

Date: January 16, 1997

VAOPGCPREC 3-97

From: General Counsel (022)

Subj: Offset of Benefits Under 38 U.S.C. § 1318

To: Assistant General Counsel (021)

QUESTION PRESENTED:

Does the nature of damages awarded in a judgment, settlement, or compromise affect the amount of benefits to be offset under 38 U.S.C. § 1318(d)?

COMMENTS:

1. Section 1318(a) of title 38, United States Code, authorizes payment of dependency and indemnity compensation (DIC) to certain survivors in cases where a veteran's death was not service connected, but the veteran was continuously rated totally disabled due to service-connected disability for a period of ten or more years immediately preceding death. Section 1318(d) requires that certain amounts received pursuant to a judgment, settlement, or compromise be offset against benefits under section 1318(a):

If a surviving spouse or a child receives any money or property of value pursuant to an award in a judicial proceeding based upon, or a settlement or compromise of, any cause of action for damages for the death of a veteran described in subsection (a) of this section, benefits under this chapter payable to such surviving spouse or child by virtue of this section shall not be paid for any month following a month in which any such money or property is received until such time as the total amount of such benefits that would otherwise have been payable equals the total of the amount of the money received and the fair market value of the property received.

38 U.S.C. § 1318(d); see also 38 C.F.R. § 3.22(b).

2. In VAOPGCPREC 79-90 (O.G.C. Prec. 79-90), we held that the offset provisions of 38 U.S.C. § 1151 require offset only of amounts awarded to the beneficiary in his or her individual capacity and not by any amounts received solely in a representative capacity (i.e., as representative for a decedent's estate or for other heirs). We noted that, although typical state wrongful death statutes permit a surviving spouse or child to recover damages in an individual capacity for harms suffered by them as the result of the decedent's death, typical state survival statutes permit recovery of damages only in a representative capacity, as trustee of the decedent's estate. Accordingly, offset under section 1151 is generally limited to damages recovered pursuant to a wrongful death claim, which typically may include such items as the value of support, services, and other contributions which would have been received by the survivors if the decedent had lived, but does not extend to damages recovered pursuant to a survival claim, which typically include any damages the decedent could have recovered if he or she had lived, such as wages lost prior to death, medical expenses, and, in some states, pain and suffering.

3. The analysis in VAOPGCPREC 79-90 was based largely upon the language of section 1151, which provides for offset "[w]here an individual is . . . awarded a judgment against the United States . . . or . . . enters into a settlement or compromise" with the United States of a claim based upon the same injury or death for which benefits are being paid under section 1151. We interpreted that language to require offset only of amounts judicially awarded to an individual in his or her own right or provided to such individual in his or her own right pursuant to a settlement or compromise. That interpretation was consistent with the purpose of section 1151, as indicated by the legislative history, to prevent individuals from recovering twice from the Government for the same injury or death.

4. Because there are potentially significant differences in the language of sections 1151 and 1318(d), we do not believe the analysis in VAOPGCPREC 79-90 is controlling in determining the scope of offset under section 1318(d). As stated above, section 1151 applies when "an individual" is "awarded a judgment" or "enters into a settlement or compromise" of a claim

<Page 3>

against the United States. Section 1318(d), in contrast, requires offset of amounts which a surviving spouse or child

"receives . . . pursuant to" an award, settlement, or compromise. The phrase "pursuant to" might be construed to encompass amounts which were not awarded directly to a surviving spouse or child in his or her own right, but which were ultimately received by the surviving spouse or child. For example, where damages are awarded to the decedent's estate pursuant to a survival claim but are ultimately received by a surviving spouse or child as heirs of the decedent's estate, the amounts would arguably be received "pursuant to" the award, settlement, or compromise, and thus may be subject to offset under section 1318(d). Alternatively, it might be concluded that, under those circumstances, the surviving spouse or child would not receive the money or property "pursuant to" the award, settlement, or compromise, but, rather, would receive it pursuant to the decedent's will or the laws governing intestate succession. Our analysis of the offset provisions of section 1151 would not govern the interpretation of the distinct language in section 1318(d).

5. In our view, however, the plain language of section 1318(d) suggests that offset under that section would, like offset under section 1151, be limited to amounts received pursuant to a wrongful death action and would not include amounts received pursuant to a survival action. Although, as noted above, the phrase "pursuant to" may be subject to differing interpretations, the surrounding language and context of section 1318(d) provide evidence as to the scope and purpose of the offset provisions. Section 1318(d) requires offset of the value of money or property received pursuant to an award based upon, or a settlement or compromise of, "any cause of action for damages for the death of a veteran." The phrase "cause of action for damages for death" is most reasonably construed to refer to wrongful death actions or similar actions seeking damages for injuries to survivors as the result of the death of another. The ordinary meaning of that phrase would not, in our view, encompass survival actions seeking damages for harms suffered by the decedent prior to his or her death.

6. In VAOPGCPREC 79-90, we discussed the distinction between wrongful death actions and survival actions. Typical state wrongful death statutes permit certain survivors of a decedent

<Page 4>

to recover damages for injuries suffered by them as the result of the decedent's death. See 22A Am. Jur. 2d *Death* § 24 (1988). Damages recoverable in wrongful death actions typically include the loss of the economic benefit which the sur-

vivors might reasonably have expected to receive from the decedent in the form of support, services, or contributions if the decedent had not died. W. Page Keeton et al., Prosser and Keeton on the Law of Torts §127 at 949 (5th ed. 1984). Some statutes also allow recovery for the mental anguish of the survivors and for loss of companionship or consortium. 22A Am. Jur. 2d *Death* § 234-236, 252-54. In contrast, typical state survival statutes permit continuation after death of the decedent's own cause of action for injuries suffered prior to his or her death. Prosser and Keeton § 126 at 942-43. Damages recoverable in a survival action are generally those to which the decedent would have been entitled at death, including such items as wages lost prior to death, medical expenses, and, in some jurisdictions, pain and suffering. *Id.* at 943. Actions under either a wrongful death statute or survival statute generally are brought by a representative of the decedent's estate; however, the wrongful death action is generally for the exclusive benefit of the surviving spouse, child, or other designated beneficiaries, while the survival action is for the benefit of the estate and the recovery under a survival statute is subject to the claims of the decedent's creditors. *Id.* at 947; 22A Am. Jur. 2d *Death* § 29.

7. The majority of states permit both a survival action for the decedent's injuries prior to death and a wrongful death action for the survivors' injuries due to death. 22A Am. Jur. 2d *Death* § 29. It is generally recognized, however, that the wrongful death action and the survival action are separate causes of action, which ordinarily may be prosecuted concurrently. *Id.*; Prosser and Keeton § 127 at 950; *Jaco v. Bloechle*, 739 F.2d 239, 242 (6th Cir. 1984); *Rosa v. Cantrell*, 705 F.2d 1208, 1222 (10th Cir. 1982), *cert. denied*, 464 U.S. 821 (1983). This distinction between the two causes of action is recognized even though both may arise from a single incident, i.e., a tort causing injury to the decedent ultimately resulting in his or her death. 22A Am. Jur. 2d *Death* § 29. "The usual method of dealing with the two causes of action has been to allocate the pain and suffering, expenses, and loss of earnings of the decedent up to the date of his death to the

<Page 5>

survival action, and hence to the estate, and the loss of benefits of the survivors to the action for wrongful death, and so to the beneficiaries." Prosser and Keeton § 127 at 950.

8. The above-referenced authorities indicate that a cause of action under a survival statute is ordinarily limited to damages accruing prior to the decedent's death and does not include any damages resulting from the death. See also *Sea-Land Svcs., Inc. v. Gaudet*, 414 U.S. 573, 575 n.2 (1974). A cause of action under a wrongful death statute, on the other hand, encompasses damages suffered by the survivors as the result of the decedent's death. Viewed in the context of this established body of law, the reference in section 1318(d) to "any cause of action for damages for the death of a veteran" is most reasonably construed as referring to actions under a wrongful death statute to recover damages incurred as the result of death. Because a cause of action under a survival statute is limited to damages for injuries incurred prior to death and does not encompass damages flowing from the death, it would not be within the ordinary meaning of the phrase "cause of action for damages for death." In the only judicial decision we have found addressing this issue, the United States District Court for the District of Connecticut concluded that damages awarded in a survival action, including lost wages, medical expenses, pain and suffering, and loss of consortium, were not subject to offset under 38 U.S.C. § 1318(d) because the damages were not linked to the veteran's death. *Parkins v. United States*, 842 F. Supp. 617, 621 (D. Conn. 1993).

9. Viewed with reference to the different types of damages recoverable for conduct resulting in the death of an individual, the ordinary meaning of the language of section 1318(d) would require offset of the value of money or property received pursuant to an award based on, or a settlement or compromise of, a cause of action, such as a wrongful death action, seeking damages for injuries incurred as the result of a veteran's death. This would include any damages typically allowed in wrongful death actions for injuries caused by the death, including the value of lost support and other services and, where allowed by statute, damages for the pain, suffering, or mental anguish of the survivors due to the death. The language of section 1318(d) would not require offset of amounts received pursuant to a survival claim as damages for

<Page 6>

injuries incurred by the decedent prior to death, such as lost wages for the period prior to death, medical expenses, and the decedent's pain and suffering.

10. The ordinary meaning of a statute's language is controlling except in the rare case in which the literal application of the statute's terms will produce a result demonstrably at odds with the intention of its drafters. *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242 (1989). We have found no clear indication in the pertinent legislative history that the offset provisions of section 1318 were intended to encompass damages recoverable under a survival claim for injury to the decedent occurring prior to death. The offset provisions currently codified in section 1318(d) were originally enacted in 1978 by Pub. L. No. 95-479, § 204, 92 Stat. 1560, 1564, which established VA's authority to pay DIC benefits to the surviving spouse or child of a veteran whose death was not service connected but who was rated totally disabled due to service-connected disability for ten or more years immediately preceding death. Those provisions were initially codified in 38 U.S.C. § 410(b). The legislative history indicates that the purpose of providing DIC in the case of such non-service-connected deaths was to provide a measure of income to the surviving spouse or child to replace the support lost when the veteran died. In a report prepared during consideration of that legislation, the Senate Committee on Veterans' Affairs stated that "[t]he appropriate Federal obligation to these survivors should, in the Committee's view, be the replacement of the support lost when the veteran dies." S. Rep. No. 1054, 95th Cong., 2d Sess. 28 (1978), reprinted in 1978 U.S.C.C.A.N. 3465, 3486. Similarly, the basis for authorizing such benefits was described during floor debates as follows:

The purpose of those benefits is to provide income security to the survivors. This reflects the Committee's view that the veteran's total disability endured over a lengthy period of time, necessarily results in a substantial impairment of the veteran's ability to provide for his or her survivors; and that the primary purpose of the new benefit is to compensate for that impairment.

<Page 7>

124 Cong. Rec. S12687 (daily ed. Aug. 7, 1978) (statement of Sen. Cranston). We have found no discussion in the legislative history regarding the scope or purpose of the offset provisions of the statute.

11. In VAOPGCPREC 79-90, we concluded that the purpose of the offset provisions in section 1151 was to prevent an individual from receiving duplicative recoveries from the Government for the same injury. The offset provisions of section 1318(d) apply when money or property of value is received from any other party, not merely the Government, pursuant to a judgment, settlement, or compromise. Accordingly, section 1318(d) does not reflect a purpose solely to prevent duplicative recoveries against the government. Inasmuch as section 1318 is intended to replace the support lost when a veteran dies, however, it may be reasonable to infer that the offset provisions of section 1318(d) are intended to preclude payment of DIC benefits when the surviving spouse or child receives compensation from other sources for the value of the support lost due to the veteran's death. That purpose would be consistent with our reading of the language of section 1318(d) as requiring offset against amounts received pursuant to a wrongful death action, which generally permits damages for lost support, but not against amounts received pursuant to a survival action, which generally provide compensation only for the decedent's pre-death injuries and not for the value of lost support following death.

12. It might be argued that, inasmuch as the purpose of section 1318 is to provide a measure of income for the support of a surviving spouse or child, it would be consistent with the statutory purpose to require offset of amounts received by a surviving spouse or child pursuant to either a wrongful death or survival action, to the extent that such amounts are available for the support of the surviving spouse or child. We note, however, that entitlement to benefits under section 1318 is not based on actual need and no reduction or offset is provided for the amount of the surviving spouse's or child's income, generally. Accordingly, we cannot infer in section 1318(d) a purpose to require offset against any money or property of value received by a surviving spouse or child from any

<Page 8>

source. Although the legislative history does not clearly indicate the purpose of the offset provisions of section 1318(d), we have found nothing in that history which would contravene our reading of the plain language of the statute.

13. Finally, we note that the reference in section 1318(d) to amounts received "pursuant to" an award, settlement, or compromise may be intended to indicate that the surviving spouse

or child need not have been an actual party to the action, but need only have received money or property of value "pursuant to" the action. Many state statutes require wrongful death actions to be brought by a representative of the estate or other designated representative, although such actions are for the exclusive benefit of the actual beneficiaries. 22A Am. Jur. 2d *Death* § 399. The phrase "pursuant to" may be read as clarifying that offset will be required against amounts received by the actual beneficiaries pursuant to a wrongful death action regardless of whether the beneficiaries were individually named as parties in the award, settlement, or compromise.

HELD:

Section 1318(d) of title 38, United States Code, requires offset against survivors' benefits payable under section 1318 of amounts received by the beneficiary pursuant to an award, settlement, or compromise based on a claim for damages resulting from the death of a veteran, i.e., the types of damages typically recoverable under state wrongful death statutes, but does not require offset of amounts received pursuant to a survival action as compensation for injuries suffered by the veteran prior to his or her death.

Mary Lou Keener

Note: This opinion was originally released in the form of a memorandum from the Assistant General Counsel, Professional Staff Group II, to the Assistant General Counsel, Professional Staff Group I, and was reissued as a precedent opinion by the General Counsel.