DIGEST - L - Mil Jr. v - Dig 694

DECISION

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

"But see" B-187231, Oct. 13, 1977

FILE: B-187230 DATE: OCT 19 1976

MATTER OF: General , USMC, Retired

DIGEST: Marine Corps general, retired for disability, who accepts Federal civilian employment is subject to reduction in retired pay required by Dual Compensation Act, 5 U.S.C. 5532(b) unless the statutory exemption in 5 U.S.C. § 5532(c) applies. Despite Court of Claims decision to contrary in Mross v. United States, 186 Ct. Cl. 165 (1968), it is the view of the Comptroller General that where combat-related disability otherwise qualifying for exemption was rated as 0 percent disabling, the disability does not qualify member for exemption from dual compensation restrictions since it was not a significant factor in officer's retirement for physical disability. 50 Comp. Gen. 480 (1971).

This action is in response to a letter dated August 16, 1976, with enclosures, from the Administrator, Agency for International Development (AID), requesting our decision as to whether General , USMC (Retired), is entitled to exemption from the retired pay reduction provision of the Dual Compensation Act, 5 U.S.C. § 5532 (1970), on the basis of hand injuries suffered in combat during World War II.

The submission indicates that General sustained burn injuries, from which he has suffered recurrent palmar skin problems, while fighting a magazine fire aboard the U.S.S. Yorktown during the battle of Midway on June 4, 1942. Hand eczema, the result of these burns, was one of the causes for which he was retired for physical disability on July 1, 1975. This disability, however, is rated as 0 percent disabling under the Veterans' Administration Schedule for Rating Disabilities (VASRD) which is the schedule used in disability retirement ratings under 10 U.S.C. 1201 (1970). See 32 CFR §§ 725.518(h)(2) and (h)(2)(v) (1975).

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Subsequent to his retirement, General was appointed to a civilian position as AID's Director, Office of United States Foreign Disaster Assistance.

Subsection 5532(b), title 5, United States Code, requires, with certain exceptions, that:

> "A retired officer of a regular component of a uniformed service who holds a position is entitled to receive the full pay of the position, but during the period for which he receives pay, his retired or retirement pay shall be reduced to an annual rate equal to the first $2,000 of the retired or retirement pay plus one-half of the remainder, if any. * * *"

Subsection 5532(c) exempts from the required reduction in retired pay retired officers:

> "(1) whose retirement was based on disability—
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> "(A) resulting from injury or disease received in line of duty as a direct result of armed conflict; or
>
> "(B) caused by an instrumentality of war and incurred in line of duty during a period of war * * *"

Agency for International Development takes the position that General hand eczema constitutes a disability covered by the statutory exception, entitling him to exemption from reduction in his retired pay, notwithstanding the fact that it is rated as 0 percent disabling. Although we do not contest the fact that General injury was incurred in a manner required by the exception to the act, we cannot, for the reasons discussed below, agree with AID's characterization of this disability as a disability sufficient to exempt him from retired pay reductions within the meaning of the act.

The Physical Evaluation Board was required to enumerate each disability which contributed to General unfitness for service, and to recommend findings for each condition

causing physical disability which General presented. 32 CFR § 725.518(c)(3)(i)(1975). Such a determination of unfitness can be based on the combined effect of several conditions despite the fact that one of them, by itself, would not cause unfitness. Id. at § 725.518(c)(4)(i). The mere fact that General disabilities were ratable under the VASRD would not necessarily render him unfit for service (id. at § 725.518(c)(4)(ii)), a finding which is prerequisite to his retirement for physical disability. Id. at § 725.518(a)(1). In this regard, a 0 percent rating may be assigned under the following circumstances:

> "Occasionally a disability is of such mild degree that it does not meet the criteria even for the lowest rating provided in the VASRD under the applicable diagnostic code number. A zero percent rating may be applied in such cases although the lowest listed rating is 10 percent or more. * * *" Id. at § 725.518(h)(2)(v).

We addressed the issue of the effect to be accorded 0 percent rated, combat-related disabilities in our decision B-155090, October 13, 1964, concerning Commander , USN, Retired, in which we held:

> "* * * It is only the disability for which a member is actually retired that may be considered in determining whether he retired because of disability incurred in combat * * * or caused by an instrumentality of war * * * The Navy did not regard that injury, standing alone, as entitling him to disability retirement * * * We do not regard the listing of that injury as one of the conditions for which he was permanently retired as furnishing sufficient basis for a conclusion that he was retired for disability under circumstances contemplated by * * * the Economy Act. [The predecessor of the Dual Compensation Act.] * * *."

See also B-155090, February 10, 1965. In support of its claim for exemption on behalf of General AID relies upon Gross v. United States, 186 Ct. Cl. 165 (1968), the holding of

which is contrary to our above-quoted decision involving the same retired member. The Court of Claims held that although Commander Mross was retired for physical disability on the basis of three conditions, one of which was combat-related, but rated as 0 percent disabling; his combat-related injury was a basis for his permanent retirement which met the requirements of the exception to the Dual Compensation Act, and he was entitled to recover withheld retirement pay. Id. at 171-172.

In answer to subsequent inquiries concerning the impact of the Mross case, we carefully reconsidered our previous position and after a review of the law and its legislative purpose we concluded that we disagreed with the court's ostensible position that any combat-incurred injury, regardless of the subsequent significance of any resultant disability at the time of retirement, sufficed to exempt a retired officer from retirement pay reductions. 50 Comp. Gen. 480 (1971). We indicated that we were unable to agree with the court's application of the statutory exemption to the factual situation present in Mross, and raised again in the instant case, for the following reasons:

> "The record in the Mross case clearly establishes that his war-incurred (perforated ear drum) was not disabling and that he subsequently served on active duty for 18 years satisfactorily with such condition and was * * * appointed a commissioned officer and promoted several times after such injury was incurred. That record also clearly establishes that the disability for which he was actually retired was a heart condition and that his war-incurred injury did not constitute a significant factor in his disability retirement." Id. 485.

We concluded, therefore:

> "[T]hat until the courts have had an opportunity to reconsider this matter in other cases, with specific reference to the above-mentioned legislative history of the exemption provision and its longstanding administrative interpretation, any change in the conclusions reached in our prior

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decision in the Mross case would not be justified." Id. at 486.

While the Court of Claims in Reith v. United States, 199 Ct. Cl. 200, 208 (1972), subsequently adopted the commissioner's report which indicated that all conditions ratable in the VASRD are deemed to contribute to unfitness, even where the rating is zero, that case involved a question of the ratability of a particular injury and did not involve the Dual Compensation Act. Thus, we are aware of no case in which the courts have had the opportunity to reconsider the position taken by the Court of Claims in Mross, and our views in the matter remain as stated in 50 Comp. Gen. 480, supra. Therefore, considering that General , like Commander Mross, completed a lengthy and successful military career subsequent to his combat-incurred hand injury which, having been rated as 0 percent disabling, does not appear to have been a significant factor in his disability retirement, it is our view that he is not entitled to the exemption provided by 5 U.S.C. 5532(c)(1).

Accordingly, General is subject to the reduction in retired pay prescribed by the Dual Compensation Act, 5 U.S.C. 5532(b).

R.F.KELLER
Acting Comptroller Gen
of the United States

COMPENSATION
  Double
    Concurrent military retired and civilian service pay
      Exemptions
        Disability incurred in line of duty

COMPENSATION
  Double
    Concurrent military retired and civilian service pay
      Commissioned officers
        Disability other than combat

COMPENSATION
  Double
    Concurrent military retired and civilian service pay
      Reduction in retired pay
        Disability status

PAY
  Retired
    Disability
      Disability not result of active duty