

B-256943

August 15, 1994

Mr. Michael A. James, Manager  
Equipment Concentration Site #15  
1900 Roberts Blvd., Bldg. 470  
Fort Chaffee, Arkansas 72905-0470

Dear Mr. James:

This responds to your letters of March 21 and April 26, 1994, and supporting material, appealing our Claims Group's settlement Z-2868827, March 17, 1994, which denied your claim for retroactive environmental differential pay due to exposure to asbestos. Your claim had been previously denied by your employer, the Army.

Our review of the Claims Group's action indicates no substantial error of fact or law, and your appeal presents nothing to change the conclusion in the Claims Group's settlement that your claim should be denied.

The Army and the union negotiated a settlement regarding the payment of retroactive environmental differential pay to employees at your duty station, Fort Chaffee. Although you were not a member of a collective bargaining unit at that time nor are you currently a member of a collective bargaining unit, the Army administratively decided to also apply the terms of the settlement to non-bargaining unit employees, including you.

We believe that the Army has shown that the agreement concerning the payment of retroactive environmental differential pay, which was applied to your claim, did in fact consider the positions you occupied at Fort Chaffee from 1981 to 1984 and from 1984 to 1988 and found that those positions did not warrant the payment of environmental differential pay. You state, however, that certain temporary employees who worked at Fort Chaffee in similar positions at the same time that you did were authorized

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<sup>1</sup>We have jurisdiction to settle your claim since you are not a member of a collective bargaining unit subject to negotiated grievance procedures covering the matter. See Cecil E. Riggs, et al., 71 Comp. Gen. 374 (1992).

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payment of environmental differential pay, while you, a permanent employee, were not authorized such pay.

The Army has advised us that the determinations as to temporary and permanent positions were made by different Personnel Officers, who although using a similar process to evaluate a position's exposure to asbestos, gathered somewhat different medical evidence, which caused a different result. The Personnel Officer having jurisdiction over the permanent employees at Fort Chaffee, including yourself, was responsible for negotiating the terms of the agreement that was then administratively applied to your case. He indicates that the medical evidence he gathered properly dictated the result in the negotiated agreement, which was applied to your case. Whether the other Personnel Officer's determination to allow a limited amount of such pay for the temporary employees was equally well supported we do not know.<sup>2</sup> However, as the Claims Group correctly informed you, our Office will not substitute its judgment for that of the agency in determining entitlement to environmental differential pay unless that judgment was clearly wrong, arbitrary, or capricious. We do not believe that you have shown that the Army's exercise of its judgment in your case was clearly wrong, arbitrary, or capricious.

Accordingly, we sustain the denial of your claim.

Sincerely yours,

/s/ Seymour Efros  
for Robert P. Murphy  
Acting General Counsel

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<sup>2</sup>We note that the other Personnel Officer found that the temporary position warranted only a 5% recovery rate rather than the 28% rate you claim.

**Date:** August 15, 1994  
**To:** Director, Claims Group/OGC - Sharon S. Green  
**From:** Acting General Counsel - Robert P. Murphy  
**Subject:** Michael A. James - Hazardous Duty Pay for Exposure  
to Asbestos (B-256943) - Z-2868827

Returned is Claims file No. Z-2868827 and a copy of letter B-256943 of today's date, affirming the Claims Group's denial of the claim for hazardous duty pay.

Attachments

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DIGESTS

1. Although GAO is precluded from taking jurisdiction of a claim from "members of a collective bargaining unit" on matters which are subject to negotiated grievance procedures under Cecil E. Riggs, et al., 71 Comp. Gen. 374 (1992), GAO may take jurisdiction of a claim from an employee who is not a member of a bargaining unit and who was not subject to negotiated grievance procedures even though the subject of the claim was a matter that was subject to negotiated grievance procedures covering other employees at the same duty station.

2. An agency has the primary responsibility in determining entitlement to environmental differential pay, and GAO will not substitute its judgment for that of the agency in making such determinations unless that judgment was clearly wrong, arbitrary, or capricious. Where the agency personnel officer, based on medical evidence, determined a permanent employee's position did not warrant such pay, GAO will not disturb the determination merely because a different personnel officer determined that temporary employees in similar positions warranted a limited amount of such pay.