

HERBERT DENNIS IVEY

IBLA 2002-167

Decided January 6, 2005

Appeal from a decision of the Alaska State Office, Bureau of Land Management, rejecting an Alaska Native Veteran allotment application. FF-93392.

Affirmed in part.

1. Alaska: Alaska Native Veteran Allotment: Generally

BLM properly rejects an Alaska Native Veteran Allotment application, pursuant to the Alaska Native Veterans Allotment Act, 43 U.S.C. § 1629g (2000), when at the time of the filing of the application, the lands had previously been conveyed outside the ownership of the United States.

APPEARANCES: Herbert Dennis Ivey, McGrath, Alaska, pro se; Joseph D. Darnell, Esq., Office of the Regional Solicitor, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HEMMER

Herbert Dennis Ivey appeals from a January 8, 2002, decision issued by the Alaska State Office, Bureau of Land Management (BLM), rejecting his Alaska Native Veteran allotment application. The decision rejected the application on two grounds: (1) portions of the land Ivey had applied for had been conveyed to the State of Alaska prior to the date Ivey submitted an application; and (2) Ivey was not on active duty in a branch of the United States military for the minimum 6 months during the period between January 1, 1969, and December 31, 1971, as required in order to qualify for an allotment under the Alaska Native Veterans Allotment Act (ANVAA), 43 U.S.C. § 1629g (2000). Ivey's service records indicated that he served in the United States Navy from August 27, 1965, until April 30, 1969, when he was placed on the temporary disability retired list.

Ivey submitted a timely Notice of Appeal and Statement of Reasons (NA/SOR). He asserts he was still in military service until May 3, 1971, at which

point he was taken off the temporary disability retired list. In addition, with his NA/SOR, Ivey submitted his Certificate of Indian Blood, which had not been submitted at the time of the January 8, 2002, decision, in compliance with 43 CFR 2568.74(a).

The ANVAA was enacted as part of the “Departments of Veterans Affairs and Housing and Urban Development and Independent Agencies Appropriations Act, 1999,” Pub. L. No. 105-276, 112 Stat. 2461, 2516-18 (Oct. 21, 1998). James N. Frank, 161 IBLA 188, 191 (2004). Section 432 of that Act amended the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601-1629 (2000), by adding a new section 41. Section 41 permitted a “person described in subsection (b)” an “Open Season for Certain Alaska Native Veterans for Allotments,” during an 18-month period subsequent to its 1998 date of enactment.<sup>1/</sup> During that time, a qualifying person would be, under specific circumstances, “eligible for an allotment of \* \* \* federal land totaling 160 acres or less under the Act of May 17, 1906 (chapter 2469; 34 Stat. 197), as such Act was in effect before December 18, 1971.”<sup>2/</sup>

[1] We must affirm BLM on the first ground stated in the decision. BLM correctly noted that the land Ivey selected to apply for had been transferred outside of Federal ownership and was not therefore available for an application under the ANVAA. The ANVAA limits the land available for selection to certain Federal lands. 43 U.S.C. § 1629g(a) (2000). Regulations implementing the statute provide that applicants may only receive title to land that is, inter alia, “currently owned by the Federal government.” 43 CFR 2568.90. Ivey’s September 24, 2001, application shows that he applied for a parcel located in secs. 1, 2, 11 and 12, T. 26 S., R. 25 E., Kateel River Meridian. However, BLM land status records reveal that all lands within Ivey’s identified parcel were patented to the State of Alaska on June 6, 1988. (Patent No. 50-88-0112.) The land is not owned by the Federal government, and was not therefore available for an ANVAA allotment. Because this finding alone defeats Ivey’s case, we affirm the decision.

We note, however, that we could not on this record affirm BLM for concluding that Ivey was not qualified within the meaning of the ANVAA based upon his service dates. Ivey’s Form DD-214 reveals that he was on active duty with the United States

<sup>1/</sup> The statute provides that such applications may be filed during the 18 months “following promulgation of implementing rules.” 43 U.S.C. § 1629g(a)(1) (2000).

<sup>2/</sup> This statute is the Alaska Native Allotment Act, formerly codified at 43 U.S.C. §§ 270-1 through 270-3 (1970), repealed by section 18(a) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1617(a) (2000). The repeal of this statute meant that all applications for Native allotments had to be filed on or prior to Dec. 18, 1971.

Navy from August 27, 1965, to April 30, 1969, when he was placed on the “Temporary Disability Retired List.” (Armed Forces of the United States Report of Transfer or Discharge, Form DD-214). While BLM concedes that Ivey served for a total of 3 years, 8 months and 2 days over the course of his career in the Navy, BLM maintains that he served only 4 of the minimum 6 months of service between January 1, 1969, and December 31, 1971, statutorily required by 43 U.S.C. § 1629g(b)(1)(B)(i) (2000). Arguing in its answer that the ANVAA requires service between those dates to be in “active duty” service, BLM contends that Ivey’s temporary disability retirement status defeats his ability to apply for an allotment.

We are not convinced that BLM’s reading of the statute is correct. The ANVAA identified the persons eligible to select an allotment, restricting the opportunity to those “veterans” who “served” between January 1, 1969, and December 31, 1971. 43 U.S.C. § 1629g(b)(1)(B) (2000); James N. Frank, 161 IBLA at 192. The veteran’s military service dates must have included “at least 6 months between January 1, 1969 and December 31, 1971,” or the veteran must have enlisted or been drafted into military service after June 2, 1971, but before December 3, 1971. 43 U.S.C. § 1629g(b)(1)(B) (2000); see also 43 CFR 2568.50. Thus, Congress extended an opportunity to select and obtain Native allotments only to veterans who were serving in the military for at least 6 months during the last two years of eligibility, or who had been drafted or enlisted during the statutory time period during the relevant time period in 1971. George F. Jackson, 158 IBLA 305 (2003). The statute reopened the application period to those persons who had military service during the last two years during which applications could be filed under the Native Allotment Act and may have missed the opportunity to timely apply for that reason. We are not persuaded that Congress’ intent was to exclude those on disability retirement status during the relevant 6 months.

In implementing the statutory obligation to establish regulations governing ANVAA applications, BLM assigned “veteran” the same meaning as that prescribed in “38 U.S.C. 101, paragraph 2.” 43 CFR 2568.30. Title 38 of the U.S. Code, pertaining to “Veterans’ Benefits,” defines “veteran” as a person who served in the active military, naval, or air service, and who was discharged or released therefrom under conditions other than dishonorable.” 38 U.S.C. § 101(2) (2000). Without question, Ivey is a veteran as defined in the statute.

The critical language of the ANVAA is that the applicant be a “veteran” who “served” between January 1 and December 31, 1969, for at least 6 months. James N. Frank, 161 IBLA at 192. Without doubt, Ivey served for 4 months in active duty status during this period. BLM presumes that “service” for the 6 months must be in “active duty” status rather than disability status. But this is not how the statute reads. “Active” status is a critical component of the term “veteran” as defined in 38 U.S.C. § 101(2), not the term “serve” within the ANVAA. Thus, the question is whether

Ivey's service in "temporary disability retired" status during the relevant year (1969) could qualify him, as a veteran, to apply for an allotment within the meaning of the ANVAA.

The relevant military provisions do not fully support BLM's assumption that service means "active duty." "Active duty" generally means "full-time duty in the Armed Forces, other than active duty for training." 38 CFR 3.6(b) (2002); see also 38 U.S.C. § 101(21) (2000). However, "[a]ctive military, naval, or air service" is defined to include certain disabilities including "inactive duty training" where the disability stemmed from the line of duty:

Active duty, any period of active duty for training during which the individual concerned was disabled or died from a disease or injury incurred or aggravated in line of duty, and any period of inactive duty training during which the individual concerned was disabled or died from an injury incurred or aggravated in line of duty or from a covered disease which occurred during such training.

38 CFR 3.6(a) (2002); see also 38 U.S.C. § 101(24) (2000). While "inactive duty training" as defined at 38 U.S.C. § 101(23) (2000) would not appear to cover Ivey, this appears to beg the question of whether a veteran could be considered to "serve" within the meaning of ANVAA in temporary disability status if the disability arose from military service in the line of duty.

Other statutory authority gives little definitive guidance. Title 10 of the U.S. Code, pertaining to retirement for disability, provides that regulars and members of the United States armed services who are determined by the Secretary of Defense to be unfit to perform the duties of the member's office, grade, rank, or rating because of physical disability incurred while entitled to basic pay or while on certain prescribed absences during such periods of service, may be retired from active service by the Secretary. 10 U.S.C. § 1201(a) (2000). In the event that the Defense Secretary cannot determine that the disability is of a permanent nature and stable, he may, under certain circumstances, place the regular or member on the temporary disability retired list. 10 U.S.C. § 1202 (2000). A regular or member placed on the temporary disability retired list is then eligible for retired pay. 10 U.S.C. § 1202 (2000). Those on the temporary disability retired list must be physically examined every 18 months to determine whether there has been a change in the disability for which they were temporarily retired. 10 U.S.C. § 1210(a)(2000). In general, as a result of a periodic examination, subject to certain findings, and in no case later than the expiration of 5 years after the date when the member's name was placed on the temporary disability retired list, the Secretary of Defense must make a determination that the member shall be removed from the list and retired, separated, or, if found to be physically fit, returned to active duty. 10 U.S.C. § 1210 (2000).

This record may be construed to support the conclusion that Ivey was placed on “temporary disability status” on April 30, 1969. In the ensuing 18 months, he was given a medical examination, and it was concluded that he should be retired. He was retired on August 26, 1971. It is not possible to determine on the record the cause of Ivey’s disability, or whether it derived from Ivey’s performance in the line of duty.

Considering this, we would not be in a position to affirm BLM’s determination that Ivey was not qualified to apply for an allotment. We render no final determination on that topic, but query whether ANVAA can be read to exclude a veteran who served for 3 years and 8 months, but during the last 2 months of the critical period in 1969 was on temporary disability retirement status and could be recalled to active duty. BLM would be obligated to explain its position further regarding the meaning of the term “serve” within the ANVAA, in another appeal, if the Board were to consider this issue.

Pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision is affirmed on the ground that the selected land had been conveyed outside of Federal ownership at the time of the application.

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Lisa Hemmer  
Administrative Judge

I concur:

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C. Randall Grant, Jr.  
Administrative Judge