From: General Counsel (022)

Subj: Official Information Regarding Incarceration Pursuant to 38 U.S.C. § 5313 -- XXXXXXXX, XXXXXX, X XXX XXX

To: Chairman, Board of Veterans' Appeals (01)

# QUESTION PRESENTED:

Whether VA's continued payment of the full amount of benefits to a veteran who was incarcerated following conviction for a felony, while awaiting official information of his imprisonment in accordance with Veterans Benefits Administration Adjudication Procedure Manual M21-1, constitutes an erroneous award based on administrative error or error in judgment pursuant to 38 U.S.C. § 5112(b)(10), so that the effective date of the reduction of the award is the date of last payment rather than the 61st day of incarceration as provided by 38 U.S.C. § 5313(a).

#### COMMENTS:

1. This is in response to your request for an opinion regarding "the propriety of the creation of an overpayment in this case," in which the Department of Veterans Affairs (VA) continued to pay unreduced compensation to an incarcerated veteran subsequent to the sixty-first day of imprisonment, contrary to 38 U.S.C. § 5313(a). Section 5313(a) provides that 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 also 38 C.F.R. § 3.665(a). VA continued to pay compensation in the instant case at the regular rate for a period after the 60th day of the veteran's incarceration while the VA regional office sought official information from the penal institution regarding his imprisonment, in accordance with the Veterans Benefits Administration (VBA) Adjudication Procedure Manual M21-1, Part IV, ¶25.04, despite having received information from other sources indicating the veteran was incarcerated. As a result, VA created an overpayment, which the veteran contends is because VA erroneously continued to pay the full amount of <Page 2>

the veteran's award despite the fact that VA was aware he was imprisoned.

- Section 5112(b)(10) of title 38, United States Code, provides that the effective date of a reduction or discontinuance of compensation "by reason of an erroneous award based solely on administrative error or error in judgment shall be the date of last payment." The effect of 38 U.S.C. § 5112(b)(10) is that a beneficiary is not obligated to repay any amount which was paid as a result of administrative error, i.e., no overpayment is created requiring recovery. 1 S. Rep. No. 87-2042, 87th Cong. 2d Sess. (1962), reprinted in 1962 U.S.C.C.A.N. 3260, 3267; Digested Opinion, 10-31-85 (8-19 Taxation - General). Since a reduction of benefits under section 5112(b)(10) due to an erroneous award based on administrative error takes effect the date of last payment, all payments made through the last payment date are lawful. Digested Opinion, 10-31-85 (8-19 Taxation - General). The question presented by this case is whether VA's continued payment of the full amount of benefits to the incarcerated veteran while awaiting official information from the penal institution regarding the veteran's imprisonment, in accordance with the VBA Manual M21-1, Part IV, ¶25.04, constitutes an erroneous award based on administrative error or error in judgment pursuant to 38 U.S.C. § 5112(b)(10), so that the effective date of the reduction of the award is the date of last payment rather than the 61st day of incarceration as provided by 38 U.S.C. § 5313(a).
- 3. Section 5112(b)(10) was added to title 38, United States Code, by Pub. L. No. 87-825, § 2, 76 Stat. 948, 949 (1962). The legislative history of this statutory provision states that section 5112(b)(10) applies to errors arising from "a misunderstanding of existing instructions or regulations or the applicable construction of statute." S. Rep. No. 2042, 87th Cong., 2d Sess. (1962), reprinted in 1962 U.S.C.C.A.N. at 3267. Section 3.500(b)(2) of title 38, Code of Federal Regulations, was promulgated in 1962 to implement 38 U.S.C. § 5112(b)(10). VA

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The term "overpayment" is not defined in title 38, United States Code. Section 1.962 of title 38, Code of Federal Regulations, states that an overpayment "refers only to those benefit payments made to a designated living payee or beneficiary in excess of the amount due or to which such payee or beneficiary is entitled."

Regulations, Compensation and Pension, Transmittal Sheet 271 at iv (Dec. 1, 1962), which accompanied the initial promulgation of 38 C.F.R. § 3.500(b)(2), stated that section 5112(b)(10) is also applicable to errors based on mistake of fact:

The terms 'administrative error' and 'error in judgment' include all administrative decisions of entitlement, whether based on a mistake of fact, misunderstanding of controlling regulations or instructions or misapplication of law, except as to reduction or discontinuance of compensation because of change in service-connected or employability status or physical condition. This includes determinations of active service (whether based on erroneous service department certifications or independent VA determinations), dependency, relationship, or other elements of entitlement, based on evidence in file.

The VA General Counsel concluded in a 1990 precedent opinion that it is "eminently reasonable, appropriate, and consistent with the law" to conclude that section 5112(b)(10) also applies to mistakes of law. VAOPGCPREC 2-90 (O.G.C. Prec. 2-90).

4. We do not believe VA committed an administrative error in the instant case involving a misunderstanding of instructions or regulations, or the applicable construction of statute. Section 5313(a) requires that compensation be reduced effective the 61st day following incarceration for conviction of a felony, see also 38 C.F.R. § 3.665(a), and the VBA Manual provision does not conflict with 38 U.S.C. § 5313(a) or 38 C.F.R. § 3.665(a) by extending payment of compensation beyond the statutory sixty-day period. The VBA Adjudication Procedure Manual M21-1, Part IV, ¶25.04, providing for discontinuance of an award, effective sixty-one days after incarceration, only after official notification is received, therefore does not involve the type of administrative error by VA to which 38 U.S.C. § 5112(b)(10) refers. The opinion request inquires about the authority for the regional office to make continued payment of unreduced compensation to the veteran pending receipt of official information from the penal institution. reply, we would note that the veteran apparently was entitled to continued receipt of benefits subject only to the limitations of section 5313(a), thus the issue properly framed is whether the regional office, obviously aware of those limitations, somehow

erred by deferring action on the award pending official documentation that the statutory prohibitions applied. The determination that the recipient of compensation has been incarcerated for a period in excess of sixty days for conviction of a felony is a factual one, which, like any factual determination, must be reasonably supported by the evidence before VA. See VAOPGCADVIS 19-96. We do not believe it was a misunderstanding of section 5313 to continue payment of compensation at the full rate until VA received evidence reasonably supporting the beneficiary's incarceration.

- The case also does not involve a mistake of fact by VA constituting an administrative error pursuant to 38 U.S.C. § 5112(b)(10). To the contrary, the M21-1 provision at issue here, which requires official information regarding a beneficiary's imprisonment, is designed to prevent the reduction of an award based upon a mistake of fact. In order for the provisions of section 5313(a) to be met, (1) the beneficiary must be incarcerated in a penal institution for a period in excess of 60 days and (2) incarceration must be for conviction of a felony. The statute will not operate in the absence of either factor. VAOPGCPREC 2-96; VAOPGCPREC 59-91 (O.G.C. Prec. 59-In the instant case, the correspondence which VA received from the veteran and his spouse did not provide any information regarding the nature of the veteran's conviction and therefore further inquiry by VA was necessary. Also, in a statement to VA dated May 8, 1990, the veteran's spouse stated that the veteran had been incarcerated since April 1990 and would be imprisoned for three years. However, the Arkansas Department of Correction eventually informed VA that the veteran had been incarcerated since January 9, 1990, and that his scheduled release date was July 9, 1996. We therefore conclude that VA committed no administrative error based upon mistake of fact in this case by continuing to pay the full rate of compensation while awaiting official information regarding the veteran's imprisonment. Since VA did not make an erroneous award in the instant case based upon an administrative error or error in judgment, an overpayment was properly created.
- 6. An overpayment is likely to occur in virtually every case involving section 5313, unless VA has made an administrative error or error in judgment, because no award of compensation

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may be reduced unless the beneficiary has been notified of such adverse action and provided with 60 days in which to sub-

mit evidence showing that the action should not be taken. See 38 C.F.R. § 3.103(b)(2). Since the continued payment of benefits at the full rate in the instant case does not involve an error by VA or the beneficiary, see 38 U.S.C. § 5112(b)(9), but rather results from the delay of the Arkansas Department of Correction in responding to VA's four requests for official information, the beneficiary who reaped the benefit of the delay in receiving official confirmation of incarceration by being paid the full amount of his award may be charged with an overpayment. See VAOPGCPREC 2-90 (O.G.C. Prec. 2-90). this regard, we note that the primary purpose of the section-5313 limitation is to prevent duplication of governmental expenditures benefiting incarcerated persons in receipt of veterans' disability compensation. See, e.g., 126 Cong. Rec. H9072, H9076 (daily ed. Sept. 18, 1980) (statements of Cong. Mont-gomery and Wylie). The veteran in the instant case received VA compensation during his incarceration, during which time he was not suffering from any lost wage-earning capacity due to his disability. Section 5302 of title 38, United States Code, however, provides an equitable mechanism for mitigating unduly harsh results where both VA and the recipient of the overpayment are blameless for creation of the resultant debt, i.e., recovery of an overpayments of benefits may be waived if recovery would be against equity and good conscience. (We understand a request for waiver of this indebtedness is presently pending before the regional office, and express no opinion on the merits of that claim.)

### **HELD:**

VA's continued payment of the full amount of benefits to a veteran who was incarcerated following conviction for a felony, while awaiting official information of his imprisonment in accordance with Veterans Benefits Administration Adjudication

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Procedure Manual M21-1, does not constitute an erroneous award based on administrative error or error in judgment pursuant to 38 U.S.C. § 5112(b)(10), so that the effective date of the reduction of the award is the 61st day of incarceration as provided by 38 U.S.C. § 5313(a).

Mary Lou Keener