

DECISION

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

FILE: B-185138

DATE:

DEC 6 1976

MATTER OF: Staff Sergeant [REDACTED], USA, Retired
[REDACTED], USA, Retired

- DIGEST:
1. Member who is retained on temporary disability retired list beyond the 5-year period after which retired pay is to terminate under 10 U. S. C. 1210(h), and then is retroactively permanently retired for physical disability pursuant to 10 U. S. C. 1201 and 1210(d) with less than 30 percent disability rating may be considered permanently retired as of the date the 5-year period expired with retired pay computed under 10 U. S. C. 1401 based on years of service rather than percentage of disability.
 2. Members after the maximum 5-year period on the temporary disability retired list (TDRL) were permanently retired for disability under 10 U. S. C. 1201 and were later recalled to active duty for reenlistment and retirement under 10 U. S. C. 3914 (nondisability). Although a retired member may be ordered to active duty, there is no authority under which such a member properly retired under 10 U. S. C. 1201 may be reenlisted and retired under 10 U. S. C. 3914. Such reenlistment and new retirement is of no effect and upon return to inactive retired status member's retired pay is for computation under 10 U. S. C. 1402(a).
 3. Periods of time while on temporary disability retired list may be added for the purpose of computing basic pay of member on active duty in uniformed service. However, since period of service on temporary disability retired list may not be used to increase retired

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pay or retainer pay or used as multiplier in computing retired pay, it may not be used in recomputing retired pay under 10 U. S. C. 1402(a). 40 Comp. Gen. 387, 390 (1960).

This action is in response to letter dated September 9, 1975, with enclosures, from Lieutenant Colonel [REDACTED] FC, Director, Retired Pay Operations, Army Finance and Accounting Center, Indianapolis, Indiana, requesting an advance decision concerning the retired pay of Staff Sergeant [REDACTED] USA (Retired), [REDACTED] and Sergeant [REDACTED] USA (Retired), [REDACTED] in the circumstances described. That request was assigned Control Number DO-A-1243 by the Department of Defense, Military Pay and Allowance Committee, and was forwarded to this Office by Office of the Comptroller of the Army letter dated October 14, 1975 (DACA-FAF-P).

The record discloses that Sergeant [REDACTED] was placed on the temporary disability retired list (TDRL) under the provisions of 10 U. S. C. 1202 (1970), effective May 1, 1968, with 20 years, 10 months and 1 day of service creditable under 10 U. S. C. 1208 (1970) and for basic pay purposes. He elected retired pay based on service (52-1/2 percent of basic pay) rather than percentage of disability (40 percent), as the greater amount. His retired pay was based on the July 1, 1966 active duty pay rates, increased by subsequent cost-of-living adjustments apparently pursuant to 10 U. S. C. 1401a(e) (1970). On March 8, 1974, it was discovered that his 5-year tenure on the TDRL had expired April 30, 1973. Letter orders, dated March 27, 1974, stating that he had been found permanently unfit for duty by reason of physical disability, removed him from the TDRL and permanently retired him with a less than 30 percent disability rating, effective May 1, 1973. His retired pay was continued based on the July 1, 1966 active duty basic pay rates.

Sergeant [REDACTED] was placed on the TDRL under the provisions of 10 U. S. C. 1202, effective April 19, 1969, with 23 years, 10 months and 6 days of service creditable under 10 U. S. C. 1208 for basic pay purposes. His disability rating was 100 percent and, therefore, he elected retired pay based on percentage of disability (75 percent maximum) rather than years of service. His retired pay was based on the July 1, 1968 active duty pay rates and was subsequently increased by cost-of-living adjustments. Letter

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orders, dated April 18, 1974, removed him from the TDRL and permanently retired him with a less than 30 percent disability rating, effective April 19, 1974. Action was taken administratively to change his status to permanent disability under 10 U.S.C. 1201, changing his retired pay computation from 75 percent based on disability to 60 percent based on years of service computed on the active duty pay rates effective July 1, 1968. However, through error, no change was made in his account causing an overpayment beginning April 19, 1974.

Letter orders, dated January 29, 1975, for both members recalled them to active duty in February 1975 for the purpose of reenlistment in the Regular Army and immediate retirement, effective March 1, 1975, for years of service under (nondisability) 10 U.S.C. 3914(1970). Sergeant [REDACTED] served on active duty for 2 days and Sergeant [REDACTED] served on active duty for 3 days.

Letter orders, dated January 29, 1975, issued for both members showed them retired effective March 1, 1975, under the provisions of 10 U.S.C. 3914. Sergeant [REDACTED] was credited with 20 years, 10 months and 4 days' active service, and 25 years, 10 months and 4 days for basic pay purposes, and Sergeant [REDACTED] was credited with 23 years, 10 months and 9 days' active service and 28 years, 10 months and 9 days for basic pay purposes to include time while on the TDRL for both members.

The submission indicates that at the time of the member's purported retirement under 10 U.S.C. 3914, their previous retirement under 10 U.S.C. 1201 was an accomplished fact and, therefore, the subsequent retirement orders "were not appropriate." The submission further indicates that, consequently, the time spent on the TDRL credited to service for basic pay purposes beginning March 1, 1975, also appears improper. In view of the doubt in the matter the members' retired pay has been reestablished as of March 1, 1975, computed under 10 U.S.C. 1201 and the following questions are presented:

"a. Should their retired pay be recomputed effective 1 March 1975 based on a 'new' retired status under 10 U.S. Code, Section 3914? and

"b. Should the previous time spent on the TDRL be credited for basic pay purposes for each retiree?"

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The provisions of 10 U. S. C. 1210(1970) were applicable to Sergeants [REDACTED] while they were on the TDRL. Under subsection 1210(a) they were to be given periodic physical examinations while they were on the TDRL. Under subsection 1210(b) the Secretary of the Army is required to make a final determination of a member's case upon the expiration of 5 years after he was placed on the TDRL. Subsection 1210(d) provides that if as a result of a periodic examination under subsection 1210(a) or upon a final determination under subsection 1210(b), it is determined that the member's physical disability is of a permanent nature and is rated at less than 30 percent, and if he has at least 20 years of service computed under 10 U. S. C. 1208(1970), his name shall be removed from the TDRL and he shall be retired under 10 U. S. C. 1201 or 1204, whichever applies, with retired pay computed under 10 U. S. C. 1401(1970). Subsection 1210(f) provides that if as a result of such a physical examination or final determination it is determined that the member is physically fit to perform the duties of his office, grade, rank and rating the Secretary shall treat him as provided in 10 U. S. C. 1211(1970), subsection (a)(3) of which provides that with his consent, such a regular enlisted member may be reenlisted. Subsection 1210(h) provides that if his name is not sooner removed, the disability retired pay of a member on the TDRL terminates upon the expiration of 5 years after his name is placed on that list.

In Sergeant [REDACTED] case it appears that upon the expiration of 5 years on the TDRL his retired pay should have terminated. However, due to administrative error his retired pay was continued until about a year later when the error was discovered and orders were issued showing that he had been found permanently unfit for duty by reason of physical disability and permanently retiring him for disability with a less than 30 percent rating, retroactively to the day after the expiration of the 5-year period.

Although under 10 U. S. C. 1210(h) disability retired pay should have terminated at the expiration of the 5-year period, that provision does not terminate the member's status on the TDRL, and we have recognized retroactive removal from the TDRL and placement on the permanent disability retired list. See 44 Comp. Gen. 249(1964) and decisions cited therein. Accordingly, it appears that in accordance with the March 27, 1974 retroactive order Sergeant [REDACTED] was permanently retired for physical disability under 10 U. S. C. 1201 pursuant to 10 U. S. C. 1210(d).

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Since Sergeant [REDACTED] retired pay was being paid based on his years of service rather than percentage of disability while he was on the TDRL and he continued to be so paid after his permanent disability retirement, that computation appears correct. Under 10 U.S.C. 1401 (Formulas 1 and 2) and 10 U.S.C. 1401a(e), it appears that such pay was correctly computed based on the July 1, 1966 basic pay rates.

Concerning Sergeant [REDACTED], it appears that he was properly removed from the TDRL at the expiration of 5 years on that list and permanently retired for disability with a less than 30 percent rating pursuant to 10 U.S.C. 1210(d) and 1201. However, since his retired pay while on the TDRL was 75 percent of his basic pay using the July 1, 1968 pay rates, based on his then 100 percent disability rating, his retired pay upon removal from the TDRL should have been recomputed based on his years of service, since his disability rating had been reduced. This was not done and he was overpaid.

In any event it appears that pursuant to 10 U.S.C. 1210(d), both members were in a valid retired status under 10 U.S.C. 1201 at the time the orders of January 29, 1975, were issued recalling them to active duty for the purpose of reenlistment and immediate retirement under 10 U.S.C. 3914. While a retired member may be ordered to active duty (10 U.S.C. 3504), we know of no authority to "reenlist" members permanently retired under 10 U.S.C. 1201, such as Sergeants [REDACTED], and then retire them under 10 U.S.C. 3914. To the contrary it is well established that a fully executed retirement order, if regular and valid, is final and can be reopened only upon a showing of fraud, substantial new evidence, mistake of law, or mathematical calculation. See 44 Comp. Gen. 258, 280 (1964), 32 Comp. Gen. 558 (1953), and 31 Comp. Gen. 296 (1952). Apparently those conditions did not exist in these members' cases; therefore, it would appear that unless their records are corrected under 10 U.S.C. 1552 (1970) to show otherwise, their status as being permanently retired for disability was final. Compare 42 Comp. Gen. 317 (1962). Accordingly, their second retirement under 10 U.S.C. 3914 is without effect to change their status and question a is answered in the negative.

Instead, it appears that 10 U.S.C. 1402(a) (1970), which provides for recomputation of retired pay to reflect later active duty, would be applicable to these members. Under that provision

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upon their release from their February 1975 active duty these members would be entitled to recompute their retired pay based on the rates of basic pay under which their retired pay was computed when they entered on that active duty (Sergeant [REDACTED], the July 1, 1966 basic pay rates; Sergeant [REDACTED], the July 1, 1968 basic pay rates) rather than later pay rates since they performed less than 2 years of active duty after retirement. 10 U.S.C. 1402(a), note 1. Such basic pay is then multiplied by 2-1/2 percent of the sum of (1) the years of service that may be credited to them in computing retired pay, and (2) their years of active service after becoming entitled to retired pay, to arrive at their retired pay.

While time spent on the TDRL or the permanent retired list may be included under 37 U.S.C. 205(a)(9) for computing a member's basic pay rate when on active duty, that statute specifically provides that such service "may not be included to increase retired pay, retirement pay, or retainer pay." Such service may not be included in determining the rate of monthly basic pay for the purposes of recomputing retired pay under 10 U.S.C. 1402(a). See 40 Comp. Gen. 387, 390 (1960) (answer to question (c)), 48 Comp. Gen. 398 (1968), and compare 44 Comp. Gen. 813 (1965).

Accordingly, in answer to question b, the members' time on the TDRL may be included in computing their basic pay for the period they served on active duty in February 1975, but such time may not be included in recomputing their retired pay under 10 U.S.C. 1402(a) upon their return to an inactive status on the retired list. Therefore, payment on the voucher enclosed with the submission is not authorized and it will be retained here.

R. F. KELLER

Deputy Comptroller General
of the United States

[REDACTED]
only original
call letters of