

RETIREMENT PAY

Computation of Retired Pay for Disability Retirement Under 10 U.S.C. §1401

You asked whether a service member with over 30 years of active duty service, who retires after 31 December 2006, and who receives a 10 U.S.C. §1201 disability retirement, is entitled to have his retirement pay computed under 10 U.S.C. §1409, due to §1401's "most favorable formula" provision. We conclude the service member is not entitled to have retirement pay computed under §1409, but rather is limited to the computation provided for in §1401 because his retirement was pursuant to the provisions of 10 U.S.C. §1201.

Factual Background

a. In 2009, the service member at issue was "permanently disability retired" from active military service with a 10 percent disability rating, in accordance with 10 U.S.C. §1201. At the time of the member's retirement, he was credited with almost 32 years of active duty service. The computation of the retired pay of a member retired for disability under §1201 is governed by 10 U.S.C. §1401. The service member's retired pay multiplier was determined to be 75 percent. His length of service percentage was determined by multiplying 2.5 percent by years of service, which was statutorily capped at 75 percent.

b. In 2010, the member sought to have the Defense Finance and Accounting Service (DFAS) lift the 75 percent cap to the computation of his retired pay. DFAS denied the request and opined that in the absence of any change in law, the retired member must request that his military personnel records be changed to show a retirement based upon length of service, rather than a disability retirement.

c. The member applied to the Air Force Board for Correction of Military Records (AFBCMR), contending that he applied for a non-disability retirement and it was denied because he was being processed for a disability retirement. The member argued that he should have been retired under 10 U.S.C. §8918, for lengthy service, and his pay multiplier should be almost 80 percent. In his application, the member stated that he injured his knee while on active duty, resulting in the inability to walk normally, and required a knee replacement.

d. The AFBCMR denied the member's application for correction of military records, concluding that insufficient relevant evidence had been presented to demonstrate the existence of an error or injustice. The AFBCMR said it was not clear whether the member was denied the opportunity to elect a length of service retirement over his disability retirement, or whether he simply made a wrong choice based on the information available to him at the time. In the absence of evidence to the contrary, the AFBCMR found no basis to recommend granting the relief sought.

e. The member is now a plaintiff in a case before the U.S. Court of Federal Claims. The case has been remanded to the AFBCMR to consider the claim that it failed to apply 10 U.S.C. §1401(b) to the member's retirement application. We have been asked to interpret §1401(b).

Law and Analysis

a. The member's retirement order states that he was "permanently disability retired" with compensable percentage for physical disability of 10 percent. The remarks portion of the order references 10 U.S.C. §1201.

b. 10 U.S.C. §1201, provides that the Secretary concerned may retire a service member, with retired pay computed under 10 U.S.C. §1401, when a service member is unfit to perform the duties of the member's office, grade, rank or rating because of physical disability. 10 U.S.C. §1401(a), limits the maximum percentage for a disability retirement to 75% (see §1401(a), Formula No. 1). The 75 percent cap equates to a 30-year career, and therefore only affects members who retire for disability with greater than 30 years of service.

c. The member argues that federal law requires that he be paid at a higher percentage of active duty pay than the 75 percent cap prescribed in 10 U.S.C. § 1401(a). He contends he is entitled to the higher percentage available for longevity retirement under 10 U.S.C. § 8918. The member believes he is entitled to almost 80 percent since he has almost 32 years of active service for retirement. The member relies on 10 U.S.C. §1401(b), which states:

(b) Use of most favorable formula.—If a person would otherwise be entitled to retired pay computed under more than one formula of the table in subsection (a) or of any other provision of law, the person is entitled to be paid under the applicable formula that is most favorable to him.

d. The most favorable formula provision contained in §1401(b) does not entitle a service member who receives a disability retirement to the more generous retirement formula for service members who receive a §8918 longevity retirement. In the present case, the member is attempting to obtain the more generous retired pay multiplier contained at 10 U.S.C. §1409(b)(3)(B), which states:

(B) Retirement after December 31, 2006.—In the case of a member who retires after December 31, 2006, with more than 30 years of creditable service, the percentage to be used under subsection (a) is the sum of—

(i) 75 percent; and

(ii) the product (stated as a percentage) of—

(I) 2 1/2; and

(II) the member's years of creditable service (as defined in subsection (c)) in excess of 30 years of creditable service, under conditions authorized for purposes of this subparagraph during a period designated by the Secretary of Defense for purposes of this subparagraph.

e. The retired pay multiplier contained in §1409 is not available to the member through the most favorable formula provision contained in §1401(b) because §1409(a)(1)(A) specifically excludes members who are entitled to retired pay under chapter 61 of Title 10, relating to retirement or separation for physical disability. Furthermore, §1401(a), Formula No. 5, does provide a retirement calculation using §1409, however, the statute excludes the use of this formula for §1201 disability retirements.

Conclusion. The retired pay of a service member who is entitled to that pay under Chapter 61 of Title 10, relating to retirement or separation for physical disability, may not have their retired pay calculated under 10 U.S.C. §1409 through §1401(b)'s most favorable formula provision, as it is specifically prohibited by §1409(a)(1)(A).

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