



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

12680

Plm-11  
Mr. Kramer

IN REPLY  
REFER TO: B-196767

January 25, 1980

The Honorable Howard M. Metzenbaum  
United States Senator  
2915 AJC Federal Building  
1240 East Ninth Street  
Cleveland, Ohio 44199

RSN 00001

Dear Senator Metzenbaum:

We refer to your letter of November 20, 1979, in which you expressed an interest in the claim of Chief Yeoman Conrad S. Syrone, USNR, ~~for~~ disability severance pay and Reserve retired pay.]

[REQUEST]

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The facts as presented indicate that Chief Syrone, a member of the Navy Reserve, has developed a physical disability which the Navy has determined is less than 30 percent under the Veterans' Administration's standard schedule of rating disabilities. As a consequence of his condition the Navy has found him to be unfit for duty. Chief Syrone has been notified that he is to be discharged from the Navy. In conjunction with being notified of his impending discharge he has been informed that he is to choose between receiving disability severance pay or receiving Reserve retired pay at age sixty. Chief Syrone contends that he is entitled to receive disability severance pay now and retired pay benefits at age sixty. He bases his contention upon our decision in 53 Comp. Gen. 921 (1974).

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The statutory provisions relating to retirement or separation from the Armed Forces for physical disability are found in chapter 61 of title 10, United States Code (1976). In order to be eligible for physical disability retirement a member of the Armed Forces, in addition to satisfying other requirements, must have at least 20 years of active service as computed under 10 U.S.C. 1208 or the disability must be rated at least 30 per cent under the Veterans' Administration's standard schedule of rating disabilities. We have been informed that Chief Syrone does not have the requisite number of years of active service and, as noted above, his disability is rated at less than 30 percent. Thus, Chief Syrone would not be entitled to a physical disability retirement.

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While not being entitled to receive physical disability retirement pay Chief Syrone is entitled to receive disability severance pay as provided for by 10 U.S.C. 1212 (1976), upon his "separation" for disability. The receipt of disability severance pay, however, is not the only option available to him. Section 1209 of title 10, United States Code (1976) provides that,

"Any member of the armed forces who has at least 20 years of service computed under section 1332 of this title, and who would be qualified for retirement under this chapter but for the fact that his disability is less than 30 percent under the standard schedule of rating disabilities in use by the Veterans' Administration at the time of the determination, may elect, instead of being separated under this chapter to be transferred to the inactive status list under section 1335 of this title and, if otherwise eligible, to receive retired pay under chapter 71 of this title upon becoming 60 years of age."

In interpreting the above statute we held in 39 Comp. Gen. 801, 804 (1960) that 10 U.S.C. 1209 authorizes a member of the Armed Forces to elect transfer to the inactive status list in lieu of separation with severance pay and to receive retirement pay under chapter 71 of title 10, United States Code, only if he meets all the qualifying requirements, except age, imposed by chapter 67, title 10, United States Code, including 10 U.S.C. 1331. We have been advised that Chief Syrone has at least 20 years of service computed under 10 U.S.C. 1331 and that he satisfies all the qualifying requirements except age imposed by chapter 67, title 10. Therefore, under 10 U.S.C. 1209 he cannot receive both payments but must elect between receiving disability severance pay upon separation or transfer to the inactive status list and upon reaching age 60 receiving Reserve retired benefits. See 41 Comp. Gen. 597 (1962).

As stated above, Chief Syrone contends that under our decision in 53 Comp. Gen. 921, supra, he would be entitled to receive both payments. In that decision we held that since Congress had not imposed any restrictions upon the receipt of severance pay and the subsequent receipt of retired pay a Regular Air Force officer who was discharged with severance pay would not be barred from receiving Reserve retirement pay if he later qualified for such pay.

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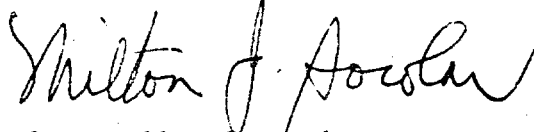
The above case is not applicable to Chief Syrone's situation. As can be gleaned from above, we based our decision on the fact that the statutes which authorized severance pay (10 U.S.C. 3786(b)(2) and 8786(b)(2)) to regular Army and Air Force officers did not prohibit the subsequent receipt of retirement benefits. No such statute is applicable to the present situation. Rather, as stated above, 10 U.S.C. 1209, expressly requires an election to receive one or the other, but not both, benefits.

Chief Syrone also contends that he has a vested right to receive retired pay benefits at age 60, under Chapter 67 of title 10. This contention is based on the fact that he was notified on May 7, 1979, of his eligibility for retired pay upon attaining age 60. We have previously held that the notice to a reservist of the Armed Forces of his eligibility to retired pay only operates to validate the service eligibility requirements of clauses (2) and (3) of 10 U.S.C. 1331(a). 51 Comp. Gen. 91 (1971). Moreover, the entitlement to retirement pay benefits for non-Regular military service arises only upon meeting specific requirements of age and service as set forth in chapter 67, title 10. Thus, even though Chief Syrone has met the service eligibility requirements, his entitlement to retired pay does not vest until he reaches the age of 60. Therefore, by not allowing Chief Syrone to receive Reserve retirement pay if he chooses to receive disability severance pay, the Government is not depriving him of an entitlement to which he presently has a vested right.

Accordingly, Chief Syrone is not entitled to receive both disability severance pay and Reserve retirement pay but must elect to receive one or the other.

We trust the above answers your inquiry and regret that a determination more favorable to your constituent is not possible under the circumstances. We have not informed Chief Syrone of our views in this matter.

Sincerely yours,



For The Comptroller General  
of the United States