



20039 *Riedinger*
UNITED STATES GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C. 20548

OFFICE OF GENERAL COUNSEL

November 13, 1981

B-192320

The Honorable J. Paul McGrath
Assistant Attorney General
Civil Division
Department of Justice

Attention: George M. Beasley III, Esq.
Commercial Litigation Branch

Dear Mr. McGrath:

Subject: Jerry Houston Stone v. United States
Ct. Cl. No. 580-81C

Reference is made to your statutory call form dated September 30, 1981, requesting a report on a petition filed September 24, 1981, in the above-entitled case wherein plaintiff seeks to have his name placed on the disability retired list of the United States Army and receive retired pay based on that status.

There is no record of any claim having been filed by the plaintiff in the General Accounting Office on account of matters set forth in the petition and we have no information about the facts of the case other than those alleged therein. We presume that the Department of the Army is providing your office with a full report on the matter.

The petition contains allegations relating to plaintiff's service in the United States Army as an enlisted member and his discharge therefrom in November 1975, while in civil confinement. The thrust of his allegations are that as a result of his service in Vietnam he was suffering from Post Traumatic Stress Disorder which produced a serious physical and mental disability in him; that such condition was at a minimum a substantial contributing cause of the misconduct which resulted in his civilian conviction and confinement; and that the Army knew or should have known by April 29, 1971, that he was a danger to himself or others and should have taken action to prevent those acts which gave rise to his confinement. Further, that he was neither informed of his disability nor of his right to a Physical Evaluation

019223

B-192320

Board (PEB) hearing and that if a hearing had been held he would have been retired for disability not later than his discharge on November 13, 1975.

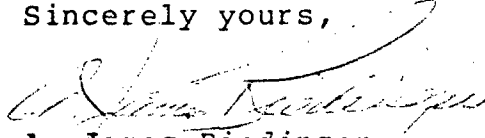
The right of an individual to be retired from one of the Armed Forces and receive pay as a result thereof, are matters strictly governed by law. Such provisions governing retirement or possible separation from the Armed Forces for physical disability, to whatever extent they would be applicable to plaintiff's 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 military Secretaries under 10 U.S.C. 1216. The Court of Claims has long held that because of this statutorily vested authority in the Secretaries, it has no jurisdiction to review administrative action in cases involving discharges or retirement in the absence of cogent and clearly convincing evidence of arbitrary and capricious action. See, in this connection, Rutherford v. United States, 216 Ct. Cl. 163 (1978).

While the plaintiff alleges total responsibility on the part of the Army for his actions, thereby implying equal lack of responsibility on his part, it is impossible to analyze the basis upon which he predicates entitlement, since other than the assertion that he was not afforded a PEB, he fails to specify what, if any, actions the Army should have taken that they did not take. Therefore, if, after you have received the report from the Army, we can provide further assistance in this matter, please contact the undersigned at telephone 275-5422.

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.

Collateral to the present petition, the plaintiff filed a petition in the Court of Claims in 1978 (Ct. Cl. 292-78), to recover active duty pay and allowances during the period May 2, 1971, through November 13, 1975, the period during which he was in civil confinement. In this regard, see our litigation report to your office (B-192320, August 13, 1978).

Sincerely yours,


A. James Riedinger
Senior Attorney