

DATE: 5-14-92

CITATION: VAOPGCPREC 11-92
Vet. Aff. Op. Gen. Couns. Prec. 11-92

TEXT:

Subj: Scope of Authority Vested in Party Holding Power of Attorney

QUESTIONS PRESENTED:

- a. Does a veteran's service organization representative, agent, or attorney, by virtue of having a properly executed appointment form of record, have complete authority to bind the claimant, e.g., may the party holding the power of attorney sign an application for compensation or pension, VA Form 21-526, on behalf of the claimant? Are there any forms, such as the Eligibility Verification Report, for which this authority does not exist?
- b. If information relevant to eligibility or payment rates furnished on a form signed on behalf of a claimant by a party holding a power of attorney is incorrect, is the claimant responsible for any resulting overpayment?

COMMENTS:

1. You have requested our opinion as to the scope of authority vested in the party holding the power of attorney of a VA claimant or beneficiary. You first ask whether a service organization representative, agent, or attorney, having been named as representative for the claimant or beneficiary in a properly executed appointment form of record, has complete authority to bind the claimant by, for example, signing an application for compensation or pension. This office has long taken the position that the power of attorney form for representation by a service organization does not authorize the representative to sign the original application for benefits for the claimant. See Op. Sol. 234-52 (9-5-52); see also Op. Sol. 168-52 (7-1-52); Op. Sol. 375-49 (9-9-49). These opinions indicate that the authorization contained in the appointment form is not sufficiently broad to authorize the accredited representative to file a claim or withdraw a claim.

These same conclusions have been reached in more recent unpublished opinions of this office. The action of the representative is considered the filing of an informal claim, which action can be ratified by the claimant through filing of a formal claim. Op. Sol. 452-49 (11-9-49). As discussed below, we believe that this position remains valid and that the rationale behind it applies equally to service organization representatives, agents, and attorneys.

2. Looking first at pertinent statutes and regulations, chapter 59 of title 38, United States Code, contains the provisions governing claim representation before VA. Section 5901 (formerly section 3401) of title 38, entitled "Prohibition

against acting as claims agent or attorney," provides that " except as provided by section 500 of title 5, no individual may act as an agent or attorney in the preparation, presentation, or prosecution of any claim under laws administered by the Secretary of Veterans Affairs unless such individual has been recognized for such purposes by the Secretary." Pursuant to this section, any individual wishing to represent a claimant before VA must be "recognized" by VA. Accredited representatives of recognized organizations may be recognized upon filing of a power of attorney with the Secretary, executed in such manner and form as the Secretary may prescribe. 38 U.S.C. § 5902(b)(2) (formerly 3402(b)(2)). Under 38 C.F.R. § 14.631(a), an attorney or accredited agent may be recognized upon filing of a power of attorney on a prescribed form. Also, pursuant to section 500 of title 5, United States Code, and 38 C.F.R. § 14.629(c)(1), an attorney may be recognized upon submission of an appropriate letter on the attorney's letterhead.

3. The plain language of 38 U.S.C. § 5901 indicates that, with the limited exception of 5 U.S.C. § 500, Congress intended chapter 59 of title 38 to be the exclusive authority for claim representation activities before VA. Further, the various provisions of chapter 59 pertaining to recognition of representatives, agents, and attorneys limit such recognition to preparation, presentation, and prosecution of claims under laws administered by the Secretary of Veterans Affairs. 38 U.S.C. §§ 5901-5904 (formerly §§ 3401- 3404). Generally, the "plain-meaning rule" dictates that, when the language of a statute is clear and unambiguous, it must be held to mean what it plainly expresses. 2A N. Singer, Sutherland Statutory Construction § 45.01 (4th ed. 1984). Read literally, preparation, presentation, and prosecution does not include authorization to sign a claim for a claimant. If Congress had intended to authorize representatives to sign applications on behalf of claimants, it could have included language to that effect in chapter 59. We find no indication that Congress intended to do so.

4. Statutes governing filing of claims for VA benefits provide only that a specific claim must be filed in the prescribed form in order for benefits to be paid. 38 U.S.C. § 5101(a) (formerly s 3001(a)). This statute reflects congressional concern with assuring that a claimant knowingly communicate a specific intention to apply for a benefit. O.G.C. Prec. 65-91. However, Congress did not address whether a claimant must personally sign the application form. For a number of years, VA regulations contained a provision requiring that an application for compensation, pension, or burial allowance be made "on the claimant's own certification." Former 38 C.F.R. § 3.26(b) (1949). Although this provision was dropped in a 1961 revision of title 38, regulations at 38 C.F.R. § 3.155 continue to reflect VA's longstanding interpretation, as discussed in the above-cited Solicitor's opinions, that a claimant's representative may file an informal claim on his or her behalf, subject to ratification by the claimant through a subsequently filed formal claim.

5. Turning to the effect of principles of agency, we note that a power of attorney is "an instrument in writing by which one person, as principal, appoints another as his agent and confers upon such agent the authority to act in the place of the principal for the avowed purposes set forth in the instrument." 2A C.J.S. Agency § 44 (1972). Where an agent acts under a power of attorney, those dealing with the agent must look to the instrument to determine the agent's authority, which is confined to those powers conferred by the instrument. Id. § 150. In general, a power of attorney must be strictly construed and will be held to grant only those powers which are specified therein. The agent may neither go beyond, nor deviate, from the power of attorney. 3 Am. Jur. 2d Agency § 31 (1986); see also Von Wedel v. McGrath, 180 F.2d 716, 718-19 (3d Cir.), cert. denied, 340 U.S. 816 (1950).

6. The VA forms approved for representation of claimants are VA Form 2-22a, Appointment of Attorney or Agent as Claimant's Representative, and VA Form 21-22, Appointment of Veterans Service Organization as Claimant's Representative. These forms specify the extent of the authority which they provide. VA Form 21-22, Appointment of Veterans Service Organization as Claimant's Representative, provides for the appointment of the service organization to "present" a benefit claim before VA and to receive any information from VA in connection therewith. VA Form 2-22a may be used to appoint an attorney or agent "to present and prosecute" a claim for VA benefits and purports to "ratify and confirm all that the representative may or shall lawfully do or cause to be done by virtue of the appointment ." Although the above-cited Solicitor's opinions suggested a possible distinction between the two forms, any differences in the current versions of the forms are not, in our view, controlling here. The reference to ratification in VA Form 2-22a is largely meaningless for agency purposes, as ratification refers to adoption of an action after it has taken place; as a substitute for prior authorization, and cannot take place prior to the happening of the event which is ratified. 2A C.J.S., *supra*, §§ 63 and 76. Further, although the Solicitor's opinions referred to the solemnity of the attorney-appointment form, we note that neither form currently requires an oath or notarization. More importantly, the plain language of the forms, in referring to presentation or presentation and prosecution of a claim, falls short of authorization to actually sign the claim on behalf of the claimant. Thus, the authority provided by VA Forms 2-22a and 21-22 appears consistent with the limitations on the scope of representation by representatives, agents, and attorneys provided in chapter 59 of title 38 and with VA's longstanding approach of requiring signature of a formal benefit claim by the claimant.

7. With regard to a representative's authority to sign other VA forms on behalf of a claimant, your request for opinion specifically mentions the Eligibility Verification Report (EVR). This form contains a block for signature of the "Claimant, Custodian or Guardian." VA's power of attorney forms authorize a claimant's representative to present or prepare and present a benefit claim before VA. While this authority can reasonably be construed to entail the

authority to present such evidence as is necessary to support the claim, signature of the form goes beyond mere presentation of evidence. By signing the form, the claimant certifies the accuracy of the information contained therein.

In our view, the power of attorney forms do not provide representatives, agents, or attorneys with this additional authority. Although the person holding the power of attorney may prepare the EVR form for the claimant and present it to VA, only the persons designated on the EVR form may sign it.

8. Apart from the EVR form, there may be circumstances where an authorized representative submits evidence on behalf of a claimant or beneficiary which later proves to be inaccurate, but which results in the payment of benefits to which the claimant or beneficiary is not entitled. In determining whether an overpayment will be created, consideration is required of why the overpayment occurred. While the term "overpayment" is not defined by statute, VA regulations pertaining to waiver define the term as referring to "those benefit payments made to a designated living payee or beneficiary in excess of the amount due or to which such payee or beneficiary is entitled." 38 C.F.R. § 1.962. Sections 5112(b)(9) and (b)(10) (formerly sections 3012(b)(9) and (b)(10)) of title 38, United States Code, provide the effective date rules governing reduction or discontinuance of benefits which are determinative of whether an overpayment will be created against the payee or beneficiary. Section 5112(b)(9) provides that where a reduction or discontinuance of compensation, pension, or dependency and indemnity compensation is by reason of an erroneous award based on an act of commission or omission by the beneficiary, or with the beneficiary's knowledge, the reduction or discontinuance is effective the date of the award.

Section 5112(b)(10), on the other hand, provides that where the reduction or discontinuance is by reason of "an erroneous award based solely on administrative error or error in judgment the effective date of the reduction or discontinuance shall be the date of last payment." See also 38 C.F.R. § 3.500(b). If an error is caused in whole or in part by the beneficiary, benefits are reduced or discontinued retroactive to the date of the award and an overpayment of benefits is created. An overpayment is not created where the erroneous award is based solely on VA administrative error or error in judgment. The key distinction is which of the two parties, the beneficiary or VA, is responsible for causing the erroneous payment. O.G.C. Prec. 2-90.

9. In a situation where it is necessary to reduce or discontinue an award of benefits because it is discovered that erroneous information was submitted on the claimant's behalf, an overpayment would properly be created against the beneficiary because the erroneous award resulted from action chargeable to the beneficiary and not from administrative error or error in judgment on the part of the Department. This would be true even if the representations were made by the beneficiary's representative, agent, or attorney. A principal is liable to third parties for acts committed by his or her agent within the scope of the agent's authority. 3 C.J.S. Agency § 390 (1973). Further, it is a universally accepted principle of agency that a principal is liable for the misrepresentations of his or

her agent acting within the scope of the agent's authority or employment. This is true even though the principal had no knowledge of and did not authorize the particular action of the agent. Amen v. Black, 234 F.2d 12, 20 (10th Cir.), cert. granted, 352 U.S. 888 (1956), cause remanded, 355 U.S. 600 (1958); Ralston Purina Co. v. Novak, 111 F.2d 631, 636 (8th Cir. 1940); 3 C.J.S., supra, § 397.

As noted above, VA's standard power of attorney forms can be fairly read as authorizing the named representative to present evidence on behalf of the claimant or beneficiary. Thus, the representative would be acting within the scope of the representative's authority in submitting evidence which later proved erroneous, and the claimant or beneficiary can, under agency principles, be held responsible for resulting overpayments.

10. We also note that, in situations involving third parties who are not representatives, this office has held that, although the fault for an overpayment lies with a third party and not with the recipient, the recipient, who actually reaped the benefit of the error, may be charged with the overpayment. O.G.C. Prec. 2-90. Of course, in instances where collection of an overpayment would be against equity and good conscience, section 5302 (formerly section 3102) of title 38, United States Code, provides for waiver of recovery of the overpayment.

HELD:

a. A veteran's service organization representative, agent, or attorney is not authorized to sign an application for compensation or pension, VA Form 21-526, on behalf of the claimant despite being named in a properly executed appointment form of record. Further, the representative, agent, or attorney may not sign an Eligibility Verification Report, used to verify continued eligibility for benefits under income-based programs, on behalf of the claimant.

b. Where a claimant's or beneficiary's duly appointed representative submits erroneous information on behalf of the claimant or beneficiary pertaining to eligibility or benefit rates, the claimant is responsible for any overpayment occurring as a result of the information supplied.

VETERANS ADMINISTRATION GENERAL COUNSEL
Vet. Aff. Op. Gen. Couns. Prec. 11-92