

Date: May 13, 1996

VAOPGCPREC 2-96

From: General Counsel (022)

Subj: Entitlement to Compensation of Veteran Who Violates Parole

-- XXXXXX, XXXXXX X, X XX XXX XXX

To: Regional Counsel (339/02)

QUESTION PRESENTED:

Whether, under 38 U.S.C. § 5313, a veteran who was paroled after being incarcerated for conviction of a felony is entitled to full compensation for a service-connected disability for the period during which he violated the conditions of parole?

COMMENTS:

1. A Department of Veterans Affairs (VA) staff attorney in the Salt Lake City Area Office of the Denver Regional Counsel has requested our review of a proposed opinion in the above-referenced case, concerning whether a veteran who was paroled after being incarcerated for conviction of a felony is entitled to compensation under 38 U.S.C. § 5313 for a service-connected disability for the period during which he violated the conditions of his parole. Initially we note, contrary to the statement on page 1 of the proposed opinion, the issue here is not "whether state criminal statutes operate to preclude full benefits in this case." In fact, Utah law is irrelevant because the veteran was convicted of a Federal crime and was released on parole by the United States Parole Commission. In our view, resolution of the question presented is controlled by title 38, United States Code. Therefore, the following opinion should be substituted for the proposed opinion.

2. The veteran was incarcerated in 1983 for conviction of bank robbery, a felony, pursuant to 18 U.S.C. § 2113(a). As a result, the VA benefits which the veteran was receiving for a service-connected disability were reduced by one-half, as required by 38 U.S.C. § 5313(a)(1)(B). On November 13, 1986, the veteran was released on parole by the United States Parole Commission, which restricted the veteran to

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remain within Utah until January 20, 1989. On November 24, 1986, the veteran began receiving the full amount of the VA benefits to which he is entitled. On February 15, 1987, the veteran left his last known residence in Salt Lake City, Utah, without the permission of United States probation officials. The veteran was recaptured on February 26, 1995, and was returned to prison until November 30, 1995. The veteran filed a claim with VA dated December 11, 1995, seeking compensation for the period from November 13, 1986, to February 26, 1995, and reinstatement of compensation effective December 1, 1995. The assistant adjudication officer in the VA Salt Lake City Regional Office has requested an opinion regarding the veteran's entitlement to compensation for the period during which the veteran evaded parole.

3. Section 5313(a)(1) of title 38, United States Code, provides that compensation in excess of a specified amount shall not be paid to any person incarcerated in a Federal, state, or local penal institution for a period in excess of sixty days for conviction of a felony, for the period beginning on the sixty-first day of such incarceration and ending on the day such incarceration ends. Congress, however, specifically limited the application of section 5313(a)(1) during consideration of the Veterans' Disability Compensation and Housing Benefits Amendments of 1980, Pub. L. No. 96-385, § 504(a), 94 Stat. 1528, 1534. The Explanatory Statement on the compromise agreement which became section 504 of Pub. L. No. 96-385 states that the limitation would not apply during a period during which the veteran is participating in a work-release program or residing in a half-way house and that "[r]estoration to the full rate [of compensation] would occur upon the person's release from incarceration, including release on parole." Explanatory Statement of House Bill, Senate Amendment, and Compromise Agreement, 126 Cong. Rec. S13294 (Sept. 24, 1980), *reprinted in* 1980 U.S.C.C.A.N. 3323, 3326-27. VA's implementing regulations found at 38 C.F.R. § 3.665(b), therefore, define "release from incarceration" to include "participation in a work release or half-way house program, parole, and completion of sentence."

4. It is clear that the veteran in the instant case was released from incarceration and was entitled to resumption of VA benefits at the pre-reduction rate when he was paroled

from prison on November 13, 1986. See VAOPGC 4-86. The question remains, however, as to whether the veteran's compensation should be reduced during the period when he was in violation of the conditions of his parole. Under the accepted rules of statutory construction, we initially look to the plain language of a statute to determine its meaning. 2A N. Singer, *Sutherland Statutory Construction* §§ 46.01-46.04 (5th ed. 1992). "If the statutory language is unambiguous, in the absence of 'a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.'" *United States v. Tur-kette*, 452 U.S. 576 (1981), quoting *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). The language of 38 U.S.C. § 5313(a) is clear. In order for the provisions of section 5313 to be met, (1) the beneficiary must be incarcerated in a penal institution in excess of sixty days, and (2) the incarceration must be for conviction of a felony. The statute will not operate in the absence of either factor. VAOPGCPREC 59-91. We conclude, therefore, that if a veteran who is entitled to compensation has been convicted of a felony and is on parole but in violation of one or more of the conditions of parole, VA benefits must be paid at the full rate because one of the conditions of the statute has not been met, *i.e.*, incarceration. In the instant case, therefore, the veteran is entitled to the full amount of compensation from November 13, 1986, when he was paroled, until April 26, 1995, which is sixty days following his reincarceration on February 26, 1995. ¹

5. We reject the notion that the fact that a veteran has been charged with a parole violation provides a basis for

¹ In VAOPGCPREC 4-86, the General Counsel held that under 38 U.S.C. § 5313 and 38 C.F.R. § 3.665(a), the sixty-day grace period prior to reduction of compensation applies to any distinct period of incarceration, whether the incarceration represents initial confinement following conviction or reincarceration for violation of parole. Thus, the veteran in the instant case is entitled to benefits for the first sixty days of reimprisonment following his recapture on February 26, 1995.

reducing the veteran's benefits under section 5313. We note

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that not every violation of parole conditions set by the United States Parole Commission automatically leads to re-incarceration, one of the two conditions required for operation of section 5313. There are two steps involved in a revocation decision. The Commission must determine (1) whether, based upon a preponderance of the evidence, the parolee has violated one or more conditions of parole; and (2) whether the parolee should be recommitted to prison or whether other action should be taken. 28 C.F.R. § 2.52(a). See also *Morrissey v. Brewer*, 408 U.S. 471, 479-80 (1972). Under the plain language of the statute, section 5313 is only applicable if the paroled veteran is recommitted to prison following a finding that the veteran violated one or more conditions of parole.

6. Our conclusion, that the provisions of 38 U.S.C. § 5313 do not apply to a veteran who violates one or more conditions of parole following incarceration for conviction of a felony until the veteran is reincarcerated, is consistent with the legislative history of section 5313. The primary purpose of the section 5313-limitation is to prevent duplication of governmental expenditures benefiting incarcerated persons in receipt of veterans' disability compensation. Congressman G.V. (Sonny) Montgomery, who was at the time chairman of the House Committee on Veterans' Affairs, stated, "I do not see the wisdom of providing hundreds and thousands of dollars of tax free benefits to such individuals when at the same time the taxpayers of this country are spending additional thousands of dollars to maintain these same individuals in penal institutions." See, e.g., 126 Cong. Rec. H9072 (daily ed. Sept. 18, 1980) (statements of Cong. Montgomery). Congressman Montgomery also explained that the purpose of compensation is to replace the lost wage-earning capacity of disabled veterans, and that veterans do not feel the economic detriment caused by a disability during long periods of incarceration. *Id.* Congressman Chalmers P. Wylie, a co-sponsor of the legislation, stated that "[i]n the case of imprisonment, when a prisoner is being fully supported by tax dollars that fund the penal institution, it becomes ludicrous to continue payment of benefits designed to help the [convicted felon] maintain

a standard of living." *Id.* at H9076 (statement of Cong. Wylie). Because a veteran who evades parole following

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conviction of a felony is not being maintained by government funds provided for operation of a penal institution, reducing benefits to such a veteran would not further the congressional purpose of avoiding duplicate government expenditures to provide maintenance for convicted felons. Therefore, until the veteran's parole has been revoked and the veteran has once again been incarcerated, the provisions of section 5313(a)(1) are not applicable.

HELD:

The provisions of 38 U.S.C. § 5313 do not apply to a veteran who is on parole following incarceration for conviction of a felony and who is in violation of one or more of the conditions of parole, unless the veteran has been reincarcerated.

Mary Lou Keener