

**DECISION**



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

**FILE:** B-213238

**DATE:** May 9, 1984

**MATTER OF:** Lieutenant Commander Conrad J. Wigge, USN

**DIGEST:**

The monthly pay of midshipmen at the U.S. Naval Academy is not basic pay within the meaning of that term as used in chapter 61 of title 10 and title 37, United States Code. Thus, a Navy officer may not have included in his disability rating for retired pay purposes the percentage of disability existing or incurred while he was a midshipman since such disability was not incurred as a member entitled to basic pay as required by 10 U.S.C. 1201.

The percentage of disability of a commissioned officer of the Navy retiring for disability was reduced because the disability was first incurred when he was a midshipman at the Naval Academy. The determination was based on the conclusion that he was not receiving basic pay when he was a midshipman at the Naval Academy. Chapter 61 of title 10, United States Code, pertaining to disability retirement and separation from the armed services requires that a member be receiving basic pay at the time the disability is incurred. We are asked whether the monthly pay of a midshipman at the United States Naval Academy is basic pay for the purposes of chapter 61 of title 10, United States Code.<sup>1</sup> We conclude that the monthly pay of a midshipman at the Naval Academy is not basic pay, within the meaning of that term as used in chapter 61, title 10, United States Code.

The Navy's physical disability evaluation system has determined that Lieutenant Commander Conrad J. Wigge, USN, is physically unfit to perform military duties and qualifies for disability retirement. Although the disability was known to exist while he was a midshipman at the United States Naval Academy, it was not serious enough to prevent

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<sup>1</sup> The Assistant Secretary of the Navy (Manpower and Reserve Affairs) submitted this request for a decision and it has been assigned control number SS-N-1426 by the Department of Defense Military Pay and Allowance Committee.

his graduation and appointment as a commissioned officer. During 9 years' active service as an officer, his condition deteriorated to its present disabling degree.

Under the Navy disability system, he was found to be 80 percent disabled but one-half of that was subtracted for a net rating of 40 percent as the basis for computing his disability retired pay. This 40 percent subtraction represents the "EPTE factor" which is that fraction of a total disability found to have existed prior to entry by the individual on active duty as a member of a uniformed service. The EPTE factor is used to allow the award of military disability retirement or separation benefits to a member with a preexisting condition, but only to the extent that the disease or injury is aggravated by active military service.

The Assistant Secretary states that while disabilities existing when the individual enters active military service directly from civilian life present no legal interpretative difficulty in the vast majority of cases, a question arises as to whether such reduction of the disability rating should be applied where the disease or injury existed while the individual is serving as a midshipman at the Naval Academy.

Lieutenant Commander Wigge, through his civilian counsel, has petitioned the Secretary of the Navy (as authorized by the Navy's disability regulations) to approve an 80 percent rating, instead of the 40 percent rating determined by the Director, Naval Council of Personnel Boards (the Secretary's principal delegated representative for disability matters). He has expressly accepted the Board's finding that from the standpoint of medical evidence his disability was initially incurred during the period of his service as a midshipman at the Naval Academy and the conclusion that his condition was aggravated by active military service. However, he contends in essence that neither the facts of his case, nor the statutes and regulations applicable to those facts, preclude him from receiving physical disability retirement benefits which includes in their basis that portion of his disability which was incurred while he was in the status of a midshipman at the Naval Academy.

The Assistant Secretary indicates that within chapter 61 of title 10, United States Code, the statutory basis for disability retirements, there is a requirement in

section 1201 that, in order for a disease or injury to be ratable (recognized for purposes of computing disability retired pay), it must have been incurred while the member was entitled to basic pay. He notes that midshipmen and cadets of the service academies receive monthly compensation, but it is not termed "basic pay." The issue presented is whether entitlement to "basic pay" must be narrowly and literally construed or whether a broader interpretation would be permissible to include duty as a midshipman at the Naval Academy as "military service" or "prior service" for disability compensation purposes.

Counsel for Commander Wigge advances various arguments supporting the position that the monthly pay of midshipmen is basic pay. He points out that the compensation of midshipmen is set out in chapter 3 of title 37, United States Code, entitled "Basic Pay." He also points out in detail many similarities between midshipmen and aviation cadets, noting that in 30 Comp. Gen. 431 (1951) the Comptroller General held that aviation cadets were members of the armed services for the purposes of disability retirement under the Career Compensation Act of 1949. That act was the forerunner of many of the provisions contained in titles 10 and 37, United States Code. On the basis of these similarities he urges that the same conclusion that we arrived at with regard to aviation cadets should be applicable to midshipmen. Additionally, he argues that 10 U.S.C. 1217, which provides that midshipmen are not eligible for disability retirement under chapter 61 of title 10 applies only while they are midshipmen and once commissioned and on active duty it has no bearing on disability retirements.

Section 1201 of title 10, United States Code, provides that a member entitled to basic pay who incurs a disability while entitled to basic pay may be retired. Thus, a member of the armed forces who is not receiving or entitled to basic pay at the time a disability is incurred may not be retired under the disability retirement provisions of chapter 61 of title 10, United States Code. See 47 Comp. Gen. 716 (1968), and 35 Comp. Gen. 626 (1956).

Under the provisions of 10 U.S.C. 1216 the Secretary concerned has broad authority to make determinations concerning fitness for duty, and the percentage of disability for members of the armed force under his jurisdiction.

While midshipman service has been deemed active Federal service for the purposes of certain statutes, it has been consistently treated as a separate and distinct status by the Congress. Section 1217 of title 10, United States Code, is an example of this; it precludes cadets and midshipmen at the academies from the disability retirement provisions of chapter 61 which are applicable to other members of the uniformed services. Additionally, 10 U.S.C. 971 precludes the crediting of academy service for any purpose to commissioned officers. These provisions show a definite disposition on the part of the Congress to treat cadets and midshipmen at the academies as having a status separate from other categories of personnel in the uniformed services. Furthermore, these statutes support a view that attendance at the academies is not to be considered for later entitlements. In effect, they require a conclusion that commissioned officers graduating from the academies and receiving commissions are to be treated in the same manner as officers who did not attend an academy.

A member of the armed forces must be entitled to basic pay in order to be entitled to various special pays and allowances authorized in title 37, as well as in order to be eligible for the benefits of chapter 61 of title 10. Thus, it seems clear that in using the term basic pay the Congress intended a specific meaning to attach since it is a key to the various elements of the compensation system for members of the uniformed services.

In this regard, pay for a midshipman at the Naval Academy during the period with which we are concerned here was set out in 37 U.S.C. 201(c). While as noted above it is in chapter 3 of title 37 which is entitled Basic Pay, it has never been categorized as basic pay, but rather is termed "\* \* \* monthly pay at the rate of 50 percent of the basic pay of a commissioned officer in pay grade O-1 with less than 2 years service \* \* \* ."2

Of particular importance to the question of whether a midshipman at the Naval Academy receives basic pay is our

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<sup>2</sup> Monthly pay of cadets and midshipmen is now provided in 37 U.S.C. 203(c) and is expressed as a fixed rate.

decision 47 Comp. Gen. 781 (1968). The question to be resolved in that case was whether cadets and midshipmen of the academies would be entitled to hostile fire pay authorized by 37 U.S.C. 310(a) if they were sent to Vietnam for orientation and training during the time of hostilities there. Special pays as well as application of disability retirement provisions are contingent on a member receiving basic pay. We concluded that cadets and midshipmen at the academies did not receive basic pay and therefore were not entitled to hostile fire pay.

The reasoning in that decision relied heavily on our decision, 30 Comp. Gen. 31 (1950), which concluded that midshipmen were not entitled to additional flying pay under the Career Compensation Act of 1949, ch. 681, 63 Stat. 802, the primary basis for the provisions now contained in title 37, since they could not be considered members of the uniformed services under that act and as a result their monthly pay was not basic pay within the meaning of that act. The provisions which were interpreted in those decisions are still in effect and in our opinion require the same conclusion that midshipmen do not receive basic pay.

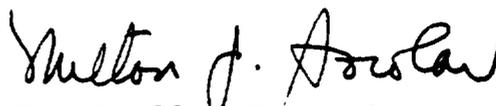
With regard to the similarities between the pay and status of aviation cadets and midshipmen, emphasis has been placed on our decision, 30 Comp. Gen. 431 (1951), which held that aviation cadets were members of the uniformed services for the purposes of the disability retirement provisions of the Career Compensation Act of 1949. Under the Career Compensation Act, in order to be eligible for disability retirement an individual must be a member of the armed services. Member was defined in that act as a commissioned officer, a commissioned warrant officer, flight officer and enlisted person. We had concluded in earlier decisions that flying cadets, Air Service and flying cadets Air Corps were enlisted men for the purposes of certain laws. Section 1 of the Army Aviation Cadet Act, June 3, 1941, 55 Stat. 239, created the grade of aviation cadet as a special and separate enlisted grade. As a result we considered aviation cadets to be eligible for disability retirement under the act because they were members, although generally aviation cadets were treated separate and apart under other provisions of the act for pay and extra pay for flying duty for members generally. The issue of whether they were receiving basic pay was not specifically raised in that decision.

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However, their pay was treated as the pay of an enlisted rating, and enlisted personnel receive basic pay.

Thus, in spite of the many similarities existing between midshipmen and aviation cadets, because of the basic difference that aviation cadets were enlisted persons under the pertinent law, different results are required with regard to their entitlements in similar circumstances.

Thus it is our view that midshipmen at the Naval Academy do not receive basic pay. This together with the broad authority granted to the Secretary of the Navy concerning disability retirements by 10 U.S.C. 1216, requires us to conclude that the action taken by the Navy to limit Lieutenant Commander Wigge's retired pay to 40 percent must be sustained.

  
Acting Comptroller General  
- of the United States