

RESTORING CERTAIN PERSONS TO THE EMERGENCY OFFICERS' RETIRED LIST

JULY 25, 1939.—Ordered to be printed

Mr. GEORGE, from the Committee on Finance, submitted the following

REPORT

[To accompany S. 134]

The Committee on Finance, to whom was referred the bill (S. 134) providing for continuing retirement pay, under certain conditions, of officers and former officers of the Army, Navy, and Marine Corps of the United States, other than officers of the Regular Army, Navy, or Marine Corps, who incurred physical disability while in the service of the United States during the World War, and for other purposes, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

The purpose of this legislation is to return those emergency officers to the retired list with pay to whom your committee believes Congress intended to extend retirement benefits when enacting Public, No. 2, Seventy-third Congress.

Section 1 of the bill would place those emergency officers in their retired pay status who were being paid such benefits on March 19, 1933, who entered active service between April 6, 1917, and November 11, 1918, and served as an officer prior to July 2, 1921, provided the disability is determined to be directly incurred in or aggravated during active service, in fact in line of duty without benefit of any statutory or regulatory presumption of any kind.

This section permits return to the retired list of those who were commissioned after November 11, 1918, provided they served between April 6, 1917, and November 11, 1918, and other requirements are met. The number to be restored under this provision is not large, and most of them were given commissions in recognition of their demonstrated fitness to serve as officers and as a reward for gallantry in action with the enemy. Some of those who did not accept commissions until after November 11, 1918, were in hospitals being treated for wounds and did not have an opportunity to accept until after that date.

On March 19, 1933, there were approximately 6,300 emergency officers retired with pay. After the original review under Public, No. 2, Seventy-third Congress, 1,518 remained. Some 4,700 had been removed by reason of the fact that they could not meet the so-called causative factor requirement as contained in Veterans Regulation No. 5, issued March 31, 1933.

Under the causative-factor requirement the emergency officer was asked to prove that he was performing some specific military duty under competent orders at the time of the incurrence of the disability. In the case of those whose disabilities were incurred in combat, or resulted directly from injuries, there was no trouble in establishing the causative factor. But for those who suffered permanent disabilities from disease incurred during World War service this requirement was practically impossible to meet, as no one could say definitely the exact moment of the incurrence of the disease, or prove that they were performing some military duty under orders from a superior officer. This strict application of the causative-factor requirement and the ambiguity of the term brought so much criticism that new instructions were issued by the Veterans' Administration on April 10, 1935.

Under the new instructions the use of the causative factor was dropped, and since that time the Veterans' Administration has used the requirement contained in section 10, Public, No. 2, "that the disease or injury or aggravation of disease or injury directly resulted from the performance of military or naval duty." The interpretation and the application of the act under the new instructions was practically as strict as under the causative-factor requirement. The emergency officer under these instructions is required by the Veterans' Administration to prove by a preponderance of evidence that but for the performance of duty his disability would not have reasonably been expected to have arisen. Although he may show by official Army and Navy Department records, or by acceptable affidavit, evidence that his disability did in fact arise during his service in line of duty, and that he was subjected to exposure and required to perform strenuous military duty, his case is still denied.

It is the contention of your committee that it is practically impossible for a person disabled by disease during World War service to prove by a preponderance of evidence that his disability would not have been incurred had he remained in civilian life. The requirement under this bill is that the officer's disability had its incurrence during active war service. Had he been in the Regular Army or Navy he would have been placed on the retired list instead of being discharged and placed on compensation.

Estimates submitted by the Veterans' Administration indicate that the disabilities of practically all those returned to the emergency officers' retired list were directly incurred in combat, or that the officer had considerable combat service. Many of the worst disabilities due to war service, such as tuberculosis, neuropsychiatric, and heart conditions were suffered by those not privileged to serve in combat. In the opinion of your committee, it would be an injustice to require combat incurrence or combat service in order to be returned to the retired list.

There is no new principle involved in this section. The principle of retirement for disabled emergency officers was established by the passage of the act of May 24, 1928, and continued under section 10, Public, No. 2.

Your committee believe that this section should not be classed as new legislation, but as an interpretative amendment to the present law to carry out the intent of Congress when enacting section 10, Public, No. 2.

The Administrator of Veterans' Affairs, in a letter to the chairman of the committee, which is attached hereto as a part of this report, estimated that approximately 2,950 emergency officers would be restored to the rolls under this section. This estimate is based upon the assumption that all service-connected cases now rating 30 percent or more disability would be restored to the rolls, except those where the disability was connected with service by the presumptions afforded by section 200 of the World War Veterans' Act, 1924, as amended. This estimate was also said to take into consideration the deaths which have occurred in this group.

Section 2 of the bill provides that the benefits under the act shall be effective only from the date of its enactment.

Section 3 amends section 212 of Public, No. 212, Seventy-second Congress. This section now limits the total amount of retired pay plus civilian pay which an individual may receive from the Government, but contains an exception which makes the limitation inapplicable to officers retired for disability incurred in combat with an enemy of the United States. This bill will broaden the exception so that the limitation will also be inapplicable in the case of disabilities resulting from an explosion of an instrumentality of war in line of duty.

The letter from the Administrator of Veterans' Affairs, reporting on this bill, as as follows:

MARCH 15, 1939.

HON. PAT HARRISON,
*Chairman, Committee on Finance,
United States Senate, Washington, D. C.*

MY DEAR SENATOR HARRISON: This is with further reference to your letter of January 11, 1939, requesting a report on S. 134, Seventy-sixth Congress, a bill providing for continuing retirement pay, under certain conditions, of officers and former officers of the Army, Navy, and Marine Corps of the United States, other than officers of the Regular Army, Navy, or Marine Corps, who incurred physical disability while in the service of the United States during the World War, and for other purposes," which reads as follows:

"That, notwithstanding the provisions of any law of the United States, any person who served as an officer of the Army, Navy, or Marine Corps of the United States during the World War, other than as an officer of the Regular Army, Navy, or Marine Corps during the World War, who made valid application for retirement under the provisions of Public Law Numbered 506, Seventieth Congress, enacted May 24, 1928 (U. S. C., Supp. VII, title 38, secs. 581 and 582), and who prior to the passage of this Act has been granted retirement with pay, shall be entitled to continue to receive retirement pay at the monthly rate paid him on March 19, 1933, if the disability for which he has been retired resulted from disease or injury or aggravation of a preexisting disease or injury incurred in such service in fact in line of duty and directly resulting from the performance of duty: Provided, That such person entered active service between April 6, 1917, and November 11, 1918, and served as an officer prior to July 2, 1921: Provided further, That where the disability is now or hereafter determined to be directly incurred in or aggravated during active service, in fact in line of duty without benefit of any statutory or regulatory presumption of any kind, it will be considered to have directly resulted from performance of duty, unless otherwise shown by official record, or clear and unmistakable evidence.

"Sec. 2. Payment of emergency officers' retirement pay shall be effective from the date of enactment of this Act in all cases where entitlement thereto is authorized solely by the provisions of this Act. No beneficiary under this Act shall receive any retirement pay for any period prior to the date of this Act.

"Sec. 3. That subsection (b) of section 212 of Public Law Numbered 212, Seventy-second Congress, shall be amended to read as follows:

"(b) This section shall not apply to any person whose retired pay plus civilian pay amounts to less than \$3,000: *Provided*, That this section shall not apply to regular or emergency commissioned officers retired for disability incurred in combat with an enemy of the United States or for disabilities resulting from an explosion of an instrumentality of war in line of duty during an enlistment or employment as provided in Veterans Regulation Numbered 1 (a), Part I, paragraph I."

The 1934 edition of the United States Code supplants the original code (1925 edition) and supplements I to VII thereto. It is therefore suggested that no reference be made to "Supp. VII" in line 2, page 2 of the bill.

The principle of providing retirement benefits for officers who served in the World War, other than as officers of the regular services, has been recognized since the passage of the Naval Appropriation Act of June 4, 1920, in which it was provided "that all officers of the Naval Reserve force and temporary officers of the Navy who have heretofore incurred or may hereafter incur physical disability in line of duty shall be eligible for retirement under the same conditions as now provided by law for officers of the Regular Navy who have incurred physical disability in line of duty." The Naval Appropriation Act, approved July 12, 1921, amended the Act of June 4, 1920, so as to restrict it to disability incurred in line of duty in time of war, and to require that application for such retirement shall be filed with the Secretary of the Navy not later than October 1, 1921. The first bill granting retirement benefits to World War emergency officers of the Army was introduced in the Congress in 1919 and thereafter numerous bills were introduced and considered until there was passed, over the President's veto, the act of May 24, 1928, Public, No. 506, Seventieth Congress. That act granted retired pay at the rate of 75 percent of the pay to which entitled at the time of discharge from their commissioned service, except pay under the act of May 18, 1920, to all persons who served as officers in the Army, Navy, or Marine Corps during the World War, other than as officers of the Regular Army, Navy, or Marine Corps, who during such service incurred physical disability in line of duty and who within 1 year from the date of the act were rated at not less than 30 percent permanently disabled for disability resulting directly from such war service. The term "World War", as used in the act is defined as including the period from April 6, 1917, to July 2, 1921, and it was provided no person shall be entitled to benefits under the provisions of the act unless application is received in the United States Veterans' Bureau within 12 months after the passage of the act.

The prerequisites for entitlement to retired pay for officers of the Regular Service are materially different than as to emergency officers. This may be attributed to the fact that the Regular officer is following the military or naval service as a career while the emergency officers, as the term implies, served during the war emergency. The Regular officer must show his inability to perform the duties of his commission because of disability incurred in line of duty and that showing must be made before he leaves the active service. On the other hand, the emergency officer must show that he had at least a 30-percent permanent disability incurred in line of duty during a specified period of time, which disability arose out of the performance of duty. Under regular retirement, the disability is determined before the termination of active service, whereas under the emergency officers' retirement law, 30-percent permanent disability or more need not be shown to have existed until May 1929, approximately 10 years after the discharge from service of these emergency officers.

It does seem that it was the intent of the Congress at the time of enactment of the original act of May 24, 1928, to include cases covered by existing law, together with the cases contemplated by the proposed legislation (S. 134, 76th Cong.). However, prior to March 20, 1933, from the legislative history it is indicated that the administration of the foregoing act was investigated and hearings were conducted with reference to possible legislation to make the law more restrictive and, in fact, repeal of the act was under consideration. While it may be said that the principle of retirement was originally established to include the group contemplated by the proposed legislation that principle was subsequently modified and the proposed legislation by bringing in the larger group very definitely and materially extends the principles now in effect.

Section 17, title I, of the act of March 20, 1933, Public, No. 2, Seventy-third Congress, repealed the Emergency Officers' Retirement Act of May 24, 1928, insofar as it pertains to the grant of emergency officers' retired pay, but section 10 of Public, No. 2, provides that—

"SEC. 10. Notwithstanding the provisions of section 2 of this title, any person who served as an officer of the Army, Navy, or Marine Corps of the United States during the World War, other than as an officer of the Regular Army, Navy, or Marine Corps during the World War, who made valid application for retirement under the provisions of Public, No. 506, Seventieth Congress, enacted May 24, 1928, sections 581 and 582, title 38, United States Code, and who prior to the passage of this Act has been granted retirement with pay, shall be entitled to continue to receive retirement pay at the monthly rate now being paid him if the disability for which he has been retired resulted from disease or injury or aggravation of a preexisting disease or injury incurred in line of duty during such service: *Provided*, That such person entered active service between April 6, 1917, and November 11, 1918: *Provided*, That the disease or injury or aggravation of the disease or injury directly resulted from the performance of military or naval duty, and that such person otherwise meets the requirements of the regulations which may be issued under the provisions of this Act."

Veterans Regulation No. 5, March 31, 1933, promulgated by the President pursuant to section 10, title I, of Public, No. 2, provides as follows:

"Any person who served as an officer of the Army, Navy, or Marine Corps of the United States during the World War, other than as an officer of the Regular Army, Navy, or Marine Corps during the World War, who made valid application for retirement under the provisions of Public, 506, 70th Congress, enacted May 24, 1928, sections 581 and 582, title 38, United States Code, and who prior to the passage of Public, No. 2, 73d Congress, has been granted retirement with pay, shall, subject to such other regulations as have been or may hereafter be issued, be entitled to continue to receive retirement pay at the monthly rate now being paid him if the disability for which he has been retired with pay resulted from disease or injury or aggravation of a preexisting disease or injury, incurred in line of duty during such service and is shown to have been heretofore properly rated: *Provided*, That such person entered active service between April 6, 1917, and November 11, 1918: *Provided further*, That the disease or injury or aggravation of the disease or injury directly resulted from the performance of military or naval duty and that the causative factor therefor is shown to have arisen out of the performance of duty during such service."

Section 1 of the bill would place those emergency officers in their retired pay status who were being paid such benefits on March 19, 1933, who entered active service between April 6, 1917, and November 11, 1918, and served as an officer prior to July 2, 1921, provided the disability is determined to be directly incurred in or aggravated during active service, in fact in line of duty without benefit of any statutory or regulatory presumption of any kind.

The first proviso of section 1 (lines 10 to 12, p. 2 of the bill), eliminates the requirement of the present law that the emergency officer must have been commissioned prior to November 11, 1918, or prior to April 1, 1920, if he served in Russia, and extends those dates to July 2, 1921. It would also permit the payment of claims wherein the disability was incurred during a period of service which did not commence until after November 11, 1918. The second proviso of section 1 would materially change the present definition of the phrase "directly resulting from the performance of duty." It would make direct incurrence in or aggravation during active service of a disability equivalent to one "directly resulting from the performance of duty" in those cases where such a finding is given without benefit of any statutory or regulatory presumption of any kind, unless a different conclusion would be warranted upon the basis of official record or clear and unmistakable evidence.

With respect to the terms "regulatory presumption" as used in the second proviso, the several regulations heretofore issued regarding service connection for disabilities were based upon sound medical judgment. For this reason it is believed that, in general, eligibility can be established under the proviso of section 1 of the bill on a factual basis without benefit of regulation. However, it is probable that some, but not many cases, would be deniable by the inclusion of the word "regulatory" in the proviso because the broad principles of these regulations, even though based upon sound medical judgment, might not cover all claims when adjudicated on an individual factual basis. In advance of actual adjudication, it would be impossible to estimate the number of cases that might be denied by reason of the word "regulatory" appearing in the proviso.

Under the terms of section 2 of the bill, benefits provided by the proposed act would be payable only from the date of enactment. No existing rights could be withdrawn, and any officer whose claim is now pending before the Board of Veterans' Appeals, if allowed, would be entitled to retroactive benefits under the existing law. The first sentence of section 2 is identical with the provisions of section 2 of H. R. 8176, Seventy-fifth Congress, as introduced in the House of Representatives on August 6, 1937. However, that sentence was subsequently eliminated in H. R. 8176 and a sentence substituted for it identical with the second sentence of section 2 of the bill here under consideration. In the opinion of the Veterans' Administration either sentence would bring the same result, and there is no need for the inclusion of both sentences in the bill.

The amendment of subsection (b) of section 212 of Public Law No. 212, Seventy-second Congress, as proposed by section 3 of the bill, has the effect of including those officers retired on account of disabilities resulting from an explosion of an instrumentality of war in the same category as those whose retirement is based upon disability incurred in combat with an enemy of the United States. An exception pertaining to disabilities resulting from an explosion of an instrumentality of war in line of duty during an enlistment or employment, as provided in Veterans Regulation No. 1 (a), as amended, part I, paragraph I, was contained in paragraph X of Veterans Regulation No. 10. However, paragraph X of Veterans Regulation No. 10 was canceled by Public, No. 357, Seventy-fifth Congress, approved August 25, 1937. Since section 3 would also apply to retired officers of the Regular Army and Navy as well as emergency officers, the committee may desire to obtain the views of the War and Navy Departments on this provision.

Former emergency officers who cannot meet the requirements of the existing law governing retirement pay receive compensation at the same rates for their service-connected disabilities as are paid nonofficers. The average pay of retired emergency officers exceeds the average compensation rate paid to the group to be affected, and for this greater benefit the requirements of existing law are not considered unduly exacting.

There is ample provision under existing law for approval of emergency officers' retirement with pay in meritorious cases, including review in doubtful cases where it may be urged that disallowance thereof does not accord with present law. Such reconsiderations are being given at the present time.

It is estimated that the additional cost of the bill for the fiscal year 1940 would approximate \$2,677,000, restoring to the retirement rolls approximately 2,950 emergency officers. This estimate is based upon the assumption that all service-connected cases now rated 30 percent or more would be restored to the rolls, except those where the disability was connected with service by the presumptions afforded by section 200 of the World War Veterans' Act, 1924, as amended. This estimate also takes into consideration the deaths which have occurred in this group.

The attention of the committee is respectfully invited to the fact that the President of the United States withheld his approval to a similar bill, H. R. 8176, 75th Congress, and his memorandum of disapproval may be found in the Congressional Record, volume 83, part 8, pages 9716-9717.

For the foregoing reason the Veterans' Administration is unable to recommend the bill to the favorable consideration of your committee.

Advice has been received from the Acting Director, Bureau of the Budget, that there would be no objection by that office to the presentation of this report to your committee.

Very truly yours,

FRANK T. HINES,
Administrator.

