

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES

WASHINGTON, D.C. 20548

1076

Modified in part by 58 C.G.

*B-190420,
June 26, 1977*

FILE: B-183533

DATE: AUG 26 1976

MATTER OF: Lieutenant Colonel , USAF,
Retired

DIGEST: A retired Regular commissioned officer who accepts Federal civilian employment, and, who immediately executes a waiver of retired pay pursuant to 38 U.S.C. 3105 in order to receive veterans' disability compensation, which award is administratively delayed but when granted by VA is made effective retroactively to date of waiver, has in effect reduced the legally authorized retired pay by the amount of the veterans' compensation; and, therefore, retired pay payments received by the member during the retroactive period must be adjusted under the dual compensation formula of 5 U.S.C. 5532 from the effective date of the waiver.

This action is in response to a letter with enclosures, from the Accounting and Finance Officer, Air Force Accounting and Finance Center, Denver, Colorado 80205, requesting an advance decision concerning the propriety of making payment on a voucher for \$701.48, in favor of Lieutenant

, USAF, Retired, for additional retired pay for the period August 8, 1971, through March 31, 1972. The letter was forwarded to our Office by the Chief, Finance Group, Directorate of Accounting and Finance, Headquarters United States Air Force, and has been assigned Air Force Request No. DO-AF-1233 by the Department of Defense Military Pay and Allowance Committee.

Our Office has also received correspondence directly from the member in which he states that his entire claim for additional retired pay is in the total amount of \$1,233.09, for the period extending from August 8, 1971, through May 31, 1973. In this connection, we have recently been advised by the Air Force Accounting and Finance Center that their request for decision in this case did not represent the member's entire claim, confirming that the period in question and the amount involved are as claimed by the member. We have been requested to include the issue of the member's entitlement for the subsequent period in this decision.

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The submission states that on August 8, 1971, the member, a Regular officer of the Air Force, retired from active military service and accepted Federal civilian employment. Concurrently with his retirement, the member applied to the Veterans Administration (VA) for disability compensation based on a 50 percent disability which arose from his Vietnam service. In view of his pending claim against the VA for disability compensation, the member had submitted VA Form 21-651 to the Air Force on August 1, 1971, whereby he waived that portion of his retired pay which was equal in amount to compensation which he might receive from the VA. Due to an error in the member's record on file with the VA, his claim was denied. However, in response to his subsequent appeal, the VA corrected its records and notified the Air Force Accounting and Finance Center on March 6, 1972, that the retired member was entitled to veterans' disability compensation in the amount of \$96 a month, effective retroactively to August 8, 1971. On May 16, 1973, the VA advised the member that as the result of their further correcting his records, he was actually entitled to disability compensation in the amount of \$193 a month, retroactive to August 8, 1971.

Because the member received retired pay equal to his VA disability compensation entitlement during the retroactive period, no retroactive payment of disability compensation was required of or made by the VA. Although the member had submitted VA Form 21-651 to the Air Force upon his retirement, whereby he waived that portion of his retired pay which was equal in amount to compensation which he might receive from the VA, it was apparently determined that his waiver became effective too late to coincide with the effective date of the retroactive VA award. Consequently, the total payments received by the member during the retroactive period were classified as retirement pay, and in view of his Federal employment during the same period, were reduced in accordance with the Dual Compensation Act of 1964, 5 U.S.C. 5532 (1970).

The member bases his claim on the argument that VA disability compensation is not subject to dual compensation reduction and since the retroactive award of VA disability compensation did not operate to reclassify the appropriate amounts of retirement pay received during the retroactive period, the total retired pay was subjected to reduction under the dual compensation formula and he was deprived of the full monetary benefit he would have received had he properly received his full VA disability compensation ab initio.

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In addition to the resolution of this claim, the Accounting and Finance Officer requests our decision as to whether the determination reached in the present case would vary in those cases where the VA awards disability compensation without administrative delay and error and the member's retired pay is promptly adjusted.

Section 3109 of title 38, United States Code (1970), prohibits the concurrent payment of retired pay and VA pension or compensation. However, in order to permit retired individuals to receive either their retired pay or their veterans' benefits, or such veterans' benefits plus retired pay equal to the difference between the amount of the VA compensation and the full retired pay entitlement without terminating the status giving rise to the right of retired pay, or to veterans' benefits, 38 U. S. C. 3105 (1970), permits the retiree to waive his retired pay to the extent of veterans' benefits being received. Under the terms of paragraph 3a, Department of Defense and Veterans Administration Memorandum of Understanding, dated July 11, 1969, payment of veterans' benefits must be deferred until reduction of retired pay has been effected by the military service concerned. Therefore, a member's waiver of retired pay does not become effective until after the notifications of the VA award are processed by the service department concerned.

In our decision B-133071, June 28, 1961, we advised the Administrator of Veterans Affairs and the Secretary of Defense concerning cases involving retroactive waivers of retired pay that:

* * * where a record is corrected by the VA to show a retroactive entitlement to compensation or pension payments, and the individual has received military retirement pay during the retroactive period, a retroactive waiver may be filed. If the retirement pay equals or exceeds the amount of the VA compensation or pension, no payment by VA is necessary for the retroactive period. If the amount of the VA compensation or pension is greater than the retirement pay, only the excess of VA compensation or pension is to be paid by VA for the retroactive period. * * *

Thus, where the amount of retired pay received by a member during the retroactive period of a VA disability compensation award equals or exceeds the total VA amount awarded retroactively, the

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amount due under the award is in effect offset by retirement pay previously received, and no payment of VA disability compensation for the retroactive period is forthcoming.

Section 5532 of title 5, United States Code (1970), provides in pertinent part that:

"(b) 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. * * *"

Where a retired military member is in the Federal employ during the period of a retroactive award of VA disability compensation, all amounts classified as retired or retirement pay are subject to reduction under the dual compensation formula. The question presented in the present case is whether a waiver filed pursuant to 38 U.S.C. 3105, supra, but which is filed prior to a retroactive award of VA disability compensation, may operate to reclassify as VA compensation, that retired pay received by the member during the retroactive period so as to retroactively exclude it from application of the dual compensation reduction formula to the extent it does not exceed the amount of the VA award.

In our decision 36 Comp. Gen. 792 (1957), we held that a valid waiver of retired pay and the payment of veterans' benefits on the basis of such waiver, operates to reduce the legally authorized retired pay by the amount of the waived retired pay, and that from the effective date of the member's waiver he ceased to be entitled to retired pay equal in amount to the compensation which he is entitled to receive from the VA. See also, 48 Comp. Gen. 73 (1968). It follows then, that disability compensation payable by the VA is not retired pay; and, therefore (as a consequence of the member's execution of the waiver of retired pay on August 1, 1971, in the present case) payments equal in amount to the VA compensation entitlement and which are received subsequent to the effective date of the waiver are classified as disability compensation and are not subject to reduction under the Dual Compensation Act, supra.

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It will be noted that the statute permitting waiver of retired pay (38 U. S. C. 3105, supra) contains no express provision granting administrative discretion as to when the waiver shall be processed and made effective. Although the statute does contain a provision for the purpose of preventing duplicate payments, in that the service department with which the waiver is filed must notify the VA of the receipt of the waiver, the amount waived, and the effective date of the waiver, there is no requirement for the service department to establish an effective date which is later than the effective date of the disability compensation entitlement if adequate provision can be made to prevent payment of double benefits. See 36 Comp. Gen. 799, supra. It is our view, therefore, that the service department may not establish an effective date for waiver which would operate to deny the member the full monetary benefit which he would have otherwise received had the award of disability compensation been timely established on or before the date on which he became entitled thereto. This rule must apply in every case where the VA award of disability compensation is delayed administratively even when such delay is not excessive but involves periods of time normally required in the processing of a member's request and agency action thereon.

Accordingly, the total payments received by the member during the period August 8, 1971, through May 31, 1973, must be retroactively adjusted under the dual compensation formula of 5 U. S. C. 5532, supra, to allow him the full monetary benefit he would have received had veterans' disability compensation payments been awarded on their effective date of entitlements and the voucher is being returned for recomputation in accordance with this decision.

[R.F. KELLER]

Acting

Comptroller General
of the United States