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CITATION: VAOPGCPREC 74-90
Vet. Aff. Op. Gen. Couns. Prec. 74-90

TEXT:

Subject: Discontinuance of Apportionment Due to Divorce

(This opinion, previously issued as General Counsel Opinion 10-87, dated May 19, 1987, is reissued as a Precedent Opinion pursuant to 38 C.F.R. §§ 2.6(e)(9) and 14.507. The text of the opinion remains unchanged from the original except for certain format and clerical changes necessitated by the aforementioned regulatory provisions.)

QUESTIONS PRESENTED:

(1) Does title 38, United States Code, support the general rule set forth in 38 C.F.R. § 3.500(d), that an apportionment of benefits is to be discontinued the date of last payment when the reason for the apportionment no longer exists?

(2) If the general rule provided by 38 C.F.R. § 3.500(d) is sustainable, does it govern discontinuance of an apportionment as to the apportionee in the event of divorce?

(3) If an apportionment may be discontinued retroactively, is the apportionee or the veteran the "indebted beneficiary" within the meaning of 38 U.S.C. § 3101(b)?

COMMENTS:

For reasons that follow, the answer to the first issue is yes and the answer to the second is no. The answer to the third issue is that both the apportionee and the veteran may, with limitations to be discussed, be considered the "indebted beneficiary" within the meaning of 38 U.S.C. § 3101(b).

The opinion concerns two cases involving overpayments of disability compensation paid to apportionees. The overpayments occurred because payments were made to each apportionee after divorce ended the marriage to the respective veteran. In the first case the veteran and spouse were divorced in 1975, but apportionment payments continued until late 1983, at which time they were retroactively discontinued effective the first day of the month of divorce. In the second case, the divorce occurred in 1980, but such payments continued until mid-1982, at which time they were retroactively discontinued effective the day following the end of the year of the divorce.

Even though the issue certified on appeal in each case involved each former spouse's entitlement to waiver, the concerns of the request focus on the effective date of discontinuance and whether it is the apportionee or the veteran against whom the

indebtedness should be assessed.

First, we consider the questions concerning the effective date of discontinuance of the apportionment. A veteran entitled to disability compensation or pension is entitled to claim specified relatives as dependents, see e.g.,38 U.S.C. § 315 and to receive additional benefits therefor. In the event a spouse or child is not living with the veteran, 38 U.S.C. § 3107(a)(2) authorizes the payment of a portion of the veteran's benefits to such dependent (an apportionment), under conditions prescribed by the Administrator. The amount of a veteran's benefits apportioned to the veteran's dependent need not equal the amount of additional benefits payable but is determined according to the facts of each case. General regulations governing apportionments appear at 38 C.F.R. §§ 3.450-3.461, with effective dates prescribed at sections 3.400(e) and 3.500(d).

The first question regards 38 C.F.R. § 3.500(d)(1), which provides the effective date for discontinuance of an apportionment as follows: "Except as otherwise provided, date of last payment when reason for apportionment no longer exists" (emphasis supplied). The Administrator is vested with broad power to make all rules and regulations necessary and appropriate to carry out the laws administered by this Agency, including those needed to govern apportionment. 38 U.S.C. § 210(c)(1). The Administrator is specifically authorized by 38 U.S.C. § 3107(a) to prescribe the conditions under which apportionment may be paid, and 38 U.S.C. § 3012 prescribes the effective dates the Administrator is to apply to reduction and discontinuance of monetary benefits.

It is appropriate here to briefly point out a difficulty in approaching this issue in relation to 38 U.S.C. § 3012. As to the primary beneficiary, e.g., the veteran, the stoppage of an apportionment is not, of itself, either a reduction or discontinuance of his or her benefit entitlement. (In fact, the veteran may experience an increase in the amount the veteran receives.) The same may not be said, however, as to the apportionee. An apportionment is surely a monetary benefit, albeit a derivative one, and its termination results in loss of such benefit. The question that must be settled is what statutory provision or provisions govern the discontinuance of the benefit of apportionment.

There appears to be no guidance on this issue in the legislative history of any of the above statutory provisions. However, it is clear from VA regulatory history that the discontinuance of apportionment has long been closely associated with the broad power of the Executive Branch to regulate veterans' benefits, the authority to apportion those benefits, and the provisions for reduction and discontinuance of those benefits. See e.g., the authority specified for the support of 38 C.F.R. § 3.317, "Discontinuance of apportionments; effective dates." 19 Fed. Reg. 6927, October 28, 1954. It is also significant that the present section 3.500(d), as well as section 3.501(d) (to be discussed), is codified under "Reductions and Discontinuances," the topic under which are found the implementing regulations for 38 U.S.C. § 3012 “Effective dates for reductions and discontinuances." These observations, and the lack of any other logical source, compel the conclusion that section 3012 governs cases in which apportionment is being terminated.

While the regulatory history of section 3.500(d) is unclear in places, the regulations have consistently held to the proposition that unless otherwise specified, an apportioned award is to be discontinued effective the date of last payment (DLP) when the reason for apportionment has ceased. See 38 C.F.R. § 3.317 (1954) and (1957); §§ 3.500(d), 3.501(d) (1959); § 3.500(d) (1962). Even though the latitude of the Administrator is broad and furnishes sufficient statutory basis for the regulation as it stands, that latitude is not limitless, for it must be exercised within constitutional bounds. In this regard we are confronted with a problem. We know of nowhere that "date of last payment" is defined, though it generally means date of last payment as of when the award or stop-payment action is taken. That is the clear import of the terminology found in 38 U.S.C. § 3012(b)(10), where administrative error or error in judgment would otherwise result in overpayment, and it is the usual application of the term by adjudication personnel, as we have learned through a number of informal contacts in the Department of Veterans Benefits.

If such meaning were to be applied to section 3.500(d) situations, there could be serious constitutional problems that we do not believe Congress or the Administrator intended. An example would be a situation in which a veteran is deprived of several thousands of dollars in disability compensation paid the apportionee that would not have been paid had the apportionee timely reported a financial windfall, vitiating the need for apportionment. This not only deprives the veteran of compensation that Congress intended the veteran to have, it also causes the veteran to receive much less compensation than a similarly circumstanced veteran whose estranged spouse gives timely notice of such windfall. It could be argued that such a scenario would constitute a denial of equal protection.

Requisites for apportionment to a spouse are proof of (1) the relationship of spouse (38 C.F.R. § 3.452(a)), (2) non-cohabitation (id.), (3) nonsupport of spouse (38 C.F.R. § 3.450(c)), and (4) relative financial need (38 C.F.R. §§ 3.451, 3.453). The purpose of apportionment is to effectuate the responsibility of a VA beneficiary to support the beneficiary's dependent. SeeSTone v. Stone, 67S.W.2d 189 (Ark.1934). Once changed circumstances cause dependency to cease (based on VA standards), the obligation that forms the basis for section 3107 ceases. The receipt of apportioned VA benefits carries with it the implied responsibility of the apportionee to timely report any change of circumstance upon which the apportionment was predicated. That obligation was plainly expressed in the enclosures to the award letter sent to each apportionee in the cases under consideration. To cause a primary beneficiary a substantial loss of benefits because an apportionee did not provide such timely notice could arguably constitute a deprivation of property without due process of law.

With this in mind, we examine DLP in the context of the apportionment regulations as well as section 3.500(d)(1). As stated, an apportioned award is based on, among other things, relative financial need (38 C.F.R. §§ 3.451, 3.453, supra). There is nothing to authorize continuation of the apportionment after that need has ceased, except a regulation designed to permit a reasonable period to administratively terminate the award to the apportionee and adjust the award to the primary beneficiary. For further

analysis, we repeat the words of section 3.500(d)(1): "Except as otherwise provided, date of last payment when reason for apportionment no longer exists" (emphasis supplied). The underscored ambiguous language could be interpreted to mean DLP as of the time the award action is taken, with the potential unconstitutional consequences, or could mean DLP as of the time the reason for the apportionment ceases to exist. While the latter does not permit a reasonable administrative adjustment period to prevent overpayment in the event of timely reporting-- which the broad language of 38 U.S.C. §§ 210 and 3107 would surely permit--we must assume that the latter meaning was intended, because neither Congress nor the VA would have intended for apportionment to continue for long periods after the reason for apportionment had ceased; neither would they have sanctioned a constitutionally faulty regulation. A similar problem is apparent in section 3.500(d)(2), even though there is far less likelihood of an extended apportioned award to a spouse of a deinstitutionalized pensioner than one to whom section 3.500(d)(1) would apply.

It is not entirely clear, from reading the regulations themselves, whether section 3.500(d) or section 3.501(d) was intended to apply to discontinuance of apportionment because of divorce. However, our study of the regulatory history of these provisions leads us to the conclusion that in the event of divorce, section 3.501(d) was intended to apply (see, e.g., Transmittal Sheet 271, 1962). Therefore, in the case of divorce, both the apportionee's award and the additional amount of compensation payable because of the apportionee as a dependent, if any, would terminate under the authority of section 3.501(d), either at the end of the year in which the divorce occurred, for divorces before October 1982, or at the end of the month in which the divorce occurred, for later divorces. (We cannot account for the timing applied in the case where a first-of-the-month rule was applied.)

We now consider the issue of whether the apportionee or the veteran is the indebted beneficiary within the meaning of 38 U.S.C. § 3101(b) and 3114, * * Section 3114 of title 38, "Indebtedness offsets," derived from Pub.L. No. 98-466, § 605(a). The basic purpose of that and other related provisions was to require the VA to take more aggressive action to recover benefit overpayments. See generally H.R. Rep. No. 498, 96th Cong., 2d Sess. 1 et seq., reprinted in 1980 U.S. Code Cong. & Ad. News 4594 et seq. Section 3114 has no bearing on the present issue. which limit VA's setoff authority to benefits owing the indebted person. In this regard, it will be helpful to first consider the nature of apportionment. As we have discussed, a veteran entitled to disability benefits may claim specified relatives as dependents, including a spouse. Absent apportionment, the additional benefits paid because of a dependent are considered the veteran's property. State v. Wallace, 97 Wash.2d 846, 651 P.2d 201, 205 (1982); Op. G.C. 4-79. But whose property is an apportioned amount of disability compensation or pension? The above-cited authorities imply, but do not hold, that it belongs to the apportionee. As we have also discussed, 38 U.S.C. § 3107(a)(2) provides authority to pay a portion of a veteran's monetary benefits to a dependent spouse or child if such dependent is not living with the veteran. Apportionment is not automatic; it must be claimed. 38 C.F.R. § 3.452(a). As indicated, the amount to be apportioned, if any, must be established by the VA, weighing factors such as

contributions toward support (id. at s 3.452(c)) and relative needs of the parties (id. at §§ 3.451, 3.453).

Once, however, the VA has determined that the dependent is entitled to an apportioned amount of the veteran's compensation, the apportionment payments are made to the dependent. The veteran loses control of that amount of money, and, in fact, the veteran's own compensation is reduced by the amount to which the apportionee has become entitled. In the case of a spouse, the apportioned amount is made by separate award to the spouse; a check (or equivalent) is issued each month naming the spouse as payee; the spouse negotiates the check; and the spouse is then at liberty to exercise uncontrolled discretion as to how the money is spent. Thus, the apportioned amount has, in effect, become a separate property of the apportionee, subject to alteration only by changed circumstances. Even though apportionment payments are paid to the apportionee as a dependent of a beneficiary, the receipt of the apportionment makes the apportionee, too, a "beneficiary." See Black's Law Dictionary 142 (rev. 5th ed. 1979).

In 1944 the Administrator restated earlier positions taken by the Comptroller General regarding recovery of overpayments, in pertinent part, as follows:

(T)he ordinary debtor-creditor relationship exists as between a beneficiary and the Government, stemming from the common-law, where the person has received a payment from the Government to which he was not entitled...."

A.D. 607--emphasis supplied. In 1968, the Second Circuit declared this common-law principle as follows:

It is of course, well established that parties receiving monies from the Government under mistake of fact or law are liable ... to refund them, and that no specific statutory authorization upon which to base a claimed right of setoff or an affirmative action for the recovery of these monies is necessary."

DiSilvestro v. United States, 405 F.2d 150, 155 (2d Cir.1968, cert. denied, 396 U.S. 964 (1969). In cases such as those presently considered, when the marriage ended, the former spouse could no longer qualify as an apportionment beneficiary under 38 U.S.C. § 3107(a)(2). Therefore, under this common-law principle, having been the recipient of payments to which there was no entitlement, the former spouse became a debtor to the Government, absent legislation to the contrary.

This common-law right of the Government to recover moneys erroneously paid has been altered by legislation, but none that would absolve the apportionee from the obligation to repay the overpayment. The current statutory law that alters the common law in this regard is 38 U.S.C. § 3101. Of particular relevance is section 3101(b), which states in pertinent part:

This section shall prohibit the collection by setoff or otherwise out of any benefits payable pursuant to any law administered by the Veterans' Administration and relating to veterans, their estates, or their dependents, of any claim of the United States or any agency thereof against (1) any person other than the indebted beneficiary or the beneficiary's estate., or (2) any beneficiary or the beneficiary's estate except amounts due the United States by such beneficiary or the beneficiary's estate by reason of overpayments or illegal payments made under such laws to such beneficiary or the beneficiary's estate or to the beneficiary's dependents as such" emphasis supplied .

The quoted language derived from section 5 of Pub.L. No. 76-866 (1940), which amended section 3 of Pub.L. No. 74-262 (1935). The Government's right to recover funds from a person who has received them by mistake and without right is not barred unless Congress has clearly manifested its intention to raise a "statutory barrier." United States v. Wurts, 303 U.S. 414, 416 (1938). Nothing in the wording of the statute or the history of these provisions indicates that Congress intended to raise such statutory barrier. * * See 15 Comp Gen. 1133. See also World War Veterans Legislation, Hearings on H.R. 1008, etc., before the House Committee on World War Veterans' Legislation, 76th Cong., 3d Sess. 3 (1940) (statement of Col. John Thomas Taylor, Director, National Legislation Committee, American Legion); World War Veterans' Legislation, Hearing on S. 3833, etc., before a Subcommittee of the Senate Committee on Finance, 76th Cong., 3d Sess. 16, 17 (1940) (statement of Gen. Frank T. Hines, Administrator of Veterans Affairs). It is clear from the wording of the statute that Congress adopted this position. Rather, the present wording of section 3101(b), derived from section 5, must be seen merely as adding another means of collecting an overpayment made to a dependent "as such," that is, by offset of benefits due the principal beneficiary. Because apportionment rests upon the dependency of the apportionee and is "carved out of" the primary beneficiary's entitlement, it is concluded that payments to the apportionee are payments to the primary beneficiary's dependent "as such," within the meaning of section 3101. Therefore, the legislative alterations of the common-law principle are to be seen as providing the VA the authority to collect, by offset (only by offset) against the primary beneficiary's veterans' benefits, amounts overpaid the apportionee on the same account.

The opinion request quotes a portion of Op. G.C. 1-79 to the effect that payments to an apportionee are payments to the veteran. There appears to be no support for that position in the legislative history of 38 U.S.C. § 3101(b). Because that opinion merely repeated dictum contained in A.D. No. 482, it does not pose a precedential obstacle to the position of this opinion that payments to an apportionee are payments to that person and to no one else. Furthermore, the issues decided by the Op. G.C. and the A.D. are distinguishable from the one presently decided. Op. G.C. 1-79 held that any overpayment of a benefit paid to a dependent in the dependent's own right could not be claimed against the veteran. A.D. 482 held that an overpayment to a veteran could not be claimed against a benefit paid to a dependent in the dependent's own right. Cases involving apportionment, such as those being considered, differ from these in that the apportionee's right to the payments is not independent of the veteran's own entitlement

but is carved out of that entitlement.

In view of the foregoing, it is inaccurate to conclude that payment to a dependent-apportionee is considered payment to the primary beneficiary, thus transferring the indebtedness for the overpayment from the dependent to the primary beneficiary. Rather, it is more consistent with the law to conclude that payment to a dependent-apportionee represents a portion of the primary beneficiary's total entitlement, divested from that beneficiary and vested in the apportionee by 38 U.S.C. § 3107 that such makes the apportionee the beneficiary of the apportionment and, thus, under the common law, a debtor of an obligation to refund payments to which the apportionee, as a beneficiary, was not entitled. It is concluded that, because of the supplementation to the common law made by section 3101(b), the VA may recover an overpayment to the apportionee from payments due, on the same account, either the apportionee or the principal beneficiary or both. Where there are no benefit payments due the primary beneficiary, there is no authority to collect from the primary beneficiary an overpayment to the apportionee. Where no further benefits are payable on the beneficiary's account, the beneficiary must stand good for the beneficiary's own debt and the apportionee must stand good for the apportionee's own debt.

Finally, it is important that this opinion not be construed as mandating offset against benefits due the principal beneficiary for the purpose of collecting an overpayment made to the apportionee. Absent waiver, it would constitute unjust enrichment to permit the apportionee to keep that to which the apportionee was not entitled. Therefore, while the Agency may collect such debt from benefits due either beneficiary on the primary beneficiary's account, it may, as a policy matter, choose to assert a claim against the apportionee and then proceed with collection from benefits due the principal beneficiary only if, because of waiver or uncollectibility, recovery cannot be had from the apportionee-debtor. To do so may require a clarifying amendment to 38 C.F.R. § 1.934, which presently could be interpreted as requiring the VA to proceed against both debtors for the full amount, simultaneously.

HELD:

(1) Section 3.500(d)(1) of title 38, C.F.R., is supported by statutory authority, i.e., 38 U.S.C. §§ 210(c)(1), 3012, and 3107(a).

(2) "Date of last payment" found in section 3.500(d) refers to DLP as of the time the reason for the apportionment ceases to exist.

(3) Section 3.500(d) does not apply to discontinuance of apportionment due to divorce; rather, section 3.501(d) applies in such cases.

(4) Section 3101(b) of title 38, U.S.C., does not shift the label "debtor" from the apportionee to the primary beneficiary, or vice versa. The primary beneficiary is responsible to refund the overpayments that the primary beneficiary has received, and

the apportionee is responsible to refund benefit overpayments that the apportionee has received.

(5) Section 3101(b) supplements the common law so as to permit collection by offset against benefits due the primary beneficiary of a debt occasioned by overpayment to the apportionee on the same account.

(6) The Agency is at liberty to first assert a claim against the apportionee and resort to offset against the benefits due the primary beneficiary on the same account only if efforts to collect from the apportionee prove unsuccessful.

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