

# DECISION



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

FILE: B-198634

DATE: May 25, 1983

MATTER OF: Major General Edwin A. Walker, AUS  
(Retired)

- DIGEST:
1. Corrections of military records made pursuant to actions by boards for correction of military records under 10 U.S.C. § 1552, are final and conclusive on all officers of the United States, except when procured by fraud. Thus, the Comptroller General does not have jurisdiction to review correction board actions in individual cases but must apply the pertinent laws and regulations to the facts as shown by the corrected records to determine the amounts payable as a result of the corrections.
  2. An Army officer, after completing over 30 years of active service, who could have retired with retired pay unconditionally resigned from the military in 1961. Subsequently, the Army Board for Correction of Military Records corrected the officer's record to show that he retired in February 1982. His situation falls within the provisions of 10 U.S.C. § 1401a(f) for the computation of his retired pay since he initially retired in 1982 and initially became entitled to retired pay at that time. However, under that section the 1972 basic pay rates (which would be most advantageous to him) in computing his retired pay may not be used because he was not a member of the Army in 1972. Thus, he could not have retired then and had no grade or basic pay rate for use in computing retired pay.

## Background

This action is in response to a request from a disbursing officer of the Army Finance and Accounting Center

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for an advance decision concerning the application of 10 U.S.C. § 1401a(f) (1976) in computing the retired pay of Major General Edwin A. Walker, AUS, Retired. The request was forwarded here by the Office of the Controller of the Army under Control Number DO-A-1416, allocated by the Department of Defense Military Pay and Allowance Committee.

We also have been advised by Department of Justice representatives that the case of Edwin A. Walker v. United States, No. 169-80C (Ct. Cl. filed April 10, 1980), involving General Walker's retired pay, currently being litigated in the United States Claims Court, has been suspended pending our determination as to whether section 1401a(f) is applicable under the present circumstances.

In deciding this case we have given full consideration to arguments made on General Walker's behalf in a brief filed with us by his attorney, Joseph Dinsmore Murphy, Esq.

#### Facts

In 1961 General Walker, who was then a Regular Army officer, held the permanent grade of brigadier general and the temporary grade of major general. For personal reasons he submitted his unqualified resignation from the Army in October 1961, which was accepted, and he was discharged from his commission on November 4, 1961. Although he had completed over 30 years of active service at the time of his resignation and was eligible to request retirement under 10 U.S.C. § 3918, he specifically rejected retirement and receipt of retired pay at that time. Subsequently, in November 1973 General Walker applied to the Army for retired pay retroactive to 1961. The Army advised him that since he had resigned, not retired, he was not entitled to retired pay. However, his request was forwarded to the Army Board for Correction of Military Records to be treated as an application for a correction of his records to allow him the retired pay of a major general retroactive to 1961. The Board denied that application. However, after additional correspondence, the Board gave further consideration to the matter based on another application filed in August 1981. At that time, the Board deemed it inappropriate to

make General Walker's retirement retroactive to 1961 because he had failed to take advantage of his option to retire at that time. However, the Board did recommend that his military records be changed to show that, under the authority contained in 10 U.S.C. § 597, he was appointed and accepted a warrant in the grade of chief warrant officer, W-4, in the United States Army Reserve on January 31, 1982, and that under the authority contained in 10 U.S.C. § 1293 and 10 U.S.C. § 3964, respectively, he was retired on February 1, 1982, and advanced on the retired list to the grade of major general, O-8. On June 21, 1982, the Assistant Secretary of the Army approved the recommendation of the Board and the recommended action was taken pursuant to 10 U.S.C. § 1552.

#### Questions Presented

We are asked the following questions concerning the computation of General Walker's retired pay: First, may General Walker's retired pay be computed using the provisions of 10 U.S.C. § 1401a(f)? If the answer to this question is affirmative, may the October 1972 basic pay rates be used in computing General Walker's retired pay since these rates would be of the greatest benefit to General Walker even though he had no military status in 1972? Alternatively, may the pay rates in effect in October 1961, just prior to his resignation but while he was on active duty, be used in computing General Walker's retired pay? We find that while General Walker's retirement falls within the provisions of section 1401a(f), that provision does not allow the use of the 1972 pay rates in computing his retired pay, and that using the 1961 pay rates would be of no benefit to him since the 1981 rates otherwise applicable result in more retired pay for him.

#### Discussion

Section 1552 of title 10, United States Code, authorizes corrections of military records, such as were made in General Walker's case, when considered necessary by the Secretary concerned to correct an error or remove an injustice. Such record corrections are "final and conclusive on all officers of the United States," except when procured by fraud. 10 U.S.C. § 1552(a). General Walker's attorney cites various

irregularities which he perceives in the Correction Board's proceedings in General Walker's case and argues that if the Board had acted properly, it would have corrected General Walker's record in 1973 to place him on the retired list at that time. However, unlike the Claims Court, which reviews Correction Board actions to determine whether they have been arbitrary, capricious, or not in accordance with law, we have no jurisdiction to perform such a review. Our role is to see that payments to be made as a result of a record correction under 10 U.S.C. § 1552 are made in the amounts determined due by applying the pertinent laws and regulations to the facts shown by the records as corrected. 34 Comp. Gen. 7 (1954); 38 Comp. Gen. 208 (1958). Therefore, in this case we must apply the pertinent statutes to the facts, as shown in the corrected record, to determine General Walker's retired pay entitlement.

General Walker resigned in 1961 and had no military status from that time until January 31, 1982, when by correction of his records he was appointed as a warrant officer and the next day placed on the retired list. The Correction Board action did not change the fact that he had resigned and had not retired in 1961, nor did it restore his military status in 1973 or at any other time until 1982. Thus, he was on neither the active nor retired lists from November 1, 1961, until February 1, 1982.

Regular Army officers, such as General Walker was prior to his resignation, are entitled to retired pay only if they are "retired." 10 U.S.C. §§ 3918, 3929, 3991. A retired Regular Army officer continues to hold a military office, remains a member of the Regular Army, and in effect receives retired pay characterized as reduced compensation for reduced services. See 10 U.S.C. § 3075; United States v. Tyler, 105 U.S. 244 (1881); and McCarty v. McCarty, 453 U.S. 210, 222-224 (1981). A Regular officer's loss of his status as a military officer entails loss of entitlement to retired pay. Hooper v. United States, 164 Ct. Cl. 151 (1964); Matter of Snyder, 58 Comp. Gen. 566, 568 (1979); and McCarty v. McCarty, cited above. Since General Walker, by resigning in 1961, lost his military status at that time, there is no basis for us to authorize payment to him of retro-active retired pay for the period from the date of his resignation, or from any other date, until he was placed

on the retired list on February 1, 1982, by the record correction action. General Walker's entitlement to retired pay began effective February 1, 1982, and it is in regard to the computation of that pay which the questions concerning 10 U.S.C. § 1401(a)(f) relate.

Application of Section 1401a(f)

Since by the record correction action General Walker was retired effective February 1, 1982, under 10 U.S.C. § 1293, as a warrant officer, but on that same date was advanced on the retired list to major general under 10 U.S.C. § 3964, his retired pay is computed under 10 U.S.C. § 3992. Under section 3992 retired pay is computed by multiplying 2-1/2 percent times the member's creditable years of service. The percentage thus derived is then applied to the monthly basic pay of the grade to which he was advanced, major general, O-8, to determine the amount of monthly retired pay.

However, there is also to be considered 10 U.S.C. § 1401a which in general directs that military retired pay be adjusted to reflect adjustments in civil service annuities which are based on changes in the Consumer Price Index. Subsection 1401a(f) was added by section 806 of the Department of Defense Appropriation Authorization Act, 1976, Public Law 94-106, October 7, 1975, 89 Stat. 538-539, commonly referred to as the "Tower Amendment." That subsection provides:

"(f) Notwithstanding any other provision of law, the monthly retired or retainer pay of a member or a former member of an armed force who initially became entitled to that pay on or after January 1, 1971, may not be less than the monthly retired or retainer pay to which he would be entitled if he had become entitled to retired or retainer pay at an earlier date, adjusted to reflect any applicable increases in such pay under this section. In computing the amount of retired or retainer pay to which such a member would have been entitled on that earlier date, the computation shall, subject to subsection (e) of this section, be based on his grade, length of service, and the rate of basic pay applicable to him at that time." (Emphasis added.)

Subsection 1401a(f) was adopted to alleviate the so-called "retired pay inversion" problem, which was created by the fact that for several years upward cost-of-living adjustments of retired and retainer pay under 10 U.S.C. § 1401a had occurred in greater amounts and with greater frequency than increases in active duty military basic pay. The result of this was that many of those who remained on active duty after becoming eligible for retirement were losing considerable amounts of retired pay. Subsection 1401a(f) was intended to provide an alternate method of calculating retired pay. It essentially involves calculating the maximum amount of retired pay based not on the member's actual retirement but rather on his earlier eligibility for retirement. See the colloquy in the Senate at the time the provision was adopted, 121 Cong. Rec. 17581-17587 (1975); S. Rep. No. 94-385, 94th Cong., 1st Sess. 73 (1975); 59 Comp. Gen. 691 (1980); 56 Comp. Gen. 740 (1977).

We have long followed the rule that in construing a statute words and phrases should be given their plain, ordinary and usual meaning unless a different purpose is clearly manifested in the statute or its legislative history. See, 46 Comp. Gen. 392 (1966). Section 1401a(f) clearly states that the retired or retainer pay of a member who initially became entitled to that pay on or after January 1, 1971, may not be less than the monthly retired or retainer pay to which he would be entitled if he had become entitled to retired or retainer pay at an earlier date.

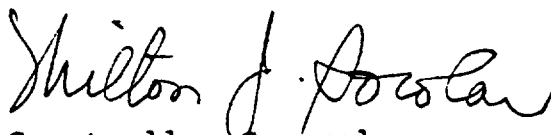
Therefore, in answer to the first question General Walker "initially became entitled" to retired pay when he was placed on the retired list on February 1, 1982. Although he had over 30 years of service in 1961 and therefore was eligible to retire at that time, he did not become entitled to retired pay then because he chose to resign rather than retire. Accordingly, General Walker's retirement situation falls within the first sentence of 10 U.S.C. § 1401a(f).

In answer to the second question as to whether the October 1972 basic pay rates may be used in computing General Walker's retired pay, since in 1972 he was not a member of the Army (he had resigned in 1961), he could not have retired in 1972. General Walker had no "grade"

or "rate of basic pay" in 1972. Thus, the more advantageous 1972 pay rates may not be used in computing his retired pay under the provision of section 1401a(f), which specifically provides that in computing the amount of retired or retainer pay to which he would have been entitled on that earlier date, the computation shall be based on the "grade" and "basic pay rate" applicable to him at that time. See, e.g., 56 Comp. Gen. 740 (1977).

For the same reasons we may not compute his retired pay on the basis of his eligibility for retirement in 1973, as his attorney argues. While General Walker requested that his records be corrected then, the Correction Board did not take the action requested, and under the corrected records, as is indicated above, he had no military status in 1973.

As to the last question concerning whether the 1961 pay rates may be used, in 1961 General Walker was on active duty, he had a grade and pay rate, and he had over 30 years of service. Therefore, at that time the literal language of section 1401a(f) was satisfied. However, we have been advised by the Army that the basic pay rates in effect in 1961 would be least advantageous to General Walker when compared with the 1972 rates and the October 1981 rates. Thus, the question concerning the 1961 rates need not be answered. Accordingly, the October 1981 rates should be used in computing his retired pay.

*for*   
Comptroller General  
of the United States