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**TEXT:**

Applicability of Pub.L. No. 101-237, § 111 to Section-306 Pension

**QUESTIONS PRESENTED:**

A. Do the liberalizing provisions of section 111 of Pub.L. No. 101-237, amending 38 U.S.C. § 3203 (a)(1), which limits the amount of VA pension an institutionalized veteran having neither spouse nor child may be paid, apply to veterans receiving section-306 pension?

B. Was VA correct in applying section 307 of Pub.L. No. 95-588, which previously raised the aforementioned limit, to recipients of section-306 pension?

**COMMENTS:**

1. Section 111 of Pub.L. No. 101-237, 103 Stat. 2062, 2064-65 (1989), amends 38 U.S.C. § 3203 (a)(1), effective February 1, 1990, to (1) raise the limitation on the amount of monthly VA pension payments to veterans being furnished domiciliary or nursing-home care by VA from \$60 to \$90, (2) extend the period of VA-furnished domiciliary care after which such limitation applies from two to three months (the same period as for VA-furnished nursing-home care), and (3) eliminate such limitation entirely in the case of veterans being furnished hospital care by VA. These liberalizing provisions clearly apply to veterans receiving "improved pension" under Pub.L. No. 95-588, 92 Stat. 2497 (1978). One of the issues here is whether they also apply to VA pension still being paid under the provisions in effect prior to enactment of that act.

2. Under sections 306(a)(1) and (b)(2) of Pub.L. No. 95-588, any person entitled to receive VA pension under the prior pension laws, i.e., pension payable under the previous provisions of 38 U.S.C. §§ 521, 541, or 542, which arose out of Pub.L. No. 86-211, 73 Stat. 432 (1959) ("section-306 pension"), and pension protected by section 9(b) of Pub.L. No. 86-211 ("old-law pension"), as in effect on December 31, 1978, could elect to receive improved pension instead. For an individual who was eligible to make such an election but did not do so, sections 306(a)(2) and (b)(3) provide that:

Such person ... shall continue to receive pension at the monthly rate being paid to such person on December 31, 1978, subject to all provisions of law applicable to basic eligibility for and payment of pension under such person's pension program, as in effect

on December 31, 1978, subject to the income ceilings specified for that pension program.

Sections 306(a)(3) and (b)(4) go on to provide for automatic increases in the maximum income limitations and spousal-income exclusion, as applicable, for those receiving pension under the previous pension programs by the same percentage as the automatic cost-of-living adjustments under the improved- pension program.

3. In a separate provision, section 307, Pub.L. No. 95-588 also increased the amounts specified in section 3203(a)(1), from \$50 to \$60, effective January 1, 1979. These increases have been consistently applied by VA to both those receiving section-306 pension and those receiving improved pension. 38 C.F.R. § 3.551(c) (issued 44 Fed. Reg. 45930, 45941 (1979)). However, they have not been applied to those receiving old-law pension. 38 C.F.R. § 3.551(b).

4. When determining the meaning of an act, one must first examine the language in which it is framed. If that language is clear and unambiguous on its face, then there is no need to interpret it. 2A N. Singer, Sutherland Statutory Construction § 46.01 (4th ed. 1984). On its face, the language of sections 306(a)(2) and (b)(3) appears to exclude both section-306 and old-law pension from the increase in the amount of pension payable contained in section 307 of Pub.L. No. 95-588, as well as the increase and other liberalizing provisions of section 111 of Pub.L. No. 101-237. Sections 306(a)(2) and (b)(3) both provide that such pension shall be paid "subject to all provisions of law applicable to basic eligibility for and payment of pension" in effect for the relevant program on December 31, 1978. The effective date of section 307 and the other amendments to title 38 implementing the improved-pension program was January 1, 1979. Pub.L. No. 95-588, § 401.

5. While the term "basic eligibility" could be interpreted to mean only those service, disability, income, and estate requirements in effect for that program, and not provisions such as section 3203(a), we must assume that Congress intended to include something more than basic eligibility when it included the additional term "payment of pension." See 2A N. Singer, supra, § 46.06. The phrase "payment of pension" would seem to apply generally to all those provisions concerning payment of pension which are in addition to basic eligibility. See generally Digested Opinion, 6-16-81 (Veteran) (end-of-the- year effective-date rule at 38 C.F.R. § 3.660(a), a provision applicable to payment of pension). We believe a provision relating to the amount of pension which may be paid to an institutionalized pensioner must be considered a "law applicable to ... payment of pension" within the meaning of section 306.

6. The language used in section 306 differs somewhat from the language of section 9(b) of Pub.L. No. 86-211, the original saving provision for old-law pension. Section 9(b) provided, in part, that:

Nothing in this Act shall affect the eligibility of any person receiving pension under title 38, United States Code, on June 30, 1960, for pension under all applicable provisions of

that title in effect on that date for such period or periods thereafter with respect to which he can qualify under such provisions.

Section 9(b) referred only to the effect of provisions of "this Act" and thus did not necessarily preclude changes in eligibility based on subsequent changes in law. However, section 306(b) of Pub.L. No. 95-588 repealed section 9 of Pub.L. No. 86-211 and substituted subsection (b)(3), which used the identical operative saving language for old-law pension as was used in subsection (a)(2) for section-306 pension.

7. A review of the legislative history of these provisions fails to provide any basis for deviating from the plain meaning of the language used in section 306, nor for treating section-306 pension differently from old-law pension in this regard. There was no reported discussion on the floor of either house or in committee of the effect of these changes to section 3203 on those still receiving pension under the prior pension programs. Section 6 of Pub.L. No. 86-211 amended section 3203 by removing pension from the limitations specified for compensation and retirement pay, i.e., half benefits or \$30 after six-months' institutionalization and by creating a new subsection containing a new pension limitation, \$30 after two-months' institutionalization. This office interpreted section 9 of Pub.L. No. 86-211 as maintaining the old section 3203 rules for old-law pension. Digested Opinion, 9-29-59 (8-16a Reduction During Hospitalization). This interpretation was reflected in an amendment to 38 C.F.R. § 3.551 which created separate subsections, subsection (b), containing the old half-benefits or \$30 limitation after six-months' institutionalization which applied to old-law pension, compensation, and retirement pay, and subsection (c), containing a \$30 limit after two-months' institutionalization which applied only to section-306 pension. See 27 Fed. Reg. 7677 (1962), as amended at 27 Fed. Reg. 8793-94 (1962).

8. For several years after enactment of Pub.L. No. 86-211, Congress, in amending the pension laws established by that statute, specified whether changes would apply to old-law pension. Pub.L. No. 87-544, 76 Stat. 208 (1962) (applied to old-law pension); Pub.L. No. 87-556, 76 Stat. 245 (1962) (did not apply); Pub.L. No. 89-362, 80 Stat. 30 (1966) (applied). It is clear that Congress understood the limitations contained in section 3203 for institutionalized veterans after enactment of Pub.L. No. 86-211 to apply only to section-306 pension and not to old-law pension, see S. Rep. No. 1700, 87th Cong., 2d Sess. 1-2, reprinted in 1962 U.S. Code Cong. & Admin. News 2012, and H.R. Rep. No. 1460, 87th Cong., 2d Sess. 1-2 (1962) (both relating to Pub.L. No. 87-566, 76 Stat. 245 (1962)); S. Rep. No. 1003, 89th Cong., 2d Sess. 1, reprinted in 1966 U.S. Code Cong. & Admin. News 1915, 1916, and H.R. Rep. No. 1215, 89th Cong., 2d Sess. 1 (1966) (both relating to Pub.L. No. 89-362, 80 Stat. 30 (1966)), and made no attempt to change this result. Pub.L. No. 93-177, § 5, 87 Stat. 694, 696 (1973), raised the pension limitation for institutionalized veterans contained in section 3203 from \$30 to \$50. Nowhere in the legislative history is its applicability or lack of applicability to old-law pension specifically discussed. However, it seems clear from Congress' discussion of changing the \$30 limit after two-months' institutionalization, as applicable to those receiving pension under Pub.L. No. 86-211 but not to those receiving old-law pension, that Congress had in mind only revision of the limitation applicable to the former group

of pensioners. See, e.g., H.R. Rep. No. 398, 93d Cong., 1st Sess. 2, reprinted in 1973 U.S. Code Cong. & Admin. News 2759; S. Rep. No. 373, 93d Cong., 1st Sess. (1973).

9. When Congress created the improved-pension program and raised the limitation from \$50 to \$60 in Pub.L. No. 95-588, there was no discussion of the limitation's applicability to those receiving pension under the previous pension programs who had not elected improved pension. See, e.g., S. Rep. No. 1016, 95th Cong., 2d Sess. (1978); H.R. Conf. Rep. No. 1768, 95th Cong., 2d Sess., reprinted in 1978 U.S. Code Cong. & Admin. News 5702. And again, when Congress enacted Pub.L. No. 101-237, raising the limitation from \$60 to \$90 and otherwise liberalizing section 3203(a), there was no discussion of its applicability to old-law or section-306 pension. See 135 Cong. Rec. S235-37 (daily ed. January 25, 1989) (remarks on introduction of S. 13 by Sen. Cranston); 135 Cong. Rec. S12548 (daily ed. October 3, 1989) (remarks by Sen. Cranston on S. 13); 135 Cong. Rec. H9106, H9111, and 135 Cong. Rec. S16454, S16457-58 (daily ed. November 20, 1989) (remarks of Rep. Montgomery and Sen. Cranston on H.R. 901). However, it is clear that Congress was focusing on changing the \$60 limitation being applied after two or three-month's institutionalization and not the different limitation still being applied in old-law-pension matters. E.g., S. Rep. No. 126, 101st Cong., 1st Sess. 75, 96- 98 (1989). Thus, it appears that Congress did not intend to liberalize the limitations applicable to old-law pension. Absent some indication in the terms of the statute or in the legislative history, we find it difficult to ascribe to Congress an intention to liberalize the rules applicable to one class of "grandfathered" pensioners, i.e., section-306 pensioners, and not to another class, i.e., old-law pensioners. Since we have concluded that Congress did not contemplate liberalizing the limitations applicable to old-law pensioners, and there is no indication of congressional intent to treat section-306 pensioners differently, it follows that Congress also contemplated no change in the limitations applicable to section-306 pensioners.

10. Turning to the history of section 306 itself, it appears this provision was intended merely to protect current pension recipients from having their benefits reduced or terminated as a result of the new law. E.g., S. Rep. No. 1016, supra, at 83. Thus, current recipients not electing to enter the new program would essentially have the laws affecting their eligibility and payments frozen, with certain specified exceptions, as of the time of enactment of the new pension law. Congress expressed no intention to permit "grandfathered" pensioners not opting to participate in the new program to take advantage of subsequent changes in the pension laws which might result in benefit to them.

11. A review of the history of the regulations implementing these provisions fails to shed any light on the reasons why VA took the approach it did in applying the changes made to section 3203, by Pub.L. No. 95-588 and subsequent legislation, to section-306 pension, but not to old-law pension. None of the explanations or comments published in the Federal Register regarding amendments to 38 C.F.R. § 3.551 addresses this issue.

12. When VA implemented the improved-pension program pursuant to Pub.L. No. 95-588, section 3.551(c) was amended to increase the amount of the limitation from \$50 to

\$60. The amendment made clear that section 3.551(c) applied to both section-306 and improved pension, but not to old-law pension which was still covered by section 3.551(b). The only explanation given for this was:

Subsection (c) has been amended to make its provisions conform to the hospital reduction rules of Public Law 95-588 which apply to both section 306 and improved pension. Effective January 1, 1979, no section 306 or improved pension in excess of \$60 monthly is payable to a veteran without dependents after the end of the third full calendar month following admission for VA hospital or nursing home care, or after the second full calendar month following admission for VA domiciliary care.

Transmittal Sheet 659 (1979). See also 44 Fed. Reg. 45,930-931 (1979).

13. Longstanding contemporaneous constructions of statutes by executive officers charged with their implementation are frequently considered significant aids in statutory interpretation. 2A N. Singer, supra, § 49.03. However, such construction cannot control over the plain terms of the statute itself and is not followed where unreasonable or clearly erroneous. Id. § 49.04. Further, the weight of an agency interpretation is reduced if circumstances suggest the agency failed to give an issue adequate consideration. Id. § 49.05. Also, while Congress may in some circumstances be considered to have acquiesced in an agency interpretation of a statute, such acquiescence is generally not found where nothing indicates the legislature had its attention directed to the administrative interpretation. Id. § 49.10. Here, while it appears that Congress was sent a draft of the proposed regulations implementing Pub.L. No. 95-588, there is no suggestion in our records that the subject changes to section 3.551 were called to Congress' attention in the comprehensive package, or that Congress focused on this provision at that time, or thereafter. Further, there is nothing to indicate that this office considered the applicability of the section 3203 changes during development of the regulations.

14. In light of the plain meaning of the words used in section 306, the lack of any legislative history to indicate that Congress meant otherwise, the total lack of any justification for VA's interpretation in the regulatory history or elsewhere, and the apparently arbitrary distinction drawn between section-306 and old-law pensioners in spite of the identical operative language applied to each in section 306, we must conclude that the increases and other liberalizations made to the limitation contained in section 3203(a) by Pub.L. Nos. 95-588 and 101-237 were not intended to apply to either section-306 or old-law pension and that, in so applying the increased limits provided in these statutes to section-306 pension, VA exceeded its statutory authority.

**HELD:**

A. The provisions of section 111 of Pub.L. No. 101-237, which amend 38 U.S.C. § 3203 (a) to liberalize the laws governing reduction of pension payable to institutionalized veterans without dependents, do not apply to veterans receiving section-306 pension,

i.e., pension payable under laws in effect on December 31, 1978, which arose out of the 1960 revisions to the pension laws pursuant to Pub.L. No. 86-211, or to veterans receiving old-law pension, i.e., pension payable under laws in effect on June 30, 1960, and protected after enactment of Pub.L. No. 86-211.

B. The increase in the amount payable to institutionalized pensioners without dependents provided for in section 307 of Pub.L. No. 95-588 should not have been applied to veterans receiving section-306 pension.

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