

CITATION: VAOPGCPREC 15-89
Vet. Aff. Op. Gen. Couns. Prec. 15-89

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TEXT:

QUESTIONS PRESENTED:

(a) When should nonrecurring or contingent income be counted for purposes of income computation under the improved-pension program?

(b) May awards for death pension be retroactively terminated or adjusted when death-pension recipients are found ineligible due to receipt of excess income?

(c) Specifically, should life insurance, interest, dividend income, or earnings be counted from the date of their actual receipt or from the effective date of the pension award?

COMMENTS:

1. In each case, awards of death-pension benefits (under the improved-pension program) were terminated based upon subsequent receipt of excess income from life-insurance proceeds, and in some instances other sources, which made the veteran's surviving spouse no longer eligible for pension benefits. The benefits had been awarded based upon the expected income reported by the surviving spouse, which did not include the insurance proceeds or other income. The awards were terminated by the regional office retroactive to the effective date of the award.

2. The Board questions these results in light of unpublished General Counsel opinions (Undigested Opinion, 7-29-86 (8-25 Income); Undigested Opinion, 8-19-87 (8-25 Income)) which held that Social Security benefits are countable for pension purposes from the date of their actual receipt rather than from the often retroactive effective date of their award. In this regard, the Board cites paragraph 9.03a(2) of VA Manual M21-1 (relating to when contingency income is countable) as being inconsistent with 38 U.S.C. § 503(a) (relating to determination of income) and 38 C.F.R. § 3.271(a) (making payments countable as income in the years FN1 in which received).

3. For the reasons set forth below, it is our opinion that retroactive reduction or discontinuance of benefits based upon receipt of excess contingency or nonrecurring income cannot be made earlier than the end of the month in which the excess income was received. Accordingly, to the extent that adjustments retroactive to an earlier effective date of award were made in the subject cases based on such income, they were unsupported by the applicable statutes and

regulations.

4. The chronology of events for these cases are set forth below in tabular form:

	Case 1	Case 2	Case 3	Case 4
Veteran's death	2/9/86	3/20/83	3/23/86	11/15/84
Death-pension application	2/24/86	3/31/83	4/2/86	11/26/84
Award letter	5/27/86	7/18/83	5/13/86	1/16/85
Effective date of award	2/1/86	3/1/83	4/1/86	12/1/84
Type of excess income	Life insurance	Social Security & life insurance	Life Insurance	Salary & life insurance
Receipt of excess income	5/28/86	Unclear (life insurance reported June 1983)	Unclear (reported to be 4/19/86)	Unclear (Employment began 1/8/85)
Effective date of termination	2/1/86	3/1/83	4/1/86	12/1/84

5. In the first and third cases, no legal rationale was articulated for the retroactive discontinuance of benefits to the effective date of the award. However, the claimants were advised that they were at fault for not reporting on their applications that they expected to receive life insurance. According to the Statement of the Case in the second case, 38 U.S.C. § 3012(b)(9) (making the effective date of a reduction or discontinuance of pension by reason of an erroneous award "based on an act of commission or omission by the beneficiary" the effective date of the award) was the basis for retroactive discontinuance. See also 38 C.F.R. § 3.500(b)(1). In the fourth case, the Statement of the Case states at page 4 that "the laws governing the administration of Public Law 95-588 benefits require that during the initial year of entitlement income be annualized from the beginning of the year." In further support, 38 C.F.R. § 3.661(b)(2)(i), 38 C.F.R. § 3.32(b), and VA Manual M21-1, chapter 9, p 9.20d(1) are cited among other sections not relevant here.

6. Many details of the income-computation method for determining pension rates which appear in 38 C.F.R. § 3.271, et seq., are not statutorily mandated, but are the product of the VA's authority under 38 U.S.C. § 210(c)(1) to promulgate necessary or appropriate regulations. Section 3.271(a) of title 38, Code of Federal Regulations, provides that (unless excluded under section 3.272) "payments of any kind from any source shall be counted as income during the 12-

month annualization period in which received". Under 38 C.F.R. § 3.271(f), when an individual is unable to predict with certainty the amount of countable annual income, the amount of pension payable is calculated based upon the greatest amount of anticipated countable income (i.e., the annual pension rate is reduced by such amount) "until the end of the 12-month annualization period, when total income received during that period will be determined and adjustments in pension payable made accordingly."

7. Under 38 C.F.R. § 3.273(a), for the purpose of determining initial entitlement, the monthly rate of pension payable to a beneficiary is calculated by reducing the maximum pension rate by the beneficiary's annual rate of countable income on the effective date of entitlement and dividing by 12. However, under subsection (b)(2) of the same section, when there is a change in the beneficiary's annual rate of income, the monthly pension rate is calculated using the new annual rate of countable income "on the effective date of the change in the annual rate of income." Under subsection (c) of that section, nonrecurring countable income is added to the beneficiary's annual rate of income for a 12-month period commencing on the effective date on which it is countable.

8. Under 38 U.S.C. § 3012 and 38 C.F.R. § 3.500, the effective date of a rating which results in the reduction or discontinuance of an award will generally be in accordance with the facts found. Pursuant to 38 U.S.C. § 3012(b)(4)(A), the effective date of a reduction or discontinuance by reason of a change in income shall be the last day of the month in which the change occurred (except as provided in section 3112, which relates to adjustments based upon Social Security increases). Section 3.500(c) references 38 C.F.R. § 3.660 as controlling with respect to the effective date of a rating in cases involving annual income. Section 3.660(a)(2), titled "Contingency," provides, in pertinent part, that "w here reduction or discontinuance of a running award of improved pension ... is required because of an increase in income, the reduction or discontinuance shall be made effective the end of the month in which the increase occurred."

9. The two General Counsel opinions which the Board cites, see paragraph 2, are not directly on point and are not dispositive of the issue. Further, as unpublished decisions, they do not have any precedential value. Nonetheless, the analysis in unpublished opinions may be useful in analyzing other fact situations. The first unpublished decision, of July 29, 1986, addressed the issue of whether, for the purpose of computing a veteran's income for improved-pension purposes, Social Security disability benefits should be counted in the year of their actual receipt, pursuant to 38 C.F.R. §3.271(a), or from the effective date of the award, pursuant to paragraph 9.03a(2) of Manual M21-1 (relating to treatment of contingency income.) Noting that the Board is not bound by administrative guidelines, the opinion held that 38 C.F.R. § 3.271 controls and that only income which was actually received during the year in question should be counted. The opinion of August 19, 1987, extended the same rule to Social Security benefits based on attained age. We note that 38 C.F.R. § 3.271(g)

specifically provides that compensation paid by the Social Security Administration "will be considered income as received", although the opinions did not turn on this subsection.

10. The reasoning set forth in the above opinions relating to the relationship between the manual and the regulations is equally applicable to the instant cases. A manual such as M21-1 can provide guidance to field offices but can in no way effect a substantive rule binding upon claimants, since manual provisions are not promulgated in compliance with the requirement of public notice and comment in regulatory development set forth in 38 C.F.R. § 1.12. FN2 In any event, extended discussion of VA Manual M21-1 is unnecessary, insofar as it is a guideline not binding upon the Board. See 38 U.S.C. s 4004(c); 38 C.F.R. § 19.1; Carter v. Cleland, 643 F.2d 1, 6 (D.C.Cir.1980). To the extent that the manual is inconsistent with the statutes or regulations or attempts to substantively affect the rights of claimants without satisfying the requirements of notice and public comment under 38 C.F.R. § 1.12 and the Administrative Procedure Act, it is of no force and effect.

11. Section 3.271(a), by its terms, makes income countable in the year of receipt. However, it does not indicate precisely when the income is to be deemed received or whether under certain circumstances the pension rate should be retroactively adjusted based upon the income received. Further analysis of 38 C.F.R. § 3.271(a) is unnecessary, however, as other regulatory provisions, discussed below, provide the answer to the questions raised.

12. Initially, there is some question as to whether the countable income involved in these fact situations should be deemed "nonrecurring" income or "contingency" income. Although "nonrecurring" income is not defined in the regulations, an inheritance is given as an example of this type of income in 38 C.F.R. § 3.273(c). Under the section 306 pension program, gifts from individuals, inheritances, and commercial life-insurance proceeds were all treated alike, as income in the year received, as we discussed in our unpublished opinion on June 16, 1981, Digested Opinion, 6-16-81 (Veteran). We see no basis for treating these categories of income differently under the improved-pension program; thus, lump-sum payments of insurance proceeds may be considered nonrecurring income. "Contingency" income is described in 38 C.F.R. § 3.660(a)(2), for section-306 and old-law pension purposes, as an increase in income which "could not reasonably have been anticipated based on the amount actually received from that source the year before." Regardless of whether the income concerned here is deemed "nonrecurring" or "contingency", the same result would ensue. Our conclusions are equally applicable to insurance proceeds, dividend and interest income, and earnings to the extent that such income is either nonrecurring or unanticipated.

13. As noted, under section 3.273(c), nonrecurring countable income "shall be added to the beneficiary's annual rate of income for a 12-month period

commencing on the effective date on which the nonrecurring income is countable." Pursuant to 38 U.S.C. § 3012(b)(4)(A), the effective date of a reduction by reason of a change in income shall be the last day of the month in which the change occurred. Similarly, under 38 C.F.R. § 3.660(a)(2), for the improved-pension program, a reduction of pension benefits based upon an increase in income due to contingency income is made effective the end of the month in which the increase occurred. Thus, for improved-pension cases, regardless of whether income is termed nonrecurring or contingent, the pension-rate adjustment should be made as of the last day of the month in which the income was received.

14. The rating board in at least one of the subject cases posited that the reduction was necessitated "by reason of an erroneous award based on an act of commission or omission by the beneficiary, or with the beneficiary's knowledge" and that under 38 U.S.C. § 3012(b)(9), the adjustment date was therefore the effective date of the award. See also 38 C.F.R. § 3.500(b)(1). This theory apparently arises from the inference that the claimant/beneficiary knew at the time of application that a life-insurance settlement would be received.

15. We have two serious reservations regarding such a determination. First, life-insurance proceeds do not change the income rate of the claimant until the date on which they are received, so there has really been no erroneous payment based upon a mistake of fact. Indeed, the sections discussed above relating to nonrecurring income and contingency income provide a legal basis for not counting such income until received, for pension-computation purposes.

Second, even one expecting to receive life-insurance proceeds may be unable to accurately foresee the timing or amount of such payment, in light of possible contesting claims, administrative delays, etc. Therefore, although we defer to the Board and the Department of Veterans Benefits as to findings of fact, we reject any automatic inference that a failure to report such proceeds in advance constitutes "an act of commission or omission by the beneficiary" within the meaning of section 3012(b)(9).

16. We also disagree with the apparent citation by one regional office of 38 C.F.R. § 3.661(b)(2)(i) as authority for retroactive termination of improved pension in this type of case. The relevant subsection is captioned "Failure to return questionnaire." Under basic rules of statutory construction, all language in a statute, including headings, is presumed to have force and effect. See 1A, 2A J. Sutherland, Statutory Construction §§ 1807, 21.04, 46.06, 47.14 (4th ed. 1985). This rule is equally applicable to regulations. Id. § 31.06. Moreover, section 3.661 addresses income and net worth questionnaires and their impact upon entitlement to benefits. When subsection (b)(2)(i) is read in context, it is clear that the subsection is applicable where an annual income questionnaire or eligibility verification report is not filed and is not applicable to cases involving income changes during the year.

17. Under VA Manual M21-1, whenever there is an increase in income which impacts upon entitlement to pension benefits, there must generally be an adjustment of the pension-benefit rate. For contingency income, the adjustment is made beginning at the end of the month of the date of receipt of the excess income, pursuant to 38 C.F.R. § 3.660(a)(2). See, e.g., VA Manual M21-1 p 9.23. However, paragraph 9.20d(1) provides the general rule that "deductions from and additions to income during the initial year will necessitate annualization from the beginning date of the award;" in other words, the actual income received during the year first will be calculated and an adjustment of the amount payable will be made retroactive to the effective date of the award. However, there is an exception for contingency income, and this type of retroactive adjustment, if applied with respect to nonrecurring or contingency income, would be inconsistent with the applicable statutes and regulations cited above.

18. In view of the above, it is our conclusion that, although retroactive adjustments may be made in death-pension awards based upon a survivor's receipt of excess income, in claims involving nonrecurring or contingent income such adjustments should be retroactive only to the end of the month in which the excess income was received. We leave for the Board's consideration the date of receipt of the excess income for the cases discussed in this opinion.

19. A copy of this opinion is being forwarded to the Chief Benefits Director. The claim files for the subject claims are returned herewith.

HELD:

For purposes of the improved-pension program, under 38 U.S.C. § 3012(b)(4)(A), the effective date of a reduction or discontinuance by reason of a change in income is the last day of the month in which the change occurred. See also 38 C.F.R. §§ 3.273(c) (nonrecurring income added to annual rate of income for 12-month period commencing on effective date on which such income is countable), 3.660(a)(2) (reduction or discontinuance required by increase in income effective at end of month in which increase occurred). Regardless of whether excess income is deemed "nonrecurring" or "contingent", any necessary adjustment or termination to benefits based upon receipt of such income should be made as of the last day of the month in which the income was received and should not be made retroactive to an earlier date. Lump-sum payments of insurance proceeds may be considered nonrecurring income. Life insurance proceeds, dividend and interest income, and earnings should be treated consistently to the extent they are nonrecurring or unanticipated and should be counted from the last day of the month of their receipt for improved-pension purposes.

1 We note that the improved-pension regulations are being revised to substitute the term "12-month annualization period" for the term "year," to codify and clarify current practice that a "year" denotes a 12-month period not necessarily corresponding to a calendar year. See 53 Fed. Reg. 23,235 (1988), which

effected this change as to section 3.271. Unless otherwise indicated, we use "year" to mean any period of 12 months' duration.

² See also section 102 of the Veterans' Judicial Review Act, Pub.L. No. 100-687, 102 Stat. 4105, 4106 (1988), which removed the statutory exemption of the VA from certain requirements of the Administrative Procedure Act, via new 38 U.S.C. § 223(b).

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