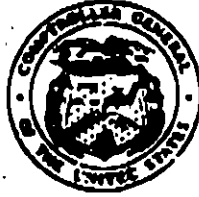


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DECISION

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

FILE: B-189540

DATE: February 23, 1978

**MATTER OF: DOD Military Pay and Allowance Committee
Submission No. SS-A-1272**

- DIGEST:**
1. A member of the Army National Guard or Army Reserve, called or ordered to active duty for a period of 30 days or less under self-terminating orders who is hospitalized under the provisions of 10 U. S. C. 3721(2) because of an in line of duty injury not due to own misconduct during that time, remains in an active military status only through the last day of duty as prescribed by those orders, with the right to continue to receive pay and allowances thereafter based on disability to perform military duty as authorized by 37 U. S. C. 204(g)(2).
 2. A member of the Army National Guard or Army Reserve, called or ordered to active duty for a period of 30 days or less under self-terminating orders who is hospitalized due to an in line of duty injury not due to own misconduct during that time, would not be placed in a status of being on active duty for 30 days or more even though the period of hospitalization is covered by an amendment to his orders or new orders issued to extend his period of active duty solely for the purpose of such hospitalization, since such a change in status is not authorized. Thus, such orders would not carry him beyond 30 days for active duty purposes and his rights to be retired for physical disability would remain determinable under 10 U. S. C. 1204.
 3. A member of the Army National Guard or Army Reserve, called or ordered to active duty for a period of 30 days or less who is hospitalized for an in line of duty disability not due to own misconduct, and who suffers an injury in the hospital during the period of active duty covered by the original orders, so long as that injury is administratively determined to be in line of duty and not due to own misconduct, may be considered as being injured as the proximate result of the performance of active duty for the purpose of 10 U. S. C. 1204.

4. A member of the Army National or Army Reserve, called or ordered to active duty for a period of 30 days or less, who is hospitalized for disease under 10 U. S. C. 3722, or injury under 10 U. S. C. 3721, who is injured while in the hospital after his active duty period under the original orders had terminated, is not considered to have been injured as the proximate result of the performance of active duty for the purpose of 10 U. S. C. 1204 benefits unless there is established a casual relationship between the original injury or disease and the injury while in the hospital, since such injury did not occur while he was in an active duty status.

This action is in response to a letter dated June 30, 1977, with enclosures, from the Acting Assistant Secretary of the Army (Manpower and Reserve Affairs), requesting an advance decision on several questions concerning the application of the provisions of title 10, United States Code, governing disability retirements or separations (10 U. S. C. 1201-1208) of enlisted members of the Army Reserve and Army National Guard performing active duty training. The request has been assigned Secretarial Submission No. SS-A-1272 by the Department of Defense Military Pay and Allowance Committee.

The submission states that paragraph 15 of Army Regulation (AR) 135-200 (change 2, June 25, 1965), provided that a member who incurred a disease or injury while on active duty for training may, with his consent, remain in a patient status after the date indicated in his orders for expiration of his active duty for training. The indicated purpose was to enable the member to receive authorized medical care (AR 40-3) and, if indicated, physical disability processing (AR 635-40). The member's orders directing active duty and which were self-terminating, were not amended to extend the expiration date of those active duty orders, but the member, if otherwise qualified, was entitled to receive pay and allowances until released from medical care, or separated or retired due to physical disability. In this regard, the submission correctly recognizes that the period after completion of the period of active duty stated in the orders is

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not considered active military service and neither leave nor active duty retirement points accrue during that time. See 37 Comp. Gen. 403 (1957) and 54 Comp. Gen. 33 (1974).

The submission states further that in those cases where a member's active duty training orders specify a period of more than 30 days and he incurs a disability from either injury or disease and is referred for disability processing under AR 635-40, he would be entitled to the benefits provided under 10 U.S.C. 1201-1203. If, however, his active duty training orders specified a period of 30 days or less, his case would be processed under AR 635-40 only if his disability is the result of injury. In that case, he would be entitled to the benefits provided in 10 U.S.C. 1204-1206.

The submission goes on to state that an interim change to paragraph 15 of AR 135-200, was promulgated on December 21, 1976. The pertinent portion of that change is as follows:

"c. General. A member on any type of ADT/FTTD [active duty/full-time training duty] under self-terminating orders, including AT [annual training], who is sick in the hospital, receiving follow-up care immediately after a period of hospitalization, has sustained an acute, grave illness/injury or other deterioration of physical condition rendering the member unfit for further duty, or in need of or undergoing treatment for class 4 or 5 dental defects (AR 40-3), may only be considered for retention past the ADT/FTTD release date when continuous hospitalization is required and/or physical disability processing is required or has been initiated." DA STL MO (AGUZ-RPP-PR) Message 211449Z Dec. 76.

It is also stated that in the past no amendatory orders were issued when a disabled member was placed in a patient status. However, the regulation as amended by the interim change provides that such orders will be issued and the active duty for training period will be extended to the anticipated date of recovery established by the medical facility commander.

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The submission goes on to state that the members most affected by this change in the regulations would be those performing annual training for 30 days or less (usually 15 days), since an amendment of orders in such cases may carry the member beyond 30 days. If so, it is speculated that it may change their active duty status from the 30 days or less category, to a status of active duty for more than 30 days and if such a member is later found to be unfit because of permanent disability, make him eligible for retirement benefits under 10 U. S. C. 1201, rather than retirement benefits under 10 U. S. C. 1204. It is suggested that while it appears that a change in status would not alter entitlements accruing because of a disability incurred prior to the date his orders were extended, the problem arises where, after the member's orders are amended and while he is a patient, he incurs a disability as a result of disease which is only covered for retirement purposes under 10 U. S. C. 1201. Doubt is expressed as to whether such conclusion is valid.

Based on the foregoing, the following questions are presented for resolution:

"1. An individual sustains an injury which qualifies him under 10 U. S. C. 1204 for disability retirement, and while hospitalized, is further disabled because of a heart attack.

"a. If the heart attack occurred after amending orders were issued, but before the expiration date of the self-terminating orders, may the disability resulting from the heart attack be considered under 10 U. S. C. 1201 for benefits?

"b. If the answer to a is no, if the heart attack was incurred after the expiration date of the self-executing orders, may it then be considered under 10 U. S. C. 1201?

"2. An individual hospitalized under appropriate circumstances because of disease and, thus, not qualified for benefits under 10 U. S. C. 1204, while hospitalized incurs a different disease or is injured and because of the new condition is determined to be unfit because of physical disability.

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"a. If the date of inception of the second condition is after issuance of amending orders but prior to the expiration date of the self-terminating orders, may the case be considered under 10 U. S. C. 1201?

"b. If the answer to a is no, may the case be considered under 10 U. S. C. 1201 if the date of inception is after the expiration date of the self-terminating orders?

"3. If the answers to all of the above are no, may an injury sustained by the individual while a patient and in the hospital environment, after issuance of amending orders, be considered as proximate result of performing active duty for purpose of establishing benefits under 10 U. S. C. 1204?

The submission states that each of the individuals described in the foregoing questions is on active duty under self-terminating orders which specify a period of duty of 30 days or less; the orders are amended solely for the purpose of hospitalization, and because of the amendment to his orders, the member's active duty time totals more than 30 days.

Members of the Army National Guard, like members of the Army Reserve who are called or ordered into Federal service are ordered to that duty as a Reserve of the Army (10 U. S. C. 3497) and are subject to the laws and regulations governing the Army (10 U. S. C. 3499). Further, under the provisions of 10 U. S. C. 3687, each of these members:

"* * * is entitled to the pensions and other compensation provided by law or regulation for a member of the Regular Army of corresponding grade and length of service, whenever--

"(1) he is called or ordered to active duty * * * for a period of more than 30 days, and is disabled in line of duty from disease while so employed; or

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"(2) he is called or ordered to active duty, or to perform inactive-duty training, for any period of time, and is disabled in line of duty, from injury while so employed."

With regard to medical and hospital benefits for such members, 10 U. S. C. 3721 provides in pertinent part:

"§3721. Members of Army, other than of Regular Army.

"A member of the Army, other than of the Regular Army, is entitled to the hospital benefits provided by law or regulation for a member of the Regular Army of corresponding grade and length of service, whenever--

"(1) he is called or ordered to active duty * * * for a period of more than 30 days, and is disabled in line of duty from disease while so employed; or

"(2) he is called or ordered to active duty, or to perform inactive-duty training, for any period of time, and is disabled in line of duty from injury while so employed."

Under 10 U. S. C. 3722 a Reserve may be hospitalized if he contracts a disease in line of duty while on active duty in time of peace. That section also provides for pay and allowances during hospitalization for up to a total of 6 months.

Regarding disability pay and allowance entitlements, 37 U. S. C. 204(g) provides in part:

"(g) A member of the Army or the Air Force (other than of the Regular Army or the Regular Air Force) is entitled to the pay and allowances provided by law or regulation for a member of the Regular Army or the Regular Air Force, as the case may be, of corresponding grade and length of service, whenever--

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"(1) he is called or ordered to active duty * * * for a period of more than 30 days, and is disabled in line of duty from disease while so employed; or

"(2) he is called or ordered to active duty, or to perform inactive-duty training, for any period of time, and is disabled in line of duty from injury while so employed."

In 41 Comp. Gen. 706, 708 (1962), we stated:

"* * * it is our view that under the provisions of 10 U. S. C. 3687, an Army reservist who is injured while employed on active duty for any period of time, or who is disabled from disease while so employed for the requisite period, is entitled to continue in receipt of active duty pay and allowances while hospitalized and while awaiting action on his retirement proceedings if such proceedings are instituted. Such section, however, does not provide that a reservist shall be considered in active military service while in receipt of such benefits * * *." (Underscoring supplied.)

See also in this connection, B-153332, March 16, 1964; 50 Comp. Gen. 99 (1970); and 54 Comp. Gen. 33, supra.

In 40 Comp. Gen. 664 (1961) we considered the propriety of issuing orders extending active duty to members on limited periods of active duty for training. Two categories of members were specifically treated--those on active duty for training for a period of not less than 3 months and not more than 6 months under 50 U. S. C. 1013(c) (1951) and those on active duty for training for less than 90 days under other provisions of law. In that case, while noting that under 10 U. S. C. 3687 (with respect to Army members), in most cases, members could be retained in a pay status during hospitalization without the issuance of orders extending their active duty, we held that if otherwise proper such members could be retained on active duty after their self-terminating orders would otherwise expire for the period necessary to determine whether they were eligible for retirement or payment of disability retirement pay because of such disability pending complete necessary physical disability processing. In that connection it was noted that members serving under 50 U. S. C. 1013(c) could not be

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retained on active duty beyond 6 months, due to the restrictive language in that section. However, in that case we did not specifically consider the effect of such extension of orders as related to members on active duty for training for less than 30 days.

In the case of members whose active duty for training is for more than 30 days the extension of active duty rather than carrying the member in a disability pay status under 10 U. S. C. 3687 and similar provisions of law applicable to services other than the Army, entitles the member to certain additional benefits, e. g., accumulation of leave, time credit for retirement purposes, additional benefits for dependents. If a member's original tour of active duty for training is for less than 30 days an extension of his active duty to cover a period of more than 30 days would also permit the member to qualify under more liberal provisions of law with respect to disability retirement. As indicated in the submission such action could result in full retirement benefits based upon disease incurred while on active duty if it is determined that the disease was not due to the member's own misconduct. If the Army is permitted to extend periods of active duty under the regulation amendment in question, the intent of Congress to distinguish between members on active duty for less than 30 days and those on active duty for more than 30 days would be defeated because the service could place members who incurred disease during a short period of active duty on active duty for more than 30 days in any case in which the disease required hospitalization for an extended period or the member was being considered for disability retirement. Such a result is not authorized by law.

Therefore, we must conclude that members who contract a disease or are injured while on active duty for less than 30 days may not have their active duty extended for the period of hospitalization or consideration for retirement and that any actions taken to effect such active duty will not be viewed as placing the member on active duty for more than 30 days for purposes of entitling them to benefits of retirement under 10 U. S. C. 1401-1203 or other benefits which flow from active duty status. Such members, for hospitalization and continued pay benefits, must rely upon the provisions of 10 U. S. C. 3687, 3721 and 3722 (as applicable to the Army) as they relate to members on active duty for less than 30 days. The decision 40 Comp. Gen. 664, supra, is modified to the extent inconsistent herewith.

Accordingly, questions 1a, 1b, 2a and 2b are answered in the negative.

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With regard to the foregoing, we also add that, to the extent that the benefits listed on pages 3 and 4 of the before-cited AR 135-200 interim change message would not inure to a member called or ordered to active duty for 30 days or less but for the proposed amendment to orders retaining him in an active duty status solely for hospitalization purposes, they may not now be allowed.

In view of our conclusions with respect to questions 1 and 2, in answering question 3 we must distinguish between cases in which the original condition for which the member was hospitalized resulted from a disease and those in which it resulted from an injury. We must also distinguish between cases in which the injury suffered while hospitalized occurred before and those in which it occurred after the termination date of the member's ordered period of active duty.

The provisions governing permanent disability retirement of members serving on active duty for 30 days or less, are contained in 10 U. S. C. 1204, which provides in part:

"Upon a determination by the Secretary concerned that a member of the armed forces not covered by section 1201, 1202, or 1203 of this title is unfit to perform the duties of his office, grade, rank, or rating because of physical disability resulting from an injury, the Secretary may retire the member with retired pay computed under section 1401 of this title, if the Secretary also determines that--

* * * * *

(2) the disability is the proximate result of performing active duty or inactive-duty training;

(3) the disability is not the result of the member's intentional misconduct or willful neglect * * *

In order for a disability to be the basis for retirement under those provisions, it must be as a result of injury, and as determined by the Secretary concerned, must be the proximate result of the performance

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of active duty and not due to the member's misconduct. Thus, where a member suffers injury while in a patient status in a hospital while still in an active duty status under his original orders, and the appropriate administrative determination is made, a disability as a result of such injury would properly be the basis for 10 U. S. C. 1204 consideration, even though the member may have been initially hospitalized for disease under 10 U. S. C. 3722.

With regard to in-hospital injuries which occur after a member's less than 30-day period of duty terminates, the facts of the individual case would be for consideration. This is so because we do not believe that such injuries may be considered the proximate result of performing active duty simply because the hospitalization commenced while the member was on active duty and at the time the injury occurred was receiving hospitalization, pay and allowances under the provisions of law discussed above. If it can be determined that the original injury or disease which was incurred during a period of active duty covered by the original orders was the direct cause of the later injury, a proximate cause relationship with the active duty injury or disease might be found. However, in the absence of a specific situation involving such facts, we feel that the question cannot be properly considered. If such a situation does arise, we believe it should be submitted for our consideration.


Deputy Comptroller General
of the United States