Date: February 17, 1996 VAOPGCPREC 1-96

From: General Counsel (022)
Subj: Effective Dates Where Award to a Surviving Spouse Results in Termination of an Award Based on a Deemed Valid Marriage -- XXXXX, XXXXXX X., XX XX XXX XXX
To: Director, Compensation and Pension Service (21)

QUESTIONS PRESENTED:

a. Do the provisions of 38 C.F.R. § 3.114(b) apply to cases in which benefits are reduced or terminated as the result of a judicial precedent?

b. If so, when, in such cases, benefits are awarded to one individual as the surviving spouse of a veteran and discontinued to another individual previously awarded benefits based on a "deemed valid" marriage to the veteran, is the effective date of the discontinuance of the latter individual's benefits governed by 38 C.F.R. § 3.114(b) or 38 C.F.R. § 3.657(a)?

COMMENTS:

1. The claims folder reflects that the veteran was married at least three times, although there is no evidence that any of these marriages was legally terminated. In 1968, the Veterans' Administration (now Department of Veterans Affairs (VA)) awarded death benefits to the veteran's third "spouse" pursuant to 38 U.S.C. § 103(a) based on a "deemed valid" marriage to the veteran. In 1969, the veteran's first spouse claimed entitlement to benefits as the veteran's surviving spouse. In a September 1969 decision, VA concluded that, although the veteran's first spouse may not have been at fault in the initial separation from the veteran, the first spouse was not faultless in their continued estrangement and, therefore, was not entitled to benefits as the veteran's surviving spouse.

2. In a May 13, 1993, precedential decision in Gregory v. Brown, 5 Vet. App. 108 (1993), the United States Court of Veterans Appeals held that 38 U.S.C. § 101(3), which defines "surviving spouse" for title 38 purposes, requires that to attain surviving spouse status a veteran's spouse who was
<Page 2>
separated from the veteran prior to the veteran's death must have been without fault only in the initial separation, not with regard to the continued estrangement. In addition, the court held unlawful a portion of former 38 C.F.R. § 3.53(a) (1993) which did not require the separation to have been due to the misconduct of or procured by the veteran. In June 1994, VA amended 38 C.F.R. § 3.53(a) to comport with the court's holding by adding a requirement that the separation have been due to the misconduct of or procured by the veteran. 59 Fed. Reg. 32,658 (1994). The amendment did not address the court's holding concerning the issue of fault in the continuation of the separation. On March 20, 1995, the veteran's first spouse filed a claim for benefits as the veteran's surviving spouse. You indicate that the first spouse appears to be entitled to benefits as the veteran's surviving spouse pursuant to the court's interpretation of the continuous cohabitation requirement and

that, accordingly, the current award to the third "spouse" will be discontinued. You have requested our views concerning the effective date of the discontinuance of benefits to the veteran's third "spouse," in view of an apparent conflict in applicable VA regulations.

3. VA's regulation at 38 C.F.R. § 3.657(a) addresses the issue of effective dates when an award to one individual as a veteran's surviving spouse results in termination of an award to another individual who was previously awarded benefits as the veteran's surviving spouse. That regulation states:

(a) Surviving spouse's awards. For periods on or after December 1, 1962, where a legal surviving spouse establishes entitlement after payments have been made to another person as surviving spouse, the full rate payable to the legal surviving spouse will be authorized effective the date of entitlement. Payments to the former payee will be discontinued as follows:

(1) Where benefits are payable to the legal surviving spouse from a date prior to the date of filing claim, the award to the former payee will be terminated the day preceding the effective date of the award to the legal surviving spouse.

<Page3>

(2) Where benefits are payable to the legal surviving spouse from the date of filing claim, the award to the former payee will be terminated effective the date of receipt of the claim or date of last payment, whichever is later.

The effective date of a reduction or discontinuance of benefits "by reason of" a change in a statute or administrative issue or a change in interpretation of a statute or administrative issue is governed by 38 U.S.C. § 5112(b)(6), which provides that the effective date of such a reduction or discontinuance "shall be the last day of the month following sixty days from the date of notice to the payee . . . of the reduction or discontinuance." VA has implemented that provision in 38 C.F.R. § 3.114(b), which provides that, when an award is to be reduced or discontinued "because of" a change in law or VA issue or a change in interpretation of a law or VA issue, the payee will be notified and given 60 days for the presentation of additional evidence. The regulation provides that, if additional evidence is not received within that period, the award will be reduced or terminated effective the last day of the month in which the 60-day period expired. In the case before you, the termination of the third "spouse's" benefits under 38 C.F.R. § 3.657(a) would create an apparent conflict with 38 U.S.C. § 5112(b)(6) and 38 C.F.R. § 3.114(b), which would provide a later effective date for discontinuance of benefits.

4. As a preliminary matter, we note that the conflict in the present case is between 38 C.F.R. §§ 3.114(b) and 3.657(a)(2), rather than section 3.657(a)(1), the provision referenced in the opinion request. The opinion request suggests, in paragraphs 6 and 7, that the effective date of the award to the veteran's first spouse would be controlled by 38 C.F.R. § 3.114(a), which implements 38 U.S.C. § 5110(g) and authorizes an effective date of up to one year prior to the date of the claim when benefits are awarded pursuant to a liberalizing law or liberalizing VA issue. We believe, however, that the first spouse's award would be

governed by 38 U.S.C. § 5110(a), which provides that an award generally may not be made

<Page 4>
effective earlier than the date of the claim. In VAOPGCPREC 10-94 (O.G.C. Prec. 10-94), we concluded that section 5110(g) applies only to awards based on a liberalizing law or VA issue and that awards based merely on an interpretation of law or VA issue announced in a judicial precedent are controlled by 38 U.S.C. § 5110(a). As stated in paragraph 2, above, the 1994 amendments to 38 C.F.R. § 3.53(a) did not implement the CVA's holding in Gregory that 38 U.S.C. § 101(3) requires that the surviving spouse be without fault only in the initial separation but not in the continuing estrangement. The first spouse's award, therefore, would not be based on a liberalizing VA issue, but rather upon the CVA's interpretation of the existing statutory standard in 38 U.S.C. § 101(3). Accordingly, the effective date of the first spouse's award would be governed by 38 U.S.C. § 5110(a) rather than § 5110(g), and, since benefits would not be payable prior to the date of receipt of a claim, 38 C.F.R. § 3.657(a)(1) would not be applicable to discontinuance of benefits to a former payee. Consequently, to the extent that 38 C.F.R. § 3.657 is applicable to the discontinuance of the third "spouse's" award, the pertinent provision would appear to be section 3.657(a)(2) rather than section 3.657(a)(1).

5. The interpretation of the "without fault" standard of 38 U.S.C. § 101(3) announced in Gregory is reflected in recent changes to the Veterans Benefits Administration's (VBA) Adjudication Procedures Manual. VBA Adjudication Procedures Manual, M21-1, Part III, para. 6.13.d., change 34 (10-9-94), and Part IV, para. 12.09.a.(3), change 65 (11-3-94). We do not believe, however, that the manual provisions constitute liberalizing VA issues which would provide a basis for applying 38 U.S.C. § 5110(g) and 38 C.F.R. § 3.114(a). By its terms, 38 C.F.R. § 3.114(a) applies only with respect to a liberalizing law "or a liberalizing VA issue approved by the Secretary or by the Secretary's direction." Provisions in manuals such as M21-1 are not approved by the Secretary or by the Secretary's direction, but rather are approved by the head of the VA component, in this case VBA, issuing the manual. Compare General Administrative Manual, MP-1, Part II, ch. 14, para. 5.e. (manuals approved by department and staff office heads) with General Administrative Manual, MP-1, Part II,

<Page 5>
ch. 14, para. 5.c. (manuals, generally bearing the "MP" designation, issued "by direction of" the Secretary). Further, benefits generally are not, or should not be, awarded "pursuant to" a manual provision. Provisions in VA manuals are not issued pursuant to rulemaking authority and are not intended to establish binding standards having the force of law or regulation. Rather, such provisions are intended merely to convey "the internal operating policies and methods pertaining to the administration of the benefit programs whose basic policies have been published in VA regulations." General Administrative Manual, MP-1, Part II, ch. 14, para. 5.e.(1). Accordingly, manual provisions do not provide authority for awarding benefits. In the instant case, the award to the

first spouse would be made "pursuant to" the statutory interpretation announced in the CVA's Gregory decision and not "pursuant to" VA's manual provisions.

6. In contrast to 38 U.S.C. § 5110(g) and 38 C.F.R. § 3.114(a), the provisions of 38 U.S.C. § 5112(b)(6) and 38 C.F.R. § 3.114(b) expressly apply to reductions and discontinuances based on a "change in interpretation" of a law or administrative issue. Under 38 U.S.C. § 103(a), the veteran's third "spouse" is entitled to receive benefits based on a "deemed valid" marriage so long as no claim has been filed by a legal surviving spouse of the veteran who is found to be entitled to such benefits. The interpretation announced in the Gregory decision does not directly terminate the third "spouse's" right to benefits. However, that interpretation does provide a new basis upon which the veteran's first spouse may establish entitlement to benefits and thereby divest the third "spouse" of entitlement. If the first spouse is awarded benefits on the basis of the changed interpretation, and changed interpretations resulting from judicial precedents are within the scope of 38 U.S.C. § 5112(b)(6) and 38 C.F.R. § 3.114(b), then the discontinuance of the third "spouse's" benefits, which is a necessary effect of that award, would, in our view, occur "by reason of" or "because of" the change in interpretation to the same extent as would the award to the first spouse.

7. We then reach the issue of whether 38 U.S.C. § 5112(b)(6) and 38 C.F.R. § 3.114(b) apply in a case where benefits are discontinued by reason of a change in interpretation of law or administrative issue resulting from a judicial precedent. By their terms, the statute and regulation apply when benefits are reduced or discontinued "by reason of" or "because of" a change in law or administrative issue or a change in interpretation of a law or administrative issue, without regard to the basis underlying the change. Because the statutory and regulatory language unambiguously applies to all cases where benefits are reduced or discontinued by reason of such a change, the statute and regulation are applicable in cases where the change is the result of a judicial precedent. Accordingly, we believe that the provisions of 38 U.S.C. § 5112(b)(6) and 38 C.F.R. § 3.114(b) would be applicable to the discontinuance of the third "spouse's" benefits.

8. Because 38 U.S.C. § 5112(b)(6) and 38 C.F.R. § 3.114(b) would appear to apply to the discontinuance of benefits to the veteran's third "spouse," such benefits could be discontinued only after expiration of a 60-day period following notice of the contemplated discontinuance. However, 38 C.F.R. § 3.657(a) would appear to require that the third "spouse's" benefits be discontinued based on the effective date of the first spouse's award or the date of last payment. To the extent that there is a conflict between the statutory standard in 38 U.S.C. § 5112(b)(6) and the regulatory standard in 38 C.F.R. § 3.657(a), the statutory standard must prevail. Indeed, as explained below, the circumstances surrounding the issuance of 38 C.F.R. § 3.657(a) indicate it was not intended to override what are now 38 U.S.C. § 5112(b)(6) and 38 C.F.R. § 3.114(b), where those latter provisions are applicable.

Rather, at the time 38 C.F.R. § 3.657(a) was issued in substantially its present form, VA apparently contemplated that the mandatory provisions of 38 C.F.R. § 3.114(b) would require VA to continue payments for the period prescribed therein even in cases where 38 C.F.R. § 3.657(a) would seem to prescribe an earlier termination date.

<Page 8>
9. When VA revised 38 C.F.R. § 3.657(a) in July 1964 to read in substantially its present form, it indicated that the amendment was consistent with a simultaneous revision to 38 C.F.R. § 3.650, which governs the adjustment of awards to dependents of veterans when additional dependents establish entitlement. Transmittal Sheet 321, at iii (7-10-64). Prior to July 1964, 38 C.F.R. § 3.657(a) provided that, "[w]here a legal widow establishes entitlement after payments have been made to another woman as widow, the award to the legal widow will be effective the day following the date of last payment to the former payee." At that time, 38 C.F.R. § 3.650 provided that, when benefits were being paid to a dependent of a veteran and another dependent established entitlement to benefits (thus requiring reduction in the existing dependent's award), the existing award would be adjusted retroactively unless an overpayment would result. Section 3.650 also provided that, if retroactive adjustment would result in an overpayment, the first dependent's award would be reduced prospectively only and the second dependent would be entitled to his or her full award only upon reduction of the award to the first dependent.

10. In 1963, the VA Chief Benefits Director proposed internally to amend 38 C.F.R. § 3.650 to provide a generally applicable rule for adjustment of awards when an award is discontinued and another person establishes eligibility for the same benefit for the period prior to termination. The Chief Benefits Director contemplated a rule under which, when an award to a payee is discontinued and a second claimant is entitled to benefits for a period prior to the effective date of the discontinuance, full retroactive benefits would be authorized for the second claimant only if an overpayment would not result. Under the proposal, if an overpayment would result, the claimant would be entitled to his or her full award only upon the discontinuance of the award to the former payee. An attached explanatory statement for inclusion in a transmittal sheet to accompany the regulation stated that the proposed amendments would apply in cases where an award was discontinued under 38 C.F.R. § 3.114(b) and that the full award to the new payee would be paid only after the former payee's award
<Page 8>
had been terminated in accordance with the procedures in section 3.114(b).

11. In a June 3, 1963, opinion, commenting on the proposed amendments, the VA General Counsel concluded that, under 38 U.S.C. § 3010(a) (now § 5110(a)), an award to an additional dependent generally must be made effective, at the full rate authorized by statute, from the date of the application for benefits. VADIGOP, 6-3-63 (14-9d Apportionment). The General Counsel concluded that there was no basis for a regulation which would provide the additional dependent with a later effective date or a lesser rate than authorized by statute. With respect to awards terminated under 38 U.S.C. § 3012(b)(6) (now § 5112(b)(6)) and 38 C.F.R. § 3.114(b), the General Counsel indicated that the fact that a former payee's award must be continued for a period of 60 days following notice

to the payee that the award would be discontinued would not affect a new payee's entitlement to the full statutory rate prescribed by statute. The General Counsel explained:

We do not believe that 38 [U.S.C. §] 3012(b)(6), which requires continuation of a . . . payment to the first payee . . . , can properly be construed as affecting the basic entitlement of the latter claimant to the DIC payment provided by 38 [U.S.C. §] 413 [(now § 1313)] for one child. . . . The liberal "grace payment" provision of [38 U.S.C. §] 3012(b)(6) was intended to provide a period of adjustment for persons whose awards are reduced or discontinued under certain conditions, not to affect the right of other claimants to amounts statutorily provided.

VADIGOP, 6-3-63, at 2.

12. In light of the General Counsel's opinion, VA amended 38 C.F.R. §§ 3.650 and 3.657 in July 1964 to provide that, when an individual establishes entitlement to benefits as a dependent or a surviving spouse, the full rate of benefits would be authorized effective from the statutory date of entitlement. The amended regulations further provided that the
<Page 9>
award to the former payee would be terminated retroactive to the date of the new beneficiary's entitlement in cases where the new beneficiary was entitled to benefits from a date prior to the date of the claim and that the award would be terminated as of the date of last payment or the date of the claim, whichever is later, in all other cases. The transmittal sheet accompanying those regulatory amendments, while not regulatory in nature, provides some evidence of VA's understanding of the operation of the amendments. The transmittal sheet stated that the provisions of 38 C.F.R. § 3.650, as amended, were "also applicable to adjustment of rates when an award is to be discontinued under VA Regulation 1114(B) [38 C.F.R. § 3.114(b)] because of a restrictive law or VA issue." Transmittal Sheet 321, at ii. The transmittal sheet explained that, where one payee's award was terminated due to a statute or VA issue and another payee established entitlement to benefits for a period prior to the date of the termination of the former payee's award, the new payee would be entitled to the full statutory award from the date of entitlement and the award to the former payee would be discontinued on the last day of the month in which the 60-day notice period in 38 C.F.R. § 3.114(b) expired. The transmittal sheet further suggested that the amendments to 38 C.F.R. § 3.657 were generally based upon the same considerations as the amendments to 38 C.F.R. § 3.650 and indicated that the above-referenced discussion in the transmittal sheet was also generally applicable to the revised 38 C.F.R. § 3.657.

13. The history of 38 C.F.R. § 3.657 thus reflects a view that the rule in 38 U.S.C. § 5112(b)(6) and 38 C.F.R. § 3.114(b) governing the effective date of a discontinuance of benefits resulting from a change in law or VA issue or a change in interpretation of a law or VA issue represents a mandatory statutory requirement which operates independently of 38 C.F.R. § 3.657. Accordingly, 38 C.F.R. § 3.657 was not intended to impose any limitation on the effective-date provisions in 38 U.S.C. § 5112(b)(6) and 38 C.F.R. § 3.114(b). The June 3, 1963, General Counsel opinion, which guided development of the 1964 amendments, indicated that retroactive adjustment of a prior payee's benefits would be authorized in the ordinary case under what is now 38 U.S.C. § 5112(a), which
<Page 10>

provides that the effective date of a reduction or discontinuance shall be "in accordance with the facts found." However, the General Counsel also noted that what is now 38 U.S.C. § 5112(b)(6) precluded reduction or discontinuance of benefits prior to expiration of a 60-day notice period in cases where that provision applied. In this context, the provision in 38 C.F.R. § 3.657(a) for discontinuance of a payee's benefits based on the effective date of a second payee's award or the date of last payment must be construed as applying to cases falling within the generally applicable effective-date provision of 38 U.S.C. § 5112(a), but not to cases governed by the more specific provision of 38 U.S.C. § 5112(b)(6).

14. In a case where 38 U.S.C. § 5112(b)(6) is applicable, reliance on 38 C.F.R. § 3.657(a) to terminate benefits prior to expiration of the 60-day notice period would be inconsistent with the statute and beyond VA's authority. The statutory provisions of 38 U.S.C. § 5112(b)(6) are mandatory. That statute provides that the effective date of discontinuance of benefits by reason of a change in law or administrative issue or a change in interpretation of law or administrative issue "shall" be the last day of the month following 60 days from the date of notice to the payee of the discontinuance. VA has no authority to establish a different effective date. Cf. Skinner v. Brown, 27 F.3d 1571, 1574 (Fed. Cir. 1994) (VA regulation imposing time limit for claiming certain benefits was inconsistent with governing statute, which contained no time limit).

15. As indicated in 38 C.F.R. § 3.657(a) and the June 3, 1963, General Counsel opinion, the effective date of an award to an individual who establishes entitlement as the legal spouse of a veteran is not controlled by the effective date of discontinuance of benefits to a former payee. As a result of the operation of 38 U.S.C. §§ 5110(a) and 5112(b)(6), it appears that benefits would be payable to both the veteran's first spouse and the veteran's third "spouse" for the period between the effective date of the first spouse's award and the date of discontinuance of the third "spouse's" award. In this regard, we note that 38 U.S.C. § 103(a), upon which the third "spouse's" benefits were based, states that "[n]o duplicate
<Page 11>
payments shall be made by virtue of this subsection." Further, the statutes governing benefits to surviving spouses generally refer to "the surviving spouse" of a veteran, thus suggesting that only one individual may be recognized as the surviving spouse of a particular veteran at any given time. See, e.g., 38 U.S.C. §§ 1121, 1141, 1304, 1310(b), 1318, 1541. Payment of benefits to both the prior payee and the legal spouse for a limited period may thus appear to conflict with 38 U.S.C. § 103(a) and other provisions governing payments to surviving spouses. On the other hand, it may be reasonable to conclude that the duplicate payments would not be made, strictly speaking, "by virtue of" 38 U.S.C. § 103(a), but rather would be independently mandated by 38 U.S.C. §§ 5110(a) and 5112(b)(6). Further, the payment of benefits to two individuals for the limited period required by statute would not necessarily compel the conclusion that both individuals are surviving spouses of the veteran during that period. Rather,
it may be reasonable to conclude that the legal surviving spouse (in this case, the veteran's first spouse) may be considered the veteran's sole surviving spouse from and after the statutory effective date of the award to that individual. Although the former payee (the veteran's third "spouse") would not be considered a surviving spouse after that date, the mandatory provisions of 38 U.S.C. § 5112(b)(6) operate to preserve that

individual's right to receive payments for a limited period after substantive entitlement under other provisions of title 38, United States Code, has ceased.

16. In construing remedial legislation, such as veterans' benefits statutes, we are required "to fit, if possible, all parts into an harmonious whole," Federal Trade Comm'n v. Mandel Bros., Inc., 359 U.S. 385, 389 (1959), and to construe statutory provisions, whenever possible, to avoid a conflict. See Morton v. Mancari, 417 U.S. 535, 551 (1974); In re Bellamy, 962 F.2d 176, 181 (2d Cir. 1992). Further, to the extent that there is an unavoidable conflict between statutory provisions, we must endeavor to reconcile those provisions to the extent possible, taking into account the goals and purposes underlying the legislation, while avoiding hardship and surprise to the affected parties. See Muller v. Lujan, 928 F.2d 207, 211 (6th Cir. 1991); Citizens to Save Spencer

<Page 12>
County v. United States Environmental Protection Agency, 600 F.2d 844, 871 (D.C. Cir. 1979). In interpreting these statutory provisions, we are further guided by the well-established principle that remedial legislation, such as veterans' benefits statutes, must be liberally construed in favor of those whom the legislation was designed to benefit. See King v. St. Vincent's Hosp. 502 U.S. 215, 220 n.9 (1991); Smith v. Brown, 35 F.3d 1516, 1525 (Fed. Cir. 1994); Tallman v. Brown, 7 Vet. App. 453, 465 (1995). Pursuant to these standards of statutory construction, we believe that, to the extent that the period of concurrent payment required pursuant to 38 U.S.C. §§ 5110(a) and 5112(b)(6) may suggest a conflict between those provisions and 38 U.S.C. § 103(a), that conflict should be resolved in favor of VA beneficiaries. Accordingly, we believe it would be appropriate to provide payments concurrently to the prior payee and the legal spouse for the limited period required by 38 U.S.C. §§ 5110(a) and 5112(b)(6). This result would not vitiate the general purpose of 38 U.S.C. § 103(a) to prevent duplicative awards of spousal benefits to more than one individual but would, under the limited circumstances here presented, reconcile that purpose with the purpose in 38 U.S.C. § 5112(b)(6) to provide VA beneficiaries with a measure of protection against sudden and unanticipated termination of benefits.

HELD:

a. The provisions of 38 U.S.C. § 5112(b)(6) and 38 C.F.R. § 3.114(b), which govern the effective date of a reduction or discontinuance of benefits by reason of a change in law or administrative issue or a change in interpretation of a law or administrative issue, are applicable to cases in which benefits are reduced or terminated by reason of a change in the interpretation of law resulting from a judicial precedent.

b. When, as the result of such a change in interpretation, an award of benefits is established for one individual as the

<Page 13>
legal surviving spouse of a veteran and discontinued for another individual who had previously received benefits based on a marriage to the veteran deemed valid pursuant to 38 U.S.C. § 103(a), the effective date of the award to the legal surviving spouse is governed by 38 U.S.C.

§ 5110(a), which provides for establishment of an effective date in accordance with the facts found, but not earlier than the date of receipt of an application for benefits. The effective date of the discontinuance to the prior payee is governed by 38 U.S.C. § 5112(b)(6) and 38 C.F.R. § 3.114(b). To the extent that application of 38 C.F.R. § 3.657(a) would, in a particular case, suggest that the prior payee's award be terminated at a date earlier than that provided by 38 U.S.C. § 5112(b)(6), that regulation must be considered superseded by section 5112(b)(6).

Mary Lou Keener