

CITATION: VAOPGCPREC 10-90
Vet. Aff. Op. Gen. Couns. Prec. 10-90

DATE: 04-30-90

TEXT:

SUBJECT: Disability pay under 37 U.S.C. § 204(g), (h) and (i)

QUESTION PRESENTED:

In view of the prohibition contained in 38 U.S.C. § 3104 (c) against payment of pension, compensation, and retirement pay to an individual for any period during which he or she receives active service pay, does compensation payable under 37 U.S.C. § 204(g), (h) and (i) to members of a reserve component of the uniformed services, who are disabled during a period of active duty or inactive-duty training, represent active service pay?

COMMENTS:

1. Statutory changes, beginning in 1986 and culminating with the passage of Public Law No. 100-456 in 1988, have substantially altered the disability pay provided for reservists FN1 in 37 U.S.C. s 204. Earlier, receipt of this type of pay was limited to reservists disabled by disease while performing active duty of more than 30 days and to those disabled by injury while performing any period of active duty or inactive-duty training. 37 U.S.C. § 204 (1985) (amended by Pub. L. No. 99-661, 100 Stat. 3875 (1986) and Pub. L. No. 100-456, 102 Stat. 1918 (1988)). The amendments to section 204 have expanded the number of possible recipients to include those disabled by disease or illness during inactive-duty training or active duty of any duration. However, it is important to note that these benefits are now offset by any nonmilitary earned income received concurrently with the military disability pay. Additional limitations on the amount a reservist may receive under subsections (g) and (h) are contained in 37 U.S.C. § 204(i). For instance, in no event may the amount exceed the amount of pay and allowances provided for a regular member of corresponding grade and length of service. Also, the pay and allowances cannot generally be paid for more than six months.

2. The similarity between this disability pay and disability severance pay is

striking. They are very similar in purpose, compensating a member during the months immediately following a period of duty during which he became disabled. See 10 U.S.C. §§ 1203 and 1212. Also, both types of pay require a calculation, with basic monthly pay used as a starting point. However, it is clear that severance pay does not represent active service pay and is not subject to the prohibition contained at 38 U.S.C. § 3104.

Instead, when Congress established this type of "special pay," it also provided for offsets of these amounts, to a large extent, against VA benefits awarded as a result of the same period of service. See 10 U.S.C. § 1174(h)(2). Congress has not included an analogous provision prohibiting duplicate payments, where disability pay to reservists is concerned. Without a specific statutory provision in section 204, or elsewhere in title 37, it must be concluded that concurrent payment is allowed, unless it would run counter to other statutory provisions, including 38 U.S.C. § 3104(c), with its broader prohibition against concurrent payment of "pension, compensation, or retirement pay" and "active service pay."

3. In this regard, we note the presence of an important companion section, 10 U.S.C. § 684 It provides that:

" A Reserve ... who because of his earlier military service is entitled to a pension, retired or retainer pay, or disability compensation, and who performs duty for which he is entitled to compensation, may elect to receive for that duty either--(1) the payments to which he is entitled because of his earlier military service; or (2) if he specifically waives those payments, the pay and allowances authorized by law for the duty that he is performing."

That provision, while not using the term "active service pay," is clearly addressing the situation under consideration. It is noteworthy, therefore, that the serviceman may continue to receive those benefits listed in 38 U.S.C. § 3104(c) if he waives the "pay and allowances authorized by law for the duty that he is performing." Under applicable rules of statutory construction, this may be viewed as a statutory definition of "active service pay," as that term is used in section 3104(c). See 2A N.J. Singer, Sutherland Statutory Construction, §§ 51.02 and 51.03 (4th ed. 1984).

4. In reviewing the existing statutory scheme, we note that "pay" is defined in title 37 to include "basic pay, special pay, retainer pay, incentive pay, retired pay and equivalent pay, but not allowances." 37 U.S.C. § 101(21). However, Public Law No. 100-456, title VI, part D, 102 Stat. 1918, 1984 (1988), when amending subsections (g), (h) and (i) of section 204, referred to these as "Benefits Relating to Incapacitation of Certain Reserve

Members in Line of Duty" and did not otherwise define the nature of these benefits. Curiously, section 204 is contained in the "Basic Pay" chapter of title 37. Even so, there is no apparent ambiguity about the status of reservists who may receive that pay. That is, if a reservist is retained on active duty during the course of an illness or while convalescing from injury, he is entitled to full pay and allowances. On the other hand, if he has been released from his short tour of active duty or inactive duty training, but continues to have residual health problems which interfere with his customary employment, he may receive disability pay, as it is now structured in section 204. See 54 Comp. Gen. Op. 33, 36 (1974) (period when reservist was entitled to pay and allowances in accordance with the provisions of 37 U.S.C. § 204 is not considered active military service).

5. Part D of title VI, Pub. L. No. 100-456, also contains an amendment to 37 U.S.C. § 4111 relating to travel allowances for dependents of a disabled reservist who is either "serving on active duty or is entitled to pay and allowances under section 204(g)." This contemporary legislative provision offers additional evidence that Congress intended for pay and allowances under section 204(g) to be something other than pay for performing active military service. See 2A N.J. Singer, Sutherland Statutory Construction, § 51.01 (4th ed. 1984).

6. We are aware, in reaching the conclusion that disability pay under 37 U.S.C. § 204 (g), (h) and (i) does not represent active service pay, that an opinion of the General Counsel in 1958 reached the opposite conclusion. That opinion held that the "sick pay" or "incapacitation pay" received by a guardsman after the expiration of a training tour during which he was injured represented "active service pay." Op. G.C. 31-58 (9-11-58). However, the nature of this disability pay has changed in several important regards since the 1950s. Examination of the two factors considered crucial to that decision demonstrates the differences dramatically. First, the General Counsel noted that the status of the guardsman involved was ambiguous. He was described by the National Guard as "absent, sick." Second, the General Counsel found that, through receipt of full pay and allowances, the guardsman was being treated exactly as would a member of the regular services who became incapacitated in the line of duty. With recent changes in the law, there is no longer ambiguity concerning the status of recipients of this disability pay. Also, reservists are no longer guaranteed full pay and allowances because of offsets for nonmilitary earned income.

7. The General Counsel opinion in 1958 led to adoption of a regulatory definition of "active service pay" which includes:

"Sick pay" or "incapacitation pay" received by a member of a reserve component who suffers injury on a training tour and continues to receive such "pay" after expiration of scheduled training pay and not in an active-duty status. 38 C.F.R. § 3.700(a)(1)(i). Obviously, in view of this opinion, that inclusion is no longer valid.

HELD:

Payments made to reservists, including members of the Army and Air Force National Guards, pursuant to the provisions of 37 U.S.C. § 204(g), (h) and (i) are in the nature of temporary disability compensation and are not intended to represent payment for duty performed, as described in 10 U.S.C. § 684. The statutes creating, and modifying, this benefit do not contain a provision prohibiting concurrent payment of these benefits with pension, VA compensation or retirement pay. See Pub. L. No. 99-661, 100 Stat. 3875 (1986) and Pub. L. No. 100-456, 102 Stat. 1918 (1988).

While previously viewed by the General Counsel as representing "active service pay" and, therefore, subject to the prohibition in 38 U.S.C. § 3104(c) against concurrent payment with other benefits, statutory changes in the nature of these payments leads us to conclude that there is no longer legal authority for that interpretation. Instead, we conclude that payments to reservists under the provisions of 37 U.S.C. § 204(g), (h) and (i) are made at a time when reservists are no longer in an "active duty" status and do not otherwise represent "active service pay." Therefore, the prohibition against concurrent payment of benefits contained in 38 U.S.C. § 3104 (c)

is not applicable to these payments.

1 The term "reservist(s)" is used throughout this opinion to mean all members of reserve components of the uniformed services, including the Army and Air Force National Guards. See 37 U.S.C. § 101(24).

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