

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

DEWITT DICKSON,
Appellant,

v.

OFFICE OF PERSONNEL MANAGEMENT,
Agency.
(CSA 2 634 621)

DOCKET NUMBER
DC831M8610338

DATE: JUL 21 1988

Burton Dix Williams, Esquire, Washington, D.C., for the
appellant.

Raymond J. Kirk, Washington, D.C., for the agency.

BEFORE

Daniel R. Levinson, Chairman
Maria L. Johnson, Vice Chairman

OPINION AND ORDER

Appellant has filed a petition for review of the initial decision issued August 13, 1986, which sustained the reconsideration decision of the Office of Personnel Management (OPM), finding an overpayment because OPM had erroneously credited appellant's military service in computing his retirement annuity. Pursuant to the Board's order of March 30, 1987, additional submissions have been

filed by OPM, the Department of Defense (DOD) and the appellant.¹

For the reasons set forth below, the Board DENIES the petition for failure to meet the criteria for review under 5 C.F.R. § 1201.115. The Board REOPENS this case on its own motion under 5 U.S.C. § 7701(e)(1)(B).

BACKGROUND

After enlisting in the the U.S. Army in July 1943, appellant served as a Flight Officer until his discharge because of physical disability on December 20, 1945. Agency File, Tab 3, Application for Immediate Retirement, Sch. A. Appellant was subsequently employed by the Federal Aviation Administration as an Air Traffic Control Specialist, retiring from that position on June 30, 1983. *Id.*

In applying for immediate retirement, appellant had indicated on his retirement application that his military-retired pay was not for "a disability incurred in combat or caused by an instrumentality of war." *Id.* OPM nevertheless credited his military service in computing his civil-service-retirement (CSR) annuity payments, despite the provisions of 5 U.S.C. § 8332(c) prohibiting the inclusion of such military service, unless the military-retired pay is

¹ In its March 30, 1987 order, the Board requested briefs from OPM, the Department of Defense (DOD) and appellant on the following issues: (1) Whether the Board has authority to review a DOD determination concerning military retirement pay where that determination has an impact on an individual's retirement under the civil service retirement system; and (2) assuming that the Board has such authority, whether appellant's service-connected disability was caused by an instrumentality of war within the meaning of 5 U.S.C. § 8332(c)(2)(A)(ii).

based on that type of disability.² *Id.* However, when OPM received verification of appellant's military status from the Department of Defense (DOD), indicating that his military-retired pay was not based on such disability, OPM recomputed appellant's CSR annuity payments, without including his military service, based on that certification. Agency File, Tab 3, Nov. 6, 1985 Letter and BRI Form 46-143A, "Verification of Military Retired Pay Status." It then notified appellant that it had overpaid him by \$3,404.00 for the period from July 1, 1983, through December 30, 1985, because he was receiving military-retired pay, which he had not waived, "of a type which bars credit for military service in [his] civil service computation." *Id.*, Nov. 6, 1985 Letter.

In his reconsideration request, appellant stated that he was "receiving military retired pay because of an injury received while on active duty by an instrumentality of war namely abnormal sound through headphones which caused

² It has been held that the purpose of this provision is to eliminate dual credit for military service for which retirement pay has been awarded, except if the pay was awarded for a disability incurred in combat or as the result of an instrumentality of war. See generally *Bailey v. United States*, 511 F.2d 540 (Ct. Cl. 1975); *Jeffrey v. Office of Personnel Management*, 28 M.S.P.R. 81, 84 (1985), *rev'd on other grounds sub nom. Horner v. Jeffrey*, 823 F.2d 1521 (Fed. Cir. 1987). Analogous language is found elsewhere in Title 5. Specifically, such language is found at 5 U.S.C. § 3501(a)(3)(A)(i)-(ii) (definition of preference eligible); 5 U.S.C. § 5532(d)(1)(A)-(B) (exemption from dual salary payment prohibitions); 5 U.S.C. § 6303(a)(3)(A)(i)-(ii) (exemption from limitations on dual service credit for annual leave purposes). For a discussion of the legislative origins and general purpose of these provisions, see 50 Comp. Gen. 480 (1971); 48 Comp. Gen. 219 (1968).

permanent deafness." Agency File, Tab 3, Request for Reconsideration. In its reconsideration decision, OPM affirmed its prior decision on the basis that its inclusion of military service was erroneous because appellant's retired pay was awarded for conditions other than those specified in 5 U.S.C. § 8332(c).

On appeal to the Board's Washington, D.C., Regional Office, appellant alleged that he was injured serving as a Flight Officer aboard a fighter plane on a training mission in the continental United States in early 1945. Appellant thus argued that his disability was caused by an instrumentality of war as provided by 5 U.S.C. § 8337(c) and that his military service was properly credited. Appellant did not challenge OPM's computation of the overpayment or allege entitlement to a waiver of the overpayment amount. In her initial decision, the administrative judge sustained OPM's reconsideration decision, finding that, under the circumstances, the airplane was not an instrumentality of war and that OPM's reliance upon DOD's certification was not misplaced.

In his petition for review, appellant reiterates his allegation that his injury was caused by an instrumentality of war. In its submission, DOD argues that the Board should accept DOD's certification as to the basis for appellant's military-retired pay because it is a purely military matter outside of the Board's authority to determine. Further noting its position that the Board is without jurisdiction

over the matter, it has declined to comment on the instrumentality of war issue.

Similarly, OPM argues that it performs "a strictly administrative function in applying the DOD determination to the facts affecting the retirement controversy," and that it has no "discretion" insofar as DOD's determination is concerned. It reasons that, since DOD's decision is outside the purview of title 5 of the United States Code, neither the Board nor OPM has jurisdiction to review the underlying military-retired pay determination or the certification provided by DOD. In any event, it contends that appellant's injury cannot be considered to have been caused by an instrumentality of war since it resulted from the operation of a radio headset. In contrast, appellant argues that he was injured as a result of an instrumentality of war because he was on a training mission when the mishap occurred and that the Board has the authority to review the matter under the retirement statute.

ANALYSIS

The Board lacks jurisdiction to review DOD's certification regarding appellant's military-retired pay status.

We find that the Board does not have the authority to review DOD's determination as reflected by its certification to OPM of appellant's military-retired pay status. That determination essentially involves a purely military matter entrusted by statute to the secretary of the appropriate military department. Indeed, under 10 U.S.C. § 1552(a), any

administrative remedy that appellant may have to challenge DOD's determination lies with the service secretary.

Section 1552(a) authorizes the secretary of a military department to correct any military record of that department "when he considers it necessary to correct an error or remove an injustice." The statute further provides that, "except when procured by fraud, a correction made under this section is final and conclusive on all officers of the United States."³ See 62 Comp. Gen. 406, 408 (1983). Since military discharges based on disability are matters of military record, such authority encompasses the type of military discharge effected. Further, since, under 10 U.S.C. § 1201, only "the Secretary may retire" military personnel because of a physical disability incurred while in the armed services, the authority to determine appellant's military-retired status, including the type and cause of his disability, must be deemed to be coextensive with that authority and reside within the discretion of the service secretary. See *Kalista v. Secretary of Navy*, 560 F. Supp.

³ Section 1552(b) provides that a request for correction must be made before October 26, 1961, "or within three years after [the affected individual] discovers the error or injustice, whichever is later," and that this filing period may be extended in the "interest of justice." It is well settled that there is a right of judicial review and that a Federal court may reverse the administrative determination if it is arbitrary, capricious, or not supported by substantial evidence." *Goyen v. Marsh*, 775 F.2d 1303, 1306 (5th Cir. 1985). See also *Weide v. United States*, 4 Cl. Ct. 432, 435 (1984), *aff'd mem.*, 765 F.2d 157 (Fed. Cir.), cert. den. 106 S. Ct. 74 (1985); *Ashe v. McNamara*, 355 F.2d 277, 281 (1st Cir. 1965). The military departments have generally established correction boards to adjudicate such requests. See generally *Goyen* at 1305, n.2.

608, 615 (D. Col. 1983) ("Congress ha[s] entrusted primary responsibility for record corrections to the service secretaries acting through corrections boards").

That this authority resides exclusively with service secretaries has also been recognized by the Comptroller General in construing U.S.C. § 5532, relating to reductions in retired or retainer pay for retired members of the uniformed services employed in civilian positions:

The Secretary of the military service concerned, and as delegated by him, has all powers, functions and duties incident to the determination of fitness of any member of the Armed Forces under his jurisdiction. This includes authority to determine the nature and cause of a disability, if any, of a member at the time his active military service is terminated.

See 55 Comp. Gen. 961, 964 (1976).

We find that this conclusion is also supported by the Board's lack of jurisdiction to examine matters solely affecting the military community.⁴ The determination of the fitness of a member of the armed forces to perform the duties of his or her military office involves an internal military matter outside the Board's review authority, even when the employee's retention of his civilian position is affected. For example, in *Schaffer v. Department of the Air Force*, 9 M.S.P.R. 305, 307-09 (1981), the Board declined to

⁴ It is a well-settled principle of law that "the military constitutes a specialized community governed by a separate discipline from that of the civilian." *Orloff v. Willoughby*, 73 S. Ct. 534, 539-540 (1953); see also *Goldman v. Weinberger*, 106 S. Ct. 1310, 1312-1313 (1986).

consider the merits of the employee's loss of membership in the active reserve for being overweight. Similarly, in *Buriani v. Department of the Air Force*, 777 F.2d 674, 677 (Fed. Cir. 1985), and *Zimmerman v. Department of the Army*, 755 F.2d 156, 157 (Fed. Cir. 1985), the court held that the Board does not have review authority over underlying military personnel decisions in connection with an appealable agency action.

Therefore, we conclude that OPM properly relied upon DOD's certification and that the Board is without authority to review DOD's underlying determination of appellant's military-retired status. See *Bailey v. United States*, 511 F. 2d 540, 544 n.4 (Ct. Cl. 1975) (since the employee never petitioned the corrections board to change the character of his military retirement, the court assumed that he was not retired for a disability incurred in combat or caused by an instrumentality of war, but was retired pursuant to 10 U.S.C. § 8911, as found by OPM).

ORDER

Accordingly, the initial decision is AFFIRMED as MODIFIED by this Opinion and Order, and OPM's reconsideration decision is SUSTAINED. This is the final Order of the Board in this appeal. See 5 C.F.R. § 1201.113(c).

NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction.


See 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

Washington, D.C.


Robert E. Taylor
Clerk of the Board