Date: October 27, 1995 VAOPGCPREC 24-95

From: General Counsel (022)

Subj: Adjustment of Benefits Under 38 C.F.R. §§ 3.557 and 3.853 for Certain Incompetent, Institutionalized Veterans

To: Under Secretary for Benefits (20)

QUESTIONS PRESENTED:

a. Are the provisions of 38 C.F.R. §§ 3.557 and 3.853 applicable in cases where a veteran has alleged but failed to establish the existence of a spouse or child, or, for section 3.853 purposes, a dependent parent, and is therefore being paid as a veteran without dependents?

b. Does the failure of a veteran to comply with the Department of Veterans Affairs' (VA) request pursuant to 38 C.F.R. § 3.216 for the social security number of a spouse, child, or dependent parent upon whom the veteran relies to avoid the application of 38 C.F.R. §§ 3.557 or 3.853 require VA to terminate benefit payments to the veteran?

COMMENTS:

1. In the claim giving rise to this request for opinion, the veteran, who was rated incompetent by VA and claimed no dependents, had an estate totaling more than $25,000. In accordance with former section 5505 of title 38, United States Code, (38 U.S.C.A. § 5505 (1991)) VA notified the conservator of the veteran's estate that it was preparing to terminate compensation payments to the veteran. The conservator informed VA that the veteran had a child and furnished a copy of a court order of support for the child. VA requested additional information to establish the child's status and to determine the child's social security number. The veteran's conservator failed to provide all of the requested information, and VA terminated compensation pursuant to former section 5505 and 38 C.F.R. § 3.853. Although all requested information other than the child's social security number was received within one year of VA's request, no determination was made as to whether the child could be recognized as the child of the veteran. Following expiration of section 5505, the

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veteran's compensation was restored, subject to adjustment pursuant to 38 U.S.C. § 5503(b) and 38 C.F.R. § 3.557 for periods when the veteran was hospitalized at VA expense. Subsequently, VA determined that the child could be recognized as the child of the veteran. The conservator has yet to furnish the child's social security number.

2. Sections 3.557 and 3.853 of title 38, Code of Federal Regulations, implement the provisions of 38 U.S.C. § 5503 and former
38 U.S.C. § 5505, respectively. Accordingly, consideration of the first question presented must begin with examination of those statutes. In determining the meaning of a statutory provision, the starting point is the language of the provision, viewed in its statutory context. See K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291 (1988); United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 241 (1989). If the plain meaning of the language of a statute is clear, then that meaning is controlling. See, e.g., West Virginia Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 98-99 (1991).

3. Section 5503(b)(1)(A) provides in pertinent part as follows:

> In any case in which a veteran having neither spouse nor child is being furnished hospital treatment or institutional or domiciliary care without charge or otherwise by the United States, or any political subdivision thereof, is rated by the Secretary . . . as being incompetent, and the veteran's estate . . . equals or exceeds $1,500, further payments of pension, compensation, or emergency officers' retirement pay shall not be made until the estate is reduced to $500.

Subsection (c) of section 5503 provides that a veteran will be deemed to be single and without dependents for purposes of subsection (b) in the absence of "satisfactory evidence" to the contrary. Thus, in order to avoid suspension of benefits under section 5503(b)(1)(A), satisfactory evidence that the veteran has a spouse or child must be submitted or developed. The statute does not define what is to be considered "satisfactory" evidence, nor

do implementing regulations at 38 C.F.R. §§ 3.557-3.559. However, VA regulations at 38 C.F.R. §§ 3.204, 3.205, 3.209, and 3.210 provide rules and guidelines concerning acceptable evidence to establish marriage, birth, and relationship.

4. A social security number is not a form of evidence referred to in the above-referenced regulations. Further, neither the plain language of section 5503(b)(1)(A), nor the above-referenced regulations, contains a requirement that a spouse or child qualify for payment of VA benefits in order to be considered the veteran's spouse or child for purposes of that statute. Nonetheless, the plain language of the statute indicates that "satisfactory" evidence of the existence and relationship of the spouse or child is required before the spouse or child may be recognized for purposes of section 5503(b)(1)(A). [1] The adequacy of evidence must be assessed under applicable regulations governing proof of relationship.

5. To the extent of any ambiguity in the statute, and in the event the legislative history of the statute might contain an extraordinary showing of contrary intention, [2] we have reviewed the

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[1] You have pointed out in your request for opinion that the provisions of 38 C.F.R. § 3.551, implementing 38 U.S.C. § 5503(a) and its predecessors, provide for reduction of pension benefits for certain institutionalized veterans having no dependents in specified classes and that, unlike the regulations governing reduction of benefits under section 5503(b), this regulation includes a provision specifically requiring satisfactory proof of dependents. 38 C.F.R. § 3.551(g). Since section 5503 contains no provision specifically requiring satisfactory evidence in claims governed by section 5503(a), but does refer to the need for such proof in claims governed by section 5503(b), we do not believe the presence of a "satisfactory proof" provision in 38 C.F.R. § 3.551(g) but not in the regulations implementing section 5503(b) suggests any intention that such proof would not be required in claims governed by section 5503(b).

[2] Where the terms of a statute are unambiguous, only the most extraordinary showing of contrary intention would justify a departure from the plain meaning of the statute. See Garcia v. United States, 469 U.S. 70, 75 (1984).

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historical development of section 5503(b) and (c). Provision for discontinuance of benefits for institutionalized incompetent veterans dates back to 1930, when the Act of July 3, 1930, ch. 849, § 14, 46 Stat. 991, 999, provided for suspension of benefits where the estate of an insane veteran having no spouse, child, or dependent parent and maintained in an institution by the United States equaled or exceeded $3,000. Paragraph VI of Veterans Regulation No. 6, promulgated on March 31, 1933, by Exec. Order No. 6094, provided for discontinuance of the benefits of an insane veteran being maintained in an institution by the United States or a political subdivision thereof, where the veteran's estate derived from funds paid under the veterans' benefit statutes equaled or exceeded $1,500. This regulation was soon cancelled and replaced by Regulation No. 6(a), which incorporated the $1,500 limitation on the estates of insane veterans. In 1943, Veterans Regulation No. 6(a) was amended to provide that, where an institutionalized insane veteran's estate derived from any source equaled or exceeded $1,500, benefits would be discontinued. Act of July 13, 1943, ch. 233, § 13, 57 Stat. 554, 557. At that time, a new section VI(C) was added to the regulation, providing that, for purposes of that provision, a veteran shall be considered as single and without dependents in the absence of satisfactory evidence to the contrary. Id.

6. The legislative history of section 5503(b), as that provision has been amended by various statutes, indicates a consistent congressional purpose to prevent the accumulation of large estates derived from veterans' benefits which, upon an incompetent veteran's death, would pass to individuals who were not intended beneficiaries of Government funds. See S. Rep. No. 1128, 71st Cong., 2d Sess. 7 (1930); H.R. Rep. No. 463, 78th Cong., 1st Sess. 16 (1943); [3] H.R. Rep. No. 993, 81st Cong., 1st Sess. (1949), reprinted in 1949 U.S.C.C.S. 1634, 1635; S. Rep. No. 344, 86th Cong., 1st Sess. 1 (1959), reprinted in 1959 U.S.C.C.A.N. 2048; see also, United States v. Macioci, 345 F. Supp. 325, 328

[3] The committee reports on the legislation which became the Act of July 13, 1943, offer no explanation for addition of the provision concerning satisfactory evidence of dependents, except the general statement that the amendments to the estate-limitation provision were intended "to insure uniform application of the limitations." H.R. Rep. No. 463, 78th Cong. at 16.

(D.R.I. 1972) (noting that benefits are not withheld where veterans have spouses or children because: 1) accumulations are less likely where the hospitalized incompetent veteran has nonhospitalized dependents currently in need of support, and 2) spouses and children, being in the class of intended beneficiaries of veterans' benefits, are "acceptable" heirs of accumulated amounts). Requiring that the existence and relationship of a spouse or child be established by evidence in order to avoid termination of benefits under section 5503(b)(1)(A) is consistent with Congress' purpose in that it tends to assure that VA funds will not accumulate and pass to unintended beneficiaries.

7. Turning to former 38 U.S.C. § 5505, that statute, which expired on September 30, 1992, [4] provided in part as follows:

> In any case in which a veteran having neither spouse, child, nor dependent parent is rated by the Secretary . . . as being incompetent and the value of the veteran's estate . . . exceeds $25,000, further payment of compensation to which the veteran would otherwise be entitled may not be made until the value of such estate is reduced to less than $10,000.

Former 38 U.S.C. § 5505(a). While the statute does not contain a provision comparable to section 5503(c) pertaining to "satisfactory" evidence that a veteran has a spouse, child, or dependent parent, we do not read the absence of such a provision as implying that the existence of a spouse, child, or dependent parent need only be alleged and need not be established by satisfactory evidence in order to avoid the operation of former section 5505. Numerous other sections in title 38, United States Code, base entitlement on the existence of a spouse, child, or dependent parent and do not specifically require "satisfactory evidence" of that fact. See, e.g., 38 U.S.C. § 1115(1). However, the

[4] Subsection (c) of former section 5505 provided that that section would expire on September 30, 1992. Section 5505 was repealed by Pub. L. No. 103-446, § 1201(g)(4)(A), 108 Stat. 4645, 4687 (1994).

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existence of a spouse, child, or dependent parent is not considered established for entitlement purposes under those provisions in the absence of acceptable proof. Cf. Tirpak v. Derwinski, 2 Vet. App. 609, 611 (1992) (VA benefit system "requires more than just an allegation").

8. Under generally applicable principles governing provision of veterans' benefits, a claimant has the ultimate burden of demonstrating that, at minimum, an approximate balance of evidence exists as to each material fact necessary to support entitlement. See Gilbert v. Derwinski, 1 Vet. App. 49, 54 (1990) (in order to prevail, veteran must demonstrate that there is at least an approximate balance of positive and negative evidence); White v. Derwinski, 1 Vet. App. 519, 521 (1991) (VA's duty to assist claimant does not shift the burden of proof from the claimant to VA); 38 C.F.R. § 3.159(a) (duty to assist does not shift from the claimant to VA the responsibility to produce necessary evidence); see also 38 U.S.C. § 5107 (burden of proof); 38 C.F.R. § 3.102 (claimant required to submit evidence). Further, as noted above, VA regulations applicable to all compensation claims specify particular rules and guidelines governing the evidence required to establish marriage, birth, and relationship for benefit purposes. See 38 C.F.R. §§ 3.204, 3.205, 3.209, and 3.210. These regulations apply to issues arising under former section 5505 as well as to those arising under section 5503(b). Thus, it appears that, in section 5503(c), Congress merely sought to restate for purposes of emphasis or clarity a principle generally applicable in adjudication of claims, i.e., that the existence and relationship of individuals will not be presumed but must be established by evidence.

9. A review of the legislative history of former section 5505 shows that, in enacting the statute, Congress took into consideration the reports by the General Accounting Office and the VA Inspector General which indicated that "large sums accumulated in the estates of non-hospitalized incompetent veterans comprised mainly of [VA] monetary benefits are in many cases being inherited by distant relatives of these veterans although little or no contact may have been maintained with the veteran." H.R. Rep. No. 881, 101st Cong., 2d Sess. 217 (1990), reprinted in 1990 U.S.C.C.A.N. 2017, 2221. In Disabled American Veterans v. United States Department of Veterans Affairs, 962 F.2d 136, 143-44 (2d Cir. 1992), the United States Court of Appeals for the Second

Circuit reviewed the legislative history and purposes of the statute and concluded that the statute furthers the goals of reducing the Federal budget deficit, preventing remote and/or non-dependent heirs of disabled veterans from inheriting VA-derived benefits, and limiting the incidence of abuse of veterans' estates by fiduciaries. Thus, a primary purpose of former section 5505 was to limit the estates of veterans with no spouse, child, or dependent parent so that large sums were not left in estates to be inherited by distant relatives who may have had little or no contact with the veterans. This purpose is similar to that of section 5503(b). As with section 5503(b), requiring that the existence and relationship of a spouse, child, or dependent parent be established by evidence in order to avoid termination of benefits under former section 5505 is consistent with Congress' purpose in that it tends to assure that VA funds will not accumulate and pass to unintended beneficiaries.

10. In the claim giving rise to this request for opinion, it appears that VA received, within one year after its request, all evidence upon which the decision rested to recognize the existence and relationship of the veteran's child. The question then arises whether a beneficiary's failure to provide upon request the social security number of a spouse, child, or dependent parent (the veteran's child in the instant case) upon whose existence a veteran relies to avoid application of the estate-limitation provisions in itself requires that VA terminate benefits.

11. The Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, 104 Stat. 1388, included as section 8053(a) a provision, currently codified at 38 U.S.C. § 5101(c), requiring claimants and beneficiaries to report social security numbers to VA upon request. Section 5101(c)(1) provides in pertinent part as follows:

> Any person who applies for or is in receipt of any compensation or pension benefit under laws administered by the Secretary shall, if requested by the Secretary, furnish the Secretary with the social security number of such person and the social security number <u>of any dependent or beneficiary on whose behalf, or based upon whom, such person applies for or is in receipt of such benefit</u>. (emphasis added).

Section 5101(c)(2) provides that the Secretary shall deny the application of or terminate the payment of compensation or pension benefits to a person who fails to comply with a request by the Secretary for a social security number. VA's implementing regulations at 38 C.F.R. § 3.216 closely follow the statutory terms with regard to these provisions.

12. The language of the statute indicates that mandatory disclosure of social security numbers may be requested for dependents or beneficiaries on whose behalf, or based on whom, benefits are applied for or received. The phrase "based upon whom . . . such person . . . is in receipt of such benefit" appears broad enough to include not only a situation where additional benefits are being paid by VA to a veteran based on the existence of a spouse, child, or dependent parent, but also the situation where a veteran's continued receipt of benefits in the veteran's own right depends on a dependent's existence. In the case of section 5503(b)(1)(A) and former section 5505, the veteran's continued receipt of compensation benefits is dependent on the existence of a spouse, child, or, with respect to former section 5505, a dependent parent. [5] Thus, the veteran's being "in receipt of" benefits may be considered "based upon" the existence of the spouse, child, or dependent parent.

13. The legislative history of section 5101(c) offers some insight into the scope and purpose of the provision. The House report on the legislation noted that "the reported bill would require claimants for [VA] benefits to disclose their Social Security numbers to permit verification of the claimant's receipt of

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[5] In VAOPGCPREC 21-92 (O.G.C. Prec. 21-92), we held that a veteran whose compensation was suspended pursuant to former section 5505 was not "in receipt of" compensation for purposes of determining eligibility for burial allowance under 38 U.S.C. § 2302. See also Osborne v. Principi, 3 Vet. App. 368, 370 (1992) ("because the veteran was not receiving any monthly payment, he was not in receipt of compensation"). These authorities indicate that a veteran whose benefits have been discontinued under an estate-limitation provision would not be considered in receipt of benefits. Thus, the veteran's status as "in receipt of" benefits is contingent on the existence of a qualifying dependent.

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Social Security or to ascertain whether the claimant has died in order to prevent fraudulent payment of benefits." H.R. Rep. No. 881, 101st Cong. 223, reprinted in 1990 U.S.C.C.A.N. at 2227. In discussing the provision of the House bill, which was enacted with only minor changes, the conference report specifically noted that VA would be required under the bill to compare its records regarding recipients of VA compensation or pension benefits with records of the Department of Health and Human Services in order to determine whether any recipient of those benefits is deceased. H.R. Conf. Rep. No. 964, 101st Cong., 2d Sess. 998 (1990), reprinted in 1990 U.S.C.C.A.N. 2374, 2703.

14. While the congressional reports refer only to claimants and recipients of benefits, we may presume Congress intended to authorize requests for the social security numbers of dependents for the same reasons as it authorized requests for the social security numbers of claimants and benefit receipts, i.e., to permit VA to verify their income and determine whether they are deceased. Determination of whether a dependent is deceased is crucial to application of the estate-limitation provisions of section 5503(b)(1)(A) and former section 5505. Thus, application of section 5101(c) to determinations under those statutes would further Congress' objective of preventing erroneous payment of benefits based on the existence of individuals who are in fact deceased. In light of the requirement in 38 U.S.C. § 5101(c)(2) that VA terminate compensation or pension to a person who fails to furnish VA with a social security number required to be furnished under section 5101(c)(1), we believe the governing statutes require termination of compensation to a veteran who fails to provide upon request the social security number of a spouse, child, or, for purposes of former section 5505, dependent parent upon whom the veteran relies to avoid application of the estate-limitation provisions of section 5503(b)(1)(A) or former section 5505.

HELD:

a. Where the other statutory criteria have been met and it has not been established by satisfactory evidence that a veteran has a spouse or child, the provisions of 38 U.S.C. § 5503(b)(1)(A), as implemented by 38 C.F.R. § 3.557, requiring discontinuance of compensation or pension payments to an incompetent veteran having

neither spouse nor child, institutionalized at government expense, and having an estate of $1,500 or more, are applicable. Where the other criteria have been met and it has not been established that a veteran has a spouse, child, or dependent parent, the provisions of former 38 U.S.C. § 5505, as implemented by
38 C.F.R. § 3.853, requiring discontinuance of compensation payments to an incompetent veteran having neither spouse, child, nor dependent parent and having an estate in excess of $25,000, are applicable.

b. The provisions of 38 U.S.C. § 5101(c), as implemented by 38 C.F.R. § 3.216, require any person who applies for or is in receipt of compensation or pension to furnish VA upon request with their social security number and that of any dependent on whose behalf, or based upon whom, benefits are sought or received. Failure of a veteran to supply the social security number of a spouse, child, or, in the case of former section 5505, dependent parent upon whom the veteran relies to avoid the application of 38 U.S.C. § 5503(b)(1)(A) or former 38 U.S.C. § 5505 would be grounds for termination of benefits pursuant to 38 U.S.C. § 5101(c)(2), which requires termination of benefits for failure to comply with a request for a social security number.

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