

Date: February 8, 1994
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O.G.C. Precedent 3-

From: General Counsel (022)

Subj: Proposal to accumulate and distribute annually monthly payments to certain National Service Life Insurance beneficiaries

To: Deputy Under Secretary for Benefits (20)

QUESTION PRESENTED:

May the Department of Veterans Affairs (VA) consolidate monthly benefits of National Service Life Insurance (NSLI) beneficiaries into one annual payment in order to protect against misuse of benefit checks?

COMMENT:

1. You have stated that the VA Insurance Service has learned that monthly NSLI checks sent to beneficiaries in the Philippines are being altered at an alarming rate to reflect higher dollar amounts, resulting in a loss to the American and Philippine banking systems estimated in the millions of dollars per year. It is suggested that the small monetary amounts reflected on the NSLI checks make them relatively easy to alter. On the other hand, issuing a single annual check for the amount of the monthly benefits for each year would make alteration more difficult, in addition to reducing the number of checks available to be altered. You have requested our opinion as to whether there is statutory authority for VA to accumulate monthly NSLI payments and issue a single annual check consisting of the accumulated monthly payments. For the reasons set forth below, we conclude that there is no statutory authority for accumulating monthly payments except for monthly payments of less than \$5 on policies which matured prior to August 1, 1946.

2. Payment of NSLI benefits is governed by 38 U.S.C. § 1916, as to policies which matured before August 1, 1946, and 38 U.S.C § 1917, as to policies maturing on or after August 1, 1946. Section 1916(a) states:

(a) Insurance which matured before August 1, 1946, is payable in the following manner:

(1) If the beneficiary to whom payment is first made was under thirty years of age at the time of maturity, in two hundred and forty equal monthly installments.

(2) If the beneficiary to whom payment is first made was thirty or more years of age at the time of maturity, in equal monthly installments for one hundred and twenty months certain, with such payments continuing during the remaining lifetime of such beneficiary.

(3) If elected by the insured or a beneficiary entitled to make such an election under prior provisions of law, as a refund life income in monthly installments payable for such period certain as may be required in order that the sum of the installments certain, including a last installment of such reduced amount as may be necessary, shall equal the face value of the contract, less any indebtedness, with such payments continuing throughout the lifetime of the first beneficiary.

Section 1916(e) further provides that "[w]hen the amount of an individual monthly payment of such insurance is less than \$5, such amount may, in the discretion of the Secretary, be allowed to accumulate without interest and be disbursed annually."

3. Section 1917(b) provides:

(b) Insurance maturing on or after August 1, 1946, shall be payable in accordance with the following optional modes of settlement:

(1) In one sum.

(2) In equal monthly installments of from thirty-six to two hundred and forty in number, in multiples of twelve.

(3) In equal monthly installments for one hundred and twenty months certain with such payments continuing during the remaining lifetime of the first beneficiary.

(4) As a refund life income in monthly installments payable for such period certain as may be required in order that the sum of the installments certain, including a last installment of such reduced amount as may be necessary, shall equal the face value of the contract, less any indebtedness, with such payments continuing throughout the lifetime of the first beneficiary; however, such optional settlement shall not be available in any case in which such settlement would result in payments of installments over a shorter period than one hundred and twenty months.

Section 1917 does not contain any provision similar to section 1916(e) authorizing VA to accumulate monthly NSLI payments of less than \$5 and to make a single annual payment. However, section 1917(c) provides in part:

If the option selected requires payment to any one beneficiary of monthly installments of less than \$10, the amount payable to such beneficiary shall be paid in such maximum number of monthly installments as are a multiple of twelve as will provide a monthly installment of not less than \$10. If the present value of the amount payable at the time any person initially becomes entitled to payment thereof is not sufficient to pay at least twelve monthly installments of not less than \$10 each, such amount shall be payable in one sum.

4. In 38 U.S.C. §§ 1916 and 1917, Congress has established several different optional methods for payment of NSLI

benefits. Except where a lump-sum settlement is selected under § 1917(b)(1), NSLI benefits under any of the optional plans are "payable" in "monthly installments." Because Congress has established a list of specific authorized methods of payment of NSLI benefits, it must be presumed that, absent a clearly expressed congressional intent to the contrary, NSLI payments may not be made in a manner not provided for in the statutory list. See National Railroad Passenger Corp. v. National Assoc. of Railroad Passengers, 414 U.S. 453, 458, reh'g. denied 415 U.S. 952 (1978) ("'when a statute limits a thing to be done in a particular mode, it includes the negative of any other mode.'"; quoting Botany Mills v. United States, 278 U.S. 282, 289 (1929)). Therefore, there is no general authority for NSLI benefits to be paid on an annual basis except as provided in the limited exception of section 1916(e).

5. Where Congress establishes specific, express exceptions to a statutory requirement, it will generally be presumed that those specific exceptions were the only ones that Congress intended to allow. See Andrus v. Glover Construction Co., 446 U.S. 608, 616-17 (1980) ("[w]here Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent"); Tennessee Valley Authority v. Hill, 437 U.S. 153, 188 (1978) (pursuant to principle of "expressio unius est exclusio alterius," Court concluded that, where Congress listed specific statutory exceptions, it intended that no other exceptions would apply). In 38 U.S.C. § 1916(e), Congress has provided an exception to the general provision for monthly payment of NSLI benefits, allowing the Secretary to accumulate monthly payments under certain circumstances. However, that exception has been expressly limited to cases where the policy matured prior to August 1, 1946, and the amount of the monthly payments is less than \$5. Because Congress has expressly identified certain limited circumstances under which monthly NSLI benefits may be accumulated and paid annually, it must be presumed that Congress did not intend to allow monthly

payments to be accumulated under other circumstances not provided for in the statute.

6. We note also that chapter 53 of title 38, United States Code, contains provisions authorizing the Secretary to withhold or discontinue payment of VA benefits in certain circumstances. See 38 U.S.C. § 5304 (prohibition on duplication of benefits); 38 U.S.C. § 5308 (withholding benefits of persons in territory of the enemy); 38 U.S.C. § 5313 (limitation on payments to persons incarcerated for conviction of a felony). However, nothing in chapter 53 authorizes the Secretary to withhold or accumulate monthly payments for the purpose of guarding against loss that may result from the illegal alteration of benefit checks. Therefore, because Congress has established several provisions authorizing VA to withhold payment in specific circumstances, it must be concluded that the VA may not withhold payment in other circumstances not provided for by statute.

7. The statutory construction principle of "expressio unius est exclusio alterius" may be overcome by a clearly expressed contrary legislative intent. See National Railway Passenger Corp., 414 U.S. at 458. However, we do not find any clear expression of congressional intent to authorize the Secretary generally to accumulate monthly NSLI payments and to pay them annually. Nothing in title 38, United States Code, indicates any such congressional intent. Moreover, to infer a general discretionary authority to accumulate monthly NSLI payments would render superfluous the specific provision of section 1916(e) authorizing the Secretary to accumulate only monthly payments of less than \$5. It is a well-established principle of statutory construction that statutes must be construed so as not to render any provisions superfluous. See United States v. Nordic Village, Inc., 117 L.Ed.2d 181, 189 (1992); Mountain States Telephone and Telegraph Co. v. Pueblo of Santa Ana, 472 U.S. 237, 249 (1985); United States v. Menasche, 348 U.S. 528, 538-39 (1954). Therefore, absent a clear expression of congressional intent, we may not infer a

general authority to accumulate payments which would render nugatory the express provisions of section 1916(e).

8. The disbursement and delivery of VA benefit payments is governed by 38 U.S.C. § 5120(a), which states that "[m]onetary benefits under laws administered by the Secretary shall be paid by checks drawn, pursuant to certification by the Secretary, **in such form as to protect the United States against loss** and payable by the Treasurer of the United States." (Emphasis added.) This provision authorizes the Secretary to prescribe the form of VA benefit checks in order to protect the United States against loss. However, it cannot reasonably be construed to authorize the Secretary to withhold benefits that are otherwise payable under law. In a 1972 decision, the VA Administrator (now Secretary) stated that section 5120(a) (formerly § 3020(a)) did not provide authority for VA to refuse to mail payment to an otherwise entitled beneficiary-payee merely because he had attempted to effectuate what might be tantamount to a prohibited assignment of his benefits. A.D. No. 993 (12-6-72). Similarly, in view of the express payment provisions of sections 1916 and 1917 and the express limited accumulation authority under section 1916(e), we cannot conclude that the Secretary's authority under section 5120(a) to prescribe the "form" of benefit checks would authorize the Secretary to withhold payment of benefits which are by statute "payable" in "monthly installments".

9. Section 5120(e) prescribes specific guidelines for the delivery of monthly benefit checks, requiring that when the first day of any month falls on a Saturday, Sunday, or holiday, the Secretary shall "to the maximum extent practicable" certify monthly benefit payments so that the checks are received by the beneficiaries on the Friday or other weekday immediately preceding such Saturday, Sunday or holiday. The legislative history of this provision indicates Congress' view that VA benefit recipients "often experience great hardship" in having to wait until after the weekend or holiday to cash their benefit checks,

and that legislation was necessary to ensure that delivery of benefit checks would not be unnecessarily delayed. S. Rep. No. 112, 95th Cong., 1st Sess. 21 (1977) reprinted in 1977 U.S.C.C.A.N. 2636, 2651. Congress' determination that VA benefit recipients may be adversely affected by a delay of a few days in receiving their benefit payments further counsels against inferring, absent clear congressional intent, a general authority to withhold or accumulate benefit payments that are due and payable under statute.

10. Therefore, we conclude that there is no express or implied statutory authority for the Secretary to withhold or accumulate monthly VA benefits except as provided in specific statutory provisions such as section 1916(e). Authority for accumulating and paying annually the monthly NSLI benefits in order to prevent misuse of benefit checks would require legislative action.

HELD:

No statutory authority exists which would allow VA to accumulate monthly NSLI benefits, other than monthly payments of less than \$5 on policies which matured prior to August 1, 1946, into a single annual payment.

Mary Lou Keener