

**Department of
Veterans Affairs**

Memorandum

Date: May 31, 2006

VAOPGCPREC 1-2006

From: General Counsel (021)

Subj: Request for Opinion – Qualifying Service under Sections 3011 and 3012 of title 38, United States Code, and Resulting delimiting Date

To: Under Secretary for Benefits (20)

QUESTION PRESENTED:

You requested our opinion regarding the proper delimiting date under 38 U.S.C. § 3031 for a veteran who qualifies for education benefits under the Montgomery GI Bill (MGIB) by serving at least three years on active duty followed by at least four years in the Selected Reserve.

DISCUSSION:

1. The request stems from a decision by the Board of Veterans' Appeals holding that a veteran who met the MGIB eligibility requirements of both section 3011 (service on active duty for a period of three years) and section 3012 (active-duty service of at least two years followed by service in the Selected Reserve of at least four years ("2 x 4" provisions)) of title 38, United States Code, was entitled to claim eligibility under the latter so as to receive the benefit of the later benefit delimiting date afforded by 38 U.S.C. § 3031(a)(1) based on such eligibility. The Regional Office, in the same case, had limited the veteran to an earlier delimiting date on the basis that the veteran, having already established entitlement to MGIB educational benefits under the three-year active duty provisions of section 3011, was ineligible for consideration under the 2 x 4 provisions.

2. Section 3031(a) provides, in pertinent part, as follows:

(a) Except as provided in subsections (b) through (g), and subject to subsection (h), of this section, the period during which an individual entitled to educational assistance under this chapter may use such individual's entitlement expires at the end of the 10-year period beginning on the date of such individual's last discharge or release from active duty, except that such

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10-year period shall begin--

(1) in the case of an individual who becomes entitled to such assistance under clause (A) or (B) of section 3012(a)(1) of this title, on the later of the date of such individual's last discharge or release from active duty or the date on which the four-year requirement described in clause (A)(ii) or (B)(ii), respectively, of such section 3012(a)(1) is met [Emphasis added.]

3. Thus, under the facts of this case, if the veteran were limited to entitlement under section 3011, as found by the Regional Office, his delimiting period for using education benefits would end on May 3, 2000, whereas having entitlement under section 3012, as the Board found, would add over four years to his delimiting period. In short, we agree with the Board's determination.

4. We find nothing in the current language of sections 3011 and 3012, or elsewhere in 38 U.S.C., chapter 30 that expresses congressional intent to limit qualification for MGIB entitlement to the section under which the individual first qualifies. Furthermore, given the language in section 3031(a)(1), it seems clear the statute recognizes that individuals may establish eligibility under either or both of the pertinent sections.

5. We note with some interest, nevertheless, that Congress, in enacting subsection 3012(e), expressly provided for an individual to make an irrevocable election of entitlement under section 3011 in lieu of section 3012 in specifically limited circumstances. This applies to an individual with two years of active duty who commences but does not complete the four-year Selective Reserve service requirement due to being discharged early from such service for a service-connected disability or for hardship. Such individual may become entitled to MGIB benefits under section 3012(b)(1)(B)(ii)(I) or (III), although for less than the maximum 36 months of entitlement. Section 3012(e) grants this individual an opportunity to make an election to be considered entitled under section 3011.

6. Presumably, although neither stated in the law, nor expressed in the pertinent legislative history we reviewed, Congress, in authorizing such election, recognized that it could be more advantageous to an individual in such circumstances to receive the lesser benefit rate but for the full 36 months of entitlement afforded under section 3011. Still, it is not clear why Congress would have believed it necessary to authorize an election in this case if an individual having dual eligibility otherwise could freely elect to become entitled under section 3011 or 3012.

7. It may be surmised that Congress did not otherwise speak to an election in cases of dual eligibility for Chapter 30 because, like the regional office in this case, it did not perceive the necessity for doing so. In other words, Congress simply may not have focused on the need to consider authorizing an election

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between entitlement under section 3011 or 3012 based on a potential advantage, thereby, in having an extended delimiting period, as under the particular fact pattern presented here.

8. We note that, prior to the enactment of Public Law 106-419 on November 1, 2000, Chapter 30 entitlement was tied to the individual's initial obligated period of active duty. Under section 3011, an initial obligated period of active duty of at least 3 years resulted in the maximum benefit rate and months of entitlement. A minimum 2-year initial active duty obligation yielded a reduced benefit rate, unless combined with a subsequent 4-year Selected Service obligation as provided for 2X4 entitlement under section 3012. Since an individual who served an initial obligated active duty period of 3 years became entitled to the maximum benefit, it is likely that the happenstance of such individual thereafter qualifying under section 3012 based on subsequent Selected Reserve service was not perceived as adding anything to the benefit, i.e., as affording anything but a cumulative basis for establishing full entitlement. The delimiting date issue perhaps was too remote an event to be of immediate concern.

9. With the enactment of Public Law 106-419, however, this changed. Entitlement could be based on an obligated qualifying active duty period other than the initial period. Thus, for example, an individual could serve a 2-year period of active duty, followed by 4 years in the Selected Reserve, then later enlist for and serve a 3-year period of active duty, and base her MGIB entitlement on the last active duty period. This legislative liberalization, coupled with the variations of multiple active duty and Selected Reserve service periods resulting from military operations in Iraq, as well as the increased relevance of the 10-year delimiting period as more veterans reach the end thereof, certainly have created the potential for further fact patterns like the instant case. It seems, nevertheless, that neither the law nor VA regulations yet reflect any recognition of this as an issue since neither contains an election mechanism addressing dual eligibility cases.

10. In any event, given the absence of any clear legislative expression to the contrary, we agree with the Board's conclusion that an individual may establish "dual eligibility" for MGIB benefits by qualifying under both sections 3011 and 3012, and we find such individual may choose to be considered entitled under the section deemed most advantageous to the veteran. We further agree, therefore, with the Board's holding that the proper delimiting date based on the facts presented here is June 1, 2004. For clarity, however, we do wish to correct the Board's misconception in reasoning that the veteran in this case established dual eligibility as contemplated by 38 C.F.R. § 21.7042(d). That regulation only addresses an individual's ability to establish MGIB entitlement under section 3011 when the individual fails to qualify under section 3012 due to failure to meet the 4-year Selected Reserve service requirement. It does not contemplate a *dual*

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eligibility situation, but rather, a circumstance where the individual's only eligibility is under section 3011.

11. Since the veteran here clearly met the requirements of 38 C.F.R. § 21.7042(b), namely, at least two years of honorable continuous active duty (he had 3 years, 8 months, and 17 days) followed by at least four continuous years of service in the Selected Reserve (he served 8 years and 4 months), the need only have relied for its decision on 38 C.F.R. § 21.7050(a)(1)(iii). That regulatory provision sets the ending date of eligibility in such cases at 10 years after the date on which the veteran meets the 4-year Selected Reserve requirement.

HELD:

In a case where a veteran meets the eligibility requirements for Chapter 30 MGIB education benefits under both 38 U.S.C. §§ 3011 and 3012, the veteran has the right to claim entitlement under whichever of such sections is most advantageous to the veteran. This includes choosing to become entitled under section 3012 when that affords a later delimiting date for using those benefits pursuant to 38 U.S.C. § 3031(a)(1).

Tim S. McClain

Attachment