

Department of
Veterans Affairs

Memorandum

O.G.C. Precedent Opinion 28-92

Date: December 23, 1992

From: General Counsel (022)

Subj: Determination of Veteran's Pay Grade--
[REDACTED]

To: Chairman, Board of Veterans' Appeals (011Q)

1-5
Do not copy!

QUESTION PRESENTED:

Whether the term, "pay grade," as used in the determination of the veteran's pay grade under 38 U.S.C. § 1302(b)(1), includes the higher grade of a veteran in a reserve component, where the military service department has certified that the veteran held both the rank of "staff sergeant" on active duty and "major" in a reserve component when the veteran was released from active duty under conditions other than dishonorable?

COMMENTS:

1. In brief, the record shows that the veteran served on active military duty from September 1940 to September 1941; from May 1942 to March 1946; and from December 1950 to June 29, 1965, when he was honorably discharged and awarded disability retirement for carcinoma of the stomach. During this time, the veteran also had service in a reserve component. 1/ When the veteran was honorably discharged his last active duty pay grade held was E-5 based on his rank of staff sergeant. 2/ The veteran died in May 1966 from carcinoma of the stomach. In June 1966, the VA regional office (VARO) determined that the death was service-connected and awarded the surviving spouse dependency and indemnity compensation (DIC) based on the Department of the Air Force (DAF) certification that the veteran's last active rank was staff sergeant, in the pay

38 USC 1302(b)(1)

1/ 38 U.S.C. § 101(27) defines the term reserve component.

2/ Pay grade and rank are used interchangeably in this opinion, although pay grade usually corresponds to the O-1 to O-10 and W-1 to W-4 designations for military service officers and the E-1 to E-9 designations for enlisted servicemembers. The military services use the pay grade designations to differentiate the officer and enlisted status and the level of rank of their servicemembers. Tables which set forth the monthly rate of DIC utilize pay grade designations. See 38 U.S.C. § 1311(a).

x 1-5F Words & phrases: pay grade
x 9 Dependency compensation - DIC



Chairman, Board of Veterans' Appeals (011Q)

grade of E-5. In February 1967, the DAF certified that captain was the highest grade held by the veteran on active duty for six months or more. As a result of the surviving spouse's efforts to have the DAF correct its certification, the DAF, in a May 1989 letter, certified that for purposes of 38 U.S.C. § 402(d) (redesignated § 1302(d)), the veteran's highest pay grade in which he served for more than six months while on active duty was captain and for purposes of 38 U.S.C. § 421 (redesignated § 1321), that "he was serving on active duty in the grade of staff sergeant, was a major in the Air Force Reserve, and retired in the grade of major," at the time the veteran was retired for disability. The DAF indicated in its May 1989 letter that it was not its purpose to determine whether the surviving spouse's DIC should be based on the veteran's pay grade of staff sergeant, captain or major under the provisions of 38 U.S.C. § 402(b)(1) (redesignated § 1302(b)(1)). The Board of Veterans' Appeals issued several remand orders to the VARO to develop and review the surviving spouse's claim that she is entitled to DIC based on the veteran's grade of major, as certified by the DAF. In December 1991, the VARO determined that the veteran's pay grade was captain and reasoned that VA was bound by the service department's certification under 38 U.S.C. § 402(d) (redesignated § 1302), that the veteran had served on active duty in the rank of captain for more than six months. The VARO did not indicate that it had made a determination of pay grade pursuant to 38 U.S.C. § 402(b)(1).

2. For purposes of clarification, we interpret the question asked in your request for an opinion as stated above. For the reasons discussed below, we conclude that, the term, "pay grade," as used in the determination of the veteran's pay grade under 38 U.S.C. § 1302(b)(1), does not include the higher grade of a veteran in a reserve component, where the military service department has certified that the veteran held both the rank of "staff sergeant" on active duty and "major" in a reserve component when the veteran was released from active duty under conditions other than dishonorable.

3. Section 1310 (formerly section 410) of title 38, United States Code, authorizes payment of dependency and indemnity compensation (DIC) to the surviving spouses of certain deceased servicemembers and veterans. Payments of DIC are made to the surviving spouse at graduated rates based on the military pay grade of the deceased servicemember or veteran. 38 U.S.C. § 1311(a) (formerly 411(a)); 38 C.F.R. § 3.5(e)(1). Section 1302(b)(1) (formerly section 402(b)(1)) of title 38, United States Code, provides the method for determining the military pay grade of a veteran who did not die in the active military, naval, or air service. Section 1302(b)(1) provides that such veteran's pay grade shall be determined as of "the time of such veteran's last discharge or release from active duty under conditions other than dishonorable." Upon

Chairman, Board of Veterans' Appeals (011Q)

request of the Department of Veterans Affairs (VA), the Secretary of the military service department shall certify the pay grade of the deceased veteran for purposes of death benefits under title 38, United States Code, Chapter 13. 38 U.S.C. § 1321 (formerly § 421). The certification of the Secretary of the military service department is binding on VA. 38 U.S.C. § 1321; 38 C.F.R. § 3.5(e)(2). Section 1302(d) (formerly section 402(d)) of title 38, United States Code, provides that a veteran's pay grade is based on the highest pay grade attained by the deceased veteran in service if the veteran has satisfactorily served in that grade on active duty for six months or more and any subsequent discharge or release from active duty was under conditions other than dishonorable. The determination whether such a veteran has satisfactorily served on active duty for six months or more in a higher pay grade shall be made by the Secretary of the department in which the higher pay grade was held. 38 U.S.C. § 1302(d) (formerly § 402(d)). The certification by the service department of the veteran's pay grade under 38 U.S.C. § 1302(d) is binding on VA. 38 U.S.C. § 1321; 38 C.F.R. § 3.5(e)(2). Additionally, the certification of the veteran's pay grade under 38 U.S.C. § 1302(b)(1) is binding on the Department of Veterans Affairs. 38 U.S.C. § 1321; 38 C.F.R. § 3.5(e)(2).

4. In this case, the determination that "captain" was the highest pay grade in which the veteran satisfactorily served on active duty for six months or more was made by the DAF and certified to VA in accordance with 38 U.S.C. § 1302(d). See 38 C.F.R. § 3.5(e)(2). The VARO considered itself bound by this determination pursuant to 38 U.S.C. § 1302(d) and paid the surviving spouse's DIC on the basis of the veteran's pay grade of captain. See 38 U.S.C. 1311(a); 38 C.F.R. § 3.5(e)(1). There is no dispute that the veteran's pay grade of captain was properly determined under the provisions of section 1302(d). However, the determination of the veteran's pay grade under section 1302(d) is necessary only when that pay grade is higher than the pay grade determined under section 1302(a) or 1302(b). See 38 U.S.C. § 1302(d).

5. The surviving spouse contends that under section 1302(b)(1), the VA must determine that the veteran's pay grade is "major" based on the certification made by the DAF, pursuant to section 1321, that the veteran's pay grade at the time of his honorable discharge was both "staff sergeant" on active duty and "major" in a reserve component and that the veteran's pay should be determined based on the higher pay grade of major. See, e.g. Lowell, 158 F. Supp. 704, 707 (Ct. Cl. 1958) ("there is nothing inconsistent about an officer holding or serving in a permanent rank and at the same time performing active duty in a different temporary rank"). Consideration of the question raised in your request for an opinion requires an interpretation of whether the term "pay grade," as it is used in section 1302(b)(1) includes

Chairman, Board of Veterans' Appeals (011Q)

the higher pay grade of a veteran in a reserve component at the time the veteran was released from active duty under conditions other than dishonorable.

6. Title 38, United States Code, does not define the term "pay grade" as used in Chapter 13. Language referring to the term "pay grade" in Chapter 13 was first introduced by Pub. L. No. 91-96, 83 Stat. 144 (1969), which established the DIC program of uniform rates based on the "pay grade" of the deceased veteran. Prior to Pub. L. No. 91-96, Pub. L. No. 84-881, 70 Stat. 957 (1956) had established a program in which DIC was received by surviving spouses at rates determined by a formula related to the "basic pay" of the serviceman's rank and length of service. H.R. Rep. No. 91-538, 91st Cong., 1st Sess. (1969), reprinted in 1969 U.S.C.C.A.N. 1192. 3/ By devising a formula in which the surviving spouse's DIC related to the veteran's "basic military pay," Congress intended that the monthly DIC rates would increase as the servicemember's basic pay was increased, thereby providing an incentive for the servicemember to make the Armed Forces a career, and also meeting the rising costs of living. Id. at 1193. Pub. L. No. 84-881 §§ 101(10)(A), 101(11)(B) defined the term "basic pay" and provided the meaning of the term for purposes of surviving spouse DIC. Sections 101(10)(A) and 101(11)(B) provided in pertinent part that:

(10)(A) "Basic pay" means the monthly pay prescribed by section 201(a), 201(e), 201(f) or 508 of the Career Compensation Act of 1949, as may be appropriate, for a member of a uniformed service on active duty. [footnotes of the Career Compensation Act of 1949 sections have been omitted] 4/

(11)(B) With respect to a deceased member or former member of a uniformed service who did not die on active

3/ The definition of the term "basic pay" and the provision which applied the term for purposes of DIC were retained in the consolidation into title 38, United States Code, of all the laws administered by the Department of Veterans Affairs. Veterans' Benefits Act of 1958, Pub. L. No. 85-857, § 401(1), 402(b)(1), 72 Stat. 1105.

4/ The cited sections of the Compensation and Career Act of 1949, ch. 681, 63 Stat. 802 (codified as amended in title 37, United States Code) prescribe the pay grades for all service personnel and include, in a single sum the amount a service person is entitled to according to the grade or rating and length of service. S. Rep. No. 733, 81st Cong., 2d Sess. (1949), reprinted in 1949 U.S.C.C.A.N. 2089, 2094.

5.

Chairman, Board of Veterans' Appeals (011Q)

duty, active duty for training, or inactive duty training, the term "basic pay" for purposes of title II [Dependency and Indemnity Compensation] means the basic pay (as defined in paragraph (10)) prescribed on January 1, 1957, or on the date of his death (whichever is the later date) for a member of a uniformed service on active duty of the same rank (with the same cumulative years of service for purposes of pay) as that of the deceased member or former member of a uniformed service on the date of his last discharge or release from active duty under conditions other than dishonorable

7. The legislative history of Pub. L. No. 84-881 emphasizes the importance the term "basic pay" has in determining what shall be deemed basic pay for purposes of DIC. S. Rep. No. 2380, 84th Cong., 2d Sess. (1956), reprinted in 1956 U.S.C.C.A.N. 3976, 3984. It seems clear from the legislative history of the DIC program implemented under Pub. L. No. 84-881 that one of the important factors in determining "basic pay" was the "pay grade" held by the servicemember when the servicemember was discharged or released from active duty. The term "pay grade" used for the determination of "basic pay" under the Pub. L. No. 84-881 DIC program is the same as the term "pay grade," which the DIC program established under Pub. L. No. 91-96 requires VA to determine under the provisions of 38 U.S.C. § 1302.

8. Reference to the legislative history of a prior statute on a related subject is a well-established practice of statutory interpretation. See 2A N. Singer, Sutherland on Statutory Construction § 48.03 (4th ed. 1984). In this case, the legislative history of the prior statutes which defined the term "basic pay" and determined the meaning of the term for purposes of DIC does not provide support for the interpretation that the term "pay grade" as used in 38 U.S.C. § 1302(b)(1) includes the pay grade of a veteran in a reserve component. There is no indication in the legislative history of either Pub. L. No. 91-96 or Pub. L. No. 84-881 that Congress intended that the meaning of the terms "basic pay" or "pay grade" include a higher rank held by a veteran in a reserve component as the basis for the pay grade determination under 38 U.S.C. § 1302(b)(1).

9. We note that the cases cited by the surviving spouse do not support her claim that under section 1302(b)(1), the term "pay grade" should be interpreted to include the veteran's higher rank of major in a reserve component. The court in the cited cases interpreted the disability retirement pay provisions of the Compensation and Career Act of 1949 and concluded that Congress intended that a servicemember who held both a temporary rank in which he was actually serving and also a higher permanent reserve

Chairman, Board of Veterans' Appeals (011Q)

rank at the time of retirement was entitled to the higher of the two ranks, for purposes of computing the servicemember's disability retirement pay. Tracy v. United States, 142 F. Supp. 943 (Ct. Cl. 1956); Lowell v. United States, 158 F. Supp. 704 (Ct. Cl. 1958); Budd v. United States, 153 F. Supp. 712 (Ct. Cl. 1958). The court in the cited cases bases its interpretation of the language in the Career Compensation Act of 1949 on terms that are not present in section 1302(b)(1). Accordingly, there is no justification for adhering to the holdings in the cited cases.

10. "[E]ach part or section [of a statute] should be construed in connection with every other part or section so as to produce a harmonious whole." Talley v. Derwinski, 2 Vet. App. 282, 286 (1992) (quoting 2A N. Singer, Sutherland on Statutory Construction § 46.05 (4th ed. 1984)). 38 U.S.C. § 1302(b)(2), addresses the determination of pay grades of veterans in reserve components who die from a service-connected disability incurred during active duty for training or inactive duty training after they are discharged or released from active duty under conditions other than dishonorable. "When the same word or phrase is used in different parts of a statute, we presume that the word or phrase has the same meaning throughout." Boyer v. Derwinski, 1 Vet. App. 531, 534 (1991) (quoting S & M Investment Co. v. Tahoe Regional Planning Agency, 911 F.2d 324, 328 (9th Cir. 1990)). Under section 1302(b)(2), such veterans' pay grades are determined by their rank during active duty for training or inactive duty training. However, if such veterans are discharged or released from such duty under conditions other than dishonorable and later enter active duty, the rank during this later active duty will be the rank upon which the veterans' pay grades for section 1302(b)(2) purposes will be determined. Clearly, section 1302(b)(2) manifests the legislative intent that in such situations the active duty rank be used for purposes of determining the veteran's pay grade, rather than the higher rank of a veteran in a reserve component. In construing section 1302(b), to produce a harmonious whole, the term pay grade as used in section 1302(b)(1) should be given the same interpretation as the term is used in section 1302(b)(2). Thus, in view of the legislative scheme of 38 U.S.C. § 1302(b), we conclude that the veteran's active duty rank must be used rather than the veteran's reserve rank in determining the veteran's pay grade under 38 U.S.C. § 1302, unless under section 1302(b)(2), the veteran's service-connected disability was incurred during active duty for training or inactive duty training. We find that this interpretation is consistent with the language of section 1302 and its legislative history.

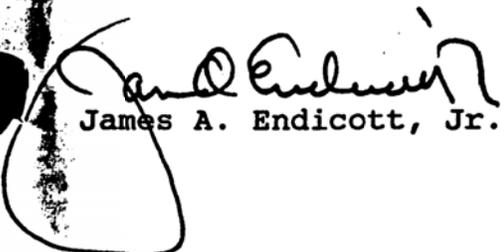
11. Based on the foregoing, we conclude that the term, "pay grade," as used for purposes of determining the veteran's pay grade under 38 U.S.C. § 1302(b)(1), does not include the higher pay grade of a veteran in a reserve component, where the military

Chairman, Board of Veterans' Appeals (011Q)

service department has certified that the veteran held both the rank of "staff sergeant" on active duty and "major" in a reserve component when the veteran was released from active duty under conditions other than dishonorable. In this case, the VARO may not determine under 38 U.S.C. § 1302(b)(1) that the veteran's pay grade is "major," where the military service department has certified that the veteran held both the rank of "staff sergeant" on active duty and "major" in a reserve component when he was released from active duty under conditions other than dishonorable. As indicated earlier in this opinion, for purposes of DIC, the veteran's pay grade is "captain" as certified by DAF based on the highest pay grade in which the veteran satisfactorily served on active duty for six months or more in accordance with 38 U.S.C. § 1302(d).

HELD:

The term, "pay grade," as used for purposes of determining the veteran's pay grade under 38 U.S.C. § 1302(b)(1), does not include the higher grade of a veteran in a reserve component, where the military service department has certified that the veteran held both the rank of "staff sergeant" on active duty and "major" in a reserve component when the veteran was released from active duty under conditions other than dishonorable.


James A. Endicott, Jr.