

Date: March 24, 1995

O.G.C. Precedent 8-95

From: General Counsel (021)

Subj: Request for legal opinion - proper interpretation of 38 C.F.R. §§ 21.4234(b), 21.5232, 21.7114, and 21.7614

To: Under Secretary for Benefits (225C)

QUESTIONS PRESENTED:

1. Must a veteran affirmatively seek a change of program of education?
2. If the answer to that question is yes, does affirmatively seeking a change of program of education require that the veteran submit an application for the change in the form prescribed by the Secretary?
3. If the answer to the first question is yes, must VA withhold payments pending receipt of a request for a change of program?
4. If the answer to the first question is yes, does the Secretary have statutory authority to eliminate this requirement by regulation?

COMMENTS:

1. Section 3691(a), title 38, United States Code, provides that a participant in VA administered educational assistance programs "may make not more than one change of program of education" but is not entitled to that change if the "program has been interrupted or discontinued due to the [individual's] own misconduct . . . neglect, or . . . lack of application" Subsection (b) of that section further provides that additional changes of program by persons eligible for such a change under subsection (a), or an initial change by a person found ineligible for such a change under that subsection, may be granted if the Secretary finds that:

"(1) the program of education which the eligible veteran or eligible person proposes to pursue is suitable to the veteran's or person's aptitudes, interests, and abilities; and

"(2) [in the case of an individual barred from an initial change under subsection (a)] there exists a reasonable likelihood with respect to the program which the [individual] proposes to pursue that there will not be a recurrence of such an interruption or failure to progress."

2. Finally, subsection 3691(c) permits further changes of programs where necessitated by circumstances beyond the control of the individual.

3. Prior to the enactment of the current version of section 3691, the law provided a much more restrictive right of the individual to change a program of education. That statute was the subject of an opinion by this office which specifically addressed the

same question presented here: Does the claimant have to affirmatively seek a change of program? We held that only the claimant may seek a change of program and he or she must do so affirmatively by making application to VA. (See Op. G.C. 12-83, dated 9-20-83.)

4. As noted in your discussion, amendments to the law, in essence, have removed the limitation on the number of program changes permissible; thereby, negating the need of the individual to manage use of such changes to avoid being barred from further receipt of benefits. Your point is that, absent such limitation, VA can safely presume that an eligible individual who enrolls in a new program of education desires to continue receiving benefits for that enrollment. Accordingly, how, when, and from whom VA receives a claim is of diminished significance.

5. While section 3691 does not by its terms specifically require that an individual apply to VA to change the program of education previously approved, we find that the section, nevertheless, requires such action.

6. Section 3691 must be read as granting only a restricted right to an eligible individual to make a change of program. For instance, subsection 3691(a) allows the individual to make one change of program, but bars entitlement to that change (except as otherwise provided in the section) if the individual's initial program was interrupted or discontinued due to his or her misconduct, neglect, or lack of application. Subsections 3691(b) and (c), moreover, allow for a second and any subsequent program change, as well as a change otherwise barred under subsection (a), but expressly require that the Secretary make specific findings before deciding whether to approve the change of program.

7. Thus, whether the change of program is the first change under section 3691(a), a second or subsequent change under section 3691(b)(1), an initial change under section 3691(b)(2), or any other change under section 3691(c), it can only be granted when VA determines that the criteria of those provisions, as applicable, have been met. In essence, the statute thereby provides the individual only a qualified entitlement, not an absolute right to receive benefits for pursuit of a program of education other than that originally applied for, approved, and pursued. It reasonably follows, therefore, that the "right" to change one's program from that already approved must be claimed; that is, presented to VA for approval under the terms of the statute.

8. Significantly, the Secretary's decision on whether a change of program may be approved is not a mere ministerial act. Rather, it is an adjudication that affects the individual's substantive legal rights. VA, for instance, may deny benefits for enrollment in a new program selected by an eligible individual when the Secretary finds that the person discontinued his or her previous program for lack of application and the new program is not suited to the person's aptitudes, interests, or abilities. While the effect of this may not match the consequences under previous law, where (with one exception) no further benefits could be paid once the person had received the maximum number of permitted changes, nevertheless, denying educational assistance for the new program desired may have as great an immediate impact on the individual.

9. Thus, in such circumstances, the individual is the real party in interest and, because entitlement to change programs is a personal right, the individual should be held responsible for filing a claim for benefits to pursue the new program. See 38 C.F.R. § 21.1030 (veteran must file a specific claim for educational assistance allowance); see, also, 38 U.S.C. § 3471 (an individual who desires to initiate a program of education must submit an application to VA in such form and with such information as VA requires) (incorporated by reference in 38 U.S.C. §§ 3034(a)(1), 3241(a)(1) and (c), and 10 U.S.C. § 16136(b) governing administration of chapters 30 and 32 of title 38 and chapter 106 of title 10, United States Code, respectively).

10. Nevertheless, your discussion seems to favor, for administrative reasons, an approach by which VA, instead of requiring direct communication from the eligible individual, would rely on third-party information (e.g., submission of an enrollment certification from a school) as notice that the veteran or eligible person wants to change the program for which education benefits are awarded.

11. You indicate that VA frequently does not timely become aware of a program change, often not until a compliance survey of the school is performed. You describe the scenario of a veteran who receives benefits for a changed program which the veteran completes, with straight A's, before the change is discovered by VA. You imply the inequity of subjecting such veteran to overpayment liability for failure to timely file a claim for the new program when the program change obviously was suitable and otherwise would have been approved.

12. We fail to understand, however, how a policy eliminating the requirement that an individual must apply for a program change, relying instead on secondary evidence such as a school certification of enrollment, would remedy what, in the example, is an obvious failure by both the individual and the school to timely notify VA of the change. Consider, too, the import of the result if, altering your example, the individual's new program were not suitable or the program's courses not approved. Clearly, without timely notice and claim, VA could not adjudicate the individual's entitlement, as required by law, and prevent potential overpayments.

13. The potential for erroneous payment of education benefits under the approach you seem to contemplate, even conceding your posture that most changes of program are approved, would render it legally unacceptable. Further, among other ills, removing the individual from the claims process could cause the individual to lose control over his or her status with VA through acts of third-parties of which the individual may not even be aware.

14. For example, a veteran pursuing a degree program approved for VA purposes at one school may choose to simultaneously pursue a certificate program at another school for which no payment is due or expected from VA. If the school offering the latter program were to submit an enrollment certification to VA, the mere receipt of such a document clearly would not be a valid basis for VA to “assume” the veteran intended to change the original program objective and, thereby, proceed to adjudicate the veteran’s entitlement to benefits for the certificate program. Indeed, receipt of such conflicting information would obligate VA to clarify the veteran’s enrollment status and intent regarding his or her program objective.

15. Thus, as we noted in Op. G.C. 12-83, until VA has been advised *by the individual* that it is his or her intent to pursue a program of education different from that already approved, VA clearly has no valid basis on which to adjudicate a claim for a change of program.

16. For the above reasons, your first question is answered in the affirmative. Although the statutory provisions governing the right to a change of program have been substantially amended since our 1983 opinion, we find that the need for the individual to affirmatively request the change remains.

17. Concerning your second question, the Secretary promulgated various regulatory procedures implementing section 3691. Among these, 38 C.F.R. §§ 21.4234, 21.5232, 21.7114, and 21.7614 provide, in part, that the eligible individual “may request a change of program by any form of communication.” Read literally, this provision does not give the individual discretion regarding whether he or she must file a claim for a change of program, but, rather, prescribes the *form* in which such a request may be made.

18. As a practical matter, of course, VA would not be able to make the determinations required by section 3691 governing the right of the individual to make a change of program without notice of the fact of the individual's intent to make the change. Under the existing regulatory provisions cited above, the individual is free to communicate that intent in virtually any form, whether oral or written, without using a predetermined standard form. Section 21.4234(b), for instance, merely states that the communication from the individual shall be by any form of communication; it does not define what form that shall be. (Again, in accordance with our previous finding, the communication, in whatever form, still must be made by the individual.)

19. Thus, the regulations afford considerable flexibility which should mitigate your concern with the paperwork and other administrative burdens accompanying adjudication of a claim for a change of program. For instance, when a third-party document is received indicating that the individual has changed programs, VA is not precluded from verifying that fact by a confirming telephone call to the individual which could be documented in the file as a request for a change of program. Similarly, a school enrollment certification indicating pursuit of a new program may be accepted as a request for a change of program when countersigned by the eligible individual. Such procedures are legally sufficient under the current regulations noted above.

20. Therefore, the answer to your second question is "yes," the individual must apply, but the form of application prescribed by the Secretary pursuant to regulation is any affirmative communication from the individual that, in essence, claims a change of program.

21. The answer to the third question posed also is in the affirmative, presuming the intent of the question is directed to withholding payment for the "new" program. However, depending on the circumstances and in its discretion, VA may or may not withhold payment awarded for the currently authorized program when the Department receives uncorroborated evidence from a third-party that the individual has changed or intends to change programs. For instance, if the nature and source of the evidence are deemed reliable (e.g., the school offering the previously authorized program specifically certifies that the individual has changed programs) and if the consequence of such change would be adverse (e.g., the change could not be approved because the new program is not suitable or its courses not approved), then suspension of payment clearly would be an appropriate action, pending further development. See 38 U.S.C. § 3690(b)(1),(2).

22. The answer to the fourth question is that VA may not adjudicate an individual's eligibility to receive educational assistance benefits for a program

of education until the individual has communicated his or her intent to pursue such a program, whether the original, second, or subsequent change of program. Since this requirement is implicit in the statutory provisions, it may not be abrogated by a Department regulation.

HELD:

1. An individual must affirmatively seek a determination of his or her eligibility to make any change of his or her approved program of education.
2. The request for a determination of eligibility for a change of program must be made by the individual and, under the applicable regulations, may be in any form prescribed by VA. The form of the communication to VA may include the individual's telephonic confirmation of third-party information and even a third-party document bearing the individual's signature from which a reasonable inference of his or her intent to change programs may be discerned.
3. VA may not pay benefits to an individual for pursuit of a program other than the one currently approved until a request from the individual for a determination of his or her entitlement to pursue a particular new program has been received and approved by VA.
4. The Department may not legally implement, by regulation, procedures to administer determinations of eligibility to pursue a change of program that do not require the individual seeking approval of such a change to communicate to VA his or her intent to do so.

Mary Lou Keener