

**Department of
Veterans Affairs**

Memorandum

Date: June 20, 2006

VAOPGCPREC 2-2006

From: General Counsel (022)

Subj: Applicability of 38 U.S.C. § 6107 Where Misuse Occurred Before December 10, 2004

To: Director, Compensation and Pension Service (21)

QUESTION PRESENTED:

Is 38 U.S.C. § 6107 applicable where a fiduciary misused benefits of a Department of Veterans Affairs (VA) beneficiary before enactment of that statute if VA makes a finding of misuse after that date?

DISCUSSION:

1. Section 503(a) of Title V of the Veterans Benefits Improvement Act of 2004, Pub. L. No. 108-454, 118 Stat. 3598, 3619 (“the Act”), added sections 6106 (“Misuse of benefits by fiduciaries”) and 6107 (“Reissuance of benefits”) to title 38, United States Code. Section 6106 defines “misuse of benefits” and bars a fiduciary from collecting from a beneficiary a fee for any month with respect to which VA or a court of competent jurisdiction has determined that the fiduciary misused all or part of the beneficiary’s benefits. Section 6107 requires VA in certain cases to attempt to recoup misused funds from a fiduciary and to reissue benefits regardless of whether the misused benefits are recouped. Before the Act added these sections, the concept of “misuse” and the obligation to reissue misused benefits did not appear in title 38, United States Code, although VA had authority under 38 U.S.C. § 5502 to determine whether fiduciaries were properly executing their responsibilities and to require an accounting of the use of VA benefits.

2. Section 507(b)(2) of the Act included the following specific provision governing VA’s obligation to reissue benefits to a beneficiary and seek recoupment from a fiduciary based on misuse:

Sections 6106 and 6107 of title 38, United States Code, as added by section 503(a), shall apply with respect to any determinations by the

Secretary of Veterans Affairs made after the date of the enactment of this Act of misuse of funds by a fiduciary.

Pub. L. 108-454, Title V, § 507(b)(2), 118 Stat. at 3622. We have been asked whether this provision makes section 6107 applicable where benefits were misused before the date of enactment (which was December 10, 2004) if VA makes a determination of misuse after that date.

3. It is well-established that “[t]he starting point in interpreting a statute is its language, for ‘if the intent of Congress is clear, that is the end of the matter.’” Good Samaritan Hosp. v. Shalala, 508 U.S. 402, 409 (1993) (quoting Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842 (1984)); see also Burkhardt v. Gober, 232 F.3d 1363, 1366 (Fed. Cir. 2000). On its face, section 507(b)(2) makes 38 U.S.C. §§ 6106 and 6107 applicable in connection with “determinations . . . of misuse of funds” made by VA after December 10, 2004. Although a lengthy prepositional phrase separates the word “determinations” from the words “of misuse,” the only logical construction of the sentence is that the “determinations” referred to in section 507(b)(2) are determinations of misuse, the only type of determination referenced in section 507(b)(2) and in 38 U.S.C. §§ 6106 and 6107.

4. Congress undoubtedly understood that a VA determination of misuse would necessarily be based on actions by the fiduciary occurring before the date of VA’s determination. Accordingly, in making 38 U.S.C. § 6107 applicable as to VA determinations of misuse made after December 10, 2004, Congress clearly intended that the provisions of that statute be applied even if the acts constituting misuse occurred prior to that date. If Congress had intended to limit their applicability to cases in which the misuse itself occurred after December 10, 2004, Congress could easily have specified that limitation. We must give effect to Congress’ decision to apply these provisions to “determinations” of misuse made after December 10, 2004, even if the misuse itself occurred before that date.

5. Because we find section 507(b)(2) of the Act clear on its face, the plain meaning must be applied unless to do so would do violence to a clearly expressed legislative intent. See, e.g., Ardestani v. INS, 502 U.S. 129, 135-36 (1991) (the presumption that the legislative purpose is expressed by the ordinary meaning of the words used is rebutted only in “rare and exceptional circumstances when a contrary legislative intent is clearly expressed” (citation and quotation marks omitted)); Garcia v. United States, 469 U.S. 70, 75 (1984) (“[O]nly the most extraordinary showing of contrary intentions from [the legislative history] would justify a limitation on the “plain meaning” of the statutory language.”); United States v. Rutherford, 442 U.S. 544, 551-52 (1979) (plain language controls unless it leads to “‘absurd results’, or consequences obviously at variance with the policy of the enactment as a whole”). There is no relevant legislative history regarding section 507(b)(2) that suggests a purpose at odds

with the statute's plain language. The apparent purpose of section 6107 is to provide restitution to incompetent VA beneficiaries who are deprived of benefits due to misuse by fiduciaries. It is not inconsistent with this purpose to provide for remuneration and recoupment when a finding of misuse is made after December 10, 2004, based on actions that occurred before that date.

6. The Supreme Court has stated that statutes generally "will not be construed to have retroactive effect unless their language requires this result." Landgraf v. USI Film Products, 511 U.S. 244, 264 (1994) (internal quotations, citation omitted). This presumption against retroactivity applies even if the statute imposes new monetary obligations solely on the Government. Id. at 271 n.25. We believe that the language of section 507(b)(2) does in fact compel application of 38 U.S.C. § 6107 in appropriate circumstances based on misuse that occurred prior to the date of enactment of the Act. Therefore, the Landgraf presumption against retroactivity does not come into play with regard to 38 U.S.C. § 6107 merely because the misuse occurred before December 10, 2004.

7. For the reasons stated above, we conclude that 38 U.S.C. § 6107 is applicable under the circumstances described therein where VA makes a determination after December 10, 2004, that a fiduciary misused a beneficiary's VA benefits, regardless of whether the misuse occurred before or after that date. We express no opinion as to whether or under what circumstances VA must make such a misuse determination regarding events that took place prior to December 10, 2004. The governing statutes are silent on this issue, and VA has latitude to address the issue by regulations. Also, we do not decide here that a misuse determination has in fact been made in any specific case, as that issue is beyond the scope of the requested opinion.

HELD:

Where VA makes a determination after December 10, 2004, that a fiduciary misused a beneficiary's VA benefits, 38 U.S.C. § 6107 is applicable according to its terms, regardless of whether the misuse occurred before or after that date.

Tim S. McClain