

**Department of
Veterans Affairs**

Memorandum

Date: May 25, 2010
From: General Counsel (022)
Subj: Clothing Allowance Benefit--38 U.S.C. § 1162
To: National Program Manager, Prosthetics and Sensory Aids Service (113)

QUESTIONS PRESENTED:

- a. Does a veteran's return to active duty status terminate the individual's status as a veteran under 38 U.S.C. § 101(2) for purposes of Department of Veterans Affairs (VA) benefits?
- b. If the answer to Question a. is no, does the clothing allowance benefit provided by 38 U.S.C. § 1162 qualify as prohibited "compensation" under 38 U.S.C. § 5304(c) to a person receiving active service pay?
- c. If the answer to Question b. is no, if a person meets the statutory definition of "veteran" and is eligible for the clothing allowance, may that person receive the clothing allowance in addition to active service pay upon return to active duty?
- d. May an individual on active duty who has not yet been discharged receive a clothing allowance?

HELD:

- a. Section 101(2) of title 38, United States Code, defines the term "veteran" to mean "a person who served in the active military, naval, or air service, and who was discharged or released therefrom under conditions other than dishonorable." This term includes individuals who have returned to active duty after previously meeting the definition of "veteran."
- b. Section 1162 of title 38, United States Code, provides a clothing allowance for each veteran who, "because of a service-connected disability, wears or uses a prosthetic or orthopedic appliance (including a wheelchair) which the Secretary determines tends to wear out or tear the clothing of the veteran," or who "uses medication which (A) a physician has prescribed for a skin condition which is due to a service-connected disability, and (B) the Secretary determines causes irreparable damage to the veteran's outergarments." This clothing allowance is not "compensation" within the meaning of that term as it is used in 38 U.S.C. § 5304(c), which prohibits payment of "[p]ension, compensation, or retirement pay on account of any person's own service . . . for any period for which such person receives active service pay." Section 101(13) of title 38,

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United States Code, defines "compensation" as "a monthly payment made by the Secretary to a veteran because of service-connected disability, or to a surviving spouse, child, or parent of a veteran because of the service-connected death of the veteran occurring before January 1, 1957." The clothing allowance is an annual benefit that does not constitute compensation within this statutory definition of "compensation," which specifies that "compensation" is a "monthly payment."

c. Because the clothing allowance is not "compensation" (and is not "[p]ension" or "retirement pay") within the meaning of section 5304(c), section 5304(c) does not prohibit the payment of the clothing allowance to a veteran who is eligible for the allowance while the veteran is receiving active service pay.

d. A non-veteran serving on active duty cannot receive a clothing allowance prior to discharge because that person is not yet a veteran and therefore does not meet the eligibility criteria for a clothing allowance under section 1162.

DISCUSSION:

1. You have asked whether a veteran's return to active duty status terminates the individual's status as a veteran under 38 U.S.C. § 101(2). Section 101(2) defines the term "veteran" for purposes of title 38 to mean "a person who served in the active military, naval, or air service, and who was discharged or released therefrom under conditions other than dishonorable." See also 38 C.F.R. § 3.1(d). The General Counsel has previously stated that "[a] person who has attained the status of a veteran based on separation from service does not lose that status merely because he or she has entered into a new period of active duty." VAOPGCPREC 10-2004. The plain language of the statutory definition of "veteran" chosen by Congress, read in the context of the statutory scheme for veterans' benefits, clearly supports this conclusion. Veteran status is based on the facts of active service and discharge or release under conditions other than dishonorable. Once service is performed and discharge under satisfactory circumstances occurs, veteran status is established. The status is based on the occurrence of past events, and the occurrence of those events does not change regardless of later active service.

2. Except as specifically provided otherwise, a basic eligibility requirement for receipt of any VA benefit is that a person must be a veteran, or the spouse, surviving spouse, child, or parent of a veteran. However, a person who meets the statutory definition of "veteran" may nonetheless become ineligible for certain VA benefits upon his or her return to active duty, not because he or she is no longer a veteran, but because statutes may otherwise limit eligibility. For

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example, 38 U.S.C. § 5304(c) prohibits the payment of pension, compensation, or retirement pay for any period for which the person receives active service pay:

Pension, compensation, or retirement pay on account of any person's own service shall not be paid to such person for any period for which such person receives active service pay.

See also 38 C.F.R. § 3.700(a)(1)(i) (stating same rule). Therefore, a person who meets the statutory definition of "veteran" maintains that status upon return to active duty, but may lose entitlement to certain VA benefits while receiving active service pay.

3. You have also asked whether the prohibition on concurrent receipt of pension, compensation, or retirement pay and active service pay in 38 U.S.C. § 5304(c) applies to the clothing allowance provided by 38 U.S.C. § 1162. Under section 1162, VA must pay an annual clothing allowance to a veteran with a service-connected disability that results in damage to the veteran's clothing:

The Secretary under regulations which the Secretary shall prescribe, shall pay a clothing allowance of \$716 per year to each veteran who--

(1) because of a service-connected disability, wears or uses a prosthetic or orthopedic appliance (including a wheelchair) which the Secretary determines tends to wear out or tear the clothing of the veteran; or

(2) uses medication which (A) a physician has prescribed for a skin condition which is due to a service-connected disability, and (B) the Secretary determines causes irreparable damage to the veteran's outer garments.

38 U.S.C. § 1162. The clothing allowance is not "[p]ension, compensation, or retirement pay." Therefore, an otherwise eligible veteran serving on active duty who is receiving active service pay may receive the clothing allowance concurrently with his or her active service pay.

4. The clothing allowance is not "pension" or "retirement pay" for purposes of section 5304(c) because the clothing allowance is granted on the basis of a service-connected disability. 38 U.S.C. § 1162. In contrast, "pension" is granted on the basis of a qualifying period of wartime service and either unemployability or age, regardless of the existence of a service-connected disability, 38 U.S.C. §§ 101(15), 1513, 1521, and "retirement pay" is granted based on the specific state of being retired from the military for reasons such as sufficient length of service or physical disability, see 10 U.S.C. §§ 101(a)(15), 1201(a) (authorizing retired pay for disability retirement), 1401 (governing computation of

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disability retired pay), 3911, 3914, 3929 (authorizing retired pay for longevity retirement), 3991 (governing computation of longevity retired pay).¹

5. Regarding “compensation” as that term is used in section 5304(c), for purposes of title 38, United States Code, Congress defined the term “compensation” as follows:

The term “compensation” means a monthly payment made by the Secretary to a veteran because of service-connected disability, or to a surviving spouse, child, or parent of a veteran because of the service-connected death of the veteran occurring before January 1, 1957.

38 U.S.C. 101(13). VA regulations define “compensation” consistently with this statutory definition. 38 C.F.R. § 3.4(a) (defining “compensation” as “a monthly payment made by the Department of Veterans Affairs to a veteran because of service-connected disability”). Although, like “compensation,” the clothing allowance is paid on the basis of a service-connected disability, the clothing allowance is not a “monthly payment” as contemplated by Congress’ definition of “compensation.” Instead, the clothing allowance is an annual payment pursuant to section 1162 and VA’s implementing regulations. See 38 C.F.R. § 3.810. Section 1162 specifically states that the clothing allowance shall be a fixed amount “per year.” 38 U.S.C. § 1162. In contrast, Congress has provided that the rates of “compensation” for a disability shall be paid “monthly.” 38 U.S.C. § 1114; see also 38 U.S.C. § 101(13) (defining “compensation” as “a monthly payment”). Congress therefore clearly contemplated that “compensation” includes only those payments made monthly. Further, had Congress intended to include other periodic payments, such as annual payments, in the definition of “compensation,” then Congress could have done so as it did in the definition of “pension.” 38 U.S.C. § 101(15). In relevant part, 38 U.S.C. § 101(15) defines “pension” as “a monthly or other periodic payment.” Id. (emphasis added). Had Congress intended to include periodic payments other than monthly payments in the definition of “compensation,” it could have included “or other periodic payment” in the definition of “compensation” in section 101(13).

6. The conclusion that the clothing allowance does not fall under the statutory definition of “compensation” is consistent with VA’s past determinations on this issue. In VAOPGCPREC 20-92, the General Counsel addressed the clothing allowance as it relates to the definition of “compensation” in section 101(13). The

¹ Title 10 and title 38, United States Code, refer to both “retired pay” and “retirement pay.” For the purposes of this opinion, we consider them equivalent. See, e.g., 10 U.S.C. § 1413a(i)(2); 38 U.S.C. § 1311(a)(2).

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General Counsel concluded that the clothing allowance is not “compensation” within the contemplation of the statutory definition:

The annual clothing allowance provided for by 38 U.S.C. § 1162, which is not paid monthly (see 38 C.F.R. § 3.810(a)), clearly is not compensation within the contemplation of these statutory definitions [including 38 U.S.C. § 101(13)]

VAOPGCPREC 20-92 (O.G.C. Prec. 20-92). Specifically, VAOPGCPREC 20-92 addressed whether the clothing allowance was subject to the provisions of 38 U.S.C. § 5313, which limit the payment of certain benefits to veterans incarcerated for conviction of a felony. In relevant part, section 5313 provides:

[A]ny person who is entitled to compensation or to dependency and indemnity compensation and who is incarcerated in a Federal, State, local, or other penal institution or correctional facility for a period in excess of sixty days for conviction of a felony shall not be paid such compensation or dependency and indemnity compensation, for the period beginning on the sixty-first day of such incarceration and ending on the day such incarceration ends

38 U.S.C. § 5313(a)(1) (emphasis added). In VAOPGCPREC 20-92, the General Counsel determined that the clothing allowance is not “compensation” limited by section 5313 because the clothing allowance is not paid monthly. Although VAOPGCPREC 20-92 addressed the clothing allowance in the context of limitations on payments to incarcerated veterans, the opinion relied upon the statutory definition of “compensation,” which applies to all of title 38, United States Code.² We adopt the same analysis in concluding that the clothing allowance is not “compensation” because the clothing allowance is not paid monthly.

7. We note that four years after issuance of VAOPGCPREC 20-92, Congress enacted section 502 of Public Law 104-275, Veterans’ Benefits Improvements Act of 1996, Pub. L. No. 104-275, § 502(a), 110 Stat. 3322, 3341 (codified at 38 U.S.C. § 5313A), which was intended to abolish payment of the clothing allowance to veterans incarcerated for a felony conviction if such veterans were furnished clothing without charge by the custodial institution. S. REP.

² VAOPGCPREC 20-92 also addressed the definition of “compensation” applicable to section 5313 only, which states that, “[f]or purposes of this section . . . [t]he term “compensation” includes disability compensation payable under section 1151 of this title.” Section 1151 provides monthly benefits for veterans disabled by treatment or vocational rehabilitation. This definition is not applicable to the questions addressed in this opinion.

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No. 104-371, at 24 (1996). While Congress clearly sought to change the result of VAOPGCPREC 20-92 for policy reasons, the legislative history of Public Law 104-275 contains nothing to suggest that Congress disagreed with the General Counsel's conclusion in VAOPGCPREC 20-92 that the clothing allowance is not "compensation" for title 38 purposes.

8. We note that, under VA regulations at 38 C.F.R. § 3.810, implementing 38 U.S.C. § 1162, a veteran must make an initial application for the clothing allowance and re-apply annually thereafter. 38 C.F.R. § 3.810(c). In VAOPGCPREC 10-2004 we held that VA should process the claims of veterans who have returned to active duty in the same fashion as it would had the veterans not returned to active duty. Specifically, in VAOPGCPREC 10-2004, the General Counsel held that:

If a veteran's return to active duty temporarily prevents VA from providing a necessary medical examination or taking other action necessary to a proper decision on the claim, VA may suspend or defer action on the claim until the necessary actions can be accomplished. VA may not deny a claim solely because the veteran has returned to active duty or solely because the veteran is temporarily unavailable for a necessary examination due to his or her return to active duty.

Id. Therefore, a veteran's successful annual application for the clothing allowance is not precluded by active duty service.

9. You have also asked whether an individual on active duty, but who has not yet been discharged, may receive a clothing allowance. If this person has never been discharged from active duty, the person could not satisfy the discharge-or-release requirement for "veteran" status. Such status is a prerequisite for payment of a clothing allowance. Because section 1162 uses the defined term "veteran" and does not explicitly provide for payment to active duty personnel who are not veterans, the clothing allowance is not payable to a non-veteran on active duty.



Will A. Gunn

cc: Acting Under Secretary for Benefits (20)