

Date: June 21, 1995

VAOGCPREC 17-95

From: General Counsel (022)

Subj: Application of 38 U.S.C. § 7722

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

QUESTIONS PRESENTED:

- a. What is the scope of any obligation imposed on the Secretary of Veterans Affairs under 38 U.S.C. § 7722, or any other legal authority, to inform individuals concerning benefits to which they may be entitled?¹
- b. Does the assumption that the Department of Veterans Affairs (VA) knew or reasonably should have known of an individual's eligibility for VA benefits have any bearing on the Secretary's notification obligation?
- c. Are the provisions of any applicable notification law or regulation, including section 7722, applicable from the date of their enactment or retroactively?
- d. May a failure to provide required notification to a claimant be the basis of a grant of an earlier effective date of an award of VA benefits and, if so, what is the legal authority to deviate from the criteria pertaining to effective dates of awards?

<Page 2>

COMMENTS:

1. The United States Court of Veterans Appeals (CVA) has held that 38 U.S.C. § 7722(c) and (d) impose on VA an affirmative

¹ You have requested our views regarding the scope of VA's notification obligation under section 7722 "or any other legal authority," and we note that a duty to provide notice or information to claimants may sometimes arise under statutory provisions other than section 7722. See, e.g., 38 U.S.C. §§ 3563, 5107(a). However, because we believe that section 7722 provides the sole notification obligation pertinent to the specific facts described in your opinion request, we have limited our analysis to the scope of the duty under that provision. The scope of VA's obligation may differ under other statutory provisions.

duty to notify individuals of their potential eligibility for VA benefits. Smith v. Derwinski, 2 Vet. App. 429, 432 (1992); Douglas v. Derwinski, 2 Vet. App. 435, 442 (1992). Those statutory provisions provide, in pertinent part:

(c) The Secretary shall distribute full information to eligible veterans and eligible dependents regarding all benefits and services to which they may be entitled under laws administered by the Department

(d) The Secretary shall provide, to the maximum extent possible, aid and assistance (including personal interviews) to members of the Armed Forces, veterans and eligible dependents with respect to subsections (b) and (c) and in the preparation and presentation of claims under laws administered by the Department.

38 U.S.C. § 7722(c) and (d). Additionally, 38 U.S.C. § 7722(b) requires VA to notify members of the Armed Forces, upon separation, of their potential entitlement to VA benefits. Substantially similar provisions were previously contained in 38 U.S.C. § 241 since 1970.

2. Definitional provisions in 38 U.S.C. § 7721(b)(2) state that, for purposes of section 7722, the term "eligible dependent" means "eligible person" as the latter term is defined in 38 U.S.C. § 3501(a)(1). Section 3501(a)(1) defines "eligible person" to refer to certain spouses and children of veterans, including "the surviving spouse of any person who died of a service-connected disability." Accordingly, VA's notification duty under 38 U.S.C. § 7722 generally extends to the surviving spouses of persons who died due to a service-connected disability, as well as to others who meet the definition of "eligible dependent" or "eligible veteran" under 38 U.S.C.

<Page 3>

§ 3501(a)(1). See Thompson v. Brown, 6 Vet. App. 436, 438 (1994) (no duty under section 7722 to provide notice to surviving spouse when it is not established that veteran died of a service-connected disability). Substantially similar definitional provisions were previously contained in 38 U.S.C. §§ 240(b) and 1701(a)(1) since 1970.

3. A determination that an individual is an "eligible veteran" or an "eligible dependent" does not, however, resolve the question of whether VA was required under 38 U.S.C. § 7722(c)

and (d) to provide that individual with information and assistance regarding his or her potential eligibility for VA benefits. As the CVA noted in Smith, 2 Vet. App. at 432, VA's notification duty under section 7722 "is not unlimited in scope . . . and requires of the VA only those actions which are reasonable under the circumstances involved." Smith, 2 Vet. App. at 432. Accordingly, a determination must be made on the facts of each individual case as to whether and to what extent VA was required to provide information and assistance to an eligible veteran or an eligible dependent. The CVA's precedents provide some guidance as to the scope of VA's obligation under 38 U.S.C. § 7722 and its predecessor in 38 U.S.C. § 241.

4. The CVA has held in several cases that when a benefits claim was pending before VA and the evidence of record indicated potential eligibility for other benefits not specifically claimed or suggested other theories of recovery not specifically asserted, section 7722 or section 241 required VA to notify the claimant of the potential eligibility and of any actions necessary to develop a claim for such benefits. See Smith, 2 Vet. App. at 432-33; Douglas, 2 Vet. App. at 442; Akles v. Derwinski, 1 Vet. App. 118, 121 (1991). However, in Thompson, 6 Vet. App. at 438, the CVA held that where a claimant had filed a claim for dependency and indemnity compensation, VA had no duty to inform her of any potential eligibility for burial benefits because she did not meet the statutory definition of an "eligible dependent" for purposes of section 7722. Accordingly, we believe that a notification duty under section 7722 will generally arise when a claim is pending before VA and the record before VA in connection with the claim indicates potential entitlement to other benefits which the claimant has not specifically claimed or other bases for relief which the claimant has not specifically asserted. How

<Page 4>

ever, that duty will arise only when the claimant is an "eligible veteran" or an "eligible dependent" within the meaning of section 7722.

5. In Lyman v. Brown, 5 Vet. App. 194, 197 (1993), the CVA held that section 7722(c) did not require VA to notify a potential DIC claimant of her possible entitlement to benefits where there was no pending claim and no showing that VA knew or should have known of a change in her marital status making her potentially eligible for such benefits. In Landicho v. Brown, 7 Vet. App. 42, 50-51 (1994), the CVA apparently held that section 7722 requires VA to provide information and assistance to accrued-benefits claimants and potential accrued-

benefits claimants when a veteran dies while such veteran's claim for benefits is pending before VA or the CVA. Presumably, under those circumstances, the veteran's potential entitlement to benefits at the time of his or her death is sufficient to put VA on notice of the possible existence of persons eligible to claim accrued benefits. Accordingly, we believe that a duty to provide information and assistance under 38 U.S.C. § 7722(c) and (d) will arise when VA knows or reasonably should know that an individual is potentially eligible for VA benefits. As noted above, however, this duty would be limited to persons who are "eligible veterans" or "eligible dependents" within the meaning of the statute. Although Landicho appears to suggest a general duty under section 7722 to provide notice and assistance to potential accrued-benefits claimants, we believe that Thompson and the statutory provisions in 38 U.S.C. §§ 3501(a)(1), 7721(b)(2) and 7722(c) and (d) make clear that such a duty would arise only where the potential accrued-benefits claimant meets the statutory definition of an "eligible dependent."

6. The outreach services provisions currently codified at 38 U.S.C. § 7722 were first enacted on March 26, 1970, by Pub. L. No. 91-219, § 214(a), 84 Stat. 76, 84 (1970), and were initially codified at 38 U.S.C. § 241. In August 1991, section 241 was replaced by the provisions now contained in section 7722. Pub. L. No. 102-83, § 2(b), 105 Stat 378, 400 (1991). The CVA has held that old section 241 and current section 7722 are "nearly identical." Douglas, 2 Vet. App. at 442. Accordingly, VA's notification obligation under section 7722 has been in effect since March 26, 1970. However, the CVA has

<Page 5>

held that those provisions of law are not applicable retroactively for any period prior to March 1970. Saunders v. Brown, 4 Vet. App. 320, 323 (1993).

7. Although 38 U.S.C. § 7722 has been construed as imposing on VA an affirmative obligation to provide information to certain individuals, we do not believe that VA's failure to provide such information would establish a basis for an earlier effective date of a subsequent award, except insofar as a court or the Secretary may direct assignment of an earlier effective date on an equitable basis. No statutory provision authorizes VA to award benefits retroactively on the basis that VA had previously failed to provide information concerning potential benefits eligibility under 38 U.S.C. § 7722. Congress has established specific rules governing effective dates in 38 U.S.C. § 5110, and VA is not free to disregard

those rules without statutory authority. Section 5110(a) expressly provides that "[u]nless specifically provided otherwise in this chapter, the effective date of an award based on an original claim, a claim reopened after final adjudication, or a claim for increase, of compensation, dependency and indemnity compensation, or pension, shall be fixed in accordance with the facts found, but shall not be earlier than the date of receipt of application therefor." (Emphasis added.) Accordingly, VA is not free to award a retroactive effective date prior to the date it receives a claim unless there is specific statutory authority for such retroactive effective date. Nothing in chapter 51 or in the outreach services provisions in chapter 77 of title 38, United States Code, provides authority for awarding an effective date earlier than the date on which VA receives the claim on the basis that VA failed to provide notice required by 38 U.S.C. § 7722.

8. Section 7722 directs VA to provide information and assistance to certain individuals but does not state or imply that VA's failure to provide such notice would provide a basis for assigning an effective date earlier than would be authorized under section 5110. Accordingly, we do not believe that section 7722 can reasonably be construed as providing the specific authorization required by 38 U.S.C. § 5110(a) in order for benefits to be paid for a period prior to the date VA receives the claim. The requirement in section 5110(a) for specific statutory authority would appear to preclude VA from
<Page 6>

concluding that section 7722 implicitly authorizes retroactive payments on the theory that Congress must have intended such a remedy as a means of enforcing VA's notification obligation under that statutory provision. Cf. Immigration and Naturalization Service v. Pangilinan, 486 U.S. 875, 883 (1988) ("A Court of equity cannot, by avowing that there is a right but no remedy known to the law, create a remedy in violation of law") (quoting Rees v. Watertown, 18 Wall 107, 122 (1874)). Further, nothing in the legislative history of section 7722 or prior 38 U.S.C. § 241 indicates an intent to establish an exception to the statutory effective-date provisions.

9. A Federal agency's power is no greater than that delegated to it by Congress. Lyng v. Payne, 476 U.S. 926, 937 (1986). The United States Court of Appeals for the Federal Circuit has stated that "[a]n agency is but a creature of statute," and "[a]ny and all authority pursuant to which an agency may act ultimately must be grounded in an express grant from Con-

gress." Killip v. OPM, 991 F.2d 1564, 1569 (Fed. Cir. 1993). Further, pursuant to the Appropriations Clause of the Constitution of the United States, money may be paid from the Federal Treasury only through an appropriation made by Congress and in a manner consistent with the congressional appropriation, as embodied in the pertinent statutes. Office of Personnel Mgmt. v. Richmond, 496 U.S. 414, 424 (1990). Accordingly, VA's authority to award benefits is limited to the awards expressly authorized by statute and VA may not award benefits in a manner not provided by statute. Inferring an exception to the effective-date provisions of 38 U.S.C. § 5110 would not only exceed VA's authority, but also would contravene the Appropriations Clause of the Constitution, the purpose of which is "to assure that public funds will be spent according to the letter of the difficult judgments reached by Congress as to the common good and not according to the individual favor of Government agents or the individual pleas of litigants." Richmond, 496 U.S. at 428. See also Schweiker v. Hansen, 450 U.S. 785, 788 (1981) (referring to "the duty of all courts to observe the conditions defined by Congress for charging the public treasury").

10. Congress, however, has authorized the Secretary to grant "equitable relief" in the form of monetary awards under certain circumstances. That authority is contained in part in 38 U.S.C. § 503(a), which states:

If the Secretary determines that benefits administered by the Department have not been provided by reason of administrative error on the part of the Federal Government or any of its employees, the Secretary may provide such relief on account of such error as the Secretary determines equitable, including the payment of moneys to any person whom the Secretary determines is equitably entitled to such moneys.

That statute expressly authorizes payment of money from the Federal Treasury on the basis of equitable considerations rather than the strict requirements of other statutory provisions governing VA awards. Accordingly, we believe that section 503(a) would permit the Secretary to award retroactive benefits without regard to 38 U.S.C. § 5110 if the Secretary were to determine both that benefits were not provided as a result of VA's failure to provide notice required by 38 U.S.C. § 7722 and that an award of such benefits was appropriate un-

der the circumstances. We do not believe that VA has any authority apart from the Secretary's section 503(a) equitable authority which would permit a retroactive award, contrary to 38 U.S.C. § 5110, on the basis of VA's failure to provide notice under 38 U.S.C. § 7722.

11. The only CVA decision we are aware of which purported to establish a remedy for VA's failure to comply with 38 U.S.C. § 7722 is Smith, 2 Vet. App. at 433-34, which based the remedy upon equitable considerations rather than upon statutory or regulatory authority. We note that the CVA's discussion of potential equitable remedies in Smith was not essential to its holding because the CVA ultimately upheld the BVA's determination that the claimant in that case had not satisfied the express statutory requirements for retroactive pension payments. Smith, 2 Vet. App. at 435. Although VA would be required to comply with the CVA's orders requiring equitable tolling in individual cases, we do not believe that the CVA's precedents may confer upon VA a general authority to grant equitable relief in contravention of statutory and regulatory authority. See Federal Trade Comm'n v. Raladam Co., 283 U.S. 643, 649 <Page 8>

(1931) (court cannot invest administrative official with powers beyond those conferred by Congress). Rather, as noted above, VA's authority to grant monetary awards is limited to the terms of the statutes providing for such awards. Accordingly, we believe that any claims for equitable relief may be resolved, when properly presented, only by a court of law or by the Secretary pursuant to his 38 U.S.C. § 503(a) authority. See Darrow v. Derwinski, 2 Vet. App. 303, 304-05 (1992) (distinguishing "the Secretary's authority to grant relief based upon principles of equity from his authority to award benefits based upon statutory entitlement").

12. The principle that an agency's authority is limited to that expressly provided by statute would appear to preclude the conclusion that VA has any general or inherent authority apart from 38 U.S.C. § 503(a) to make awards on equitable bases in a manner not authorized by statute. We are aware of no cases holding that agencies have inherent equitable powers to make awards based on equitable principles in the absence of express statutory authority. One court has stated that although an agency "does not have the same range as an equity court to summon powers to the call of justice, [W]hen an agency is exercising powers entrusted to it by Congress, it may have recourse to equitable conceptions in striving for the reasonableness that broadly identifies the ambit of sound dis-

cretion." City of Chicago v. Federal Power Comm'n, 385 F.2d 629, 642 (D.C. Cir. 1967). That statement indicates that an agency may rely upon equitable principles in the course of exercising its discretion and implementing statutory authority. It does not, however, suggest that an agency may take action contrary to statutory requirements based solely upon equitable principles. The Supreme Court has noted that "[a]n agency, like a court, can undo what is wrongfully done by virtue of its order." United Gas Improvement Co. v. Callery Properties, 382 U.S. 223, 229 (1965). Although that statement may indicate that agencies have some inherent authority to correct mistakes in their orders, we do not believe that it suggests that an agency generally has inherent equitable powers to authorize awards or remedies not provided by Congress.

13. In Brush v. Office of Personnel Mgmt., 982 F.2d 1554 (Fed. Cir. 1992), the United States Court of Appeals for the Federal Circuit held that an agency's failure to provide
<Page 9>

statutorily required notice may justify waiver of certain regulatory filing requirements and upheld the Merit System Protection Board's (MSPB) practice of ordering waiver of the filing requirements under those circumstances. However, we do not believe that court's implicit recognition of the MSPB's authority to waive regulatory filing requirements in such cases suggests that the MSPB or other administrative bodies generally may exercise equitable powers or waive statutory requirements. In Killip, 991 F.2d at 1569, the Federal Circuit held that OPM did not have authority to waive a statutory time limit applicable to elections of particular benefits and could not consider an election filed outside of the statutory period. The court stated that "[s]uch action by an administrative agency violates the principle that an agency is strictly limited by the authority granted by Congress, and therefore can have no effect." Killip, 991 F.2d at 1570. Accordingly, we believe that Brush and Killip, viewed together, support our conclusion that agencies lack authority to waive or ignore statutory requirements on the basis of equitable principles. Additionally, we note that there may even be some ambiguity regarding the powers of Article I courts to exercise equitable powers. Compare Commissioner of Internal Revenue v. McCoy, 484 U.S. 3, 7 (1987) ("The Tax Court is a court of limited jurisdiction and lacks general equitable powers."); with Bokum v. Commissioner of Internal Revenue, 992 F.2d 1136, 1140 (11th Cir. 1993) (although Tax Court may not exercise jurisdiction of a court of equity, it has authority to consider equitable estoppel claims in cases properly before it).

14. In view of the principle that "[a]ny and all authority pursuant to which an agency may act ultimately must be grounded in an express grant from Congress," Killip, 991 F.2d at 1569, and in the absence of any authority establishing that agencies have inherent power to award equitable remedies, we do not believe that there is any sound basis for concluding that VA has general authority to award an effective date inconsistent with statutory requirements on the basis of equitable principles. Further, the express grant of equitable authority to the Secretary in 38 U.S.C. § 503(a) strongly suggests that VA does not have authority, other than as provided in that provision, to make awards contrary to statutory requirements based upon equitable principles. In the circumstances described in your opinion request, application of eq

<Page 10>

uitable estoppel or tolling to award an earlier effective date would contravene the clear statutory direction in 38 U.S.C. § 5110(a) that benefits may not be paid for a period prior to the date VA receives a claim unless a statute specifically authorizes such retroactive payment. Inasmuch as Congress has not provided by statute for a retroactive effective date based upon VA's failure to provide notice under 38 U.S.C. § 7722, VA may not assume the authority to provide such a remedy. Any administrative remedy based upon equitable principles is, therefore, limited to the Secretary's authority under 38 U.S.C. § 503(a) to correct administrative errors.

15. In any event, we do not believe that the applicable precedents would authorize an equitable remedy in the circumstances described in your opinion request. The case law indicates that the available equitable remedies for violations of 38 U.S.C. § 7722 are generally limited to equitable tolling of specific time periods and do not include awards based upon equitable estoppel or other awards which would require payment of Federal funds in a manner not authorized by Congress. This distinction is based upon the Supreme Court's opinions in Richmond, 496 U.S. 414, and Irwin v. Department of Veterans Affairs, 498 U.S. 89 (1990). In Richmond, the claimant had relied upon erroneous advice from Navy personnel and, as a result, had failed to comply with the statutory criteria for a Federal disability annuity benefit. He sued to collect the annuity, asserting that the government's error had prevented him from obtaining that benefit. The Supreme Court denied his claim, holding that there was no statutory basis for providing the requested relief and that "judicial use of the equitable doctrine of estoppel cannot grant respondent a monetary remedy

that Congress has not authorized." Richmond, 496 U.S. at 426. In Irwin, the claimant had failed to comply with a 30-day statute of limitations for seeking court review of an agency decision, and asserted that his failure was based upon error by the government. Although the Court denied the claim, it held that "the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States." 498 U.S. at 95-96. Accordingly, the Court held that statutory time limits in suits against the United States are subject to equitable tolling under certain circumstances.

<Page 11>

16. In Smith, the CVA stated that the equitable tolling doctrine announced in Irwin would apply to toll specific time periods in administrative actions before VA. In that case, the appellant, a claimant for a VA pension, had failed to file a timely application for retroactive benefits under 38 U.S.C. § 5110(b)(3)(A), which requires a specific application for retroactive benefits to be filed within one year after the claimant becomes permanently and totally disabled. The CVA concluded that VA had erroneously failed to inform the claimant, under 38 U.S.C. § 7722, of the need to file a specific claim for retroactive benefits, and that VA's failure tolled the one-year application period. Smith, 2 Vet. App. at 434-35. The CVA stated that its holding was based upon the equitable tolling doctrine of Irwin and not upon the equitable estoppel doctrine discussed in Richmond. In Harvey v. Brown, 6 Vet. App. 416, 423 (1994), the CVA noted that it had applied the doctrine of equitable tolling in prior cases but had consistently declined to apply equitable estoppel against VA.

17. We do not believe that the doctrine of equitable tolling would have any application in a claim, such as the one discussed in your opinion request, seeking an earlier effective date based on an assertion that VA's failure to provide notice under 38 U.S.C. § 7722 prevented the claimant from bringing the claim at an earlier time. The Supreme Court in Irwin stated that "[f]ederal courts have typically extended equitable relief only sparingly." 498 U.S. at 96. The cases applying Irwin suggest that the doctrine of equitable tolling is limited to tolling a specific statutory limitations period in order to preserve a claim or action which would otherwise be lost due to the claimant's untimely action. See Lambert v. United States, 44 F.3d 296, 298 (5th Cir. 1995); Cada v. Baxter Healthcare Corp., 920 F.2d 446, 451 (7th Cir. 1990); American Int'l Underwriters, Inc. v. Continental Insurance Co., 843 F.2d 1253, 1260 (9th Cir. 1988). We have found no

cases applying the doctrine where it would not be necessary in order to preserve a claimant's right to submit a claim, but would only affect the effective date or amount of the award. A claim for DIC benefits may be brought at any time. The amount of the award is determined in part by the effective-date provisions of 38 U.S.C. § 5110, which provides that DIC benefits generally may not be paid for a period prior to the date of application therefore. Accordingly, equitable tolling
<Page 12>

is not necessary to preserve a claimant's right to receive DIC benefits.

18. As stated above, we do not believe that the doctrine of equitable tolling may be applied solely for the purpose of granting an earlier effective date for an award, when tolling is not necessary to preserve the underlying claim. We note that 38 U.S.C. § 5110(d)(1) establishes entitlement to retroactive DIC benefits when a claim therefore is received within one year after the date of the veteran's death, and that this requirement could be viewed as analogous to the one-year filing period in Smith. However, the case described in your opinion request does not implicate entitlement to retroactive benefits under section 5110(d)(1) because VA's duty to inform the claimant of her potential DIC entitlement did not arise until several years after the veteran's death.

19. Accordingly, we believe that the claim for an earlier effective date based on VA's failure to provide notice does not invoke tolling of any statutory limitations period. Such a claim essentially asserts that VA should be estopped from applying the effective-date provisions in section 5110 because VA's error precluded the claimant from earlier complying with the statutory requirement of a formal claim for benefits. We do not believe that the claim may be resolved on the basis of equitable tolling, as in Smith. Rather, we find this situation to be more analogous to Richmond, where the claimant asserted that governmental error prevented him from satisfying the substantive statutory criteria for payment of benefits. See Harvey, 6 Vet. App. at 423-24 (distinguishing Richmond and Irwin). In Schweiker v. Hansen, 450 U.S. 785 (1981), the claimant asserted entitlement to an earlier effective date for her award of certain Social Security benefits on the basis that the Social Security Administration's failure to inform her of the appropriate application requirements prevented her from filing her claim sooner. The Supreme Court evaluated her claim solely in terms of the possible applicability of equit-

able estoppel and did not discuss equitable tolling. This suggests, consistent with our above analysis, that a claim merely seeking an earlier effective date would be cognizable, if at all, only under the doctrine of equitable estoppel and not on the basis of equitable tolling. See Conary v. Derwinski, 3 Vet. App. 109, 115 (1992) (Steinberg, J., con-

<Page 13>
curring) (VA failure to inform claimant of filing requirements does not provide basis for retroactive award where filing requirements do not relate to a "statutory time period for filing a claim against the U.S. Government"). As noted above equitable estoppel may not provide a basis for payment of money from the Federal treasury in a manner not provided for by law.

HELD:

a. The provisions of 38 U.S.C. § 7722, as interpreted by the Court of Veterans Appeals, require VA to inform individuals of their potential entitlement to Department of Veterans Affairs benefits when (1) such individuals meet the statutory definition of "eligible veteran" or "eligible dependent," and (2) VA is aware or reasonably should be aware that such individuals are potentially entitled to VA benefits. VA's duty to provide information and assistance to such individuals requires only such actions as are reasonable under the circumstances.

b. The notification requirements currently in 38 U.S.C. § 7722 and previously in 38 U.S.C. § 241 have been in effect since March 26, 1970, and do not apply retroactively to any period prior to that date.

c. A failure by VA to provide the notice required by 38 U.S.C. § 7722 may not provide a basis for awarding retroactive benefits in a manner inconsistent with express statutory requirements, except insofar as a court may order such benefits pursuant to its general equitable authority or the Secretary of Veterans Affairs may award such benefits pursuant to his equitable-relief authority under 38 U.S.C. § 503(a).

Mary Lou Keener

