

**GAO**

United States General Accounting Office  
Washington, DC 20548

Office of  
General Counsel

In Reply  
Refer to:

B-199678  
August 27, 1980

The Honorable Alice Daniel  
Assistant Attorney General  
Civil Division  
Department of Justice

Attention: Judith Cohn, Esq.  
Commercial Litigation Branch

Dear Ms. Daniel:

Subject: Vernie Hollins, Conservator, on behalf  
of Theophilus A. Hearn, an Incompetent  
Person v. United States Court of Claims  
No. 364-80C (Your file AD:DMC:JC:nlp  
154-364-80C)

Reference is made to letter dated July 17, 1980, and statutory call form of the same date requesting a report on a petition filed July 14, 1980, in the above-entitled case wherein plaintiff, as conservator for an incompetent person, seeks judgment for an amount equal to the disability retired pay the incompetent would receive for his grade and years of service, from October 20, 1972, to the date of judgment, correction of his service records to show his placement on the permanent disability retired list of the Navy with a disability rating of 100 percent and monthly disability retired pay thereafter.

There is no record of any claim having been filed by or for the incompetent 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 those alleged therein. We assume the Department of the Navy and, since the petition mentions veterans benefits, the Veterans Administration are each providing your office with full reports on the matter.

According to the petition, the incompetent person enlisted in the United States Naval Reserve in 1972 for a 2-year period. Under the enlistment contract



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he was to perform an initial period of recruit training (active duty for training) beginning May 3, 1972. Upon completion of that training he would be released to inactive duty training for a period equal to the number of days of leave earned and would thereafter be further ordered to active duty.

Apparently, while in the inactive duty status following release from recruit training on July 14, 1972, the incompetent allegedly suffered a psychotic breakdown, which apparently has permanently incapacitated him. It is contended that the Navy diagnosed his condition as a mental disorder and recommended that he be administratively separated because of an "erroneous enlistment" on the basis that his condition antedated his entry into the service. As a result, he was discharged from the Navy on October 19, 1972, and denied retirement benefits on the basis that all the requisites for physical disability retirement had not been met. In turn, the Veterans Administration denied him benefits on the ground that his disability was not incurred or aggravated by military service.

The thrust of the plaintiff's allegation seems to be that the incompetent has been caught between the law and regulations governing retirement from the armed forces and those governing benefits from the Veterans Administration. It is the plaintiff's view that the incompetent should be entitled to retirement from the Navy with a disability rating of 100 percent.

In spite of this specific request for relief under law, nowhere in the petition is it asserted or even suggested that any of the administrative actions taken and determinations made by service medical authorities or boards, including the Correction Board, were improper, erroneous or contrary to the law or facts, or that there is a legal basis upon which retired pay or veterans benefits are due. The relief sought seems to be based strictly on equitable grounds. That is, it is asserted that the law has failed to cover all

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contingencies and that which the law has failed to do, should be forced into the mold of the law by the court.

An individual's entitlement to be retired from one of the armed forces and receive retired pay as a result thereof, are matters strictly governed by law. Since it appears that the incompetent had been serving in an ordered period of active duty for training in excess of 30 days as a member of the Naval Reserve, then by virtue of U.S.C. 1215, such provisions governing retirement or separation from the armed forces for physical disability, to whatever extent they would be applicable to his situation, are those contained in 10 U.S.C. 1201 (disability retirement) and 10 U.S.C. 1203 (disability separation), with the power to determine these entitlements vested in the Secretaries under 10 U.S.C. 1216. The Court of Claims has long held that since such authority is vested in military Secretaries, it has no jurisdiction to review administrative action in cases involving service connected disabilities, absent cogent and clearly convincing evidence of arbitrary and capricious action. See in this connection, Rutherford v. United States, Ct. Cl. No. 500-76, decided April 19, 1978.

As it would appear to relate to the plaintiff's case, the key language of section 1201 and 1203 is that the member must be entitled to basic pay at the time of retirement; that a Secretarial determination is made that the member is unfit to perform the duties of his grade, rank or rating; and that there is a finding that the physical disability was incurred while the member was entitled to basic pay.

The petition does not contain an allegation that the incompetent was in a basic pay status (active duty) when the psychotic breakdown occurred or that it originated at any time during the period of active duty training. Active duty for training is specifically included under the definition of active duty in 10 U.S.C. 101 (22), but inactive duty training is not

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included. See 10 U.S.C. 101(31)). Also through the series of boards, culminating with the Board for Correction of Naval Records, it was administratively concluded that there was no basis to find that the incompetent person was unfit for duty at the time he was released from active duty for training. Neither the correctness of this finding nor the statement of the Chief of the Bureau of Medicine and Surgery that the origin of the condition antedated his entry into the service, has been challenged by the plaintiff. On the assumption that the circumstances of the case as stated in the petition are correct and the plaintiff does not interject as an issue the allegation of arbitrary and capricious administrative action regarding a material fact, it would appear that there is no legal basis upon which the requested relief may be granted under those or any other retirement provisions.

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

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

Sincerely yours,

*David F. Riedinger*

*for* Edwin J. Monsma  
Assistant General Counsel

*Riedinger, David F.*