Date: May 10, 1995 VAOPGCPREC 13-95

From: General Counsel (021)

Subj: Specially Adapted Housing Death Case;

To: Under Secretary for Benefits (20)

QUESTION PRESENTED:

May VA reimburse the estate of a deceased veteran whose application for specially adapted housing was pending at the time of death for any of the losses suffered in anticipation of the approval of the grant?

DISCUSSION:

1. This office has received for concurrence proposed correspondence related to the above-captioned deceased veteran's specially adapted housing (SAH) case. For the reasons discussed below, we cannot concur with the proposed letters. This is the same case involved in VAOPGCPREC 4-95 (O.G.C. Prec. 4-95). As a result of discussions between attorneys in this office and members of your staff, we understand that you also seek additional guidance on when, for purposes of chapter 21 of title 38, United States Code, a veteran will be deemed to have been "granted assistance."

2. The veteran was rated 100 percent service-connected disabled as a result of a brain stem injury with comatose state. The injuries were considered permanent and total. The veteran had also been adjudged incompetent, and the veteran's mother was designated as the veteran's guardian. On January 18, 1994, the guardian, on behalf of the veteran, signed a contract to purchase an existing house in Junction City, Kansas, that apparently was not modified to meet the veteran's special needs. The files we received do not contain a copy of the loan application, but do contain documents related to such application. Since these were dated January 20, 1994, we consider it reasonable to conclude the guardian sought financing on or before January 20. The guardian subsequently submitted a VA Form 26-4555, Veteran's Application in Acquiring Specially Adapted Housing or Special Home Adaptation Grant. The form is dated "2-94." Thus, we cannot determine when the form was completed. The back of the form contains a date stamp indicating it was received by the mailroom of the VA Medical and Regional Office Center (VAMROC), Wichita, Kansas, on February 22, 1994. Closing on the Junction City home occurred on February 28, 1994.

3. The initial interview in the processing of the SAH grant was conducted with the guardian by a VA regional office employee on March 2, 1994. A report of

contact, VA Form 119, prepared by the VA employee states that, at the time of the interview, the veteran was hospitalized at the VA Medical Center (VAMC), Knoxville, Iowa. The guardian was working with the VAMC on having the veteran released to a home environment on a permanent basis. The employee further wrote on the Form 119:

> Explained requirements of a pre-approved by VA remodeling plans, selection of a contractor, . . . etc.
>
> As the veteran has not as yet been officially approved for SAH, advised [guardian] to wait until approval before beginning.

The guardian signed VA Form 26-4555c, Veterans Supplemental Application for Assistance in Acquiring Specially Adapted Housing, on March 3, 1994. The guardian checked Box C in Item 5 of this form, indicating the guardian was applying for a grant to remodel the home currently owned by the veteran. The form additionally states that in addition to the veteran, the veteran's parents, a sister, age 35, and a brother, age 22, would be residing in the property.

4. The file contains a letter dated March 15, 1994, from a staff physician in the Acute Medical Unit of the VAMC, Knoxville, stating that it would be medically feasible for the veteran to reside in the home. On March 28, 1994, a rating board issued a decision that the veteran was entitled to SAH benefits based on the nature of the veteran's disability. The VAMROC sent a letter to the veteran on April 6, 1994, stating in part:

> It has been determined that you meet the basic eligibility REQUIREMENTS for specially adapted housing, and that it appears medically feasible for you to reside in such a home. . . . Please understand that this letter is <u>not</u> an approval of a grant to you. Therefore, <u>do not</u> make any agreements or incur any debts or obligations in connection with a specially adapted home until our representative has visited you.

5. On April 13, 1994, the veteran's parents and their attorney met with Mr. Russell L. Muse, a Field Examiner in the Veterans Services Division of the VAMROC. According to Mr. Muse's Field Examination Report, "Th[e] meeting was primarily to get a set of mutually acceptable court orders that would determine the financial status of the veteran and to work out any disagreements." The memo states that Mr. Muse told the guardian and attorney "the [SAH] grant is being worked on by [the] Loan [Guaranty division at the VAMROC]." Mr. Muse's report contains no other details with respect to the SAH

grant. In a letter dated August 4, 1994, the attorney for the guardian asserts that "Mr. Muse said that the housing grant had been approved . . . ."

6. The file reflects additional contacts between VA and the guardian regarding the selection of a contractor and the requirement for three bids. There is no additional documentation regarding approval of an SAH grant.

7. The veteran died on July 20, 1994, at the VAMC. A memorandum in the file dated July 21, 1994, written by Mr. D. Vosburg who, at the time, was Chief, Construction and Valuation Section of the VAMROC, stated that "no [SAH] grant was requested yet as guardian of veteran was soliciting bids to remodel existing home to wheel chair environment."

8. VA's policy with regard to veterans who die prior to completion of the SAH grant is set forth in chapter 7 of VA Manual M26-12. This policy is based on guidance provided by this office in VA Op. Sol. 510-50 (October 26, 1950). In summary, that opinion held that the SAH grant was personal to the veteran, and the objective of the statute; *i.e.,* to furnish a service-connected disabled veteran with a home modified to the particular needs of the veteran's disability, cannot be met following the veteran's death. Therefore, grant funds generally cannot be disbursed following a veteran's death except to discharge certain obligations incurred by the veteran in reliance upon an approved grant. SAH grant funds are not payable as an accrued benefit. Pappalardo v. Brown, 6 Vet.App. 63, 65 (1993).

9. Since this case does not involve grant funds already in escrow, we will not comment on that situation. As pertains to this case, the manual provides "the veteran's death any time before the VA has disbursed the grant (i.e., relinquished control of the grant check) precludes payment of the grant as contemplated by the governing law." M26-12, para. 7.02. The manual further provides that "The fact that a grant . . . may not be disbursed after the death of the veteran will not . . . preclude action by the VA to reimburse the estate of the veteran . . . to pay off actual contract obligations preliminary or incident to the acquisition of a specially adapted home, undertaken by the veteran before his death and after filing a VA Form 26-4555c, . . . in comtemplation [sic] of or reliance on receiving a grant . . . . The objective of such payment is not to provide a home for the veteran's heir. It is purely and simply to make the veteran's estate whole . . . ." M26-12, para. 7-4.

10. We are concerned with language in the manual and your proposed letters that refer to reimbursing the estate of the veteran for obligations undertaken by a veteran in "reliance" on receiving a grant. Since the earliest days of the

Republic, the Supreme Court has consistently declined to find the Government liable to individuals as a consequence of estoppel or detrimental reliance on actions or statements of Federal officials and employees. See: Lee v. Munroe & Thornton, 11 U.S. (7 Cranch) 366 (1813); Utah Power and Light Co. v. United States 243 U.S. 389, 408-409 (1917); Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947); Schweiker v. Hansen, 450 U.S. 785 (1981).

11. In recent years, the Supreme Court has refused to adopt a firm rule that the Government may never, under any circumstance, be estopped. Heckler v. Community Health Services of Crawford County, 467 U.S. 51, 60-61 (1984); Office of Personnel Management v. Richmond, 496 U.S. 414, 423-424 (1990). Although the Court has "reversed every finding [by lower Federal courts] of estoppel [against the Government] that [the Supreme Court] ha[s] reviewed," Richmond, 496 U.S. at 422, the Court continues to leave open the possibility a case might arise where it would find that the Government could be bound by the conduct of its agents. Id. at 423. The Court acknowledged that a party claiming reliance on the Government's actions would have a heavy burden. Heckler, 467 U.S. at 61. The party could not claim reliance on oral advice. Id. at 65. In addition, a party claiming detrimental reliance cannot obtain a money remedy that the Congress has not authorized. Richmond, 496 U.S. at 226-228.

12. In Richmond, a former Federal employee who retired on disability sought advice from a Federal personnel office regarding the effect of outside earnings on the retiree's pension. The retiree was given a copy of an Office of Personnel Management (OPM) publication which explained the earnings limit for persons on disability retirement. Apparently neither the retiree nor the personnel office employee realized that the law had been amended, and the OPM publication was out of date. Relying on the publication, the retiree accepted some extra work, but kept earnings within the limits described in the publication. Nevertheless, OPM discontinued the retiree's annuity based on the new law. The Supreme Court held that OPM was correct. The Court reasoned that, under the Constitution, money may not be drawn from the Treasury except under an appropriation made by law. Id. 496 U.S. at 424. Paying money contrary to the express requirements of the law was therefore prohibited. Id. The fact that the retiree acted in reliance on the advice of a Federal official and the out-of-date publication made no difference.

13. In order for VA to pay a deceased veteran's estate under the SAH program, we must find that the payment is, in fact, authorized by law. We find nothing in either the statute or the regulations governing the SAH program that specifically addresses the situation of a veteran who dies while a grant application is in progress. We agree, however, with the dicta in the 1950 Solicitor's opinion that the SAH grant program is intended to be of the highest beneficial character and,

within reasonable legal bounds, should be liberally construed. We also find nothing in chapter 21 of title 38 that specifically precludes VA from paying reasonable costs associated with a grant in cases where a veteran dies before the special adaptation process has been completed.

14. Pappalardo involved a similar claim by the brother of a deceased veteran for reimbursement of costs associated with remodeling a home. VA denied reimbursement since, VA claimed, the SAH grant had not been approved when the veteran died. (The decision does not mention chapter 7 of M26-12 or the 1950 Solicitor's opinion.) The Court of Veterans Appeals opined that "the dispositive issues would appear to be, as a factual matter, whether the grant had been approved by VA before the veteran's death and, if so, whether VA would then have authority to make reimbursement to the [brother]." 6 Vet.App. at 65. The court cited 38 C.F.R. § 36.4406 which states "**After approval** of an application for a[n SAH] grant, the Secretary shall decide upon a method of disbursement . . . ." Id. (Emphasis added.) The court remanded the case to the Board of Veterans Appeals for readjudication of the issue of whether the grant had been approved. The court did not specifically address the second issue; *i.e.,* VA's authority to reimburse the brother.

15. In VAOPGCPREC 4-95 (O.G.C. Prec. 4-95), we held that the time when a veteran is deemed to have been granted assistance under the SAH program requires a factual adjudication by the Veterans Benefits Administration (VBA). *See:* Pappalardo, 6 Vet.App. at 65. In our subsequent discussions with VBA staff, we believe this point needs further clarification.

16. Section 2101(a) of title 38 contains the eligibility requirements for SAH benefits. Summarized, these are:

a. The veteran is entitled to compensation for total and permanent service-connected disability due to certain specific conditions listed in the statute;

b. It is "medically feasible" for the veteran to reside in the proposed home;

c. The costs associated with the proposed home bear a proper relation to the veteran's present and anticipated income and expenses;

d. The nature and condition of the proposed home are suitable for the veteran's special needs; and

e. Such additional requirements set forth in VA regulations. Current regulations include requirements regarding the title for the proposed home, a fair housing certification, and flood insurance. See 38 C.F.R. § 36.4402(a)(4)-(6).

16. Current administrative practice, we have been advised, is that when VA determines all the statutory and regulatory requirements have been met, the Loan Guaranty Officer signs the VA Form 26-4555c. In a limited number of field offices, the case is then sent to Central Office for review. Central Office review has been discontinued for most offices, however. Based on the informal information we have been given, and absent regulatory guidance, we believe that SAH benefits can be considered as being granted or approved when the VA employee who has been granted final approval authority signs Form 26-4555c. *See:* Pappalardo, 6 Vet.App. at 66 (Nebeker, C.J., concurring in part and dissenting in part) ("There is no factual issue on whether the application [for SAH benefits] had been approved . . . . [A]pproval of the application . . . .is a procedural or administrative fact . . . .")

17. We strongly urge the Veterans Benefits Administration (VBA) to issue a regulation setting forth with certainty what constitutes final approval for granting SAH benefits. You may wish to state in this regulation that, upon a determination that all requirements have been met, the official who is designated in the regulations as having this authority will signify approval of the SAH grant on VA Form 26-4555c. You are, of course, free to designate another reasonable benchmark for what constitutes the final approval for granting SAH assistance. Whatever you select, however, should be clearly set forth in regulations.

18. We now come to what appears to be a potential "Catch 22" in death cases. VA cannot approve SAH assistance until VA determines that "the nature and condition of the proposed housing unit are such as to be suitable to the veteran's needs for dwelling purposes." 38 U.S.C. § 2101(a). In order for VA to make this finding, VA must review detailed plans and specifications for the proposed home. Obtaining such detailed plans would likely require the veteran to either spend money or become obligated for costs such as architectural fees and planning and preparation costs by the building contractor prior to VA's final approval of SAH assistance. VA certainly is aware many veterans are incurring these costs, and a VA employee may have even informally agreed to such an expenditure. For VA to advise a veteran to incur these costs in order for the grant to be finally approved, then deny reimbursing the veteran's estate since the grant was not "approved" appears inequitable. We do not believe that the Congress intended this result.

19. Accordingly, we believe VA may issue regulations that would authorize a veteran who meets all initial qualifying criteria to incur certain preliminary costs prior to final grant approval. The regulation should set forth when this authority will be given; *e.g.,* when the veteran has been adjudicated as having the requisite disability, medical feasibility has been established, a home or homesite has been

tentatively identified that appears capable of being finally approved, and a preliminary finding of financial feasibility has been made. Once these tests have been met, VA could authorize, in writing, the veteran to incur necessary costs (a dollar limitation may be included in the regulation) for planning and preparation. A reasonable listing or description of what costs will be authorized should be included in the regulation. The regulation should also state these costs may be included in the grant if it is finally approved. If the veteran dies prior to final approval, the regulation should provide that VA may reimburse the veteran's estate for these costs if VA determines it is likely final approval would have been given had the veteran lived.

20. The regulation should also clearly state that authorization to incur planning and preparation costs, or the reimbursement of such costs to the estate of a deceased veteran, is not to be considered as approval for granting SAH assistance. This is important because eligibility for Veterans Mortgage Life Insurance, 38 U.S.C. § 2106, is conditioned on VA "granting assistance." *See:* VAOPGCPREC 4-95 (O.G.C. Prec. 4-95).

21. We wish to emphasize that approval to incur these costs should be in writing. In this regard, we wish to comment on the language of VA's April 6 letter to the veteran, quoted in paragraph 6, above. (A similar notice was given in Pappalardo, 6 Vet.App. at 64.) We agree with your warning to the veteran that this letter is not an approval, and the veteran should not incur any obligations or costs. We would suggest, however, that you delete "until our representative has visited you" and substitute "until VA advises you in writing that such costs have been authorized" from similar letters in the future.

22. Although properly drafted regulations should help resolve future cases, they will not benefit the instant veteran. Under 38 C.F.R. § 36.4407, the Secretary is permitted to take action "to relieve undue prejudice to a veteran or third party contracting or dealing with such veteran . . . ." We believe this regulation would permit VA to continue the practice authorized in M26-12, paragraph 7.04, of reimbursing the veteran's estate or a third party for certain limited costs clearly incurred in preparation for the remodeling of the home. We understand, for example, that the contractor ordered special supplies and incurred a loss in returning those items. This would be a reasonable expense under section 36.4407. Your proposal to reimburse the family for a potential loss on the resale of the property goes well beyond what the statute and regulations envision, however.

23. As a final note, we also find the statement in the April 6 letter, "you meet the basic eligibility REQUIREMENTS for specially adapted housing" somewhat confusing, and suspect many veterans would, also. (The term "basic eligibility" is

also used in 38 C.F.R. § 36.4408(c), although it is not defined.) We would suggest that future letters state instead, "the nature of your disability qualifies you to be considered for specially adapted housing benefits." If you want to keep the term "basic eligibility" in the regulation, you should define such term to avoid confusion.

HELD:

The Veterans Benefits Administration (VBA) should issue regulations establishing what constitutes the final approval for granting SAH assistance. These regulations should also provide that VA may authorize a veteran who meets all initial qualifying criteria to incur certain preliminary costs prior to final grant approval. They may also permit VA to reimburse these costs to the estate of a veteran who dies prior to final approval if VA determines it is likely approval would have been given had the veteran lived. Until such regulations are issued, VA may continue the practice authorized in M26-12, paragraph 7.04, of reimbursing a veteran's estate or a third party for certain limited costs clearly incurred in preparation for the remodeling of the home.

Mary Lou Keener