

**Department of
Veterans Affairs**

Memorandum

Date: July 12, 2004

From: General Counsel (023)

Subj: Character of Discharge of National Guard Member.

To: Director, Compensation and Pension Service (21)

VAOPGCPREC 6-2004

QUESTIONS PRESENTED:

A. Is the determination of the character of discharge of a National Guard member who seeks disability compensation for an injury incurred during active duty for training (ADT) based only on discharge or release from the ADT period or must the determination be based on the member's discharge from the entire period of service in the National Guard?

B. If the character of a National Guard member's discharge is based on the member's discharge from the entire period of service in the National Guard, must the Department of Veterans Affairs reconsider an award of disability compensation made before the member separated from the National Guard if, at the time the member is separated from the National Guard, the member's discharge is characterized as less than honorable?

DISCUSSION:

1. In the claim giving rise to the request for this opinion, the claimant enlisted in the Army National Guard in 1981. A DD-214 for the claimant's initial, five-month period of ADT indicated that the claimant was discharged from ADT under honorable conditions. The claimant's National Guard Bureau Form 22 (NGB 22) shows that the claimant was separated from the National Guard in 1989. State records indicate that the discharge followed repeated unexcused absences. The National Guard Bureau characterized the claimant's service as "under other than honorable conditions." While in the National Guard, the claimant had multiple periods of ADT, but it appears that the claimant did not receive a DD-214 other than the one issued for the claimant's initial ADT period. We have been asked about claims for disability compensation for disability resulting from injuries allegedly incurred during two ADT periods, one in 1985 and the other in 1987, and therefore we confine this opinion to the issue of disability compensation based on injury incurred during ADT.

2. Basic entitlement to service-connected disability compensation for veterans derives from 38 U.S.C. §§ 1110 and 1131, which authorize compensation "[f]or disability resulting from personal injury suffered or disease contracted in line of duty . . . to any veteran . . . who was discharged or released under conditions other than dishonorable from the period of service in which said injury or disease was incurred." 38 U.S.C. §§ 1110, 1131. To qualify for compensation under this provision, an individual must have the status of a veteran, and must also have been discharged or released under conditions other than dishonorable from the period of service in which the disabling injury or disease was incurred.

3. A "veteran" is "a person who served in the active military, naval, or air service, and who was discharged or released therefrom under conditions other than dishonorable." [FN#1] 38 U.S.C. § 101(2); see also 38 C.F.R. § 3.1(d). "Active military, naval, or air service" includes "any period of [ADT] during which the individual concerned was disabled or died from a disease or injury incurred or aggravated in line of duty." 38 U.S.C. § 101(24); see also 38 C.F.R. § 3.6(a). Certain duty in the National Guard of any state can be considered ADT under 38 U.S.C. § 101(22)(C); see also 38 C.F.R. § 3.6(c)(3). Thus, if the evidence establishes that a claimant suffered a disabling injury while on ADT, the claimant may be considered to have "served in the active military, naval, or air service" for purposes of 38 U.S.C. § 101(2). The question then becomes whether the claimant was "discharged or released [from active military, naval, or air service] under conditions other than dishonorable." 38 U.S.C. § 101(2).

4. As noted above, status as a veteran is premised on meeting two criteria, active military, naval, or air service and discharge or release "therefrom" under conditions other than dishonorable. The term "therefrom" refers to "active military, naval, or air service," indicating that it is the discharge or release from active service that is the controlling criterion. Active service includes any period of ADT during which the individual concerned was disabled or died from injury or disease incurred or aggravated in line of duty. National Guard service itself does not constitute active service. Because National Guard service itself is not active service, and the particular ADT period during which an individual incurs disability is active service, the relevant inquiry under the statutory scheme, which premises veteran status on the character of discharge or release from active service, is not the character of discharge from an individual's National Guard service as a whole, but rather the character of discharge from that portion of the individual's service that qualifies as active service for VA purposes, i.e., the period or periods of ADT during which the individual was disabled by injury or disease in line of duty. Although we find that the statutory scheme is plain on its face on this issue, we note that neither the legislative history of 38 U.S.C. §§ 101, 1110, and 1131, nor VA regulations suggest a contrary result.

5. Having concluded that the character of discharge or release from the period of ADT during which disability was incurred is controlling for purposes of determining veteran status, we turn to the requirement of 38 U.S.C. §§ 1110 and

1131 that, in order to receive compensation, the veteran must have been discharged or released under conditions other than dishonorable from the period of service in which the disabling injury or disease was incurred. Again, we find the terms of the statutes determinative. Both section 1110 and section 1131 authorize compensation for disability resulting from injury suffered or disease contracted "in the active military, naval, or air service," provided the veteran was discharged or released under conditions other than dishonorable from the "period of service" in which the injury or disease was incurred. Use of the terms "active military, naval, or air service" and "period of service" together in the same sentence strongly suggests that the referenced period of service is the period of "active . . . service" in which the disability was incurred. Because in the case of a National Guard member the period of active service must necessarily be the period of ADT in which disability was incurred, not some broader period of National Guard service during portions of which the member was not engaged in "active . . . service," see Lorenzano v. Brown, 4 Vet. App. 446, 449 (1993) (referring to "period of service" as used in 38 U.S.C. § 1112(a) as "one having a beginning, an end, and continuity"), the character of discharge or release from the relevant period of ADT is controlling for purposes of sections 1110 and 1131.

6. The definition of "discharge or release" set forth in 38 U.S.C. § 101(18) is consistent with our conclusion. That provision states:

The term "discharge or release" includes (A) retirement from the active military, naval, or air service, and (B) the satisfactory completion of the period of active military, naval, or air service for which a person was obligated at the time of entry into such service in the case of a person who, due to enlistment or reenlistment, was not awarded a discharge or release from such period of service at the time of such completion thereof and who, at such time, would otherwise have been eligible for the award of a discharge or release under conditions other than dishonorable.

38 U.S.C. § 101(18). Clearly, that provision, in stating that the term "discharge or release" "includes" two specified circumstances, indicates that it is not intended as an exclusive list of circumstances that constitute discharge or release from service. This conclusion is also apparent from the fact that the provision covers only two narrow situations, retirement and reenlistment prior to completion of an obligated term of service. The provision does not mention the more typical case of a person who enlists for a particular period of service, completes that period, and leaves the service. The statutory language does not bar consideration of other unspecified circumstances, such as release from a period of ADT, as constituting discharge or release from service for VA purposes.

7. As a matter of practice, VA's Adjudication Procedure Manual M21-1 (Manual M21-1), part IV, para. 10.3c. states that, for purposes of awarding benefits based on an injury incurred during ADT, "the term 'released' means return to civilian status even though not relieved from possible liability to serve at a future time

. . . . The individual does not have to be discharged or otherwise separated from the National Guard.” Thus, a National Guard member may be considered released from active service and may be awarded veterans’ benefits while continuing to serve in the National Guard after the member is released from ADT and returned to civilian status. The interpretation set forth in Manual M21-1 is consistent with our view of the governing statutes as set forth above.

8. In conclusion, because the period of service from which a National Guard member must have been discharged or released under other than dishonorable conditions is the period specific to the injury for which that veteran seeks disability compensation, the relevant inquiry is the character of discharge or release from each relevant period of ADT during which a claimant incurred an injury for which he or she seeks disability compensation. Although a National Guard member may not have received a DD-214 or other document characterizing the discharge or release from the particular period of ADT in question, VA may nonetheless determine the character of discharge for that period of service based on available evidence.

9. Regarding the second question presented, because we conclude that a claimant’s eligibility for VA disability compensation is governed by the character of the claimant’s discharge or release from the ADT period during which a disabling injury or disease was incurred, VA is not required to reconsider an award based on a period of ADT if the claimant is subsequently discharged from the National Guard under other than honorable conditions, unless the facts underlying the subsequent discharge specifically relate to the ADT period and suggest that the earlier determination regarding character of discharge or release from that ADT period was clearly and unmistakably erroneous. See 38 C.F.R. § 3.105(a), (c), and (d).

HELD:

A. When an individual applies for benefits based on an injury incurred during active duty for training (ADT) while in the National Guard, the Department of Veterans Affairs must determine under 38 C.F.R. § 3.12 whether the individual was discharged or released from the ADT period under conditions other than dishonorable.

B. If VA has awarded disability compensation to an individual based on a disability incurred in a period of ADT while the individual was in the National Guard and the individual is subsequently discharged from the National Guard under other than honorable conditions, VA need not reconsider the earlier award unless the facts underlying the subsequent discharge specifically relate to the ADT period and suggest that the earlier determination regarding character of discharge or release was clearly and unmistakably erroneous.

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Attachment – Claim File

¹ Section 3.12 of title 38, Code of Federal Regulations, governs VA determinations of whether a claimant's discharge can be characterized as having been under other than dishonorable conditions. Pursuant to 38 C.F.R. § 3.12(a), VA is bound by a service department "discharge under honorable conditions." However, if a claimant has received a discharge "under other than honorable conditions," VA must determine whether the claimant's discharge was under dishonorable conditions. See 38 C.F.R. § 3.12(d) and (k) (listing criteria); see generally 38 C.F.R. § 3.203(a)(2) (VA may accept as evidence service department documents relating to "character of service").