

November 21, 1996

VAOPGCPREC 12-96

General Counsel (022)

Recoupment of Armed Forces Severance Pay from Veterans' Disability Compensation--XXXXXXX, XXXX X. X XX XXX XXX

Chairman, Board of Veterans' Appeals (011G)

QUESTION PRESENTED:

Whether 38 C.F.R. § 3.700(a)(3) or any other legal authority requires withholding of a veteran's Department of Veterans Affairs (VA) disability compensation to recoup the amount of nondisability severance pay received by the veteran from the veteran's armed forces component upon discharge from military service.

COMMENTS:

1. The record indicates that the veteran served on active duty in the Air Force from June 1974 to November 1987, attaining the rank of major. Upon discharge, the veteran received a lump-sum payment from the Department of the Air Force, which the Air Force termed "nondisability severance pay." The veteran was subsequently awarded VA disability compensation. Based on evidence received from the Air Force, the VA regional office determined that the lump-sum payment was subject to recoupment from VA disability compensation and began withholding a portion of the veteran's disability compensation to recoup the total amount of the lump-sum payment. The veteran appealed. By letter dated February 4, 1994, the Department of the Air Force informed VA that the veteran was administratively discharged involuntarily from the Air Force because of misconduct or moral or professional dereliction and received nondisability severance pay authorized by section 631 of Pub. L. No. 96-513, 94 Stat. 2835, 2954 (1980), and former 10 U.S.C. § 8786 (see 10 U.S.C.A. § 8786 (1959)). (In fact, former section 8786 authorized severance pay for Air Force officers removed from the active list for failure to meet standards of performance. Former section 8796 of title 10, United States Code, authorized such benefits for Air Force officers removed for moral or professional dereliction.) The veteran cites 38 C.F.R. § 3.700(a)(3) and maintains that the lump-sum payment received from the Air Force should not be recouped from VA disability compensation since the payment represented severance pay not due to a disability.

2. Section 1212 of title 10, United States Code, addresses eligibility for disability severance pay by members of the Armed Forces. The provisions of section 1212(c) govern the recoupment of disability severance pay from VA disability compensation payable for the same disability. Section 1212(c) provides in pertinent part that, "[t]he amount of disability severance pay received under this

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section shall be deducted from any compensation for the same disability to which the former member of the armed forces or his dependents become entitled under any law administered by the Department of Veterans Affairs." Section 1212(c) derives from section 403 of the Career Compensation Act of 1949, ch. 681, § 403, 63 Stat. 802, 820 (also referred to as Public Law 351, 81st Congress).

3. Section 3.700(a)(3) of title 38, Code of Federal Regulations, was promulgated in 1959 to implement the statutory provisions codified at 10 U.S.C. § 1212(c). The VA transmittal sheet accompanying the initial promulgation of 38 C.F.R. § 3.700(a)(3) describes that provision as a restatement of "Public Law 351, 81st Congress." Compensation & Pension Trans. Sheet 200 (5-29-59). As initially promulgated, section 3.700(a)(3) consisted of language, identical to language contained in the current version of that regulation, providing that,

[w]here the disability or disabilities found to be service connected are the same as those upon which disability severance pay is granted, an award of compensation will be made subject to recoupment of the disability severance pay. *There is no prohibition against payment of compensation where the veteran received nondisability severance pay or where disability severance pay was based upon some other disability.*

(Emphasis added.)

4. At the time of issuance of 38 C.F.R. § 3.700(a)(3), former chapter 859 of title 10, United States Code, (see 10 U.S.C.A. ch. 859 (1959)) provided procedures for the removal of Air Force officers who failed to meet standards of performance. A provision of that chapter, former 10 U.S.C. § 8786, authorized severance pay for certain officers removed from the active list in connection with proceedings under former chapter 859. The following year, former chapter 860 was added to title 10 to provide procedures for removal of and severance pay for certain Air Force officers in connection with proceedings for moral or professional dereliction. See 10 U.S.C.A. ch. 860--repealed, note (Supp. 1996). (Similar provisions regarding Army officers were contained in former chapters 359 and 360 of title 10.) Title 10 contained no provision requiring recoupment of severance pay under these statutes from VA disability compensation. Thus, at the time, 38 C.F.R. § 3.700(a)(3) was correct in stating that there was no prohibition against payment of compensation where a veteran had received nondisability severance pay.

5. The referenced provisions of title 10 authorizing severance pay for certain Air Force and Army officers were repealed by the Defense Officer Personnel Management Act, Pub. L. No. 96-513, § 213, 94 Stat. 2835, 2885 (1980). That repeal was effective September 15, 1981. Pub. L. No. 96-513, § 701, 94 Stat. at 2955. That law added a new chapter 60 to title 10, unifying the procedures for

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removal of officers for failure to meet performance standards and for moral or professional dereliction and authorizing a benefit termed "separation pay" for certain officers removed in connection with proceedings under that chapter. Laws governing separation pay for officers discharged under chapter 60 and certain other provisions of title 10 were added at 10 U.S.C. § 1174. Section 631 of Pub. L. No. 96-513 provided that a member of the Armed Forces who was on active duty on September 14, 1981, and was involuntarily discharged or released from active duty under any provision of title 10 as in effect on or after that date is entitled to elect to receive any severance pay or readjustment payment to which the member would have been entitled under laws in effect on that date. 94 Stat. at 2954. It appears that the benefit termed by the Air Force as "nondisability severance pay," which the veteran in the instant case, who was on active duty on September 14, 1981, received, was paid pursuant to this savings clause.

6. Section 1174(h)(2) of title 10, United States Code, provides in pertinent part that:

A member who has received separation pay under this section, or severance pay or readjustment pay under any other provision of law, based on service in the armed forces shall not be deprived, by reason of his receipt of such separation pay, severance pay, or readjustment pay, of any disability compensation to which he is entitled under the laws administered by the Department of Veterans Affairs, but there shall be deducted from that disability compensation an amount equal to the total amount of separation pay, severance pay, and readjustment pay received, less the amount of Federal income tax withheld from such pay (such withholding being at the flat withholding rate for Federal income tax withholding, as in effect pursuant to regulations prescribed under chapter 24 of the Internal Revenue Code of 1986).

The provision excepting from the general offset requirement "the amount of Federal income tax withheld" was added to section 1174(h)(2) effective October 1, 1996, and made applicable to "payments of separation pay, severance pay, or readjustment pay that are made after September 30, 1996." National Defense Authorization Act for Fiscal Year 1997, Pub. L. No. 104-201, § 653, 110 Stat. 2422, 2583 (1996).¹ The purpose of 10 U.S.C. § 1174(h)(2) is apparently "to eliminate receipt of double benefits for the same period of service." VAOPGCPREC 14-92 (O.G.C. Prec. 14-92) (citing H.R. Rep. No. 1295, 94th Cong., 2d Sess. 71 (1976)). Section 1174(h)(2) clearly and unambiguously

¹ Because the payment of "nondisability severance pay" that prompted the opinion request was made before October 1, 1996, the exception for amounts withheld as Federal income tax does not apply to this case.

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requires that the total amount of any payment referred to in that provision (less any amounts withheld for Federal income tax) shall be recouped from VA disability compensation for a disability incurred prior to the date of receipt of the payment. See *Sabonis v. Brown*, 6 Vet. App. 426, 428, 430 (1994) (the meaning of the recoupment provision of 10 U.S.C. § 1174 is unambiguous), *appeal dismissed*, 56 F.3d 79 (Fed. Cir. 1995). The reference in section 1174(h)(2) to "severance pay or readjustment pay" appears to have been intended to encompass payments under the savings clause of section 631 of Pub. L. No. 96-513, the statute which added section 1174. Since it appears that the veteran received severance pay under section 631 upon leaving the Air Force, VA is required to withhold the veteran's disability compensation until the total amount of the severance pay (less any amounts withheld for Federal income tax) is recouped.

7. Although the statement in 38 C.F.R. § 3.700(a)(3) that there is no prohibition against payment of compensation where a veteran has received nondisability severance pay was accurate when that regulation was added in 1959, the regulation was not updated to reflect the change in law resulting from enactment of 10 U.S.C. § 1174(h)(2), which became effective in 1981. In 1987, the Veterans' Administration amended section 3.700(a) to implement the recoupment requirements of Pub. L. No. 96-513. 52 Fed. Reg. 27,339 (1987). That amendment added a new subsection (a)(5) providing that a veteran who has received separation pay may also receive VA disability compensation for a disability incurred in or aggravated by service prior to the date of receipt of the separation pay, subject to recoupment of the total amount of separation pay received. Although the notice proposing that amendment noted the advice of the Veterans' Administration General Counsel that, "[w]here entitlement to VA compensation was established on or after September 15, 1981, the total amount of separation pay awarded under section 1174(h)(2) of Title 10, United States Code, or severance pay or readjustment pay under any other provision of law is subject to recoupment through withholding of disability compensation," 52 Fed. Reg. 3286, 3287 (1987), new subsection (a)(5) referred only to recoupment of separation pay and did not address recoupment of severance pay and readjustment pay. Further, the amendment left unchanged the obsolete statement in subsection (a)(3) of section 3.700 that there is no prohibition against payment of compensation where a veteran has received nondisability severance pay. To the extent that that statement suggests that recoupment of such severance pay is not required, the statement is inconsistent with the governing statute, 10 U.S.C. § 1174(h)(2), which clearly and unambiguously requires that the total amount of any severance pay (less any amounts withheld for Federal income tax) be recouped from VA disability compensation, and the statement is of no legal effect. See *Manhattan General Equip. Co. v. Commissioner*, 297 U.S. 129, 134 (1936); *United States v. Larionoff*, 431 U.S. 864, 873 (1977).

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8. The request for opinion cites provisions of Adjudication Procedure Manual M21-1 (Manual M21-1) as indicating that there is no provision of law or instruction requiring recoupment of severance pay (as distinguished from disability severance pay) awarded under certain statutes providing for payments to officers removed from service. Certain paragraphs of the manual cited in the request for opinion appear to be obsolete provisions which have been replaced by current Manual M21-1, Part IV, paras. 20.02.b.(2) and 20.40 (change 70, May 25, 1995). The current manual provisions, and their predecessors, contain a number of inaccuracies and, to the extent they could be read as containing any suggestion that recoupment of severance payments made pursuant to section 631 of Pub. L. No. 96-513 from VA disability compensation is not required, they would be in conflict with 10 U.S.C. § 1174(h)(2) and would be without effect.

HELD:

Section 1174(h)(2) of title 10, United States Code, which provides that there shall be deducted from any disability compensation under laws administered by the Department of Veterans Affairs (VA) an amount equal to the amount of separation pay received under section 1174 or severance pay or readjustment pay received under any other provision of law (less any amounts withheld for Federal income tax for such payments made after September 30, 1996), requires that VA recoup from a veteran's VA disability compensation the amount of "nondisability severance pay" received by the veteran under section 631 of Pub. L. No. 96-513. The statement in 38 C.F.R. § 3.700(a)(3), which reflects the statute requiring recoupment of disability severance pay, that, "[t]here is no prohibition against payment of compensation where the veteran received nondisability severance pay" is of no effect as it is inconsistent with 10 U.S.C. § 1174(h)(2).

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