

(DIGEST - L - *MW*)

**DECISION**



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

FILE: B-193386

DATE: June 8, 1979

MATTER OF: SP4 [REDACTED], MN ARNG

- DIGEST:
1. A member of the National Guard who is disabled in line of duty from injury while performing active duty for training is entitled by law to continued pay and allowances during the subsequent period when he remains incapacitated for the performance of his normal military duties, and the determination as to how long the disability continues is left to the exercise of sound administrative judgment. In each case the service concerned is to determine when the injured member has recovered or determine that he should be separated for disability. 37 U.S.C. 204(h) (1976).
  
  2. When a National Guard member is injured in line of duty while performing active duty for training, administrative determinations concerning the member's disability should, whenever possible, be based upon the findings and conclusions of service medical personnel (as distinguished from civilian physicians), but in the absence of such findings, military command authorities may reasonably rely on secondary evidence, including statements from private physicians, in making the necessary administrative determination as to whether the member is physically able, and should therefore be required, to resume his normal military duties.
  
  3. A National Guard member injured in the line of duty on June 12, 1977, who was thereafter relieved by military command authorities from the performance

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of his normal military duties for reasons of physical unfitness until March 24, 1978, on the basis of evaluations by civilian physicians and evidence that he was physically unable to pursue his civilian farming occupation, may be allowed disability pay and allowances through March 24, 1978, even though Veterans Administration personnel advised him to "try working" on July 26, 1977, since such advice did not constitute a final determination regarding fitness for active military service.

This action is in response to a letter dated August 28, 1978, with enclosures, from Captain Robert C. Akervick, FC, Finance and Accounting Officer, Fort McCoy, Wisconsin, requesting an advance decision as to the propriety of making payment on a voucher in the net amount of \$3,135 to SP4 [REDACTED], MN ARNG, [REDACTED], representing disability pay and allowances for the period July 27 through December 14, 1977, as a result of injuries he sustained on June 12, 1977, while on annual training duty with the Minnesota Army National Guard. The request was forwarded here by the Office of the Comptroller of the Army by letter dated October 31, 1978 (DACA-FAB), and has been assigned Control No. DO-A-1306 by the Department of Defense Military Pay and Allowance Committee.

It is indicated that the member was injured in the line of duty when struck by a falling tree on June 12, 1977, while he was performing 2 weeks' annual active duty for training with his National Guard unit. He completed the active duty tour, in a limited duty status, but had continuing headaches together with severe neck and back pain. He apparently attended his scheduled unit weekend drill in July and was then referred to the Veterans Hospital at Fargo, North Dakota, for further medical treatment. The Veterans Administration (VA) medical records state in pertinent part as follows: "7/26/77 Discharged from further care or medication. Advised to try working." The member

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received disability pay through July 26, 1977, pursuant to 37 U.S.C. 204(h) and paragraph 80254 of the Department of Defense Military Pay and Allowances Entitlements Manual (DODPM).

It is further indicated, however, that the member thereafter continued to suffer physical discomfort to the extent that he was unable to perform his civilian occupation as a self-employed farmer and had to hire outside help to do his farm work. It also appears that he sought further medical treatment from physicians of his own choosing. A statement in the file dated December 14, 1977, from one of his private physicians says in part:

"\* \* \* Injuries of this kind usually take a long time to heal and still may leave him with some degree of residual disability. He is currently being managed on no excessive activities, physical therapy and anti-inflammatory agents. At this stage no prediction can be made as to when he will be ready again for National Guard duty.  
\* \* \*

Eventually on March 24, 1978, the member was evaluated at the Fitzsimmons Army Medical Center, Denver, Colorado, and was then determined to be fit for active military service with no physical profile limitations. It was noted that he was still experiencing some residual pain as the result of his injury, but that his condition had slowly improved with the passage of time.

Between July 27, 1977, and March 24, 1978, the member was excused by military authorities from attending his unit training assemblies. In that regard, it was determined by the member's unit commander that he could not perform all of the military duties called for in his military occupation specialties, and would have been limited to the performance of light duty. In April 1978 the member resumed paid attendance at his unit drills and the performance of his normal military duties.

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In the submission, doubt is expressed as to whether the member is entitled to disability pay for periods beyond July 26, 1977, in these circumstances. In effect, it is questioned whether the member's release from medical treatment by VA authorities on July 26, 1977, constitutes an event which would operate to terminate his entitlement to further disability pay. In that connection, it is also, in effect, questioned whether the member's subsequent inability to perform his civilian farming occupation, and the opinions expressed by his private physicians that he was unfit for the performance of National Guard duty, constitute a sufficient basis for the continuation of disability pay.

Subsection 204(h) of title 37, United States Code (1976), provides that a member of the National Guard is entitled to the pay and allowances provided by law or regulation for a member of the Regular Army or Regular Air Force of corresponding grade and length of service, whenever he is called or ordered to perform active duty for training under 32 U.S.C. 502-505, and is disabled in line of duty from injury while so employed.

Administrative directives which implement this statutory provision are contained in the DODPM and regulations issued by the service Secretaries.

Subparagraph 80254(d)(3) of DODPM, in effect at the time, provides that a member's entitlement to pay and allowances while disabled terminates upon determination by proper authority that the member has recovered sufficiently to perform his normal military duties, or when he is actually restored to his normal military duties, whichever occurs first. This provision further states that attendance at a unit training assembly or performance of limited or restricted duty does not, in itself, constitute restoration to normal military duties.

Rule 1, Table 8-2-4 of the DODPM, provides that if a member of a Reserve component is disabled in the line of duty due to injury while serving on active duty for any period of time, then he is entitled to active duty pay

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and allowances and medical benefits commensurate with the Regular forces so long as he is unfit for his normal military duty per medical authority. This rule also provides that such entitlement is not affected by the member's resumption of his normal civilian occupation, but that failure of the member to provide current and sufficient information may result in the discontinuance of active duty pay and allowances.

Subparagraph 4-2j of Army Regulation 40-3 in effect at the time, states that when a member of the Army Reserve or the Army National Guard is hospitalized or requires continued medical treatment at the expiration of his period of training duty for an in-line-of-duty condition, he is entitled to continuation of pay and allowances as authorized in paragraph 80254 and Table 8-2-4, DODPM. The regulation also states that entitlement to pay and allowances ceases when treatment is terminated by medical authority; when the individual can perform his military duties in the same manner as before the medical conditions occurred; or when disability processing is completed through a physical evaluation board, whichever occurs first.

We have held that the right to active duty pay and allowances under 37 U.S.C. 204(h) and similar statutory provisions applicable to members of the Reserves, is based upon the member's physical disability to perform his normal military duty, not his normal civilian pursuit, and the determination as to how long the disability continues is left to the exercise of sound administrative judgment. In each case the service concerned is to determine when the injured member recovers sufficiently to perform his normal military duties or to determine that he should be separated for disability. 54 Comp. Gen. 33, 36 (1974); 52 id. 99 (1972); 43 id. 733, 737 (1964).

We have further expressed the view that an administrative determination concerning disability should, whenever possible, be based upon the findings and conclusions

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of service medical personnel (as distinguished from civilian physicians), clearly setting forth the period of inability to perform normal military duties because of the particular disability. 47 Comp. Gen. 531, 534 (1968); 36 *id.* 692, 694 (1957). A determination made by service medical authorities that a member is again physically fit for duty terminates his entitlement to disability pay and allowances, in the absence of contrary proof that he is, in fact, still physically incapacitated. In such circumstances, the member's complaint of continuing physical discomfort and his further treatment by civilian physicians are generally insufficient in themselves to overcome the presumption that he has recovered the ability to resume his normal military duties. 52 Comp. Gen. 667, 670 (1973).

However, we have also recognized that cases may occur in which the injured member is conditionally discharged from hospitalization or care by service medical personnel without any final determination having been made as to whether the member has recovered to the point of being physically able to resume his normal military duties. In such cases, it is permissible for the member's unit commander or other appropriate military authority to use secondary evidence, including personal interviews with the member, statements from civilian physicians, and information concerning the member's ability to resume his civilian occupation, in making the necessary administrative determination as to whether the member is physically able, and should therefore be required, to resume his normal military duties. 52 Comp. Gen. 99, *supra*; 36 *id.* 692, 694 *supra*; B-187049, November 9, 1976; B-184239/ B-183984, November 13, 1975. In such circumstances, the member remains entitled to continued disability pay and allowances, provided he cooperates with service authorities and keeps them currently advised concerning his condition. 52 Comp. Gen. 99, 104-105, *supra*.

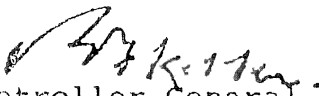
In the present case, the member was discharged from the VA hospital on July 26, 1977, with the advice that he should "try working." Such advice cannot properly be

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regarded as a final determination that the member was then fully fit for active military service without physical profile limitations, and it was obviously not treated as a final disposition of the matter by the concerned military command authorities at the time. In our view, those authorities acted prudently, and within the bounds of sound administrative discretion, in determining that the member remained incapacitated for the performance of his normal military duties through December 14, 1977, on the basis of the periodic evaluations by the civilian physicians and the other information submitted. Moreover, it appears that the member cooperated with his commanding officers, kept them regularly advised as to his condition, and otherwise acted in good faith in the matter throughout the period ending on December 14, 1977.

Accordingly, the member is allowed disability pay and allowances for the period July 27 through December 14, 1977. The voucher, which is returned together with the related documentation, may be processed for payment, if otherwise correct.

Furthermore, although the documentation submitted does not fully cover the subsequent period from December 15, 1977, to March 24, 1978, it is indicated that the member was relieved from the performance of military duty during that period for reasons of physical incapacitation. It is therefore our view that the member may be paid additional amounts of disability pay and allowances for the subsequent period ending March 24, 1978 (the date he was finally determined by service medical authorities to be again fit for military duty), provided that the concerned military command authorities are satisfied that the member remained cooperative and that a sufficient factual basis existed to justify their relieving him from his normal duties because of physical unfitness during that time.

  
Deputy Comptroller General  
of the United States