

PLM-11

DECISION



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

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FILE: B-194169

DATE: March 26, 1979

MATTER OF: Dr. David D. Bonnet, USPHS (Retired)

[Revocation of Voluntary Retirement]

DIGEST: A Public Health Service (PHS) commissioned officer voluntarily retired after 20 years' service immediately after which he developed symptoms of prostatic carcinoma which was not diagnosed until 3 months after retirement. PHS desires to revoke the voluntary retirement orders and issue new permanent disability retirement orders on the basis that carcinoma was definitely in existence at the time of retirement and had it been known the officer would have been retired for disability. Although the time period between retirement and revocation of orders is unusually long, in view of the unique circumstances, and fact that there is no authority similar to 10 U.S.C. 1552 to correct PHS officers' records, the orders may be revised based on the substantial new evidence presented.

This is in response to a request from the Assistant Secretary for Management and Budget, Department of Health, Education, and Welfare, regarding whether the voluntary retirement orders of Dr. David P. Bonnet, a retired Public Health Service (PHS) commissioned officer, may be revoked and new orders issued placing him on permanent disability retirement under 10 U.S.C. Chapter 61 (1976), pursuant to 42 U.S.C. 213a(a)(2) (1976).

On June 1, 1978, Dr. Bonnet voluntarily retired from the PHS with over 20 years' service. His tour of duty was previously interrupted from July 1973 to September 1976, during which time he was on the temporary disability retired list because of illness. He was subsequently recalled to active duty and remained so until his retirement. Prior to his retirement, Dr. Bonnet underwent the necessary final medical examination. The medical report stated that there were no signs of recurrence of his lymphosarcoma nor any other disabling medical condition.

Immediately after his retirement, Dr. Bonnet developed symptoms of another illness and was seen at the Honolulu PHS Outpatient Clinic on September 1, 1978. A diagnosis of adenocarcinoma of the prostate was subsequently confirmed. Further examinations have revealed that the cancer has spread to other parts of the body and there are signs of recurrence of his previous lymphosarcoma.

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This request was submitted because the PHS does not have the statutory authority to review the retirement or separation of an officer without pay for physical disability or to correct his records, as is the case with the Armed Forces (10 U.S.C. 1552 and 1554 (1976)). The PHS contends that the discovery of the prostate carcinoma is sufficient substantial new evidence to allow a modification of Dr. Bonnet's retirement orders. The PHS points out that if they had the authority to correct service records, Dr. Bonnet's orders would be amended to show that he was retired as 100 percent disabled rather than voluntarily retired.

As a general rule, the action taken in issuing a retirement order is final and cannot be revoked in the absence of fraud, substantial new evidence, mistake of law, or mathematical miscalculation. 52 Comp. Gen. 797 (1973); 46 Comp. Gen. 671 (1967); 31 Comp. Gen. 296 (1952). In this case there is no question of fraud, mistake of law or mathematical miscalculation. Concerning substantial new evidence, in B-143484, August 23, 1960, we stated that the new evidence must relate to a fact in existence at the time of retirement which could not have been presented at that time, which is not merely cumulative and which would have warranted a different action had it been presented.

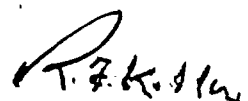
The discovery of adenocarcinoma of the prostate represents a new disease not known to be linked to the previous discovery of lymphosarcoma. According to PHS, the medical evidence establishes beyond any reasonable doubt that a disseminated prostatic cancer must have been in existence prior to and at the time of Dr. Bonnet's retirement. Also, as stated above, had PHS known of the cancer Dr. Bonnet would have been retired as 100 percent disabled. Thus, the discovery of prostatic cancer in Dr. Bonnet's situation would appear to qualify as substantial new evidence.

In addition to the above requirements a time element must also be satisfied before the substantial new evidence rule is applied. In previous cases the substantial new evidence rule has been confined to situations where prompt administrative action to revoke or modify the retirement orders is taken either contemporaneously with or within a short period of time following the effective date of a person's ordered retirement. See: 52 Comp. Gen. 797 (1973); 46 Comp. Gen. 671 (1967); 40 Comp. Gen. 419 (1961). Just what constitutes a short period of time turns largely on the facts of each case. Two aspects, however, must be considered. First, prompt and timely action of appropriate medical authorities in notifying the order-issuing authority. Second, prompt and timely action by the order-issuing authority in initiating the action to revoke or modify the retirement orders following receipt of the information.

In the present situation, prompt and timely action was taken by the appropriate medical authorities in notifying the order-issuing authority once the prostatic cancer was discovered. The fact that the cancer was not diagnosed until 3 months had elapsed since Dr. Bonnet's retirement is not unreasonable under the circumstances. However, 8 months have elapsed since Dr. Bonnet's retirement without any action having been taken to change his retirement orders. Apparently, this was due, at least in part, to the PHS' uncertainty as to whether they had the authority in these circumstances to revise the orders.

In most cases we have limited application of the substantial new evidence rule to situations where little or no administrative delay exists. See 46 Comp. Gen. 671, and compare 52 Comp. Gen. 797. In the present situation since clearly there was a discovery of a physical disability, which would have served as a basis for a disability retirement, and since the physical disability was in existence at the time of Dr. Bonnet's retirement, discovery of such physical disability constitutes substantial new evidence. In the unique circumstances of this case, and considering that the alternative remedies available to military members are not available to PHS officers, such new evidence may be considered sufficient to warrant the revocation of existing retirement orders.

Accordingly, we would not object if the Public Health Service revokes Dr. Bonnet's voluntary retirement orders and issues new orders retiring him for disability.


Deputy Comptroller General
of the United States