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PRECEDENT AND LAW FILES

O.G.C. Precedent 52-91

General Counsel (022)

Setoff of Federal Tort Claims Act Damages Under
38 U.S.C. § 351
Assistant General Counsel (021)

8-18
Set Off

QUESTION PRESENTED:

Are noneconomic elements of damages recovered pursuant to the Federal Tort Claims Act (FTCA) subject to administrative offset under 38 U.S.C. § 351?

COMMENTS:

1. This question arose in the context of settlement discussions in the case of Brooks v. United States, No. 89-CV-40164 FL (E.D. Mich. filed May 3, 1989). The plaintiff in Brooks is a veteran who suffers from painful and frequent urination allegedly aggravated by chemotherapy resulting from a mistaken diagnosis of bladder cancer. The veteran has been awarded compensation under 38 U.S.C. § 351 for this condition.

2. The applicable statute clearly prohibits double recovery under 38 U.S.C. § 351 and the FTCA, 28 U.S.C. §§ 2671-2680. O.G.C. Prec. 79-90, see infra paragraph 9. Section 351 provides in pertinent part:

Where an individual is . . . awarded a judgment . . . or . . . enters into a settlement or compromise under [the applicable sections of the FTCA] by reason of a disability, aggravation, or death treated pursuant to this section as if it were service-connected, then no benefits shall be paid to such individual for any month beginning after the date such judgment, settlement, or compromise on account of such disability, aggravation, or death becomes final until the aggregate amount of benefits which would be paid but for this sentence equals the total amount included in such judgment, settlement, or compromise.

x 1-5 38 USC § 351



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The above cited language expressly authorizes VA to setoff against VA compensation granted under section 351 the "total amount" of an FTCA judgment, settlement, or compromise recovered by an individual without regard to whether the recovery was for economic or noneconomic loss. It is well established that the clear and unambiguous language of a statute is to be read to mean what it plainly expresses. See 2A N. Singer, Sutherland Statutory Construction §§ 46.01-.04 (4th ed. 1984) (plain meaning rule -- literal interpretation). The plain and unambiguous meaning of section 351, is to preclude double recovery from the Government for a single injury.

3. This interpretation of section 351 conflicts with an October 23, 1981, decision by the Board of Veterans Appeals (BVA) which incorrectly held that the word "included" as used in section 351 supports a distinction between recoupment of economic and noneconomic damages. The BVA holding is both inconsistent with a literal reading of section 351 and inconsistent with the legislative history of the statute, infra, para. 4. Section 351 clearly provides for offset of the "total amount included" in a judgment, settlement, or compromise. Since Congress expressly directed the "total amount" to be offset, it is simply not relevant whether economic loss was "included" in the FTCA award; both economic and noneconomic damages are subject to offset.

4. Even if we were to assume that the quoted statutory language is ambiguous, the legislative history of Pub. L. No. 87-825 supports the proposition that damages under the FTCA are subject to offset regardless of whether economic or noneconomic in nature. The offset provision was added to section 351 of title 38 by section 3 of Pub. L. No. 87-825, 76 Stat. 948, 950 (1962). The Senate and House committee reports on H.R. 7600, 87th Cong., which ultimately was enacted as Pub. L. No. 87-825, indicate that neither the Senate nor the House of Representatives contemplated an exception from offset for noneconomic damages. The reports of both committees clearly state that "the amount of any recovery pursuant to a civil judgment, settlement, or compromise" (emphasis added) would be set off against compensation benefits. S. Rep. No. 2042, 87th Cong., 2d Sess. 2, reprinted in 1962

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U.S. Code Cong. & Admin. News 3260; H.R. Rep. No. 2123, 87th Cong., 2d Sess. 2 (1962); see also Letter of Administrator of Veterans Affairs on H.R. 7600 to Chairman, Senate Committee on Veterans' Affairs (August 28, 1962). Further, the Explanatory Statement on H.R. 7600, prepared by VA and incorporated in S. Rep. No. 2024, supra, and H.R. Rep. No. 2123, supra, reprinted in 1962 U.S. Code Cong. & Admin. News 3263, 3268, discusses an intention in section 3 to "preclude duplicate recoveries for the same disability or death." The Explanatory Statement observed "[i]t is possible today for an injured veteran to secure a judgment under the Federal Tort Claims Act and thereafter be awarded disability compensation from the Veterans' Administration for the same injury." Id. The use of the term "same injury" suggests concern with an individual's recovery for the event of the injury, as opposed to the type of damages stemming from that event. The Explanatory Statement went on to indicate the offset of section 351 benefits would continue until the amount withheld "equals the total amount paid under the judgment, settlement, or compromise." (emphasis added) Id. These statements, together with the absence of anything in the legislative history even remotely suggesting a distinction between the offset of economic damages and noneconomic damages, leads to the conclusion that Congress intended the offset provision of section 351 to encompass all types of damages. See generally 2A N. Singer, Sutherland Statutory Construction § 48.03 (4th ed. 1984) (preenactment history).

5. Although a number of courts have discussed offset in the context of the FTCA, we consider judicial opinion on this issue inconclusive. As noted by the BVA in its October 23, 1981, decision, the Supreme Court examined the issue of the relationship between VA benefits and the FTCA in Brooks v. United States, 337 U.S. 49 (1949). The Court in Brooks stated that, "[p]rovisions in other statutes for disability payments to servicemen and gratuity payments to their survivors . . . indicate no purpose to forbid tort actions under the Tort Claims Act." 337 U.S. at 53. In examining the issue of offset in fixing tort awards, the Court clearly indicated that the Government should not be required to "pay twice" for the same injury and that "[c]ertain elements of tort damages may be equivalent of elements taken into account in providing disability payments." Id. at 53-54. However, in doing so, it

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explicitly left open the issue of which "elements" of damages are subject to offset in determining an award under the FTCA. The Supreme Court again examined the offset issue in United States v. Brown, 348 U.S. 110, 113 (1954), adhering to its holding in Brooks that "receipt of disability payments under the Veterans Act . . . did not preclude recovery under the Tort Claims Act but only reduced the amount of any judgment under the latter Act." Again, the Court in Brown did not address the issue of the elements of the FTCA award. Significantly, the Court's decisions in both Brooks and Brown occurred prior to the passage of Pub. L. No. 87-825. They dealt only with offset against an FTCA award and did not address offset of benefits to recover the amount of a tort award, a procedure which did not exist at the time. In Kubrick v. United States, 444 U.S. 111 (1979), the Supreme Court referenced the section 351 offset provision, stating in a footnote that, "[u]nder 38 U.S.C. § 351, the benefits payments must be set off against the damages awarded in tort; and the increment in future monthly benefits is not paid until the aggregate amount of the benefits withheld equals the damages awarded." 444 U.S. at 116 n. 5. This passing reference to section 351 is consistent with our view that the full amount of the damages awarded to an individual is to be offset.

6. Consistent with Brooks and Brown, lower courts have since upheld offset of VA benefits against economic damages recovered under the FTCA. E.g., Mosley v. United States, 538 F.2d. 555, 561 (4th Cir. 1976); Johnson v. United States, 271 F. Supp. 205, 211 (W.D. Ark. 1967); Schwartz v. United States, 230 F. Supp. 536 (E.D. Pa. 1964). These decisions lend some support by implication to the proposition that noneconomic damages are not subject to offset by the value of a VA benefit award in determining tort damages. The district court in Christopher v. United States, 237 F. Supp. 787, 799 (E.D. Pa. 1965), was more explicit in stating that offset against a

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pain and suffering award for the amount of VA benefits to be received is inappropriate. 2/ However, as with the Supreme Court decisions cited above, these cases dealt only with determination of damages under the FTCA and did not address the issue of offset under 38 U.S.C. § 351.

7. The decisions relating to offset of VA benefits against noneconomic damages awarded under the FTCA are not dispositive of the situation presented here. 3/ This inquiry involves the extent VA may set off amounts recovered under the FTCA against future benefits awarded under 38 U.S.C. § 351. In the situation you present, no direct reduction of monies due the veteran under an FTCA award or settlement would take place. Any offset would be against VA benefits under the authority of section 351 and would be contingent upon the veteran's continued eligibility for such benefits. Section 351 makes no distinction between economic and noneconomic damages and accordingly the total amount of tort damages deemed by VA

2/ As indicated by the directory language of section 351, the suggestion in Christopher that section 351 offset is discretionary is clearly wrong. We also note that, in Ulrich v. United States, 853 F.2d 1078, 1082-83 (2nd Cir. 1988), the Second Circuit recognized a distinction between the offset of 351 benefits against an FTCA award and the offset against such an award of benefits payable as special monthly compensation under 38 U.S.C. § 314, holding "unlike § 351 benefits, there is no statutory authority for setting off § 314 benefits against plaintiff's pain and suffering award." Apparently, the court was operating under the assumption that statutory authority is necessary in order for a credit for VA benefits to be allowed in setting a tort award, an assumption inconsistent with the Supreme Court's decision in Brooks.

3/ Likewise, Greenwood v. United States, 858 F.2d 1056, 1057 (5th Cir. 1988), is not controlling, as the issue of offset of noneconomic damages against section 351 benefits was not before the court and the holding simply authorized VA to pursue its remedies under the provisions of section 351.

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to constitute double recovery from the Government 4/ would be subject to offset against section 351 benefits.

8. We have not previously issued a precedent opinion on whether noneconomic damages are to be offset under 38 U.S.C. § 351. However, in Digested Opinion, 1-13-86 (8-18 Off-Set), the General Counsel dismissed the economic/noneconomic distinction advanced in Christopher, stating:

[T]he court in Christopher failed to recognize that section 351 simply does not authorize such a distinction with respect to amounts subject to offset. Thus, while the two awards may be different in nature, we believe the distinction is devoid of legal meaning in the absence of statutory authority recognizing such a difference.

Although not precedential, this opinion highlights the absence of authority in section 351 for a distinction between economic and noneconomic damages.

9. We also discussed the offset provision, as it relates to current case law, in O.G.C. Prec. 79-90. 5/ Following a detailed review of the legislative history of section 351, we stated:

4/ We have previously recognized a distinction between "double payment" and "double recovery." See O.G.C. Prec. 79-90, discussed infra, paragraph 9.

5/ In O.G.C. Prec. 79-90, we recognized that the nature of tort damages may be relevant for the limited purpose of determining the legal status in which the recipient of a tort award received the damages. This determination was found necessary in light of the need under section 351 to determine whether the damages compensated for harm suffered by the individual whose benefits may be subject to offset, as only such damages could be offset from that individual's benefits under the statute.

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Thus, we conclude that the offset provision of section 351 was intended to assure that the same individual does not recover twice for the same disability or death. We consider this clear indication of congressional purpose controlling over inconsistent judicial pronouncements on the subject.

We continue to believe that the clear evidence of congressional intent to prohibit dual recovery, as provided in the terms 38 U.S.C. § 351 and in the legislative history of that statute, must control over the inconclusive judicial opinions relating to FTCA awards.

HELD:

Section 351 of title 38, United States Code, provides that where an individual is awarded a judgment against the United States or enters into a settlement or compromise under the Federal Tort Claims Act (FTCA) by reason of disability, aggravation, or death treated pursuant to section 351 as if it were service-connected for purposes of compensation paid by the Department of Veterans Affairs (VA), then no such benefits shall be paid to such individual by VA until the aggregate amount of benefits which would have been paid equals the total amount included in such award. Offset against VA benefits of both economic (loss of earning capacity) and noneconomic (e.g., pain and suffering) elements of damage recoveries under the FTCA, 28 U.S.C. §§ 2671-2680, is consistent with the terms of section 351 and its stated purpose. Accordingly, the full amount of damages recovered by an individual under the FTCA is subject to offset against benefits payable to that individual under section 351, regardless of whether those damages compensate for economic or noneconomic loss.

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