



Comptroller General
of the United States

Washington, D.C. 20548

150447

Decision

Matter of: Dr. Michael A. Ricciutti--Claim for Amounts
Due Following Records Correction by the Board
for the Correction of Public Health Service
Commissioned Corps Records

File: B-251241

Date: May 7, 1993

DIGEST

Because 10 U.S.C. § 1552 provides that the actions of Correction Boards are final and conclusive on all officers of the United States, this Office will not question the actions of the Board for the Correction of Public Health Service (PHS) Commissioned Corps Records when it corrected the records of a PHS officer to indicate that he was not terminated in 1979 but was retired with a disability rating of 50 percent.

DECISION

This action is in response to a request from a certifying officer of the Department of Health and Human Services for an advance decision regarding payment of retroactive active duty pay and disability retired pay to Doctor Michael A. Ricciutti pursuant to correction of his records by the Board for Correction of Public Health Service (PHS) Commissioned Corps Records (Board). The Commissioned Officer and Field Systems Division, Office of the Secretary, Department of Health and Human Services, has questioned the propriety of the Board's correction of Dr. Ricciutti's records and the percentage of disability awarded to him. Since the actions of Correction Boards are final and conclusive on all officers of the United States, this Office will not question the Board's decision.

The record indicates that Dr. Ricciutti was terminated from the PHS in 1979. He began receiving disability benefits from the Veterans Administration (VA) which were gradually increased until 1982. In 1982 he applied to the Board for removal of the termination from his record, retroactive payment of pay and allowances for the period immediately prior to his termination, and either a return to active duty or retirement with disability. The Board denied his application. In 1989 he requested reconsideration on the grounds that he had been "unable to defend himself" earlier

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due to his mental and physical condition. The Board agreed to reconsider his case, and give it a detailed review. On August 27, 1992, the Board issued a decision removing the 1979 termination from Dr. Ricciutti's record and retiring him with a disability rating of 50 percent, in excess of that previously awarded by VA. The certifying officer responsible for paying Dr. Ricciutti the resulting retroactive pay and allowances and retired pay questions the Board's actions and the amount due.

Certain rights, benefits, privileges, and immunities available to officers in the Armed Forces are extended to commissioned officers of the PHS by 42 U.S.C. § 213a. Among these is the benefit of requesting a correction board to correct an officer's records, which by virtue of 42 U.S.C. § 213(a)(12) makes 10 U.S.C. § 1552 applicable to the Commissioned Corps of the PHS.

Under 10 U.S.C. § 1552, the Secretary of a military department (under 42 U.S.C. § 213a(b), the Secretary of the Department of Health and Human Services or his designee) may correct any military record in his department when necessary to correct an error or remove an injustice. Corrective action is taken through a board of civilians within the department. Section 1552(b) requires a claimant to request correction within 3 years of discovery of the error or injustice; however, the board may excuse a delay in the interest of justice. Under section 1552(a), correction by a Board is final and conclusive on all officers of the United States unless procured by fraud.

When the Board corrected Dr. Ricciutti's record to indicate that he retroactively was entitled to specified pay and allowances and that he had been retired for disability rather than terminated, that action was final and conclusive on all officers of the United States unless procured by fraud. See Major General Edwin S. Walker, AUS (Retired), 62 Comp. Gen. 406 (1983). In that decision we noted that it was not within the jurisdiction of this Office to review the actions of the Correction Board; rather, our function is to see that payments to be made as a result of a record correction are made in amounts determined to be due by applying the law to the corrected record.

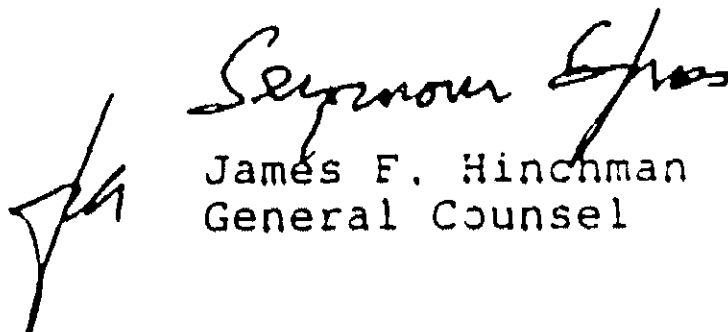
In response to questions presented to us, we note that the Board acted within its statutory authority in considering Dr. Ricciutti's request more than 3 years after the events involved in his request occurred and in granting his request after having denied it earlier. Moreover, while the submission questions whether the Board should have acted on Dr. Ricciutti's application before he exhausted all administrative remedies, we point out that the Board may determine what remedies are "practical and appropriately

available to the applicant." See PHS General Administration Manual, Chapter 16-00-30D. As to the disability rating of 50 percent, as we noted above it is not within the jurisdiction of the Office to review the actions of the Correction Board. In any event it does appear that the Board's action is supported by the record.

When the amounts due a claimant due to correction are calculated, two statutes are relevant to prevent duplication of benefits. As noted by the certifying officer, 10 U.S.C. § 1552(e) states that no payment due to records correction may be made for a benefit to which the claimant may later become eligible through the VA. Under 38 U.S.C. § 5305, a commissioned officer in the PHS, if he is to receive benefits from the VA, must waive an amount of his retired pay equal to the amount of VA benefits to which he is entitled.

In this case, if Dr. Ricciutti had been receiving retired pay earlier and wished to receive VA benefits, he would have been required to waive an amount of retired pay equal to the amount of VA benefits to which he was entitled. Therefore, any retroactive pay now due him should be reduced by the amount of VA benefits he received in the past. Any possible future duplication of benefits should also be avoided.

The questions submitted to us are answered accordingly.


James F. Hinchman
General Counsel