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Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Sergeant Peter H. Baruso

File: B-251025

Date: January 19, 1993

DIGEST

An enlisted member of the Pennsylvania National Guard who developed a medical condition was declared medically unfit for retention in the Guard and was honorably discharged. The former member has filed a claim for incapacitation pay, pursuant to 37 U.S.C. § 204. However the National Guard determined that the condition was not service-connected. Determination of such matters is within the jurisdiction of the pertinent service, and without a determination that the disability was incurred in the line of duty, no entitlement exists for incapacitation pay. Thus, we affirm the determination of the Claims Group.

DECISION

This action is in response to a request from former Pennsylvania National Guard member Peter H. Baruso for reconsideration of our Claims Group's determination regarding his claim for Incapacitation Pay and Allowances during his period of hospitalization in 1983 to 1984. Our Claims Group, by letter dated September 22, 1992, concluded that this Office could not consider the claim. Mr. Baruso has requested reconsideration of his claim. We uphold the Claims Group's determination for the following reasons.

Mr. Baruso, originally enlisted in the Pennsylvania National Guard on October 7, 1972. He left at the end of his enlistment but reenlisted and left the National Guard several times. During his enlistment periods he incurred two injuries determined to be line of duty (LOD) injuries. On October 7, 1978, Mr. Baruso injured his right ankle. He sustained a fractured ankle and pulled ligaments and was treated for those injuries. On August 16, 1981, Mr. Baruso sustained a new injury to his ankle. He was again treated for the injury and on December 3, 1981, he was found to be fit for duty.

On October 4, 1983, Mr. Baruso went to a naval hospital complaining of pain in the right heel. On November 27,

1983, he underwent surgery. The record reflects that the surgery was not related to the previous LOD injuries.

On April 26, 1984, a medical evaluation board was completed. At that time it was determined that he was not fit for duty. He was honorably discharged from the National Guard on June 1, 1984. On September 15, 1984, the state surgeon ruled that the problem which arose in 1983 was not duty related and had existed prior to entry in to the service.

Mr. Baruso filed a claim for incapacitation pay for the period between November 1983 through June 1984. The National Guard denied the claim for incapacitation pay since the state surgeon and the medical evaluation board had stated that the condition for which he had been found medically unfit for retention was not service-connected or in the line of duty. On appeal our Claims Group concluded that determinations regarding injury in line of duty are matters solely within the jurisdiction of the concerned military agency and did not consider his claim.

Mr. Baruso requests reconsideration on the basis that our Claims Group's settlement was a determination of whether his medical condition was incurred "in line of duty." This is not, the case. The Claims Group settlement was based on the fact that the proper military authorities had made the determination that his disability was not incurred in the line of duty.

Section 204 of title 37 U.S. Code provides in part that a reserve member is entitled to the pay and allowance provided by law or regulations when the member is physically disabled as a result of an injury, illness or disease, incurred or aggravated in the line of duty while performing active duty or inactive duty for training or while traveling directly to or from such duty or training.

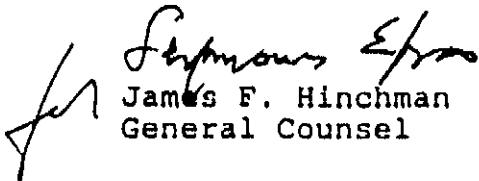
Applicable regulations authorize that such a decision be made by the appropriate officials in the pertinent service. See e.g., NGB Pamphlet 37-5 and Army Regulation 635-40. In the present case, the determination was made by the Pennsylvania National Guard after a medical evaluation was completed by the Navy. The matter was reviewed more than once and ultimately the finding was that the condition for which Mr. Baruso was eventually discharged, existed prior to entry in to the National Guard and that the condition was not "service connected" or "in the line of duty."

The administrative report and the record before us reflect determinations made by the appropriate medical and military authorities that while Mr. Baruso may have received injuries to his right foot in 1978 and 1981, the conditions which caused his disability in November 1983 through March 1984,

which caused him to be determined unfit for retention in the National Guard were not service-connected, nor were they incurred or aggravated in the line of duty.

We have consistently held that the right to pay and allowances is based upon the member's physical disability to perform his normal military duty, and the determination as to how long the disability continues and whether it was incurred in the line of duty is left to the exercise of sound administrative judgement of the agencies concerned. See SP4 Carl L. Adams, MN ARNG, B-193386, June 8, 1979.

Accordingly, in the absence of a determination by the appropriate authorities that his injury was incurred in the line of duty, Mr. Baruso's claim must be denied.


James F. Hinchman
General Counsel