



UNITED STATES GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C. 20548

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Released

B-191816

OFFICE OF GENERAL COUNSEL

IN REPLY REFER TO: B-191816

MAY 25 1978

The Honorable Barbara Allen Babcock
Assistant Attorney General
Civil Division
Department of Justice

Attention: LeRoy Southmayd, Jr., Attorney
Court of Claims Section

Dear Ms. Babcock:

Subject: _____ v. United States,
Court of Claims No. 407-77

Reference is made to your letter dated April 26, 1978 (file reference BAB:LS:els 154-151-78), and statutory call form of the same date, requesting a report on a petition filed April 11, 1978, in the above-entitled case, wherein plaintiff seeks to have his name placed on the disability retired list effective February 1, 1977, and receive retired pay based on such status or in the alternative, seeks readjustment pay in the sum of \$15,000.

There is no record of any claim having been filed by the plaintiff with the General Accounting Office on account of matters set forth in the petition and we have no information as to the facts of the case other than the allegations made therein.

The petition contains allegations relating to certain enumerated injuries sustained by the plaintiff in 1972 while serving on active duty in the United States Air Force as a Reserve colonel, and his release from that duty on January 31, 1977. Plaintiff contends that despite those injuries and the fact that his medical condition as a result thereof remain unabated, he was released from active duty as being physically fit. Plaintiff alleges that at the time of his release he was in fact unfit for military duty and is entitled to be retired for disability. He argues that the action by the Secretary in so releasing him as fit for duty was arbitrary, capricious and contrary to law and fact. In support of that position, plaintiff avers that effective February 1, 1977, the Veterans Administration rated him at 60 percent for degenerative arthritis.

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Plaintiff contends, in the alternative, that if the finding of fitness for duty was correct, since he had requested such retention, but which request was denied, his release was, in effect, involuntary and he is therefore entitled to readjustment pay in the amount of \$15,000.

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. Under the provisions of 10 U. S. C. 1216, the Secretary concerned has all powers, functions and duties incident to the determination of the fitness for duty of any member of the Armed Forces under his jurisdiction and the percentage of disability, if any, of any such member at the time separated. The Court of Claims has long held that since such authority is vested in the military Secretaries, it has no jurisdiction to review the administrative actions in cases involving service-connected disabilities absent cogent and clearly convincing evidence of arbitrary and capricious action. In this regard, while the facts in the case may show that plaintiff's disability was rated by the Veterans Administration at 60 percent, such rating is not binding on the Department of the Air Force. See in this connection, v. United States, Ct. Cl. No. 500-76, decided April 19, 1978, and cases cited therein.

With regard to the plaintiff's entitlement to readjustment pay should he fail in his efforts to establish disability status for retired pay purposes, 10 U. S. C. 687(a) authorizes such pay in the case of:

"A member of a reserve component * * * who is released from active duty involuntarily * * * and who has completed immediately before his release, at least five years of continuous active duty."

However, 10 U. S. C. 687(b) provides that subsection (a) provisions do not apply to a member who:

"(6) upon release from active duty, is immediately eligible for disability compensation under a law administered by the Veterans Administration and who elects to receive that compensation."

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That subsection goes on to state that a member covered by clause (6) may receive a readjustment payment and disability compensation "if an amount equal to 75 percent of the readjustment payment is deducted from the disability compensation."

Thus, it would appear that if the plaintiff had the requisite minimum continuous years of active service and was actually found to have been involuntarily released from active duty, the before-quoted language could be interpreted by the court as authorizing payment of readjustment pay to the extent authorized in 10 U. S. C. 687(b).

No record has been found in this Office of any claim or demand which might serve as a basis for a cross-action against the plaintiff in this case.

Further, inquiry concerning this matter may be addressed to Mr. A. James Riedinger, telephone number 275-5422.

Please keep us advised of the progress of this case.

Sincerely yours,

~~Edwin J. Monsma~~

Edwin J. Monsma
Assistant General Counsel