

Date: May 9, 1994
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O.G.C. Precedent 13-

From: 022

To: VA District Counsel (316/02)
730 Peachtree Street, N.E.
Atlanta, GA 30365

Subj: Period of Active Service -- Effect of Correction
Board Action
XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX

QUESTION PRESENTED:

Whether service connection may be established for a disability incurred following the date on which a veteran was, in fact, discharged from active military duty, where the discharge was subsequently voided and full active-duty credit granted by a Board for Correction of Military Records to a date subsequent to the date on which the disability was incurred.

COMMENTS:

1. The veteran was honorably discharged from the Army on February 14, 1983, due to alcohol abuse rehabilitation failure. On May 26, 1989, the Department of the Army Board for Correction of Military Records (BCMR) voided the discharge and extended the period of the veteran's active-duty service until August 15, 1985, when the veteran's term of service would have expired. The veteran subsequently filed a claim for disability compensation, alleging that a knee injury suffered while playing basketball in March 1984 is service connected because it occurred during active military service, as extended by the BCMR. The veteran appealed denial of the claim to the Board of Veterans' Appeals, which remanded the case, directing the agency of original jurisdiction to refer the case to the District Counsel, and if necessary to the General Counsel, to obtain an opinion on whether the veteran's service between February 1983 and August 1985 constitutes active service for purposes of determining whether the veteran's disability is service connected.

2. You conclude in your request for opinion that, although the BCMR extended the veteran's period of active-duty service until August 15, 1985, the veteran was not on "active duty" within the meaning of 38 U.S.C. § 101(21) when the knee injury occurred in March 1984. In support of the conclusion that the veteran was not on "active duty" when the knee injury occurred, you rely on an undigested opinion of this office which involved similar facts. In Undigested Opinion 8-24-88 (9-4c Effective Date -- Compensation), the veteran received an other-than-honorable discharge on March 11, 1983, but the discharge was subsequently upgraded to honorable by the Navy Discharge Review Board. The Board for the Correction of Naval Records recommended that the veteran's records be corrected to reflect continuous active duty until December 4, 1985, the date his enlistment would have expired, and to reflect an honorable discharge on that date. The veteran then filed a claim for disability compensation based upon a back injury which occurred during employment as a longshoreman from 1983 to 1985. The General Counsel stated that "'active duty' contemplates performance of service in defense of the Nation and while under the control of military authorities." The General Counsel reasoned that, since the veteran performed no military service after March 1983, was not on leave, did not return to the control of military authorities, and was not detailed to civilian duties incident to service, the veteran was not engaged in active duty when the back injury occurred. We agree that active-duty service requires that a veteran be under the control of military authorities and therefore available to perform military duties. We provide the following additional analysis in support of this conclusion.

3. VA has traditionally accorded deference to service department determinations regarding dates of service. Op. G.C. 7-83 (7-29-83). Further, VA must accept the action of a military correction board as long as it was in accordance with the correction board's authority and was not procured by fraud. The secretary of a military department may correct any military record of that department when he or she considers it necessary to correct an error or remove an injustice. 10 U.S.C. § 1552(a)(1). A correction is "final and conclusive on all officers of the United States," unless it was procured by fraud. 10 U.S.C. § 1552(a)(4). Nonetheless, for the reasons stated in Digested Opinion 5-23-84

(8-4 Discharge of Veterans), correction board actions are binding only as to the facts found, not as to entitlement based on those facts. Thus, VA retains the authority to determine entitlement to veterans' benefits based on the application of the law to those facts. See *id.*; *cf.* Op. G.C. 7-83 (service dates established under Presidential Proclamation No. 4313).

4. The criteria for determining eligibility for veterans' benefits are set forth in titles 38 of the United States Code and Code of Federal Regulations. Service connection may be established for a death or disability if the disability was incurred or aggravated, or the death resulted from, a disability incurred or aggravated in the line of duty in the active military, naval, or air service. 38 U.S.C. § 101(16). An injury is incurred in the line of duty "when the person on whose account benefits are claimed was, at the time the injury was suffered or disease contracted, in active military, naval, or air service, whether on active duty or on authorized leave, unless such injury or disease was a result of the person's own willful misconduct or abuse of alcohol or drugs." 38 U.S.C. § 105(a).

5. Questions regarding whether a veteran was engaged in active service under various veterans' benefit laws were addressed many years ago by the Attorney General of the United States. For purposes of section 300 of the War Risk Insurance Act, as amended by the Act of June 25, 1918, ch. 104, § 10, 40 Stat. 609, 611, the Attorney General defined "active service" as excluding those "who, for any reason, have been relieved of active duty." 32 Op. Att'y Gen. 12, 13 (1919).¹ In 1924, the Secretary of War requested that the Attorney General interpret "active service" for purposes of the World War Adjusted Compensation Act, ch. 157, § 201, 43 Stat. 121, 122 (1924). The Attorney General concluded that active service referred to an individual's status in the military establishment, i.e., as available for the performance of duty against the enemy, and did not include those persons on the retired or reserve list who may be recalled under certain conditions. 34 Op.

¹ In 1855, the Attorney General had described "active service" as referring to "the orders under which the party may happen to be." 7 Op. Att'y Gen. 149, 161 (1855).

Att'y Gen. 228, 229-30 (1924). According to the Attorney General, active service for purposes of payment of an adjusted service credit included all service from the time of induction until separation, but did not include any period of time in which the individual was beyond the control of superiors and in a state of desertion. *Id.* at 231-32. Based upon this opinion, the General Counsel of the Veterans' Bureau held that, for purposes of determining eligibility for disability compensation, a veteran who was absent without leave but not absent in desertion was in active service. 32 Op. G.C. 38, 40 (1925); see also 2 Op. Sol. 273 (11-17-31) (forty-six days during which veteran was on furlough prior to discharge may be counted in determining whether he had requisite ninety-day period of service for purposes of determining surviving spouse's eligibility for pension).

6. Two subsequent opinions by the Attorney General held that periods of time in which veterans were absent without leave but not in a state of desertion did not constitute active service. A 1935 opinion, 38 Op. Att'y Gen. 202 (1935), interpreting the World War Adjusted Compensation Act, involved a veteran who was absent without leave and charged with desertion. Because of the veteran's mental condition, the charge of desertion was removed, and the veteran was honorably discharged from the Army. The Attorney General found that, since "the absence or desertion effectually terminated all actual military service and was coextensive with the entire period for which adjusted compensation might have been allowed," the veteran was not entitled to compensation. Similarly, a 1938 Attorney General opinion held that active service was not rendered during the period a veteran was absent without leave for almost two years, confined while awaiting trial, and serving a sentence of confinement at hard labor. 39 Op. Att'y Gen. 139, 141-42 (1938). The VA Solicitor noted, however, that these opinions turned on the fact that the absence in question effectively terminated all actual military service.

49 Op. Sol. 259, 262 (3-20-40).

7. VA defined "active service" in Instruction No. 6 to Veterans Regulation No. 1, which was promulgated on April 15, 1933, under the Act of March 20, 1933, ch. 3,

48 Stat. 8. Paragraph 1 of Instruction No. 6, which was the forerunner of current 38 C.F.R. § 3.15,² stated in part "active service shall be accepted as exclusive of unauthorized leaves of absence, or of periods of agricultural, industrial or indefinite furlough, or other authorized leaves of absence during which no duty could be or was performed, except leaves of absence for periods of one day, weekends, and the like." (Emphasis in original). Based upon Instruction No. 6, the Administrator of Veterans Affairs concluded that individuals who were enlisted in the United States Navy, ordered home, and injured while awaiting orders to report to a Naval Training Station were not eligible for disability compensation because "'no duty could be or was performed' at the time of the incurrence of their respective disabilities." Administrator's Decision No. 376 (6-22-36). Similarly, a 1936 VA Solicitor's opinion concluded that a veteran was not engaged in active service when injured while on a ten-day pass working at his regular place of employment. 26 Op. Sol. 542 (6-13-36).

8. Subsequent decisions of the Administrator of Veterans Affairs and the VA General Counsel indicated that an individual must be under military control to be considered in "active service." Administrator's Decision No. 917 (10-10-52) addressed the issue of whether a servicemember, who was convicted and confined by civil authorities and given an undesirable discharge while in confinement, was in active service during that confinement for purposes of section 2 of the Servicemen's Indemnity Act of 1951, ch. 39, § 2, 65 Stat. 33. That decision held that, although the individual was carried on the rolls of the military forces until after transfer to a penitentiary, he was not in the active service from the date of his surrender to the civil authorities. Administrator's Decision No. 917 distinguished Administrator's Decision No. 904 (5-19-52),

² For purposes of determining entitlement to service-connected benefits under laws administered by VA, 38 C.F.R. § 3.15, "Computation of Service," excludes from "active service" any period of time which is "spent on an industrial, agricultural, or indefinite furlough, time lost on absence without leave (without pay), under arrest (without acquittal), in desertion, while undergoing sentence of court-martial or a period following release from active duty under the circumstances outlined in § 3.9 [relating to Philippine service]."

involving the same statute, which had held that a veteran who was convicted by a general court martial and was confined at hard labor for six months was not separated from active service until he was dishonorably discharged upon his release from confinement. Administrator's Decision No. 917 explained that the servicemember in Administrator's Decision No. 904 "remained under military control and was subject to the rehabilitation programs of the Regular Military Establishments," while the individual who was confined by civil authorities ceased to be under military control upon his surrender to those authorities. In Op. G.C. 4-83 (2-25-83), the General Counsel concluded that, for purposes of determining whether a veteran had wartime service for non-service-connected disability-pension purposes, the period during which the veteran was incarcerated by civil authorities immediately preceding service discharge did not constitute active service because "the veteran was not under control of military authorities at any time after" he was incarcerated.

9. VA also addressed the issue of what constitutes active service in regard to determinations about the status of Philippine veterans who were injured after they were captured and paroled by the Japanese and before they returned to the control of the United States military forces. In 95 Op. Sol. 263 (11-26-47), a Philippine veteran who served with the United States Navy was injured after release from active duty for self-preservation. During that period, the veteran mingled with the civilian population and engaged in private business. He subsequently returned to duty and was held to be entitled to pay and allowances under the Act of March 7, 1942, ch. 166, 56 Stat. 143 (1942) (commonly referred to as the Missing Persons Act), as amended by the Act of July 1, 1944, ch. 371, 58 Stat. 679 (1944), for the period between his release from active duty and his return to active duty. However, relying upon Administrator's Decision No. 746 (5-23-47), which stated that the period subsequent to the date of parole and prior to return to military control is not active service, the Solicitor held that periods during which active military duties were not performed do not constitute active service and, therefore, this veteran was not in active service when injured. See also 97 Op. Sol. 590 (4-12-48) (death occurred after veterans escaped from or alluded capture by the Japanese);

92 Op. Sol. 665 (6-24-47) (injury occurred after parole by Japanese).

10. Based on the foregoing, we conclude that the veteran in the case at issue was not in the active service at the time injury was incurred in March 1984, because, although the veteran's active duty status was subsequently extended until August 15, 1985, the veteran was not under military control, having received a discharge and returned to civilian pursuits, and, therefore, was not available to perform military duties between February 14, 1983, the original date of discharge, and August 15, 1985. Accordingly, it does not appear that service connection may be established for the veteran's disability.

HELD:

Service connection may not be established for a disability incurred following the date on which a veteran was discharged from active military duty, although the discharge was subsequently voided and full active-duty credit granted

by a Board for Correction of Military Records to a date after the date on which injury occurred, because the veteran was not engaged in active service at that time.

Mary Lou Keener