

DECISION

118769
**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548**

FILE: B-205953**DATE:** June 18, 1982**MATTER OF:** Disability Incurred While on Excess Leave

DIGEST: A member of the Regular Army who incurred a permanent and total physical disability while in an excess leave status is not eligible for disability retired pay. Under 10 U.S.C. § 1201 the member must have incurred his disability while entitled to receive basic pay in order to be eligible for disability retirement and 37 U.S.C. § 502(b) (1976) and applicable regulations specifically prohibit entitlement to pay and allowances to members during excess leave. Since the member did not incur his disability while he was entitled to receive basic pay, disability retirement is precluded.

The Assistant Secretary of the Army (Installations, Logistics and Financial Management) has requested a decision concerning the authority of the Department of the Army to approve a physical disability retirement and retired pay for an enlisted member of the Regular Army who incurred his disability while in an excess leave status. As explained below, since the member was in an excess leave status and was not "entitled to basic pay" when the disability was incurred, as required by the disability retirement statute, we conclude that he may not be paid disability retired pay.

The matter has been assigned submission number SS-A-1381 by the Department of Defense Military Pay and Allowance Committee.

On June 24, 1980, the member left his place of duty without authorization. He was apprehended on September 4, 1980, and was delivered subsequently into the custody of military officials. Upon being confronted with a charge of violating Article 86 of the Uniform Code of Military Justice (unauthorized absence), the member elected to apply for an administrative discharge in lieu of a court-martial, as was allowed by Army regulations. While awaiting disposition of his application for a discharge, the member requested excess leave (leave without pay). His request was granted. He used the 4 days regular leave he had accrued and was placed officially in excess leave status on September 14, 1980.

On September 20, 1980, while he was away from the military and on excess leave, the member was involved in an automobile accident which left him permanently and totally disabled. Thereafter, his pending application for administrative discharge was set aside and steps were initiated to process him for disability

retirement. Should he qualify for retirement it is expected that his disability will be rated at 100 percent.

The provisions of law governing the retirement of a service member for physical disability are in title 10, United States Code, chapter 61. The applicable provision permits the Secretary of the Army to retire a member whose disability was "incurred while [the member was] entitled to basic pay," 10 U.S.C. § 1201. Since the member in this case incurred his disability while in an excess leave status, it is necessary to determine whether he meets the requirement of having been entitled to basic pay at that time.

The statute under which excess leave is granted is 37 U.S.C. § 502(b) (1976) which provides:

"* * * a member who is authorized by the Secretary concerned, or his designated representative, to be absent for a period that is longer than the leave authorized by section 701 of title 10 is not entitled to pay or allowances during the part of his absence that is more than the number of days' leave authorized by that section." (Emphasis supplied.)

That provision of law explicitly precludes entitlement to pay and allowances for members of the armed services while in an excess leave status. Paragraph 10306 of the Department of Defense Military Pay and Allowances Entitlements Manual, entitled "Pay and Allowances During Excess Leave," clearly reiterates the prohibition of 37 U.S.C. §502 (b) by stating:

"Members on excess leave are not entitled to pay and allowances * * *. Apply the above as follows:

"a. When the complete period of leave is granted as excess leave, pay and allowance accrual will be stopped beginning with the first day of leave.

"b. When a portion of the leave is granted as advance leave and a portion granted as excess leave, pay and allowance accrual will be stopped beginning with the first day of excess leave. Members on excess leave are considered to have a rate of pay." (Emphasis supplied.)

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The Assistant Secretary indicates that personnel at the Army Finance and Accounting Center have expressed the opinion that members on excess leave are considered to have a rate of pay pursuant to paragraph 10306(b) of the Pay and Allowance Manual, and that "rate of pay" and "entitlement to basic pay" are synonymous. Therefore, this member could be considered as entitled to basic pay at the time he was injured.

We can find no compelling basis for this conclusion. In our opinion, the term "rate of pay" as used in the context of the regulation simply refers to a monetary figure to be used in the computation of certain benefits for which the member on excess leave would otherwise be eligible. The term does not mean that the member is "entitled" to pay while he is in an excess leave status.

In accordance with the law and regulation cited above, the member was not entitled to basic pay during his excess leave. 58 Comp. Gen. 708 (1979), 47 Comp. Gen. 467 (1967), 43 Comp. Gen. 539 (1964). In a somewhat similar case we held that a member who was injured during a period in which he was not entitled to pay by reason of a court-martial sentence, was not entitled to disability severance pay which is also authorized for certain members who incur a disability "while entitled to basic pay." 34 Comp. Gen. 67 (1954), 10 U.S.C. § 1203.

Accordingly, we conclude that the member in this case is not eligible for physical disability retired pay because his disability was incurred during a period of excess leave during which he was not entitled to basic pay.

John R. Van Cline
for Comptroller General
of the United States