

CITATION: VAOPGCPREC 22-90
Vet. Aff. Op. Gen. Couns. Prec. 22-90

DATE: 7-17-90

TEXT:

SUBJECT: Reconsideration of Final Waiver Decisions in Light of Public Law 101-237

QUESTIONS PRESENTED:

- a. May final waiver decisions made before December 18, 1989, be reconsidered in light of the changes to the criteria for waiver contained in Public Law 101-237, § 311?
- b. If question (a) is answered in the affirmative, and the decision being reconsidered has already been affirmed by the Board of Veterans Appeals (BVA), who has jurisdiction to reconsider the waiver?

COMMENTS:

1. The Secretary is empowered to waive collection of debts to the VA when recovery "would be against equity and good conscience...." 38 U.S.C. § 3102. Except for debts arising in the housing loan program under chapter 37 of title 38, United States Code, a request for waiver must be filed within 180 days of receiving notice of a debt from VA. 38 U.S.C. § 3102(a). There is no time limit on requesting waiver of a housing loan debt. 38 U.S.C. § 3102(b). The authority to consider waiver requests from veterans has been delegated to regional office Committees on Waivers and Compromises (COWC). 38 C.F.R. § 1.955.

2. The Veterans' Benefits Amendments Act of 1989, Public Law 101-237, § 311, enacted December 18, 1989, amended the provisions of the statute relating to debt waivers. With regard to debts arising under the housing loan program, 38 U.S.C. § 3102(b) was amended by changing the provision that the Secretary "may waive payment of an indebtedness" to read the Secretary "shall, except as provided in subsection (c) of this section, waive payment" of debts if collection would be against equity and good conscience.

3. In addition, this enactment revised the bars to waiver of all debts contained in 38 U.S.C. § 3102 (c). Previously, debts could not be waived if there existed "an indication of fraud, misrepresentation, material fault, or lack of good faith on the part of the person" requesting waiver. The 1989 statute deleted "material fault" and "lack of good faith" as bars to waiver, and substituted "bad faith."

4. Generally, waiver decisions by COWC are final, subject to certain appellate rights. 38 C.F.R. §1.969(b). A decision may, however, "be reversed or modified on the basis of new and material evidence, fraud, a change in law or interpretation of law ... or clear and unmistakable error...." 38 C.F.R. § 1.969(a).

5. You correctly note that the Congress did not specifically make the recent amendments to 38 U.S.C. § 3102 retroactive. In fact, section 11 of Public Law 101-237 does not contain an effective date. Absent a provision setting another effective date, a bill takes effect at 12:01 a.m. on the day it is signed by the President. U.S. v. Casson, 434 F.2d 415, 418-419 (D.C.Cir.1970). Generally, statutes are to be applied only prospectively. See: Sutherland, Statutory Construction, § 41.04. We have found nothing in that statute or its legislative history to indicate a retroactive intent. The President signed Public Law 101-237 on December 18, 1989. Therefore, we conclude that the amendments to the waiver standards took effect at 12:01 a.m. on December 18, 1989.

6. Having determined the effective date, we must next consider what would constitute prospective application of the statute. One possibility would be to apply the new waiver criteria only to debts arising on or after December 18, 1989. Another possibility would be to apply the new criteria to all waiver requests made on or after that date. A third possibility would be to apply these new rules to all waiver cases pending on that date. Yet another possibility is to apply the criteria to debts outstanding on the effective date, regardless of when the debt arose, provided any applicable time limits for initially requesting waiver had been met.

7. This office need not weigh the various possible ways in which the new criteria may be applied. As we have previously noted, VA has specifically provided in 38 C.F.R. § 1.969(a) that veterans may seek to have a waiver decision reviewed and modified when there has been "a change in law." The regulation does not limit waiver reconsideration to retroactive changes in the law. We, therefore, believe the regulation contemplates permitting veterans to request waiver reconsideration to take advantage of subsequent liberalizations of the law. Since the law is not retroactive, only the portion of the debt outstanding on the new law's effective date; i.e., December 18, 1989, will be eligible for waiver.

8. A particularly strong case can be made for permitting waiver reconsideration of loan guaranty debts since, as we noted above, there is no time limit for requesting waiver as to such debts. Consider the cases of two hypothetical veterans. Assume these veterans incurred loan guaranty debts under similar circumstances at the same time. Veteran A could have requested waiver and been denied. Veteran B could have simply ignored VA's demand for payment. After a liberalizing amendment, veteran B could request waiver and, under the new law, have his debt waived. If, however, regulation 1.969 were construed as prohibiting veteran A from seeking waiver reconsideration, that veteran might be required to continue paying a debt that would now be considered eligible for

waiver. Such a result appears inequitable. We do not believe the Congress could have desired such a result, especially under a statute such as section 3102 which is founded on the equitable principle of equity and good conscience.

9. Further, even as to non-loan guaranty debts, we see no conflict between VA's regulation permitting waiver reconsideration based on new statutory criteria, regardless of whether the decision being reconsidered antedated the statutory changes, and the section 3102 requirement that a request for waiver of such a debt be filed within 180 days of notice. Clearly, although the regulation imposes no time limit on seeking reconsideration, its conditions necessitate that the statutory filing requirements for the initial waiver request already must have been satisfied.

10. The next issue we must address is refunds to persons whose waiver is reconsidered and approved. Generally, waiver applies not only to the amount of the outstanding debt, but also to the portion of that debt already recovered by the Government. 38 C.F.R. § 1.967(a). "If collection of an indebtedness is waived ... such portions of the indebtedness previously collected by VA ... will be refunded." Id.

11. Originally, VA regulations precluded refunds. In an unpublished memorandum dated August 18, 1976, this office concluded that refunds could not be made. That opinion was superseded by another unpublished memorandum dated July 18, 1980. In the 1980 memorandum, this office noted VA may begin offsetting against other VA benefits to collect moneys due, even though the veteran, under the law that existed at that time, had 2 years within which to request waiver of non-loan debts. Relying on Califano v. Yamasaki, 442 U.S. 682 (1979), we concluded that due process considerations require VA to refund moneys previously collected on a debt that is subsequently waived pursuant to a timely waiver request. Further, the text of the statute precludes the "recovery of payments" by VA where such recovery was against equity and good conscience. We concluded that retaining money collected prior to the completion of the administrative waiver process once it was determined that waiver should be granted would constitute a "recovery" proscribed by the statute.

12. In the case of debts affected by this opinion, VA had already determined that, under the law as it existed when waiver was initially considered, recovery of the debt was permitted. The subsequent amendment of the law, coupled with the regulation, renders the debt appropriate for waiver reconsideration at this time. Applying the principles discussed above, it would be inappropriate for VA to retain all of the money collected on a debt that was waived after reconsideration. Since the debt was not eligible for waiver until the effective date of Public Law 101-237; i.e., December 18, 1989, only moneys collected on or after that date should be refunded. Any money collected before that date may be retained by VA because, at the time those moneys were collected, the debt was not eligible for waiver. Further, refunding money collected prior to the effective date of the

statute would improperly give the enactment retroactive effect.

13. We wish to stress that the statute does not automatically require waiver reconsideration based on a change in the law. Rather, reconsideration is authorized by 38 C.F.R. § 1.969 which must be given its full force and effect. You may want to consider amending 38 C.F.R. §§ 1.967 and 1.969 to clarify procedures if waiver criteria are amended in the future.

14. You also requested our opinion regarding waiver denials that were appealed to and sustained by BVA. We believe 38 C.F.R. § 1.969 envisions that a request for reconsideration would be considered at the COWC having jurisdiction over the veteran's claim. The fact that BVA may have considered the case and issued a final ruling should make no difference. BVA considered the record below and the law as it existed at that time. Reconsideration based on a new law should be made at the same level that would initially consider the case; i.e., COWC. The reconsidered decision could then be appealed, if appropriate.

15. Paragraph 14 of this opinion should not be viewed as an opinion on whether or not BVA could entertain a motion for reconsideration. We have noted that BVA Rule 85 (38 C.F.R. § 19.185), which relates to reconsideration, does not provide for reconsideration based on new law. Nevertheless, it is the policy of this office to defer to BVA on questions of their jurisdiction. Accordingly, we express no opinion on whether a motion for waiver reconsideration filed directly with BVA could be considered by that body.

HELD:

a. (i) Under 38 C.F.R. § 1.969, a veteran whose request for waiver of a VA benefits overpayment or loan guaranty indebtedness was denied before December 18, 1989, may request reconsideration in view of the amendments to 38 U.S.C. § 3102 made by section 311 of Public Law 101-237. Reconsideration may be undertaken by the regional office Committee on Waivers and Compromises, even if the prior waiver decision had been considered and denied by BVA.

(ii) If waiver is granted under the amended statute, only moneys collected by VA on such debt on or after December 18, 1989, should be refunded to the veteran. Moneys collected before that date may be retained by the Government.

b. We express no opinion on whether a request for reconsideration filed directly with BVA would be entertained by that body.

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