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Vet. Aff. Op. Gen. Couns. Prec. 85-90

TEXT:

Subject: Waived Income for Pension Purposes

(This, opinion, previously issued as General Counsel Opinion 3-81, dated April 22, 1981, 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.)

QUESTION PRESENTED

Does a withdrawn application for Social Security benefits constitute a waiver of income?

COMMENTS:

The question presented deals with whether the withdrawal of an application for Social Security benefits should be regarded as a waiver under 38 U.S.C. § 503(a) if (1) the application involves benefits optionally available at a reduced level prior to age 65 and (2) entitlement to such benefits has been favorably determined by the Social Security Administration.

Title 38, United States Code, section 503(a), relating to determinations of annual income for VA pension purposes under chapter 15 of title 38, provides that all payments of any kind or from any source shall be included as income, with specified exclusions. This section also provides that such payments shall include salary, retirement or annuity payments, or similar income that "has been waived, irrespective of whether the waiver was made pursuant to statute, contract, or otherwise."

The requirement that waived income be included was added in the comprehensive reform of the VA pension program under Pub.L. No. 86-211, effective July 1, 1960, and carried forward in the subsequent comprehensive reform under Pub.L. No. 95-588, effective January 1, 1979. Prior to Pub.L. No. 86-211, income waived pursuant to statute was not considered for pension income-determination purposes. At that time, pension payments were not graduated, and the waiver of a relatively small amount of income could result in eligibility for a relatively substantial amount of pension. A 1959 VA survey indicated that a certain proportion of veterans (11 of 774 beneficiaries surveyed) had waived or partially waived their right to receive income such as civil service annuities, railroad retirement benefits, or private pensions, so as to bring themselves within the annual income limitation and thus qualify for VA pension. (See Survey of Financial Conditions of Veterans Receiving Non-Service-Connected Disability Pensions, House Committee Print No. 30, 86th Congress, reprinted in 2 VA, History of

Veterans Laws: Public Laws 86-150, 86-211.) In Congress' view, as set forth in both the House and Senate reports accompanying the legislation subsequently enacted as Pub.L. No. 86-211, there was no justification for establishing a test of need, as measured by income, and at the same time enabling beneficiaries to create their own need (by waiving income) so as to meet the needs test.

Since 1960, we have on several occasions dealt with the question of what constitutes a waiver of income. By memorandum opinion dated September 8, 1960, we indicated that unemployment compensation benefits not applied for should not be regarded as waived income. In Op.G.C. 10-62 (1962), we held that a union pension plan increase offered to, but not accepted by, plan participants was not waived income. In that opinion, we efined a waiver as "a complete abandonment or surrender of all or part of a benefit which a person is entitled to receive." By memorandum dated July 24, 1962, we indicated that payments for jury duty not received because not applied for should be regarded as waived income. (In Pub.L. No. 88-664 (1964), Congress provided that jury duty payments should be excluded from income for pension purposes. This exclusion was not carried forward by Pub.L. No. 95-588 and is thus applicable today only with regard to section 306(a) pensioners.)

In February 1963, having been advised by the Social Security Administration of a proposed regulatory change involving withdrawal of applications where the prospective beneficiary has been found to be entitled, we considered the question of whether such a withdrawal should be regarded as a waiver. Our memorandum of February 28, 1963, states as follows:

"In any case wherein a VA beneficiary has applied for Social Security benefits, and has been found entitled, a withdrawal of the application should be considered by the VA as being a "waiver" within the meaning of 38 U.S.C. § 503. Consequently, the amount of Social Security benefits for which entitlement has been determined should be counted as "income" for VA pension purposes, under the cited section, irrespective of whether the benefits are actually received." (Emphasis in original.)

In a memorandum opinion dated December 3, 1964, we again dealt with the question of a surviving spouse's withdrawn Social Security application in a case in which the effect of the withdrawal would have been to increase the Social Security family benefit payable to the children; had such withdrawal not been regarded as a waiver, aggregate family income (pension plus Social Security) would have been increased. We found no reason to depart from our earlier conclusion regarding withdrawn applications where the prospective beneficiary has been found to be entitled.

In 1964, Pub.L. No. 88-664 provided for an exclusion of 10 percent of the amount of retirement or similar benefits payable to a pensioner. This exclusion was broadly construed and, together with the income-decrement formula approach used to determine a VA pensioner's pension payment, would have tended to remove any incentive on the part of a pensioner to withdraw a Social Security application; in general, a pensioner would have found it to his or her advantage to apply for and receive Social

Security benefits. Moreover, even if a withdrawn application had not been regarded as a waiver, the amount of additional pension payable would rarely have been sufficient, we believe, to motivate a withdrawal of the application. For example, in 1978, a surviving spouse without dependents eligible for Social Security at the rate of $341.66 per month would have been eligible for $5 per month in VA pension. A waiver of the Social Security benefit would have increased the pension payment to $133 per month, but it is obvious that such a waiver would have been extremely disadvantageous to the surviving spouse. Similarly, a surviving spouse eligible for Social Security at a far lesser rate--for example, $125 per month--could not, by waiving the Social Security benefit, have increased his or her monthly income. This would also be the case if the surviving spouse were in need of regular aid and attendance. However, such a waiver, if permitted, would have been advantageous where the surviving spouse had several dependent children and the VA pension payment, increased by reason of the dependents, exceeded the surviving spouse's Social Security benefit.

Under the Improved Pension program established by Pub.L. No. 95-588, no 10-percent exclusion of Social Security benefits is permitted, and the method of determining the pension payment is such that no Improved Pension beneficiary would find it to his or her present advantage--or disadvantage--to waive Social Security benefits to which the beneficiary is entitled. Even in the limited situation described above--a surviving spouse with several dependents--the effect of permitting a waiver would not be to increase the surviving spouse's monthly income. For example, assume that a surviving spouse with 6 dependent children has been found to be eligible for $300 per month in Social Security benefits on her own account, with an additional benefit payable to each of the dependent children, and would be, but for the family's receipt of the Social Security benefits, eligible for $641 per month in VA pension, the present maximum rate for a surviving spouse with 6 dependents. If the family's total Social Security benefits are less than $641, the VA pension payment would make up the difference. If the Social Security family benefits exceeded $641, the surviving spouse would find it financially disadvantageous to waive his or her benefits in order to receive VA pension since the Social Security benefits payable to the dependents would be applied to reduce his or her pension payment.

Under the section 306 and Improved Pension programs, the withdrawal of the surviving spouse's Social Security application, even if not construed as a waiver, cannot result in an increase in a pensioner's present monthly income. The only purpose of such a withdrawal is to maintain eligibility for a higher Social Security benefit at age 65. The effect of treating a pensioner's withdrawn application as a waiver would be to force reactivation of the application and thus deprive the pensioner of the opportunity to receive an unreduced Social Security benefit at age 65. The pensioner's present financial needs would thus be met by the Social Security trust fund. The effect of not treating the application as a waiver would be to continue meeting the pensioner's needs from the VA pension appropriation. If, at age 65, the pensioner becomes eligible for a Social Security benefit that exceeds the VA pension, the pensioner presumably would elect the higher benefits. At that point, the pensioner's financial needs would be met by Social Security and no longer by the VA pension appropriation. We do not believe that

the deferral of a pensioner's right to receive Social Security benefits amounts to a "creation of need."

It should be noted that Congress, in creating the need-based Supplemental Security Income and Medicaid programs under the Social Security Act, specifically required applicants to apply for other benefits to which they may be entitled. However, it has not imposed such a specific requirement on VA pension applicants. We have found no basis in the legislative history of section 503(a) that suggests that mere failure to apply for benefits which one is otherwise entitled to receive should be regarded as a waiver. This being the case, it would appear that the effect of regarding an application, withdrawn after a finding of entitlement, as a waiver, is to discriminate, in terms of pension eligibility, between those who have failed to apply for benefits to which they are entitled and those who have applied and been found entitled. We are not aware of anything in the legislative history accompanying section 503(a) indicating Congress' intent to permit such discrimination. Rather, it appears to us that the requirement that waived income be considered in pension income determinations was intended to address any situation in which a pensioner or prospective pensioner is attempting to distort the purposes of the need-based pension program. This would occur where the waiver, by reducing countable income and thus enabling the pensioner to maintain pension eligibility, has as its underlying purpose the maximization of income, an end that is attained when the reduction of income occasioned by the waiver is more than offset by the VA pension payment. Such a result distorts the purpose of the need-based pension program.

In the instant case, even though the pensioner is attempting to maintain eligibility for VA pension, the purpose is not to maximize present income. Rather, the pensioner seeks to remain eligible for the unreduced Social Security benefit available to her at age 65. The withdrawal of the pensioner's application cannot be said to be "a complete bandonment" of a benefit he or she is entitled to receive but is rather a deferral of the right to receive that benefit.

HELD:

The withdrawal of a Social Security application after a finding of entitlement, under circumstances indicating that the purpose of such withdrawal is to maintain eligibility for an unreduced Social Security benefit upon attainment of a certain age, should not be regarded as a waiver under section 503(a) nor should the Social Security benefit that would be received but for the withdrawal be counted as income for purposes of the Improved Pension program.

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