

Date: August 24, 1995

VAOPGCPREC 21-95

From: General Counsel (022)

Subj: Multiple Overpayments--Notification of Waiver Rights

To: VA District Counsel (330/02)

QUESTION PRESENTED:

Must a recipient of Department of Veterans Affairs (VA) benefits who has been notified of waiver rights upon adjudication of an overpayment be notified of such rights again when an additional overpayment is established based on a separate and distinct transaction?

COMMENTS:

1. Upon adjudication of an overpayment of VA benefits, the VA Debt Management Center (DMC) sends a computer-generated letter notifying the beneficiary of his or her right to request a waiver of recovery of the overpayment. We understand that, when the Adjudication Division informs the DMC that an additional amount is owed, as a result of either an upward adjustment of the original overpayment or a separate and distinct transaction, the DMC treats the additional amount as an adjustment to the original debt and provides no further notification of waiver rights to the debtor. Although the Adjudication Division sends the debtor a statement explaining the basis for creation of an overpayment arising from a separate and distinct transaction, the debtor receives no new notice of waiver rights. We believe this practice is inconsistent with governing statutes and regulations.

2. Under 38 C.F.R. § 3.103(f), a VA beneficiary is entitled to notification of any decision affecting the payment of benefits. See also 38 U.S.C. § 5104(a) and 38 C.F.R. § 3.103(b)(1) (claimants are entitled to notice of decisions affecting provision of benefits). This notification must explain the reasons for the decision. 38 C.F.R.

§ 3.103(f); see also 38 C.F.R. § 1.911(d)(2) (pertaining specifically to explanation of creation of an overpayment). The notices provided by the DMC and the Adjudication Division serve to fulfill these obligations.

3. Section 5302(a) of title 38, United States Code, requires the Secretary to "include in the notification [of an indebtedness] . . . a statement of the right of the payee to submit an application for a waiver . . . and a description of the procedures for submitting the application." Further, under that section, a debtor must request waiver of an overpayment within 180 days from the date of notification of the indebtedness or "within such longer period as the Secretary determines is reasonable in a case in which the payee demonstrates . . . that . . . notification was not actually received . . . within a reasonable period" after such notification was attempted. See also 38 C.F.R. §§ 1.911(c)(2) and 1.963(b)(2); VA Financial Policy Manual, MP-4, part I, ch. 8, para. 8B.08(a)(2). In addition, 38 U.S.C. § 5314(b)(1) requires that VA make reasonable efforts to notify a debtor of the right to request waiver before offsetting overpayments against future payments of VA benefits. Section 1.911(d)(3) of title 38, Code of Federal Regulations, requires that VA provide the debtor with "a brief explanation of the concept of, and requirements for, waiver." See also 38 C.F.R. § 1.911(b) (requiring notification of rights and remedies in connection with a debt). In our view, a description of the waiver procedures would be incomplete if it did not include the time limits for filing the application.

4. Federal case law is replete with cases in which time bars were excused due to inadequate notice of procedural requirements. See, e.g., City of New York v. New York, New Haven & Hartford R.R. Co., 344 U.S. 293 (1953) (notice of deadline for filing claims); Walls v. Merit Sys. Protection Bd., 29 F.3d 1578 (Fed. Cir. 1994) (notice of deadline for filing appeals); White v. Jacobs Eng'g Group, 896 F.2d 344 (9th Cir. 1989); Pathman Constr. Co., Inc. v. United States, 817 F.2d 1573 (Fed. Cir. 1987). In Mays v. Brown, 5 Vet. App. 302, 306 (1993), the Court of Veterans Appeals held that time limits for claiming VA outpatient dental treatment do not begin to run where the service-department secretary fails to comply with the notification provisions

of 38 U.S.C. § 1712(b)(2). See also Smith (Edward F.) v. Derwinski, 2 Vet. App. 429 (1992) (VA failure under 38 U.S.C. § 7722(d) to notify of filing deadline for retro-active benefits tolled deadline).

5. The controlling question then is whether the statutory and implementing regulatory requirements for notification of waiver procedures apply each time a debtor's indebtedness is increased as a result of a transaction separate and distinct from that which gave rise to the original indebtedness. Section 5302(a), in requiring notification of waiver procedures at the time of notification of an indebtedness, makes no distinction between debtors who already have an outstanding indebtedness to VA and those who do not. Further, in the case of debts arising out of separate and distinct transactions, the circumstances giving rise to the debts, and the amount of the debts, may differ greatly. The debtor's circumstances also may have changed greatly since establishment of the original debt. These circumstances could substantially affect the debtor's ability to qualify for waiver under the factors specified in 38 C.F.R. § 1.965. A debtor who may not have qualified for waiver of the original indebtedness and who chose not to apply could not be expected to remember waiver procedures explained in a notice received in connection with the prior indebtedness or even to have retained the explanation of procedures in the event a later indebtedness arose, waiver of which might be available. In such a case, we would question whether the Department had fulfilled its duty under section 5314(b)(1) to make reasonable efforts to notify the debtor of his or her right to request waiver.

6. Failure to provide notice of waiver procedures when an additional indebtedness arises from a separate and distinct transaction would result in notice being provided to an individual who had a previous debt which was satisfied but not to an individual whose previous debt was still outstanding at least in part. Certainly, it could not be argued that the debtor who had satisfied his or her obligation should not receive notice of waiver rights concerning a new obligation merely because that individual had once had another indebtedness with respect to which notice of waiver

rights had been furnished. We see no basis for distinguish-ing for notification purposes between such a person and one who still has an outstanding debt, particularly when the debtor with an outstanding prior obligation may actually have received notice of procedural rights at a date prior to the date such notice was received by the individual who had already satisfied the prior obligation.

7. The first sentence of 38 C.F.R. § 1.911(b) provides that VA will promptly demand payment when it determines that a debt exists. The second sentence of subsection (b) goes on to require that a debtor be notified of "his or her rights and remedies in connection with the debt." These provisions were clearly intended to operate together with reference to a particular debt. Just as we do not believe the first sentence of section 1.911(b) could reasonably be read as permitting the Department to dispense with a prompt demand for payment of a new indebtedness arising from a separate and distinct transaction merely because the debtor already had an outstanding debt to the Department, neither do we believe that the notification required by the second sentence of that provision regarding the same debt may be dispensed with because notice had previously been provided in connection with the preexisting debt.

8. Finally, the DMC procedure suggests that VA treats all outstanding indebtedness owed VA by a particular person as a single indebtedness for purposes of section 5302(a), regardless of whether the indebtedness arose from one or multiple transactions. Such a construction would seemingly have the untoward consequence of requiring an individual to apply for waiver within 180 days of notification of the original portion of the outstanding indebtedness for all indebtedness which was then outstanding or might later be added to the amount due, notwithstanding that at that time a substantial portion of the indebtedness may not have as yet arisen, may not have been foreseeable, and could not have been considered for waiver. Congress could not have intended such a result.

9. In view of the foregoing, we conclude that, when an overpayment arises from a transaction separate and distinct

from that which gave rise to a prior, outstanding overpayment, new notice to the debtor of waiver rights is necessary with respect to the new overpayment. While the Adjudication Division does provide the debtor with an explanation of the new overpayment, it does not explain waiver rights and time limits. Governing statutes and regulations require that such an explanation be provided, whether by the Adjudication Division or the DMC, at the time notice is provided to the debtor advising him or her of the new overpayment.

HELD:

A recipient of VA benefits who has been notified of his or her right to request a waiver of indebtedness arising from an overpayment of such benefits must again be notified of waiver rights when an additional overpayment is established based on a separate and distinct transaction.

Mary Lou Keener