

Date: April 17, 1997

VAOPGCPREC 16-97

From: General Counsel (022)

Subj: Application of the Veterans' Benefits Improvements Act of 1996, Pub. L. No. 104-275, §§ 502 and 507--Clothing Allowance; Accrued Benefits

Director, Compensation and Pension Service (213A)

QUESTIONS PRESENTED:

a. Whether, under Section 502 of the Veterans' Benefits Improvements Act of 1996, which added section 38 U.S.C. § 5313A, the period for which the clothing allowance of certain incarcerated veterans is to be reduced begins on the first day of incarceration or on the sixty-first day of incarceration.

b. Whether the amendment made to 38 U.S.C. § 5121(a) by section 507 of the Veterans' Benefits Improvements Act of 1996, which increased from one year to two years the period for which accrued benefits may be paid, applies only in claims involving deaths which occur on or after October 9, 1996, the date of enactment of the amendment.

COMMENTS:

1. The Department of Veterans Affairs (VA) is authorized under 38 U.S.C. § 1162 to pay an annual clothing allowance to a veteran whose service-connected disability requires the veteran to wear or use a prosthetic or orthopedic appliance (including a wheelchair) which tends to wear out or tear the veteran's clothing, or who uses medication prescribed for a service-connected skin condition which causes irreparable damage to the veteran's outer garments. Section 502 of the Veterans' Benefits Improvements Act of 1996 (VBIA), Pub. L.

No. 104-275, 110 Stat. 3322, added a new section 5313A to title 38, United States Code, providing in pertinent part:

In the case of a veteran who is incarcerated in a Federal, State, or local penal institution for a period in excess of 60 days and who is furnished clothing without charge by

the institution, the amount of any annual clothing allowance payable to the veteran under section 1162 of this title shall be reduced by an

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amount equal to 1/365 of the amount of the allowance otherwise payable under that section for each day on which the veteran was so incarcerated during the 12-month period preceding the date on which payment of the allowance would be due.

Pub. L. No. 104-275, 110 Stat. at 3341.

2. With regard to when, under new section 5313A, the clothing allowance of certain incarcerated veterans is to be reduced, as in all questions which require statutory interpretation, the analysis must begin with the statutory language itself. See *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 409 (1993); *Tallman v. Brown*, 7 Vet. App. 453, 460 (1995). Where a statute's meaning is plain on its face, that meaning is generally controlling, and recourse to the statute's legislative history is unnecessary. See *Darby v. Cisneros*, 509 U.S. 137, 147 (1993); *Garcia v. United States*, 469 U.S. 70, 75 (1984); *Skinner v. Brown*, 27 F.3d 1571, 1574 (Fed. Cir. 1994). In this case, we find a degree of ambiguity in the statutory terms which requires further inquiry.

3. Section 5313A refers to a veteran "incarcerated in a Federal, State, or local penal institution for a period in excess of 60 days" and provides for reduction of the annual clothing allowance payable to such a veteran under section 1162 by a fraction of the amount otherwise payable for a particular year "for each day on which the veteran was so *incarcerated* during the 12-month period preceding the date on which payment of the allowance would be due." (Emphasis added.) The term "so incarcerated" could be interpreted as referring to the entire period for which a veteran is incarcerated in a penal institution. However, use of the term "a period in excess of 60 days" in describing the subject incarceration could suggest that the term "so incarcerated" only refers to that portion of the period of incarceration which exceeds 60 days. See Webster's Third New International Dictionary 792 (1981) (alternatively defining

"excess" as "the amount or degree by which one thing or number exceeds another"). Given these differing possible interpretations of the statutory terms, we consider recourse to the legislative history of the statute necessary.

4. The report of the Senate Committee on Veterans' Affairs on the VBIA described what became section 502 of Pub. L. No. 104-275 as abolishing the clothing allowance in the case of incarcerated veterans if they are furnished clothing

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without charge by the custodial institution. S. Rep. No. 371, 104th Cong., 2d Sess. 24 (1996), *reprinted in* 1996 U.S.C.C.A.N. 3762, 3775. The report went on to state that the provision "would do so by reducing the annual allowance by 1/365 for each day in excess of 60 days that the veteran is incarcerated." *Id.* (emphasis added). Clearly, this statement reflects an understanding that the statute would restrict payment of the clothing allowance only during the period beginning on the sixty-first day of a veteran's incarceration, just as 38 U.S.C. §§ 1505(a) and 5313(a)(1) require reduction of compensation, pension, and dependency and indemnity compensation to incarcerated persons for the period beginning on the sixty-first day of incarceration. On this basis, we conclude that Congress, in section 502 of the VBIA, intended to and did provide for reduction of the clothing allowance payable under 38 U.S.C. § 1162 to certain incarcerated veterans for each day in excess of the first sixty days of a period of incarceration.

5. Turning to the application of section 507 of the VBIA, 38 U.S.C. § 5121(a) provides for the payment of certain periodic monetary benefits to which an individual was entitled at the time of the individual's death under existing ratings or decisions or based on evidence on file at the date of death to specified survivors of the individual. Section 507 amended 38 U.S.C. § 5121(a) to increase from one year to two years the retrospective period for which accrued benefits may be paid. Congress expressly provided in certain sections of the VBIA when the amendments made by those particular sections would take effect, the occurrences or transactions to which they would apply, or the period for which benefits could be paid under the amendments. See Pub. L. No. 104-275, §§ 505(d), 506(b), and 508(b), 110 Stat. at 3342-44. Congress included no such specific provision in the VBIA with regard to the two-year accrued-

benefit provision of the newly amended section 5121(a). Because Congress did not specify an effective date for the amendment made by section 507, the amendment took effect on October 9, 1996, the date of enactment of the VBIA. See 2 Norman J. Singer, *Sutherland Statutory Construction* § 33.06 (5th ed. 1993) (unless otherwise specified, a statute takes effect from the date of its enactment); 73 Am. Jur. 2d *Statutes* § 361 (1974) (same).

6. We have found nothing in the legislative history of section 507 which would indicate Congress' intent with regard to the scope of application of the amendment made by that provision. Certainly, the provisions of amended section

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5121(a) would apply to claims arising after the effective date of the amendment. Principles of finality established by 38 U.S.C. §§ 7104(b) and 7105(c) would apply in claims finally decided prior to that date. As to claims pending on the effective date of the amendment, and those which arose prior to that date but which had not yet been filed as of that date, principles governing the retroactive effect of changes in law must be considered.

7. In *Karnas v. Derwinski*, 1 Vet. App. 308, 313 (1991), the United States Court of Veterans Appeals held that, "where the law or regulation changes after a claim has been filed or reopened but before the administrative or judicial appeal process has been concluded, the version most favorable to appellant . . . will apply unless Congress provided otherwise or permitted the Secretary of Veterans Affairs . . . to do otherwise and the Secretary did so." Implicit in this conclusion is the concept that a liberalizing change in law could also be applied in a claim which arose, but had not yet been filed, as of the effective date of the change in law. In *Karnas*, the Court of Veterans Appeals cited Supreme Court cases involving litigation between private parties and governmental entities for the principle that a court is generally to apply the law in effect at the time it renders a decision, unless to do so would work a manifest injustice. 1 Vet. App. at 311-12. The court concluded that application of the law most favorable to a private-party claimant would never result in manifest injustice to the Government. *Id.* at 313. Under *Karnas*, to the extent that section 5121(a), as amended by section 507, is

more favorable to a claimant than the former section 5121(a), VA would be required to apply the amended section 5121(a).

8. In a recent precedent opinion, VAOPGCPREC 10-97, we observed that decisions of the United States Supreme Court and the United States Court of Appeals for the Federal Circuit rendered since *Karnas* was decided have called into question certain conclusions reached by the Court of Veterans Appeals in that case. We noted that recent Supreme Court decisions have emphasized the existence of a presumption against retroactive application of new statutes. As explained in VAOPGCPREC 10-97, the Supreme Court has assessed the retroactive effect of a new statute on the basis of whether it

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would "impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Landgraf v. USI Film Products*, 114 S. Ct. 1483, 1505 (1994). The Court indicated that a statute which would have such effects will not be applied retroactively absent clear congressional intent favoring such a result. *Id.* Our opinion also noted that subsequent Supreme Court and Federal Circuit decisions had undermined the Court of Veterans Appeals' premise, stated in *Karnas*, that retroactive application of a statute would never result in manifest injustice to the Government. Based on this analysis, we declined to apply *Karnas* in a situation involving only determination of the amount of benefits payable for a period which ended before the subject change in law took place.

9. In one sense, application of the amended section 5121(a) in pending or new claims based on deaths which occurred prior to October 9, 1996, could be viewed as attaching new legal consequences to events completed prior to enactment of the amendment, since it would obligate the Government to pay additional sums as a result of deaths which occurred prior to enactment of the amendment. However, we believe that special factors relating to the nature of accrued benefits weigh in favor of application of the amended statute in such cases. Accrued benefits represent benefits which were "due and unpaid" under existing ratings and de-

cisions or evidence already on file at the time of a claimant's death. Therefore, although the death of the claimant is a prerequisite to the payment of such sums as accrued benefits, the Government's underlying obligation to the decedent would already have arisen prior to amendment of the statute authorizing fulfillment of that obligation through payment of accrued benefits to the decedent's survivors. The rationale for extension of the period for which accrued benefits may be paid was to "recognize the length of time it currently takes VA to process and adjudicate a claim." H.R. Rep. No. 650, 104th Cong., 2d Sess. 5 (1996). Application of the amended section 5121(a) to claims based on deaths occurring prior to enactment of the amendment cannot be viewed as disadvantaging the Government, since it would merely allow VA to pay sums which it otherwise would have been obligated to pay had not administrative delays prevented it from making payment to the decedent during his or her lifetime. In light of the foregoing, we conclude that section 5121(a) as amended by the VBIA may be applied in claims involving deaths occurring prior to the date of enactment of the amendment which were not finally decided prior to that date.

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**HELD:**

a. Section 5313A of title 38, United States Code, as added by section 502 of the Veterans' Benefits Improvements Act of 1996, requires that the Department of Veterans Affairs reduce the annual clothing allowance payable under 38 U.S.C. § 1162 to certain incarcerated veterans by 1/365th for each day on which the veteran was incarcerated during the twelve-month period preceding the date on which the payment of the allowance would be due, beginning with the sixty-first day of the period of incarceration.

b. Section 5121(a) of title 38, United States Code, as amended by section 507 of the Veterans' Benefits Improvements Act of 1996, which authorizes payment of accrued benefits for a period of two years prior to the death of an individual entitled to periodic monetary benefits at death under existing ratings or decisions or based on evidence on file at the date of death, is applicable in claims for accrued benefits based on deaths which occurred prior to the October 9, 1996, date of enactment of the amending statute which were not finally decided prior to that date.

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