Date: January 4, 1995 O.G.C. Precedent 1-95

From: General Counsel (022)

Subj: Surviving Spouse's Improved Pension Amount Where Veteran's Child Receives Protected Apportionment of Section 306 Pension

To: Chairman, Board of Veterans' Appeals (01)

QUESTION PRESENTED:

a. Is the Department of Veterans Affairs Adjudication Procedure Manual M21-1, part IV, ¶ 20.46b., inconsistent with applicable law and regulation insofar as the manual directs that a surviving spouse's improved-pension award shall reflect the dependency of a child who is not in the surviving spouse's custody, but who receives a protected apportionment of the surviving spouse's pension under section 306 of Public Law No. 95-588?

b. If the manual provision is consistent with the law and regulations, must it be applied uniformly regardless of whether it is to the surviving spouse's advantage?

COMMENTS:

1. The claimant, the surviving spouse of a deceased wartime veteran, established entitlement to death pension in October 1970. Part of her monthly pension was apportioned to the veteran's child from a previous marriage, who has been adjudged permanently incapable of self-support. The child is not in the custody of the surviving spouse. In 1981, the surviving spouse elected to receive improved pension benefits under the Veterans' and Survivors' Pension Improvement Act of 1978, Pub. L. No. 95-588, 92 Stat. 2497. The child did not make such an election. Under 38 C.F.R. § 3.701(a), the surviving spouse's election of improved pension benefits does not affect the child's right to continue receiving the apportioned amount in effect on December 31, 1978. Pursuant to her election, the surviving spouse was granted improved-pension benefits at the rate prescribed in 38 U.S.C. § 1541(c), which applies "[i]f

there is a child of the veteran in the custody of the surviving spouse." The apportionment to the child was continued at the protected rate.

2. The surviving spouse now asserts that her pension should not be paid under section 1541(c), but, rather, at the lesser rate under section 1541(b), which applies "[i]f no child of the veteran is in the custody of the surviving spouse." She states that the additional pension amount awarded on account of the veteran's child renders her ineligible for Supplemental Security Income. The regional office has concluded that the spouse's improved pension must be paid under section 1541(c). The regional office apparently relied upon a provision in the VA Adjudication Procedure Manual, M21-1, part IV, ¶ 20.46 (April 3, 1992), which provides as follows:

> The election by a surviving spouse also controls the rights of all children in the case except for those children outside the surviving spouse's custody who are receiving an apportioned share of the surviving spouse's Section 306 or Old Law award.
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> **a. Child Not in Custody.** A surviving spouse's election of Improved Pension will not deprive a child not in the spouse's custody of continued entitlement to receive the same rate of payment which he or she was receiving under Old Law or Section 306 pension. Such a child may elect Improved Pension if it is to the child's advantage.
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> **b. Child's Protected Rate Continued.** If the protected rate is continued to the children, reflect their dependency in the surviving spouse's award with the additional amount for each child included in determining the surviving spouse's maximum rate payable, with the rebuttable presumption that the children's income is not considered as being available to the surviving spouse, and with the apportioned amount shown as type 1 withholding.

The manual provision thus provides that the improved-pension award to a surviving spouse pursuant to an election be paid at the higher rate under section 1541(c) where, as here, there is

a child of the veteran who is not in the surviving spouse's custody, but who has a protected entitlement to an apportionment. That requirement is seemingly inconsistent with 38 U.S.C. § 1541, which requires payment of the lesser rate in section 1541(b) when there is no child of the veteran in the custody of the surviving spouse.

3. Where the language of a statute is clear and unambiguous, the statute must be applied according to its plain meaning, unless a straightforward application of the language as written would violate or affect the clear purpose of the statute. See Dameron v. Brodhead, 345 U.S. 322, 326 (1953); see also West Virginia Univ. Hospitals, Inc. v. Casey, 499 U.S. 83, 98-99 (1991); K Mart Corp. v. Cartier, 486 U.S. 281, 291 (1980). The provisions of section 1541(b) and (c) unambiguously provide that the lesser rate in section 1541(b) is to be paid when there is no child of the veteran in the custody of the surviving spouse, and the higher rate in section 1541(c) is to be paid when there is a child of the veteran in the custody of the surviving spouse. The statute makes no exception for cases involving a surviving spouse's election or a protected apportionment to a child not in the spouse's custody. Rather, section 306 of the Pension Improvement Act provides that all elections of improved pension would be "subject to the terms and conditions in effect with respect to the receipt of such pension." Pub. L. No. 95-588, § 306, 92 Stat. at 2508. Accordingly, once a surviving spouse elects to receive improved pension, pension must be paid in accordance with the current provisions of section 1541, and VA lacks authority to pay the increased statutory rate under section 1541(c) when the veteran's child is not in the surviving spouse's custody. See O.G.C. Prec. 4-92, at 2.

4. Applying 38 U.S.C. §§ 1541(b) and (c) according to their plain meaning would not violate the clear purpose of the Pension Improvement Act. The basic purpose of that statute was "to provide greater assistance to those in need and to remove a number of inconsistencies, anomalies, and problems which prevent the current program from operating in all cases in the equitable manner intended by Congress." H.R. Rep. No. 1225, 95th Cong., 2d Sess. 4 (1978). Section 107 of the Pension Improvement Act established higher rates of pension to surviving

spouses when children of the veteran were in the surviving spouses' custody. The legislative history indicates that this provision was "aimed at providing a rational, cost-effective system that insures that available tax dollars are applied to those who need it and in proportion to their needs." H.R. Conf. Rep. No. 1225, 95th Cong., 2d Sess., 34 (1978). Under 38 C.F.R. § 3.57(d)(1), a surviving spouse will be considered to have custody of a child when the spouse "has the legal right to exercise parental control and responsibility for the welfare and care of the child." Accordingly, consistent with the stated purpose of relating pension to actual need, section 1541(c) limits payment of increased pension to instances where the surviving spouse has responsibility for the welfare and care of the veteran's child, and presumably incurs regular costs in providing such care.

5. We recognize, however, that the straightforward application of that statute to the claimant in the instant case raises additional concerns. Under the old pension law, the surviving spouse's award would be paid at the increased rate whenever there was a child of the veteran, regardless of whether the child was in the surviving spouse's custody. Accordingly, under the old law, the surviving spouse whose pension was subject to apportionment for an out-of-custody child would be receiving an increased pension on account of that child. In contrast, current 38 U.S.C. § 1541 authorizes payment of the increased rate only when the child is in the surviving spouse's custody. However, under current 38 U.S.C. § 1542, a veteran's child who is not in the surviving spouse's custody is entitled to a separate pension in his or her own right. Accordingly, the current statute apparently contemplates that the surviving spouse's award need not be increased on account of an out-of-custody child because that child may receive pension in his or her own right, rather than through apportionment of the surviving spouse's pension. In the instant case, however, the out-of-custody child's apportionment under the old law is protected and must continue to be paid even though the spouse's improved pension no longer includes the additional statutory amount for a child of the veteran. It may appear inequitable to apportion part of the surviving spouse's pension in favor of the veteran's child when the spouse's pension does not include an additional amount on account of the child. However, for the reasons set

forth below, we do not believe that the straightforward application of the statutes and regulations produces a result so inequitable as to justify ignoring the plain language of 38 U.S.C. § 1541(b) and (c).

6. First, nothing in the applicable statutes or regulations clearly indicates that the pension benefit payable to the child must be paid through withholding of the surviving spouse's improved-pension award, rather than as a distinct entitlement payable under prior law and protected under the Pension Improvement Act. Although an apportionment is a derivative benefit, we have previously noted that an apportionment "represents a portion of the primary beneficiary's total entitlement, divested from that beneficiary and vested in the apportionee." O.G.C. Prec. 74-90. Accordingly, an apportionee obtains a legal right to the apportionment, subject to the primary beneficiary's continued entitlement to the underlying benefit. VA regulations at 38 C.F.R. § 3.701 provides that "[t]he election of improved pension by a surviving spouse . . . shall not prejudice the rights of any child receiving an apportionment on December 31, 1978." This provision might be viewed as essentially freezing the apportionee's rights in place as of December 31, 1978, such that the surviving spouse's election of improved pension destroys the spouse's entitlement to section 306 pension, but does not affect the child's right to receive an apportioned share of the section 306 award. Accordingly, we believe that the statute and regulations would permit the protected pension benefit of the child to be paid as a separate payment under the old law, rather than as a portion of the surviving spouse's improved-pension award.

7. We note, however, that the transmittal sheet accompanying the issuance of the pertinent provisions of section 3.701(a) stated that, because a child's apportionment was protected, "a surviving spouse who wishes to elect improved pension must consider the amount of an apportionment in deciding whether receipt of improved pension is advantageous." Trans. Sheet 661, at ii (7-27-79). This would suggest the view that the protected apportionment must be paid through withholding from the surviving spouse's improved-pension rather than as a distinct payment because it would not be necessary to consider the amount of the apportionment if the protected apportionment

were paid separately from the surviving spouse's improved pension. However, because the transmittal sheet is, by its terms, merely informative and not regulatory, we do not believe it would present a significant obstacle to adoption of the interpretation discussed above.

8. Second, even if the protected apportionment is paid out of the surviving spouse's improved-pension award, we do not believe that paying the rate prescribed in 38 U.S.C. § 1541(b) in this case would produce a result so absurd as to justify disregarding the statutory language. Withholding the protected apportionment for an out-of-custody child from the surviving spouse's monthly payment will result in a decrease in the surviving spouse's benefits, which would not be offset by an increased award for the child under 38 U.S.C. § 1541(c). However, because of the significant differences between improved-pension rates and pension rates under prior law, awarding the spouse the rate under section 1541(c) would result in a substantial and unjustified windfall to the surviving spouse. In the instant case, for example, the protected apportionment amounts to $30 per month, which has been withheld from the surviving spouse's award. However, the difference between the improved-pension rates for a spouse alone and a spouse with one child in custody amounts to approximately $135 per month. See VA Adjudication Procedure Manual M21-1, part I, appendix B. Accordingly, the claimant receives approximately $105 per month above the statutory rate prescribed for surviving spouses with no children of the veteran in their custody, and thus receives a significantly greater amount than similarly-situated surviving spouses in cases not involving protected apportionments. We cannot, therefore, conclude that the procedure described in VA Adjudication Procedure Manual M21-1, part IV, ¶ 20.46b., is more consistent with the statutory purpose than applying 38 U.S.C. § 1541(b) and (c) according to their plain meanings.

9. Finally, we note that nothing in the statutes or regulations precludes apportionment of a surviving spouse's pension when the spouse is being paid at the rate for a spouse alone under 38 U.S.C. § 1541(b). The Secretary has broad authority under 38 U.S.C. § 5307(b) to apportion a surviving spouse's

pension in favor of a veteran's child not in the spouse's custody. VA regulations provide that death pension "will be apportioned if the child or children of the deceased veteran are not in the custody of the surviving spouse." 38 C.F.R. § 3.460. Those statutory and regulatory provisions originated at a time when a surviving spouse's pension award included an additional amount on account of any child of the veteran, whether or not in the spouse's custody. However, they apply by their terms to improved pension as well, and would provide a basis for paying an apportionment to an out-of-custody child even though the surviving spouse's improved pension does not include an additional allowance for that child.

10. For the foregoing reasons, we believe that the provisions of 38 U.S.C. § 1541 must be applied according to their plain meaning. Because the provisions in VA Adjudication Procedures Manual M21-1, part IV, ¶ 20.46b. would require payment of the rate in 38 U.S.C. § 1541(c) to a surviving spouse who does not have custody of any children of the veteran, that provision is inconsistent with the plain language of the statute.

11. In view of our conclusion that the manual provision is inconsistent with the statute, the issue raised in your second question, concerning the application of the manual provision, is moot.

HELD:

a. The provision in VA Adjudication Procedure Manual M21-1, part IV, ¶ 20.46b., requiring payment of increased improved-pension to a surviving spouse when a veteran's child not in the spouse's custody receives a protected apportionment, is inconsistent with the provisions of 38 U.S.C. § 1541(b) and (c) which authorize payment of the increased rate only when the veteran's child is in the surviving spouse's custody.

b. In view of the holding in paragraph a., above, the second question presented is moot.

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