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DECISION



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

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FILE: B-187049

DATE: NOV 9 1976

MATTER OF:

ARNG

DIGEST: Army National Guard member injured in line of duty during annual training, who was thereby rendered physically unable and--as determined by Army medical personnel--permanently unqualified under Army regulations to perform his normal duties as military policeman, is entitled to disability pay and allowances during period of disability ending when Army authorities acted to change his Military Occupation Specialty from military policeman to unit clerk, thus limiting his normal military duties to activities within range of his reduced physical capabilities.

This action is in response to a letter dated April 30, 1976 (file reference ATZI-CM-F), with enclosures, from Major L. E. Hicks, FC, Finance and Accounting Officer, United States Army Administration Center, Fort Benjamin Harrison, Indiana, requesting an advance decision as to the propriety of making payment on two vouchers totaling \$6,641.21, to , ARNG, representing disability pay and allowances for the period February 1 through November 30, 1975, as a result of injuries he sustained on August 16, 1974, while on annual training duty with the Ohio Army National Guard. The request was forwarded to this Office by Office of the Comptroller of the Army by letter dated July 26, 1976 (DACA-FAF-M), and has been assigned control number DO-A-1258 by the Department of Defense Military Pay and Allowance Committee.

The record shows that on August 16, 1974, the member was involved in a jeep accident while performing annual training duty as a military policeman with his unit at the Savanna Army Depot, Savanna, Illinois. The accident was determined to have been incurred in the line of duty, not due to misconduct.

The injuries suffered by the member in the mishap included compression fractures of the sixth and seventh thoracic vertebrae;

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torn costochondral cartilages (separated ribs); multiple lacerations and bruises; and strained back and neck muscles, with possible nerve damage in those areas of his body.

After receiving initial medical treatment at the Savanna Army Depot, he was hospitalized at Mercy Hospital, Clinton, Iowa, between August 17 and 20, 1974. Following that period of hospitalization, the member then returned to his home in Ohio. During the remainder of 1974, he received further treatment at the Veterans Administration Hospital, Cleveland, Ohio, and also at non-governmental facilities and by civilian physicians.

The submission indicates the member's medical records were lost by the Veterans Administration. However, the available documentation indicates the member received treatment on August 30 and 31, 1974, at private medical facilities due to severe pain. It also appears that on September 9, 1974, medical authorities at the Veterans Administration Hospital advised him to stay in bed with complete rest for 4 weeks. On October 8, 1974, he was advised to keep his physical activity to a minimum for another 12 weeks, and at the end of this period he was to make arrangements to see an Army doctor at a military medical facility for further evaluation.

On January 17, 1975, the member was sent to Ireland Army Hospital, Fort Knox, Kentucky, for a follow-up medical examination. He was found to be qualified for limited duty, due to the compression fractures of the thoracic spine and given a temporary 3-month L-3 physical profile and a code C assignment limitation (Chapter 9, Army Regulation 40-501), with further specific restrictions that he not be required to lift anything weighing more than 15 pounds; to work in one position for more than one hour; or to perform any duty which would require him to sleep on a bed without the support of a bedboard. On July 31, 1975, the member was reexamined at Ireland Army Hospital. At the time of that examination, he was found to have status-post thoracic compression fractures with anterior wedging of the sixth and seventh thoracic vertebrae and residual symptoms. The report of examination suggested that he should be assigned a permanent L-3 profile with these restrictions: "No lifting over 30 pounds, no running or marching over 30 minutes without five minutes rest, must be allowed to sleep on a bedboard."

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The record further shows that as the result of the injuries sustained in August 1974, the member was excused from all regular military duties through the month of January 1975. Between February 1 and November 30, 1975, he attended regularly scheduled weekend unit assemblies but was excused on medical grounds from participating in the unit's 2-week active duty for training period in June 1975. It is indicated that by February 1, 1975, he was able to work full time at his civilian occupation, that of facility engineer.

By letter dated September 12, 1975, the Adjutant General of Ohio requested the Chief of the National Guard Bureau to make a determination concerning the member's entitlement to disability pay. The Adjutant General expressed the opinion that the member should be terminated from entitlement to such pay effective January 18, 1975, and that he should be retained in Military Occupation Specialty (MOS) 95B (Military Policeman). By indorsement dated November 6, 1975, the Chief of the National Guard Bureau replied that if the unit commander stated the member had been performing normal military duties, then incapacitation pay could be terminated, but if the commander could not make this statement, appropriate action had to be taken either to reassign him to a compatible MOS or to discharge him.

Consequently, an MOS Reclassification Board met on November 9 and 26, 1975, to consider the member's case. The member's company commander submitted statements indicating he had been excused from the annual 2-week active duty for training period in June for medical reasons, but had been able to otherwise perform normal military duties at weekend assemblies "except no lifting to help load vehicles." The member was reclassified from MOS 95B (Military Policeman) to 75B (Unit Clerk) effective December 1, 1975, due to his physical inability to perform all the duties required in the military police field.

The record indicates that the member received disability pay from the time he was released from active duty for training on August 25, 1974, following the accident, through January 31, 1975. The Chief of the National Guard Bureau and the Commander of the United States Army Finance and Accounting Center have both expressed the opinion that the member is entitled to further disability

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pay for the period February 1, 1975, through November 30, 1975, the period during which final action in his case was pending. However, the Adjutant General of Ohio questioned whether sufficient medical evidence existed to warrant entitlement to disability pay beyond January 31, 1975, under the applicable laws and regulations.

Subsection 204(h) of title 37, United States Code, 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.

Subparagraph 80254(d)(3) of the Department of Defense Military Pay and Allowances Entitlements Manual (DODPM) (change 32, April 15, 1973), 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 regulatory 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 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, 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

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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.

Subparagraph 9-3(c)(3) of Army Regulation 40-501, provides that a physical profile containing one or more numeral designations "3" signifies that the individual has medical conditions or physical defects which require certain restrictions in assignment within which he is physically capable of performing full military duty. Such individuals are not acceptable under procurement (entry) standards in time of peace, but may be acceptable in time of partial or total mobilization. They meet the retention standards while in service, but should receive assignments commensurate with their functional capability.

Army Regulation 611-201, at page 3-9E-6, provides that a member with an L-3 physical profile is not physically qualified to perform the duties of a Military Policeman (MOS 95B). However, the regulation at page 3-71-33 provides that such member is physically qualified to be a Unit Clerk (MOS 75B).

We have previously expressed the view 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. However, neither the mere physical presence of the injured member at a regular drill of his military unit nor a conditional temporary assignment to limited duty in itself constitutes an event which terminates entitlement to pay and allowances on account of an injury incurred in line of duty. See 52 Comp. Gen. 994(1972): B-184239 / B-183984, November 13, 1975.

In the present case, while it appears the member worked at his normal civilian occupation and performed limited military duty between February 1 and November 30, 1975, these activities

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alone do not constitute grounds for terminating disability pay under the applicable laws and regulations. During this period the member had an L-3 physical profile assigned to him by Army medical authorities. He therefore did not at that time possess the physical qualifications prescribed by Army Regulation 611-201 for his normal military duties as a military policeman, and he was in fact physically unable to fully perform those duties. He did not become physically qualified under Army standards to perform his normal military duties until December 1, 1975, when Army authorities acted to change his MOS and his normal military duties from those of a military policeman to those of a unit clerk.

The Adjutant General of Ohio questions whether disability payments beyond January 31, 1975, can be substantiated by the available medical records and whether the member has provided sufficient information regarding his disability. It appears that by letter dated December 31, 1975, the Adjutant General asked the member to produce further information, stating, "Required documentation is a report from a physician who has performed an examination and can determine that you were incapacitated for the performance of your military duties beyond 31 January 1975." The member replied that he could not produce any medical reports not already on file.


While failure of a member to provide current and sufficient information regarding his physical condition may constitute grounds under the regulations for discontinuance of disability pay, in our view, sufficient medical information exists in this case in the form of the documentation submitted by Army medical authorities to justify disability pay beyond January 31, 1975. Moreover, it appears the member has been fully cooperative and any delays in finalizing administrative action caused by records being lost or other events cannot be attributed to his actions.

The Adjutant General also notes that subparagraph 4-2j of Army Regulation 40-3 provides that entitlement to disability pay ceases "when treatment is terminated by medical authority", and has questioned whether treatment was terminated in this case prior to November 30, 1975. The records do not indicate that the member personally consulted a physician or other medical authority between August 1 and November 30, 1975. Following the physical evaluation of July 31, 1975, however, the examining physician prescribed the use of a bedboard and imposed limitations on lifting and other physical activities. It is our view that this constitutes

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palliative treatment designed to alleviate the symptoms of the member's spinal abnormalities. It does not appear that this treatment for the member's condition was terminated prior to November 30, 1975, and consequently the cited regulatory provision affords no basis for disallowing his claim.

Accordingly, the member's claim for disability pay is allowed for the period February 1 through November 30, 1975. The vouchers, which are returned, may be processed for payment, if otherwise correct.

 R. F. KISLER
Comptroller General
of the United States

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