RESERVES

Eligibility for Disability Evaluation System Determination

This responds to your request for our opinion whether MSgt Alpha is eligible for referral to the Disability Evaluation System (DES) pursuant to 10 U.S.C. § 1204, *Members on active duty for 30 days or less or on inactive-duty training: retirement*, as the result of injuries incurred when his motorcycle was struck by an automobile between successive periods of inactive duty training (IDT). For reasons set forth below, it is our opinion that MSgt Alpha is not eligible for disability processing, as he was neither performing active duty or IDT; traveling directly to or from the place at which such duty is performed; or remaining overnight immediately before the commencement of IDT, or remaining overnight between successive periods of IDT, at or in the vicinity of the site of the IDT.

Background

MSgt Alpha is a traditional reservist assigned to Bravo AFB. His residence is approximately 20 miles northeast of Bravo AFB. MSgt Alpha was placed on active duty from 14 February 2011 through 27 August 2011 to cross train from the security forces career field to another career field at Bravo AFB. During this period (9 and 10 March 2011), MSgt Alpha relocated from his residence in another part of the state to his present residence near Bravo AFB.

Following his cross training, MSgt Alpha scheduled Unit Training Assemblies (UTAs) from 1-2 September 2011 at Bravo AFB. On Thursday, 1 September 2011, after completing the first two periods of his UTA at 1630 hours, MSgt Alpha left Bravo AFB with a group of 10 to 12 other motorcycle riders enroute to a sports bar approximately 60 miles from Bravo AFB. During the ride, MSgt Alpha got ahead of the other riders, so he stopped in the median, approximately nine miles southwest of Bravo AFB, to wait for the other motorcyclists. At approximately 2006 hours, while waiting, MSgt Alpha's motorcycle was struck by an automobile. Injuries as a result of the accident led to amputation of MSgt Alpha's legs, one above the knee and one below. MSgt Alpha was scheduled to perform another UTA the following morning at 0700 on 2 September 2011.

Case Processing

On 22 February 2013, the MAJCOM/CV found MSgt Alpha's injuries were not in the line of duty (NILOD). As a result, MSgt Alpha became ineligible for compensation. On 16 May 2013, MSgt Alpha requested a reinvestigation of his case. On 19 June 2013, the approving authority granted MSgt Alpha's request for a reinvestigation of his case. On 15 August 2013, the investigating officer (IO) recommended a finding of ILOD. However, on 8 October 2013, the appointing authority disapproved the IO's findings and found MSgt Alpha "NILOD-Not Due to Own Misconduct." Additionally, on 28 October 2013, the appointing authority found that MSgt Alpha's injuries "existed prior to service" (EPTS) and that an LOD finding was not applicable.

MAJCOM/JA concurred with the appointing authority's finding that MSgt Alpha was "NILOD-Not Due to Own Misconduct," concluding that the provisions of 10 U.S.C. § 1074a did not cover MSgt Alpha as he lived within the vicinity of Bravo AFB, the site of his IDTs.

The Physical Evaluation Board (PEB) determined MSgt Alpha's injuries existed prior to service and therefore ineligible for referral into the DES. On 9 January 2014, the Office of Airmen's Counsel (OAC) appealed the PEB findings on MSgt Alpha's behalf.

Authorities

The controlling statutes for medical and dental care, and disability benefits for members on active duty less than 30 days are 10 U.S.C. § 1074a,[1] *Medical and dental care: members on duty other than active duty for a period of more than 30* day, and 10 U.S.C. § 1204, *Members on active duty for 30 days or less or on inactive-duty training: retirement.*[2] Section 1074a has been expanded over the years to provide greater coverage for reserve component (RC) members who become injured or ill while performing IDTs. In 1983, Congress introduced § 1074a, allowing medical and dental care for reservists who incurred or aggravated an injury while traveling to or from inactive duty training.[3] In 1984, Congress expanded § 1074a to include care for members who contracted diseases or became ill during IDTs.[4]

In 1996, Congress amended § 1074a to include medical coverage for RC members who stayed overnight at or in the vicinity of their training site, prior to commencement of or in-between successive periods of IDT.[5] This expanded coverage had one caveat: the training site had to be "outside reasonable commuting distance from the member's residence."[6] This language has traditionally been interpreted to mean RC members who live *outside* a reasonable commuting distance of the training site and subsequently become injured/ill between the end of one IDT period and the beginning of the next (i.e., overnight) are generally entitled to the benefits enumerated in § 1074a. However, members who live *within* a reasonable commuting distance (i.e., "local") would not be entitled to the same benefits.

In 1997, Congress likewise amended § 1204 to include coverage for members on active duty less than 30 days for disabilities incurred, "while remaining overnight, between successive periods of inactive-duty training, at or in the vicinity of the site of the inactive duty training, if the site is outside reasonable commuting distance of the member's residence."[7]

In 1997, Congress directed the Department of Defense (DoD) to conduct a study "on the means of improving the provision of uniform and consistent medical and dental care to members of the

[1] See OpJAGAF 1996/68, 3 May 1996.
[2] The specific issue in this case pertains to disability eligibility; however, because Congress utilized virtually identical language in both 10 U.S.C. § 1074a and 10 U.S.C. § 1204, and amended both statutes for identical reasons reflected in the legislative record, we likewise discuss both statutes.
[3] Department of Defense Authorization Act, 1984, Section 1012.
[4] Department of Defense Authorization Act, 1985, Section 631.
[5] National Defense Authorization Act for Fiscal Year 1996, Section 702.
[6] *Id.*
[7] Department of Defense Authorization Act, 1997, Section 534.

RCs."[8] In 1999, DoD delivered its report to Congress with 14 recommendations. Of relevance to this case is "Recommendation 3," which stated:

> RC members are frequently required to remain overnight in the field in an Inactive Duty status. Consideration should be given to providing medical coverage for Reserve component members who are injured or become ill while remaining overnight at the site of inactive duty training between successive training periods, even if they reside within reasonable commuting distance. These members ***may be training late into the evening or performing duty early in the morning which could make commuting to and from their residence impractical***. This requires new legislation."[9] (Emphasis added).

In 2002, Congress, acting upon DoD's recommendation, amended both §1074a and § 1204 by deleting the phrase, "if the site is outside reasonable commuting distance from the member's residence."[10]

Legislative History

Introduced in the Senate on 29 June 2001,[11] as Section 632, *Improved Disability Benefits for Certain Reserve Component Members*, the Senate Congressional Record for FY 2002 NDAA, referencing both § 1074a and § 1204, explained as follows:

> Section 632 would add overnight healthcare coverage when authorized by regulations for Reserve Component members who, although they may reside within a reasonable commuting distance of their inactive duty training site, ***are required to remain overnight between successive drills at that training site because of mission requirements***. Some Reserve Component members are required to remain overnight in the field when performing inactive duty training. Others may be training late into the evening or performing duty early in the morning, ***which could make commuting to and from their residence impractical***. On those occasions ***when it is not feasible*** for members who live in the area to return to their residence between successive drills because of mission requirements, they are currently not protected should they become injured or ill during that overnight stay. The Secretary of Defense report to Congress on the means of improving medical and dental care for Reserve Component members, which was sent to Congress on November 5, 1999, recognized this shortcoming and recommended that the law be amended to provide medical coverage when the member remains overnight between successive training periods, even if they reside within reasonable commuting distance.[12] (Emphasis added).

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[8] DoD Report to Congress, *Means of Improving the Provision of Uniform and Consistent Medical and Dental Care to Members of the Reserve Components*, 1 November 1999.
[9] *Id.*
[10] National Defense Authorization Act for Fiscal Year 2002, Section 513.
[11] National Defense Authorization Act for Fiscal Year 2002, 107th Congress, 1st Session Issue: Vol. 147, No. 93 – Daily Edition.
[12] Congressional Record – Senate, Section 632, 29 June 2001. NDAA for FY 2002 (Senate – October 03, 2001). 107th Congress, 1st Session Issue: Vol. 147, No. 131 – Daily Edition.

Similarly, the House Congressional Record, with respect to both § 1074a and § 1204, advanced the following language:

> SEC. 515. MEMBERS OF RESERVE COMPONENTS AFFLICTED WHILE REMAINING OVERNIGHT AT DUTY STATION WITHIN COMMUTING DISTANCE OF HOME.
>
> (a) Medical and Dental Care for Members.--
> Section 1074a(a)(3) of title 10, United States Code, is amended by inserting before the period at the end the following: "or if the member remained overnight for another reason authorized under applicable regulations."
>
> ***
>
> (c) Eligibility for Disability Retirement or Separation.--
> (1) Section 1204(2)(B)(iii) of title 10, United States Code, is amended by inserting before the semicolon at the end the following: "or if the member remained overnight for another reason authorized under applicable regulations."[13]

The Senate Report pertaining to this amendment, stated:

> The committee recommends a provision that would authorize certain benefits for members of the reserve components who become injured or ill in the line of duty when they are authorized to remain overnight at an inactive duty training site that is within a reasonable commuting distance of home. The benefits include medical and dental care for the member and the member's dependents; eligibility for disability retirement or separation; recovery, care, and disposition of remains; basic pay; and compensation for inactive-duty training.[14]

Likewise, the House Report explained this provision:

> This section would remove the requirement that reservists must be performing inactive-duty for training at a site that is outside normal commuting distance before being eligible for disability benefits and programs if they incur or aggravate an injury, illness, or disease in the line of duty when remaining overnight at training locations before or between inactive-duty training periods.[15]

The Bill introduced on the Senate Legislative Calendar read:

> (Sec. 515) Makes a reserve member eligible for medical and dental care, disability retirement, basic pay and other compensation, and certain other benefits if such

[13] Congressional Record – House, Section 515, 17 October 2001. NDAA for FY 17 2002. 107th Congress, 1st Session Issue: Vol. 147, No. 140 – Daily Edition.
[14] S. Rept. 107-62 – 107th Congress (2001-2002).
[15] H. Rept. 107-194 – 107th Congress (2001-2002), September 4, 2001.

> member remains overnight at a duty station within normal commuting distance of home for reasons authorized under applicable regulations.[16]

Finally, the FY 2002 NDAA Conference Report stated:

> The House amendment contained a provision (sec. 514) that would remove the requirement that reservists must be performing inactive-duty for training at a site that is outside normal commuting distance before being eligible for disability benefits and programs if they incur or aggravate an injury, illness, or disease in the line of duty when remaining overnight at training locations before or between inactive-duty training periods. The Senate bill contained a similar provision (sec. 515).[17]

A related statute, 10 U.S.C. § 1475, *Death gratuity: death of members on active duty or inactive duty training and of certain other persons*, currently provides a death gratuity for the survivors of reserve members that die while on IDT; while traveling directly to or from that active duty for training or inactive duty training ***or while staying at the Reserve's residence***, when so authorized by proper authority, during the period of such inactive duty training or between successive days of inactive duty training. Paragraph (a)(3). (Emphasis added).

This statue was amended in 2011 whereby the phrase, "while staying at the Reserve's residence, when so authorized by proper authority, during the period of such inactive duty training or between successive days of inactive duty training" was inserted.[18] This was done in response to the Army's denial of death benefits to the family of an Arkansas National Guard officer, Captain Samson Luke, who, after performing the first day of his weekend duties in extremely cold weather, died of a heart attack while at his home for the evening. He lived 12 miles from his drill site and was not billeted at his drill site. At the end of his Saturday afternoon drill, he drove home, expecting to return early the next morning for the next drill period. As such, he fell outside the coverage of the existing statute. Following fairly significant media attention,[19] Senator Mark Pryor of Arkansas offered an amendment to the FY 2012 NDAA, resulting in insertion of the above language in 10 U.S.C. § 1475.

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[16] Summary: S.1416 – 107th Congress (2001-2002). Reported to Senate without amendment (09/12/2001). *See also*, S.1419 – 107th Congress (2001-2002). Passed Senate amended (10/02/2001): "(Sec. 515) Makes a reserve member eligible for medical and dental care, disability retirement, basic pay and other compensation, and certain other benefits if such member remains overnight at a duty station within normal commuting distance of home for reasons authorized under applicable regulations."

[17] NDAA for FY 2002 Conference Report to accompany S. 1438, December 12, 200: H. Rept. 107-333.

[18] NDAA for FY 2012, Section 651.

[19] *See* http://www.foxnews.com/politics/2011/12/02/family-bronze-star-recipient-appealing-for-death-benefits-after-pentagon.html.

Cases

The general rule is that military reservists revert to their civilian status when released from military control, and they are no longer entitled to certain medical benefits for injuries sustained after their release and are engaged in civilian pursuits.[20]

In a case with similar facts to the present, the Department of Homeland Security Board for Correction of Military Records (BCMR) determined that the Coast Guard did not err by finding that a Coast Guard member, killed in a car accident between successive IDTs, was not in a duty status at the time of her death.[21] In that case, the applicant had completed her drill at approximately 1630 on 11 January 2003, and had left the duty site; her following drill commenced at 0730 the following day. The distance between the applicant's residence and her duty site was approximately 14 miles. She was killed in a car accident at 2001 hours. She was a passenger in her own car used to drive an active duty friend from the airport to her friend's duty station. The Coast Guard determined that the applicant's death did not take place while she was in a duty status.[22]

The Judge Advocate General of the Coast Guard rendered an opinion, reasoning:

> In this case [the applicant] was acting as a citizen at the time of her death. There is nothing pejorative in this determination. She did nothing wrong and in fact was helping an active duty Coast Guardsmen when she died, but she did so in her own private capacity -- not under orders . . . [The applicant] completed her military duties when her drill ended. Had she driven directly home, she would have been considered in a duty status until she arrived [there]. When she decided to do something different, she stopped being [applicant's name] Coastie and became [applicant's name] citizen, even if her voluntary actions as a citizen were to lend a hand to an active duty Coast Guard friend.

The applicant's father argued that applicant's unit was different from normal Coast Guard Reserve units because of their 24-hour watches, which subject personnel to recall during the drill weekend from Friday night to 1800 hours or later on Sunday night.

The relevant Reserve Policy Manual regulation,[23] governing duty status for incapacitation benefits, incorporated the duty status standards contained in § 1074a and § 1204.[24] Applying this standard, the BCMR upheld the Coast Guard's determination, reasoning that there was no evidence the

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[20] See *Matter of Campbell*, 1984 U.S. Comp. Gen. LEXIS 147 (Comp. Gen. Dec. 3, 1984). *See* also, 43 Comp. Gen. 412 (when a reservist is ordered to perform inactive duty training, they are so employed from the time they first must report for that duty until the end of the ordered period of such duty for that day).

[21] BCMR Docket No. 2003-109, located at http://boards.law.af.mil/CG/BCMR/Other%20Cases/2003-109.pdf.

[22] The applicant's father filed a claim with the Department of Transportation for the costs of the applicant's funeral and the one-time government death benefit.

[23] COMDTINST M1001.28B.

[24] *Id*. at Article 6.A.2b. A member is considered to be in a duty status during any period of active duty or inactive duty; while traveling directly to or from the place that duty is performed; while remaining overnight immediately before the commencement of duty, or remaining overnight between successive periods of inactive duty at or in the vicinity of the site of the inactive duty.

applicant was traveling directly to or from duty at the time of her death. The evidence demonstrated the applicant completed her drill at approximately 1630 and either had not traveled directly to her home or had traveled beyond her home. Since the applicant was more than 50 miles from her duty site at 2000 hours on the date of her death, she was neither in close proximity to her duty site nor was she near the commencement of her duty, which was scheduled for 0745, the next morning.

The BCMR placed further reliance on the case of *Andrews v. United States*, 4 Cl. Ct. 114 (1983), which recognized the military's control or right to control a reservist as a factor in determining a member's duty status. In *Andrews*, the plaintiff had orders for a two-day period of IDT at a camp 75 miles away from his usual home drilling site. He was to be billeted at this location overnight. After the training exercise secured the first day at 1647 hours, the plaintiff made a short "chow run" off-site and was injured on the return in a collision. He left in a military vehicle, wearing military fatigues, and was returning to the base after a brief meal. The Court ruled for the plaintiff reasoning that the military clearly had the right to control plaintiff. It reasoned he was billeted at the drilling site and was expected to be there at all times unless authorized to be elsewhere, concluding plaintiff had not reverted to his normal civilian status during this abbreviated chow run.

Applying *Andrews*, the BCMR concluded there was no evidence describing the amount of control the Coast Guard had over the members of the unit once the drill was secured. For instance, members of the unit were not required to remain on base or near the duty site, no evidence was presented as to what activities they could or could not participate in once the drill had secured, or what would happen to them if they could not be reached by telephone. Even if the applicant was told that it was okay to transport her friend to another town, it was not for government business. Consequently, there was insufficient evidence establishing that the applicant was under military control at the time of her death.

Analysis

In the present case, the MAJCOM/JA concluded that the plain meaning of the "remaining overnight requirement" applies only to members who must travel to the vicinity of the IDT from outside the commuting distance. We disagree. As discussed above, Congress deleted from both § 1074a and § 1204 the requirement that the IDT site be outside the reasonable commuting distance of the member's residence.

The OAC concluded that Congress' removal of "outside the reasonable commuting distance" entitles MSgt Alpha to benefits on an equal footing with active duty members. We likewise disagree with this conclusion as failing to appropriately contemplate the requirement that the disability be incurred "while remaining overnight between successive periods" of IDT.

Construing the plain language of § 1074a and § 1204, in relation to related statutes, such as 10 U.S.C. § 1475 and 10 U.S.C. § 1481, that specifically provide recent coverage for members who die at their residence between IDTs, we conclude, on these facts, MSgt Alpha was not "remaining overnight" at or in the vicinity of the IDT site requirement. By all indications, MSgt Alpha, several hours after conclusion of his IDT duty, was on a motorcycle trip to a location

approximately 60 miles from his duty station in the opposite direction of his residence. We do not believe an RC member "remain[s] overnight" at their residence, even if within the reasonable commuting distance; rather, they live there. We conclude the language, "in the vicinity" of the IDT site, is designed to expand the area of the drill site to encompass reasonable meal runs or billeting within the locality of the installation. However, this language cannot be de-coupled from the requirement that the RC member "remain overnight," rather than leave to go home. The language clearly takes into account that RC members may maintain a residence within the reasonable commuting distance of the IDT site, but nonetheless incur an injury while "remaining" at or near the drill site.

This conclusion is reinforced by the legislative history of § 1074a and § 1204. The Senate Congressional record, when the amendment to remove the "reasonable commuting distance" was introduced, unambiguously explained that the statute would add overnight coverage for RC members who, although they may reside within a reasonable commuting distance of their IDT site, are "***required***" to remain overnight between successive drills at that training site "***because mission requirements***," render it "***not feasible"*** or ***"impractical"*** to commute to and from their residence.[25] (Emphasis added).

Similarly, the House Congressional Record's provision was titled, "Members of Reserve Components Afflicted While Remaining Overnight at Duty Station Within Commuting Distance of Home," and authorized care for members who "remained overnight for another reason authorized under applicable regulations."[26] This language is limited in scope and envisions injuries occurring at the duty station when authorized to remain, even though the member's residence is within commuting distance.

Moreover, the Senate and House Reports explain that the amendments authorize benefits for reservists "when they are authorized to remain overnight at an inactive duty training site that is within a reasonable commuting distance of home,"[27] and incur an injury "when remaining overnight at training locations" between IDTs.[28]

The legislative history, from introduction through passage, envision injuries that occur when a RC member is injured at or near their IDT site when not returning to their residence because a "mission requirement" renders return to their residence "impractical" or "not feasible."

We also find the amendment to 10 U.S.C. § 1475, following the death of an RC member who died at home between IDTs, adding the phrase, "while staying at the Reserve's residence, when so authorized by proper authority, during the period of such inactive duty training or between successive days of inactive duty training" significant. This amendment reinforces the conclusion that explicit statutory authorization is required for payment of benefits to RC members, or their survivors, injured or killed outside of the specific statutorily delineated status categories (*i.e.*, when

[25] Congressional Record – Senate, Section 632, 29 June 2001. NDAA for FY 2002 (Senate - October 03, 2001). 107th Congress, 1st Session Issue: Vol. 147, No. 131 – Daily Edition.
[26] Congressional Record – House, Section 515, 17 October 2001. NDAA for FY 17 2002. 107th Congress, 1st Session Issue: Vol. 147, No. 140 – Daily Edition.
[27] S. Rept. 107-62 – 107th Congress (2001-2002).
[28] H. Rept. 107-194 – 107th Congress (2001-2002), September 4, 2001.

performing IDT, or traveling directly to or from their duty site). If Capt Luke was not covered when he died at home between IDTs in the absence of explicit statutory authorization (even though within the vicinity of his drill site), it is difficult to see how MSgt Alpha is covered for injuries incurred when not serving in any of the statuses contained in § 1074a or § 1204.

The *Andrews* case, referenced in the above BCMR opinion, was premised on an analysis of 10 U.S.C. § 6148, which, like its Air Force counterpart statute—10 U.S.C. § 8721—entitled reserve component members to hospital benefits whenever called to perform inactive duty training for any period of time, and are disabled in line of duty from injury "while so employed."[29] Those statutes were repealed and replaced by 10 U.S.C. § 1074a.[30] The *Andrews* court applied the "while so employed" standard to the "gray area" where reservists are no longer engaged in training, but depart the camp before the end of their UTA/drill weekend, explaining each case must be decided on its facts to determine whether the military had control over the reservist. *Andrews* at 119.[31]

The statutes at issue in *Andrews*, as noted above, were replaced by the statutes governing the present case, which do not use the "while so employed" language, but instead, delineate specific circumstance under which a reservist is entitled to medical benefits resulting from injury (performing IDTs, traveling directly to or from place of duty, remaining overnight at or in the vicinity of the training site). Consequently, the continued application of the "while so employed" language, and its corollary, "military control" test interpreting that standard, is questionable. Nonetheless, even assuming the soundness of its continued use, application in the present case does not change the result. There are no facts indicating any degree of control the Air Force exercised over MSgt Alpha after completion of his IDT. He was not conducting Air Force business; he was not required to return to Bravo AFB following dinner; there is no evidence he was billeted at Bravo AFB, or that the Air Force otherwise exercised any control over his actions after the conclusion of his IDT. Consequently, even applying the "flexible" nature of this line of cases, there was no nexus between Air Force business and MSgt Alpha's activities.

Based on the above authorities, the central question in cases where the RC member lives within the vicinity of the training site, and becomes injured or disabled between successive periods of IDTs, is whether he or she was "remaining overnight" at, or in the vicinity, of the training. We conclude, based on the specific facts of this case, MSgt Alpha had reverted to his civilian status at the time he incurred his injuries, and is therefore outside the coverage of § 1074a and § 1204.[32]

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[29] *See also, Matter of Campbell*, 1984 U.S. Comp. Gen. LEXIS 147 (Comp. Gen. Dec. 3, 1984); *To Lieutenant Colonel J. J. Vanya*, 44 Comp. Gen. 408, 1965 U.S. Comp. Gen. LEXIS 259, 44 Comp. Gen. 408 (Comp. Gen. 1965).

[30] NDAA for FY 1987, Section 604.

[31] *See* also 43 Comp. Gen. 412 (1963) and *James E. Williams*, B-156628 (June 1, 1965), where the GAO reasoned that although the scheduled training for the day had been completed at the time of the reservist's injury, Williams should be deemed to be employed since he was required to remain in the bivouac area and was under military control.

[32] We are not unsympathetic to MSgt Alpha's situation, however, the Air Force (or any federal agency) is not entitled to award benefits costing federal dollars without specific statutory authority. *See Office of Personnel Management v. Richmond,* 496 U.S. 414 (1990). We would add that Congress has been receptive to proposals to amend statutes governing pay and benefits for reserve component members in an effort to ameliorate statutory shortcomings. Congressional interest in MSgt Alpha's case could generate the statutory authorization needed in his situation.

This opinion rescinds and supersedes OpJAGAF 2016/2, 9 February 2016.