Department of Veterans Affairs

Memorandum

Date: August 11, 1999 VAOPGCPREC 8-99

From: General Counsel (022)

Subj: Applicability of Incontestable Provision in NSLI Policies--38 U.S.C. § 1910

To: Under Secretary for Benefits (20)

QUESTION PRESENTED:

Whether 38 U.S.C. § 1910 prohibits the Department of Veterans Affairs (VA) from contesting a Government life insurance policy issued as a result of administrative error on the basis that the insured carries more than $10,000 of Government life insurance in contravention of 38 U.S.C. § 1903?

COMMENTS:

1. Section 1903 of title 38, United States Code, provides that the "amount of insurance with respect to any one person shall be not less than $1,000 or more than $10,000." We have been informed that, as a result of an internal computer match, VA has discovered approximately 50 cases in which a veteran's aggregate Government life insurance coverage exceeds $10,000, and that the policies which exceed the $10,000 limit were issued primarily as a result of administrative error. In most of these cases, veterans applied for and were issued more than one Service Disabled Veterans' Insurance (SDVI) policy for which they were eligible as a result of their disabilities, *see* 38 U.S.C. § 1922, but the combined amount of their policies exceeds $10,000. The opinion request also inquires about cases in which an insured paid premiums on his or her own Government life insurance policies as well as on another veteran's policy because, due to administrative error, VA sent multiple premium statements to the insured.

2. Section 1910 of title 38, United States Code, states that all contracts or policies of insurance which have been issued, reinstated or converted "shall be incontestable from the date of issue, reinstatement, or conversion except for fraud, nonpayment of premium, or on the ground that the applicant was not a member of the military or naval forces of the United

States." The general rule as to an incontestable clause in life insurance policies is that it protects an insured from a contest regarding the validity of the policy except on the bases provided for in the clause. 43 Am. Jur. 2d *Insurance* §§ 761, 765 (1982). However, it is well-established that the United States is in a position different from that of private insurers and the Government is not bound by the actions of its agents which are beyond the scope of their statutory authority. *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 383-84 (1947). The issue raised by your inquiry is whether the incontestability clause, which has been included in Government life insurance policies issued to persons in active service and veterans since 1921, bars a challenge to policies which were not issued in accordance with 38 U.S.C. § 1903 because of administrative error.

3. The Act of October 6, 1917, ch. 105, Art. IV, 40 Stat. 398, 409, commonly known as the War Risk Insurance Act, authorized the issuance of war-risk insurance against permanent total disability and death for persons in active service. These policies did not include an incontestability clause. The Act also provided that, in the event of a pre-existing permanent and total disability, the policy would be in effect as life insurance but not as insurance against such disability. The Act of August 9, 1921, ch. 57, §§ 27, 30, 42 Stat. 147, 156-57, authorized reinstatement of war-risk insurance policies under specified conditions, one of which was that the applicant not be permanently and totally disabled, and also made any such policy incontestable, with certain exceptions, after six months from the date of reinstatement. The General Counsel of the Veterans' Bureau construed the incontestable clause as providing that, after the six-month period expired, the reinstated policy could not be contested on the basis of the existence of permanent and total disability, even if such condition occurred prior to the conversion. 34 Op. G.C. 2004 (1925); 22 Op. G.C. 3729 (1922); *see also* 8 Comp. Gen. 174 (1928); 1 Comp. Gen. 108 (1921). However, the Comptroller General and some courts concluded that, if a veteran was rated totally and permanently disabled prior to the first payment of insurance under an original application for insurance or application for reinstatement and/or conversion, the incontestability provision did not bar a challenge to the policy on the

basis of antecedent disability. 9 Comp. Gen. 291 (1930); *Jordan v. United States*, 36 F.2d 43 (9th Cir. 1929); *Anderson v. United States,* 36 F.2d 45 (9th Cir. 1929); *United States v. Golden*, 34 F.2d 367 (10th Cir. 1929); *see also* 32 U.S. Op. Atty. Gen. 379 (1921).

4. The War Risk Insurance Act was superseded by the World War Veterans' Act, 1924, ch. 320, 43 Stat. 607. Section 307 of the World War Veterans' Act, 1924, which was added by the Act of July 3, 1930, ch. 849, § 24, 46 Stat. 991, 1001, and is virtually identical to current 38 U.S.C. § 1910, made all contracts or policies of insurance incontestable from the date of issuance, reinstatement, or conversion for all reasons except fraud, nonpayment of premiums, or the applicant not having been a member of the military or naval forces of the United States. The Supreme Court concluded that Congress enacted section 307 to overcome the decisions of the courts and the Comptroller General holding that the prior incontestable clause did not bar a challenge to war-risk insurance policies on the basis of the veteran's preexisting disability and that Congress intended to sustain the previous interpretation and practice of the Veterans' Bureau with regard to the incontestable provision. *United States v. Patryas,* 303 U.S. 341, 348 (1938). The Supreme Court held in *Patryas* that the Government could not contest a veteran's entitlement to disability benefits under a reinstated war-risk insurance policy, which the veteran converted into a five-year renewable term policy, on the basis that the veteran was permanently totally disabled before the policy was reinstated and converted. The Supreme Court stated:

> A provision making a policy "incontestable" except for certain clearly designated reasons is wholly meaningless and ineffective if, after proof of the loss insured against, the policy can be contested upon grounds wholly different from those set out in the exception. The object of the provision is to assure the insured that payment on his policy will not be delayed by contests and lawsuits on grounds not saved by the exceptions.

Id. at 344. The Supreme Court further stated that the purchaser of a contract of insurance containing an

incontestability clause "is entitled to rely on the plain terms and inducements of the provision which limits the grounds for contest of liability to those specifically reserved." *Id.* at 349. Although the converted policy at issue in *Patryas* did not expressly exclude liability for permanent disability existing prior to the issuance of the policy, in subsequent cases, the courts concluded that *Patryas* could be applied to Government insurance policies which did expressly limit liability to prospective permanent and total disability. *See Continental Ill. Nat. Bank & Trust Co. v. United States,* 153 F.2d 490 (7th Cir. 1945) (incontestability clause of converted war-risk insurance policy precluded Government from challenging veteran's right to total permanent disability benefits by asserting total disability existed before policy was issued); *Byrd v. United States*, 106 F.2d 821 (10th Cir. 1939) (by enacting section 307, Congress intended to bar challenge on the basis of antecedent disability with respect to a yearly renewable term insurance policy, as well as to reinstated and converted policies). *Compare Nieves v. United States,* 160 F.2d 11 (D.C. Cir. 1947) (total and permanent disability which occurred prior to April 6, 1917, bars entitlement to automatic war-risk insurance which provided coverage for persons in active service on or after such date who become totally and permanently disabled while in "such service"); *Continental Ill. Nat. Bank & Trust Co. v. United States,* 123 F.2d 1013 (7th Cir. 1941), *cert. denied,* 316 U.S. 676 (1942).

5. Questions regarding the applicability of the incontestable provision to Government insurance policies issued as a result of administrative error were also addressed by the Solicitor of the Veterans Administration. In a 1933 opinion, the Solicitor held that a United States Government Life Insurance (USGLI) [1] policy which was erroneously extended for a second five-year term by VA based on an untimely application for renewal and for which premiums were deducted from the insured's compensation, was incontestable under section 307 of the World War Veterans' Act, 1924. 8 Op. Sol. 300 (5-11-33); *see also* 22 Op. Sol. 348 (9-30-35); 15 Op. Sol. 28 (7-5-34); 4 Op. Sol.

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[1] Under the Act of October 6, 1917, war-risk insurance was convertible into various permanent plans of insurance, and these permanent plans became known as USGLI.

430 (5-31-32). The Solicitor stated that policies which were erroneously issued or renewed by VA could not be contested in the absence of fraud or deception by the insured. The Solicitor explained:

> The Congress in the enactment of the incontestable clause of the statute respecting insurance unquestionably intended to extend to the insured a security in his insurance. If we were to hold that an insurance policy in the future might be cancelled by disclosure of error or mistake on the part of the Administration in the past such construction, in the opinion of this Office, would in effect nullify the purposes sought to be accomplished by the Congress in the enactment of the incontestable clause.

8 Op. Sol. at 304-05. In 95 Op. Sol. 96 (11-10-47), a veteran was issued a $10,000 USGLI policy, although he was only entitled to $5,000 of USGLI because eighteen years earlier he had surrendered a $5000 USGLI policy for its cash value. [2] The second policy was issued as a result of administrative error. Relying upon *Patryas,* the VA Solicitor concluded that, because administrative error is not one of the exceptions for contesting a Government life insurance policy after its issuance, the Government was liable for the full amount of the USGLI policy issued to the veteran.

6. The VA Solicitor also addressed the applicability of the incontestability clause in National Service Life Insurance (NSLI) policies. [3] In 97 Op. Sol. 82 (3-4-48), a veteran was issued a NSLI policy for $3,000. The veteran's

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[2] Section 310, which was added to the World War Veterans' Act, 1924 by the Act of May 29, 1928, ch. 875, § 15, 45 Stat. 964, 970, stated that no person who has surrendered his USGLI policy for its cash surrender value shall be entitled to apply for insurance to the extent of the amount of the insurance which was surrendered.

[3] The incontestability clause was added to the National Service Life Insurance Act of 1940, ch. 756, 54 Stat. 1008, by the Act of August 1, 1946, ch. 728, § 9, 60 Stat. 781, 787, and was intended to be comparable to section 307 of the World War Veterans' Act, 1924. S. Rep. No. 1705, 79th Cong., 2d Sess. 8 (1946).

NSLI policy was later disallowed because of an erroneous determination that his total disability commenced prior to the effective date of the insurance, and he was instead issued a gratuitous insurance policy for $5,000. It was subsequently determined, however, that the NSLI policy had been erroneously disallowed and that he was entitled to a waiver of premiums for the policy. In response to an inquiry regarding the status of the gratuitous policy, the Solicitor concluded that, because the statute authorized gratuitous insurance in an amount which together with any insurance then in force equaled $5000, and because the veteran had in force a $3000 NSLI policy when he became entitled to the gratuitous insurance, any amount of gratuitous insurance in excess of $2000 was not authorized by law and therefore was contestable. 92 Op. Sol. at 84. This opinion, however, did not mention the 1947 VA Solicitor's opinion. The following year, the VA Solicitor held that a $5,000 NSLI policy which was issued to a veteran while he had a $1000 NSLI policy in force, in contravention of another statutory provision which also limited an insured to insurance in such amount as would provide an aggregate of $5,000 of insurance, was incontestable. [4] 105 Op. Sol. 285 (12-16-49). The veteran was granted the $5,000 policy as a result of his misrepresentation on his application and administrative oversight. The veteran paid premiums on $6000 of insurance until his death. The Solicitor stated that the incontestability provision "was enacted in obvious recognition of the inevitability of mistakes, misunderstandings, oversights and errors; it would be entirely unnecessary in their absence." 105 Op. Sol. at 286. Because the case did not come within the scope of any of the bases for contest, including fraud, the Solicitor concluded that the $1000 of insurance which exceeded the statutory maximum amount of insurance was not subject to contest. *See* 107 Op. Sol. 315 (5-17-50) (NSLI policy incontestable regardless of whether erroneously issued).

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[4] The statutory provision at issue in 97 Op. Sol. 82 (3-4-48) was section 602(d)(3)(A) of the NSLI Act, and the relevant provision in 105 Op. Sol. 285 (12-16-49) was section 602(d)(3)(B) of the NSLI Act.

7. Opinions by the Administrator of Veterans Affairs also indicated that an NSLI policy is incontestable even if issued as a result of administrative error. Administrator's Decision No. 737 (2-6-47) addressed the issue of whether an application to convert an NSLI policy to an endowment policy, which was approved even though the insured had filed a claim for waiver of premiums alleging that he was totally disabled prior to the date of his conversion application, could be contested. Section 602(f) of the NSLI Act, as amended by the Act of August 1, 1946, ch. 728, § 3, 60 Stat. 781, 782, provided that conversion to an endowment plan could not be made while the insured was totally disabled. The Administrator stated:

> The plain provisions of [the incontestability clause] provide protection for policies that have been issued unless the case comes within one of the specified exceptions in the incontestable statute itself. This is true even though it be perfectly clear upon subsequent consideration that the policy should not have been issued. The incontestable provision would be entirely meaningless if its application was restricted to those cases in which the policy had been properly issued. Moreover, there is no satisfactory basis for holding that it is applicable to some policies which have been issued improperly, but not to others. The basis for determining whether a policy is subject to contest or is incontestable is found in the statute itself. "All contracts or policies" are incontestable unless a contest may be predicated upon some one of the exceptions specified in the statute.

The Administrator, therefore, concluded that the NSLI endowment policy was incontestable, but that a policy issued upon an authorized plan could be substituted for the endowment policy if the insured agreed to such a substitution. In a subsequent decision, the VA Administrator held that an SDVI policy which was issued to a veteran even though he was not eligible for the policy because he was discharged from active service before April 25, 1951, was incontestable. Administrator's Decision No. 924 (2-27-53). The Decision stated that the "kind of administrative error made in this case is analogous to the administrative error considered in Administrator's Decision

No. 737 (the issue of a policy in contravention of the specific provisions in section 602(f))." *See also* Administrator's Decision No. 849 (6-23-50) (NSLI policy issued during enlistment which was subsequently terminated as fraudulent is incontestable except for fraud relating to the insurance or nonpayment of premiums).

8. The opinion request refers to Administrator's Decision No. 785 (5-27-48), involving an NSLI policy which was erroneously granted to a member of the Philippine Scouts who was not entitled to the insurance but who paid premiums on the policy until his death. In Decision No. 785, the Administrator concluded:

> [T]he incontestable provision does not reach, and was not intended to reach, policies of insurance in a case wherein the insured under existing law stood outside of the required eligibility for the benefit as provided by the Congress and in a case wherein there was no authority in law for any agent of the United States Government to enter into the insurance contract originally under any circumstances and no authority existed for the attachment of any liability against the United States.

The decision distinguished the facts in this case from those in Administrator's Decision No. 737 and 95 Op. Sol. 96 on the basis that, while the insureds in the latter cases were not entitled to the insurance in question, they were within the eligible class of persons to whom the benefits of the insurance laws were available. The decision appeared to find that the insured was within the scope of the exception to the incontestability clause applicable to persons who were not members of the military or naval forces of the United States. We believe that the cases identified in your opinion request involving policies issued in excess of the statutory limit of $10,000 can be distinguished on this basis from Administrator's Decision No. 785.

9. Based on the foregoing, we conclude that when, as a result of administrative error, a veteran has been issued Government life insurance policies which total in excess of $10,000 in

violation of 38 U.S.C. § 1903, the policies may not be contested pursuant to 38 U.S.C. § 1910 except for fraud or nonpayment of premiums, or on the ground that the applicant was not a member of the military or naval forces of the United States.

10. Finally, the opinion request inquires about cases in which veterans have paid premiums on policies which do not belong to them because of erroneous billing by VA. The doctrine of promissory estoppel provides that an insurer is precluded from denying liability if the insured relied upon some act, conduct, or nonaction of the insurer and suffered a prejudicial change of position as a result. 16B Appleman, Insurance Law and Practice § 9081 (1981). The essential elements of estoppel include misleading a party entitled to rely on the acts or statements in question and a consequent change of position to the party's detriment. 44 Am. Jur. 2d *Insurance* § 1572 (1982). The courts have generally recognized that liability of the United States under NSLI policies cannot be created by estoppel based upon the acts or omissions of its agents. *See United States v. Holley,* 199 F.2d 575 (5th Cir. 1952); *McDaniel v. United States,* 196 F.2d 291 (5th Cir. 1952); *James v. United States*, 185 F.2d 115 (4th Cir. 1950). Although there have been decisions which have indicated that equitable principles may be applied in order to continue an NSLI policy in force, *Kubala v. United States,* 210 F.2d 943 (5th Cir. 1954); *United States v. Morrell*, 204 F.2d 490 (4th Cir.), *cert. denied,* 346 U.S. 875 (1953), we do not believe that a contract of NSLI can be created by the doctrine of promissory estoppel. *See Maxwell v. United States*, 313 F. Supp. 245, 249 (N.D. Cal. 1970); 16B Appleman, Insurance Law and Practice § 9090 (1981). To give rise to an NSLI contract, there must be a meeting of the minds of the contracting parties. *Taylor v. Roberts*, 307 F.2d 776, 779 (10th Cir. 1962). Under the facts presented in your opinion request, it does not appear that the insureds applied for the additional policy for which they paid premiums or that an additional policy was approved by VA. Consequently, we do not believe that a second NSLI policy was created in these cases. We further do not believe that the doctrine of promissory estoppel can be applied in these circumstances to create insurance liability.

HELD:

a. Where, as a result of administrative error, Government life insurance policies issued to the same insured total in excess of $10,000 in violation of 38 U.S.C. § 1903, the policies are incontestable pursuant to 38 U.S.C. § 1910 except for fraud or nonpayment of premiums, or on the ground that the applicant was not a member of the military or naval forces of the United States.

b. A contract for National Service Life Insurance (NSLI) cannot be created by the doctrine of promissory estoppel. To give rise to an NSLI contract, there must be a meeting of the minds of the contracting parties. Where veterans paid premiums on additional NSLI policies which did not belong to them because of erroneous billing by the Department of Veterans Affairs (VA), additional NSLI policies in favor of these individuals were not created.

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