

**Department of
Veterans Affairs**

Memorandum

Date: February 23, 2005

VAOPGCPREC 3-2005

From: General Counsel (022)

Subj: Calculation of Sixty-First Day of Incarceration – 38 U.S.C. §§ 5313(a) and 1505(a)

To: Director, Compensation and Pension Service (21)

QUESTION PRESENTED:

When does the sixty-first day of incarceration occur pursuant to 38 U.S.C. §§ 5313(a) and 1505(a) when a veteran is given credit for time served prior to conviction or prior to sentencing for a felony, or, for purposes of section 1505(a), a misdemeanor.

COMMENTS:

1. This is in response to your request for an opinion as to when the sixty-first day of incarceration occurs for purposes of 38 U.S.C. §§ 5313(a) and 1505(a). [FN#1] Section 5313(a) of title 38, United States Code, provides that compensation and dependency and indemnity 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. See 38 C.F.R. § 3.665(a) (implementing regulation). Section 1505(a) of title 38, United States Code, prohibits the payment of pension under public or private laws administered by VA to any person imprisoned in a Federal, state, or local penal institution as a result of conviction of a felony or misdemeanor, for the period beginning on the sixty-first day of such imprisonment and ending on the day such imprisonment ends. See 38 C.F.R. § 3.666 (implementing regulation). We understand that persons convicted of crimes are often given credit against their sentences for time during which they were incarcerated prior to conviction of a crime or prior to imposition of the sentence for the crime. The question arises as to whether the period of incarceration for purposes of 38 U.S.C. §§ 5313(a) and 1505(a) includes periods of incarceration prior to conviction or prior to sentencing.

2. The Supreme Court has instructed that “[t]he starting point in interpreting a statute is its language, for ‘if the intent of Congress is clear, that is the end of the

matter.” Good Samaritan Hosp. v. Shalala, 508 U.S. 402, 409 (1993) (quoting Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842 (1984)). It is assumed “that the legislative purpose is expressed by the ordinary meaning of the words used.” Richards v. United States, 369 U.S. 1, 9 (1962). Thus, “[a]bsent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.” Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980). It is also a well-established canon of statutory construction that meaning be attributed, if possible, to every word of a statute. See United States v. Menasche, 348 U.S. 528, 538-39 (1955).

3. Examining the terms of the statutes at issue, it is apparent that, in order for VA to reduce compensation or pension pursuant to 38 U.S.C. §§ 5313(a) or 1505(a), four prerequisites must be satisfied. The veteran must be: (1) incarcerated (“imprisoned” under section 1505(a)); (2) in a Federal, State, or local penal institution; (3) in excess of sixty days; and (4) for (“as a result of” under section 1505(a)) conviction of a felony (or misdemeanor under section 1505(a)). See VAOPGCPREC 10-2001. All four requirements must be satisfied before the statutory provisions are applicable. For example, in VAOPGCPREC 2-96, we held that 38 U.S.C. § 5313(a) does 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 conditions of parole, unless the veteran has been reincarcerated. Thus, 38 U.S.C. §§ 5313(a) and 1505(a) are applicable on the sixty-first day on which all requirements of the statute have been satisfied. To interpret these statutes otherwise would render portions of 38 U.S.C. §§ 5313(a) and 1505(a) superfluous. See R.E. Dietz Corp. v. United States, 939 F.2d 1, 5 (2d Cir. 1991) (giving meaning to phrase to avoid rendering statutory language superfluous).

4. In order to satisfy the fourth statutory requirement identified above, an individual must be incarcerated or imprisoned for the specified period “for” or “as a result of” a “conviction.” In determining the plain meaning of statutory language, it is presumed that “legislative purpose is expressed by the ordinary meaning of the words used.” Ardestani v. Immigration & Naturalization Serv., 502 U.S. 129, 136 (1991) (quoting American Tobacco Co. v. Patterson, 456 U.S. 63, 68 (1982)); accord Jones v. Brown, 41 F.3d 634, 638 (Fed. Cir. 1994). The word “for” means “because of,” Webster's Third New Int'l Dictionary 886 (1981), and the phrase “as a result of” connotes a causal connection. See Brown v. Gardner, 513 U.S. 115, 119 (1994). According to Black's Law Dictionary 335 (7th ed. 1999), the term “conviction” means “[t]he act or process of judicially finding someone guilty of a crime; the state of having been proved guilty” or “[t]he judgment (as by a jury verdict) that a person is guilty of a crime.” Thus, the sixty-first day for purposes of 38 U.S.C. §§ 5313(a) and 1505(a) cannot occur until sixty-one days after a judge or jury has found an individual guilty of a crime and the individual has been imprisoned or incarcerated because of the determination of guilt. Thus, although a veteran may have been incarcerated prior to conviction, and although the period of incarceration prior to conviction may have been cred-

ited against the veteran's sentence, the sixty-first day of incarceration should for this purpose be measured from the date all conditions precedent have occurred, including pronouncement of guilt by a judge or jury. However, once a veteran is imprisoned or incarcerated in a penal institution because of pronouncement of guilt for a requisite crime, the period of incarceration for purposes of 38 U.S.C. §§ 5313(a) and 1505(a) would include any period of incarceration between the date of conviction and the date of sentencing.

5. The meaning of the term "penal institution" for purposes of the requirement of 38 U.S.C. §§ 5313(a) and 1505(a) that incarceration or imprisonment be in a Federal, state, or local "penal institution" is also of relevance to the issue presented. According to Black's Law Dictionary 1133 (6th ed. 1990), the term "penal institution" is a "[g]eneric term to describe all places of confinement for those convicted of crime," such as jails, prisons, and other correctional institutions. [FN#2] In this regard, the term "penal" connotes punishment. See Black's Law Dictionary at 1132 ("penal" means "inflicting a punishment"). A penal institution, however, may also house persons who are detained prior to trial and have not been adjudged guilty of any crime. 60 Am. Jur. 2d Penal & Correctional Institutions § 3 (2003). We believe that, so long as one purpose of a facility is to provide a place for punishment of persons convicted of crimes, the nature of the facility does not change merely because it may also house persons for other purposes.

6. Although the meaning of the statutory terms appears plain, we note that the legislative history of the statutes at issue is not inconsistent with our conclusion. Garcia v. United States, 469 U.S. 70, 75 (1984) (legislative history may be used as an additional tool of analysis, but "only the most extraordinary showing of contrary intentions" would justify departure from plain meaning); United States v. Public Utils. Comm'n, 345 U.S. 295, 315 (1953) (court may look to legislative history to determine congressional purpose when literal words would bring about result completely at variance with purpose of statute). The primary purpose of the limitation on VA compensation and pension in 38 U.S.C. §§ 5313(a) and 1505(a) is to eliminate a double burden on United States taxpayers where an incarcerated veteran is already being supported by government funds provided for the operation of a penal institution. VAOPGCPREC 10-2001 and VAOPGCPREC 59-91, both citing 126 Cong. Rec. H9072 (daily ed. Sept. 18, 1980) (statement of Cong. Montgomery); 103 Cong. Rec. H4388 (daily ed. April 1, 1957 (statement of Cong. Adair); 102 Cong. Rec. H11732 (July 16, 1956) (statement of Cong. Teague). The legislative history also notes Congress' concern that the purpose of compensation is to replace the lost wage-earning capacity of disabled veterans, and veterans do not feel the economic detriment caused by a disability during long periods of incarceration. 126 Cong. Rec. H9072 (daily ed. Sept. 18, 1980) (statement of Cong. Montgomery).

7. We recognize that a veteran who is incarcerated prior to conviction of a crime is being maintained by local, State, or Federal taxpayers and is not suffering a

loss of wage-earning capacity while imprisoned. Nonetheless, Congressman G.V. (Sonny) Montgomery, chairman of the House Committee on Veterans' Affairs in 1980 when 38 U.S.C. § 5313(a) was enacted, specifically stated that the limitation on payment was to be imposed "during confinement in a penal institution 61 days after imprisonment following conviction of a felony." 126 Cong. Rec. H9072 (daily ed. Sept. 18, 1980) (statement of Cong. Montgomery) (emphasis added). Congress also explained that the limitation in 38 U.S.C. § 5313(a) is to be imposed during imprisonment "as the result of the veteran's conviction of a felony." H.R. 7511, "Veterans' Disability Compensation & Housing Benefits Amendments of 1980"—Explanatory Statement of House Bill, Senate Amendment, and Compromise Agreement, 126 Cong. Rec. H9073 (daily ed. Sept. 18, 1980). Similarly, when 38 U.S.C. § 1505(a) was enacted, Congress was "of the opinion that there is no valid basis why a man should receive a pension for non-service-connected disability or age while he is incarcerated in a penal institution for a crime of which he has been convicted." H.R. Rep. No. 85-280, at 3 (1957) (emphasis added); S. Rep. No. 85-225, at 3 (1957) (emphasis added). The legislative history, therefore, is not in conflict with the plain meaning of the statutory terms, i.e., that the sixty-first day of incarceration cannot occur until sixty-one days after all the statutory requirements are satisfied, including conviction of a felony (or for section 1505(a) purposes a misdemeanor) and imprisonment because of the determination of guilt.

HELD:

The provisions of 38 U.S.C. §§ 5313(a) and 1505(a) do not apply until all of the following requirements of the statutes have been satisfied: (1) incarceration (imprisonment); (2) in a Federal, State, or local penal institution; (3) in excess of sixty days; and (4) for (as a result of) conviction of a felony (or a misdemeanor under section 1505(a)). For purposes of these statutes, when a veteran is incarcerated for conviction for a felony, or, for purposes of section 1505(a), a misdemeanor, the sixty-first day of incarceration cannot occur until sixty-one days after guilt is pronounced by a judge or jury and the veteran is incarcerated in a penal institution because of the determination of guilt, notwithstanding that the veteran may be given credit for time served prior to those events. However, once a veteran is imprisoned or incarcerated in a penal institution because of pronouncement of guilt for a felony (or misdemeanor in the case of section 1505(a)), the period of incarceration for purposes of 38 U.S.C. §§ 5313(a) and 1505(a) would include the period of incarceration between the date of conviction and the date of sentencing, i.e., reduction of benefits could occur as of the sixty-first day after conviction.

¹ Section 5313A of title 38, United States Code, provides that the annual clothing allowance to which a veteran is entitled under 38 U.S.C. § 1162 must be reduced

if a veteran who is incarcerated in a Federal, State, or local penal institution for more than sixty days is furnished clothing without charge by the institution. The VA General Counsel held that the allowance must be reduced for each day in excess of the first sixty days of a period of incarceration. VAOPGCPREC 16-97.

² We have previously stated that incarceration does not include parole, work release, residency in a halfway house, participation in a community control program, or confinement to a state hospital. VAOPGCPREC 10-2001.