disposal personnel resulted in his performing various duties with explosives which proper officials found authorized his receipt of the extra pay. At that time the documentation required by Air Force regulations was completed by his superiors to authorize demolition duty pay for him, and regular payments of demolition duty pay began effective June 1, 1980. At that time Major Lederman also filed the claim for retroactive pay which is the subject of this decision.

The Air Force Accounting and Finance Center reviewed the claim but found it too doubtful for them to pay because Major Lederman had not been issued competent orders assigning him to demolition duty for the period and, although the duty he performed appeared hazardous, it did not appear to meet the criteria for demolition duty pay. Accordingly, the claim was forwarded to our Claims Group for settlement where it was first received in July 1981.

The Claims Group found that the portion of the claim which accrued more than 6 years prior to the receipt of the claim in the General Accounting Office (that portion applicable to the period prior to July 1975) was barred from consideration by the act of October 9, 1940, ch. 788, 54 Stat. 1061, as amended (now codified at 31 U.S.C. § 3702(b)), which bars claims received in our Office more than 6 years after they accrue. As to the remainder of the claim, the Claims Group disallowed it on the basis that incentive pay for demolition duty is not authorized for all members of the uniformed services who handle and use explosives, but only for those assigned to duty involving demolition of explosives as a primary duty or who are undergoing training for such duty. The Claims Group found that the agency had not determined that Major Lederman met these requirements of law and regulation during the period of his claim.

Major Lederman has disagreed with the Claims Group's disallowance. As to the application of the barring act to part of his claim, he indicates that he first filed his claim with the Air Force in July 1980, and he should not be held responsible for the fact that it was not forwarded to our Office until July 1981. As to the basis for disallowing the remainder of his claim, he states

that the Air Force does not issue orders that describe a person's job, but only orders assigning him to an organization. Thus, he indicates, in effect, that no specific orders are necessary and the documentation he submitted should be sufficient to show that he was performing demolition duty during the period of his claim.

Discussion

1. Barring Act

Our review of the record in this case indicates that Major Lederman has been on active duty in the Air Force continuously during the entire period of his claim and continuing to the present time. Under the provisions of the Soldiers' and Sailors' Civil Relief Act of 1940, Major Lederman's active service is not to be included in computing the applicable period of any statute of limitations, including the barring act. See 50 U.S.C. Appendix § 525 (1976); 36 Comp. Gen. 645, 648-649 (1957); and 35 Comp. Gen. 527 (1956). Accordingly, contrary to the Claims Group's determination, no part of his claim is barred from our consideration.

2. Incentive Pay for Duty Involving Demolition of Explosives

Incentive pay for hazardous duty "required by orders * * * involving the demolition of explosives as a primary duty, including training for that duty," is authorized by 37 U.S.C. § 301(a)(6), subject to "regulations prescribed by the President." The President's regulations are found in Executive Order No. 11157, Part I, section 109(b), which provides:

- "(b) The term 'duty involving the demolition of explosives' shall be construed to mean duty performed by members who, pursuant to competent orders and as a primary duty assignment (1) demolish by the use of explosives underwater objects, obstacles, or explosives, or recover and render harmless, by disarming or demolition, explosives which have failed to function as intended or

which have become a potential hazard; (2) participated as students or instructors in instructional training, including that in the field or fleet, for the duties described in clause (1) hereof, provided that live explosives are used in such training; (3) participate in proficiency training, including that in the field or fleet, for the maintenance of skill in the duties described in clause (1) hereof, provided that live explosives are used in such training; or (4) experiment with or develop tools, equipment, or procedures for the demolition and rendering harmless of explosives, provided that live explosives are used." (Emphasis added.) See also Department of Defense Military Pay and Allowances Entitlements Manual, paragraph 20331b, which restates these provisions.

Under these provisions of law and regulation, to be entitled to incentive pay for hazardous duty involving demolition of explosives, the member must have been assigned pursuant to competent orders to the type of duty described above as a primary duty assignment. While Major Lederman indicates that the Air Force does not issue orders describing a specific job, we note that it does by regulation require a letter from the member's commanding officer and a military pay order (DD 114) certifying, in effect, that the member has been assigned to demolition duty of the type prescribed by the Military Pay and Allowances Manual. See Air Force Manual 177-373, Volume 1, paragraphs 40-22, 40-23, 40-24, and Table 40-5, Rule 1. Apparently, in the Air Force this is the required documentation to show that a member has been assigned as a primary duty assignment to demolition duty by competent orders, that is by someone with the authority to assign him to such duty.

No such documentation was issued indicating that Major Lederman was assigned by competent orders to demolition duty for the period of his claim. The lack of the

required documentation is consistent with the fact that, although Major Lederman was working with explosives, the duties he performed were not those set out in the regulations for which hazardous duty pay is authorized. The regulations governing hazardous duty pay for work involving demolition of explosives make it clear that not all work with explosives entitles a member to this incentive pay. Entitlement is based on the performance of duty involving demolition of explosives and certain underwater objects as primary duty or training for such duty. See the regulation quoted above; 39 Comp. Gen. 731 (1960); B-147173, September 25, 1961.

We note that in explanatory comments regarding demolition duty pay, furnished us in connection with this case, the Air Force distinguishes "demolition" from "detonation" in that demolition involves the destruction of explosives by explosives and is, therefore, different from detonation of explosives, unless detonation is accomplished by means of an explosive.

Major Lederman and his superiors describe his duties during the period of his claim as primarily experimental in nature, involving the design and fielding of explosives and propellants. There is no clear evidence in the record before us that his primary duty during the relevant period involved the "demolition" of explosives, as defined by the service, within the context of the hazardous duty pay provisions.

Unless all essential elements prescribed by the regulations are present, it cannot be said that a member of the uniformed services handling explosive ordnance, no matter how hazardous his work may be, is performing duty involving the demolition of explosives within the meaning of those regulations. In the absence of a clear showing that the member actually performs duty that meets all requirements of the law and regulations, he may not be regarded as having performed "duty involving demolition of explosives." 39 Comp. Gen. 731, 733 (1960).

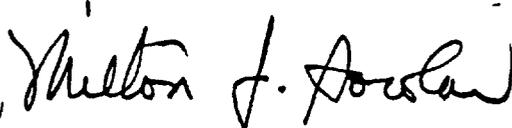
Major Lederman's belief that he is entitled to the incentive pay appears to be based in part on the fact that other members who were performing similar kinds of duty as he were paid hazardous duty pay. However, the fact that payments may have been improperly made provides

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no legal justification to make additional improper payments. The Government is not estopped from repudiating unauthorized actions of its officials. Matter of Peak, 60 Comp. Gen. 71, 74 (1980); Matter of Pradarits, 56 Comp. Gen. 131, 136 (1976).

Conclusion

Accordingly, Major Lederman is not entitled to hazardous duty pay as claimed, and the disallowance of his claim is sustained.

for 
Comptroller General
of the United States