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*Riedinger*  
*M.P.*



**DECISION**

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

FILE: L-100075

DATE: NOV 21 1977

MATTER OF: Major Warren H. Kinser, USAF, Retired

**DIGEST:** Claim for arrears of military retired pay which payments had been suspended in 1967 because the retired member had disappeared, received in the General Accounting Office (GAO) on June 15, 1973, may not be considered for payment for the period prior to June 14, 1970, since the act of October 9, 1940, as amended, 31 U.S.C. 71a (supp. V, 1975), prohibits consideration of any part of a claim that accrued more than 5 years before the date the claim was first received in GAO.

This action is in response to a letter dated July 28, 1977, from Major Warren H. Kinser, USAF, Retired, in which he requests further consideration of his claim for retired pay believed due for the period July 1, 1967, through August 31, 1970.

The matter of this claim was the subject of our Claims Division settlement dated March 20, 1977, which allowed a portion of the claim in the amount of \$37,104.81, covering the period October 1, 1970, through August 31, 1970, but disallowed the claim for the prior period, based on the provisions of the act of October 9, 1940, Ch. 788, 54 Stat. 1061, as amended, 31 U.S.C. 71a (Supp. V, 1975).

The member was retired from the Air Force in the grade of major under the provisions of 10 U.S.C. 8011, on March 31, 1959, and became entitled to retired pay computed under the provisions of 10 U.S.C. 8901, effective April 1, 1959. By court order dated April 23, 1962, the member was adjudged a legal incompetent because of mental illness and his wife, Mary A. Kinser, was appointed guardian of his person and property in Florida. On November 23, 1962, he escaped from the state mental hospital in which he was confined. The file indicates that he resided in Arkansas from then until 1967, when he again disappeared.

Apparently the member's retired pay was paid to him from 1959 until 1962 when he was adjudged incompetent, and to his wife, as guardian, from then until July 1, 1967, when he disappeared. Because

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of his disappearance his retired pay payments were suspended at that time and were not resumed on a regular basis until after August 31, 1978.

The member was found mentally incompetent by court order in Arkansas on January 31, 1977. Mrs. Kinsler was discharged as his guardian by court order in Florida on February 8, 1977.

The member contends that he made a request to the Air Force at least several years ago to send him his past due money. As a result, it is indicated that he believes he is entitled to virtually all, if not all of his past due retired pay.

The act of October 9, 1940, supra, provides in pertinent 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 \* \* \*."

The limitations prescribed by the act of October 9, 1940, supra, are more than merely a statute of limitations. Rather, these provisions establish as a condition precedent to the right to have a claim considered by the General Accounting Office that it be "received" in that Office within 6 years or be forever barred from consideration thereafter. Compare Bartlesville Zinc Co. v. Mellon, 56 F. 2d 164 (7th Cir. 1932), and Carpenter v. United States, 38 F. 2d 606 (2d Cir. 1932). This Office is without authority to waive any of the provisions of that act or make any exceptions to the time limitations it imposes. While it is undisputed that both the member and the attorney for his guardian filed a claim for these monies with the Air Force Accounting and Finance Center prior to the time a claim was received here, such filing does not in any way affect the operation of the 1940 act to claims which are to be adjusted and settled here. See 32 Comp. Gen. 267 (1962) and 42 Comp. Gen. 337 (1963).

In computing the amount of Major Kinsler's retired pay which is not barred, the Claims Division used the date of October 1, 1978, as the date a claim was first received from Major Kinsler. However,

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the record shows that a claim for the unpaid retired pay from an attorney, Mr. David LaCruix, on behalf of Mrs. Kinser, was first received by the General Accounting Office on June 14, 1976. Since at that time Mrs. Kinser was still Major Kinser's guardian, that claim may be considered as tolling the 1960 barring act as of June 14, 1976.

Thus, the additional retired pay for the period June 14, 1976, through September 30, 1976, is authorized to be paid to Major Kinser and the Claims Division settlement is modified accordingly. He will receive a settlement in due course. However, since military retired pay accrues from day to day, those portions which accrued more than 6 years prior to the date of filing of that claim here (June 14, 1976) are barred from consideration by this Office. Compare Coyne v. United States, 184 Ct. Cl. 840 (1966). Therefore, we may not authorize payment of those amounts.

R. F. KELLER

Deputy Comptroller General  
of the United States