

**Department of  
Veterans Affairs**

**Memorandum**

Date: January 4, 2010

**VAOPGCPREC 1-2010**

From: General Counsel (022)

Subj: Overpayment and Requirement to Offset from Compensation Paid Under 38  
U.S.C. § 1151 Amounts Recovered Under the Federal Tort Claims Act

To:

Regional Counsel (339/02)

**QUESTION PRESENTED:**

May the amount of a tort claim settlement required to be offset from 38 U.S.C. § 1151 disability compensation be reduced by the amount of an overpayment of such compensation, due to untimely discontinuance of compensation, that does not result in the creation of a debt or is waived?<sup>1</sup>

**HELD:**

If a veteran who has established entitlement to compensation for a disability under 38 U.S.C. § 1151(a) is awarded a judgment or enters into a settlement or compromise under the Federal Tort Claims Act based on the same disability, section 1151(b)(1) prohibits the Department of Veterans Affairs (VA) from paying compensation for that disability for any month beginning after the judgment, settlement, or compromise becomes final until the aggregate amount of compensation that would otherwise have been paid equals the amount of the judgment, settlement, or compromise. If VA erroneously continues to pay compensation to the veteran and the resulting overpayment does not result in establishment of a debt or VA waives recovery of the overpayment, VA may not apply the amount of the overpayment or the waived amount to reduce the amount required to be offset from future compensation payments.

**DISCUSSION:**

1. In the case underlying the request for this opinion, a veteran who was in receipt of compensation under 38 U.S.C. § 1151 in March 1997 obtained a settlement from the United States under the Federal Tort Claims Act (FTCA) in the amount of \$775,000 based on the same disability for which he is

<sup>1</sup> Although the opinion request characterizes VA's overpayment of 38 U.S.C. § 1151 compensation as having been waived by the Board of Veterans' Appeals (Board), the Board did not waive the overpayment amount but, rather, concluded that it was an "invalid" debt.

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compensated under section 1151.<sup>2</sup> If an individual is awarded a judgment or enters into a settlement or compromise under the FTCA based on a disability treated under section 1151(a) as if it were service connected, VA is prohibited from paying section 1151 benefits for that disability for any month beginning after the date such judgment, settlement, or compromise becomes final until the aggregate amount of benefits that would otherwise have been paid equals the total amount included in such judgment, settlement, or compromise. 38 U.S.C. §1151(b)(1). Thus, the regional office (RO) in this case should have discontinued compensation payments under section 1151 starting with the payment for April 1997 until the aggregate amount of compensation that would otherwise have been paid equaled \$775,000, the amount of the settlement. However, the RO failed to discontinue the veteran's section 1151 payments beginning with the payment for April 1997 and, instead, continued to pay the veteran compensation for the period from April 1997 through December 2005.

2. In July 2005, after the Director of the Compensation and Pension Service directed the RO to begin the required offset of section 1151 compensation, the RO notified the veteran of VA's proposal to discontinue section 1151 compensation payments effective April 1997 until \$775,000, the amount of the tort claim settlement, was offset. The RO stopped paying compensation in January 2006 and eventually made the discontinuance of compensation effective from April 1, 1997, which created an overpayment of \$234,372. The veteran both challenged the validity of the asserted debt and requested waiver of the overpayment through the RO's Committee on Waivers and Compromises. In February 2008, the Committee determined that the overpayment of VA compensation was validly created and denied a waiver of the overpayment in that amount. The veteran appealed to the Board.

3. In July 2008, the Board determined that the RO's payment of compensation for the period April 1997 through December 2005 resulted in an overpayment in the amount of \$234,372. The Board also determined that an overpayment in the amount of \$222,128 for the period from April 1997 through July 2005 was an "invalid" debt because it was solely the result of administrative error on the part of

<sup>2</sup> Under 38 U.S.C. § 1151(a), a disabled veteran or, in the case of a veteran's death, a survivor may under certain circumstances involving negligent VA medical treatment establish entitlement to compensation or dependency and indemnity compensation, respectively, "as if" the veteran's disability or death were service connected. Under the FTCA, 28 U.S.C. §§ 1346(b), 2671-2680, an action may be brought on a claim against the United States for money damages for personal injury or death caused by the negligent or wrongful act or omission of a Government employee acting within the scope of his or her employment. 28 U.S.C. § 1346(b)(1).

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VA without the veteran knowing that it was erroneous.<sup>3</sup> The question presented is whether the \$222,128 amount may be applied toward the aggregate amount (\$775,000) required to be offset from compensation payments.

4. VA generally is required to recover erroneous VA payments or overpayment of benefits. See *Edwards v. Peake*, 22 Vet. App. 57, 59 (2008); 38 U.S.C. § 5314(a) (generally requiring VA to deduct from future benefit payments a debt arising from a person's participation in a VA benefits program); 38 C.F.R. § 1.912a(a) (same); 38 U.S.C. § 5316 (authorizing VA to recover a benefits-related debt by bringing a suit if the person fails to appropriately respond to reasonable administrative efforts to collect the debt). However, VA may waive recovery of an indebtedness if a request for waiver is timely raised and recovery of the debt would be "against equity and good conscience." 38 U.S.C. § 5302(a). Before deciding a request for waiver, VA must first consider the validity of the debt. See 38 C.F.R. § 1.911 (once VA determines that a debt exists, VA must notify the debtor; the debtor may then challenge the existence or amount of the debt and request waiver of collection of the debt); *Schaper v. Derwinski*, 1 Vet. App. 430, 437 (1991) (holding that VA must first decide a veteran's challenge to the lawfulness of a debt asserted against him or her before adjudicating the waiver application); *Smith v. Derwinski*, 1 Vet. App. 267, 272 (1991) (noting that, "[b]y regulation, the VA has established a mechanism which permits an alleged debtor to dispute the VA's conclusion that a debt actually exists").

5. In this case, the Board properly first considered the validity of the debt before considering the veteran's request for waiver. The Board determined there had been an overpayment in the amount of \$234,372 because VA erroneously paid compensation to the veteran for the period from April 1997 through December 2005 following the veteran's tort settlement in March 1997, which violated 38 U.S.C. § 1151(b)(1)'s prohibition against duplicate payments. However, the Board also determined that, until the RO notified the veteran of the overpayment in July 2005, the veteran did not know that VA was prohibited from paying section 1151 compensation following the tort claim settlement until the aggregate amount of benefits that otherwise would have been paid equaled the total amount of the settlement. The Board concluded the veteran was not indebted to VA for the overpayment in the amount of \$222,128 paid from April 1997 through July 2005 because it was solely the result of administrative error on the part of VA. See 38 U.S.C. § 5112(b)(10); 38 C.F.R. § 3.500(b)(2). Therefore, VA may not recover from the veteran the amount of \$222,128 in erroneous compensation.

<sup>3</sup> The Board remanded the case to the RO to readjudicate the issue of waiver for the valid debt of \$12,244, which constituted overpayment from August 2005 through December 2005 following VA's July 2005 notice to the veteran of the overpayment.

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payments.<sup>4</sup> See 38 U.S.C. § 5314(b) (prohibiting offset of a debt from future benefit payments unless VA first makes a determination with respect to the beneficiary's dispute of existence or amount of debt).

6.t Regarding the question of whether VA may apply its overpayment in the amount of \$222,128 to reduce the amount it is required to offset from section 1151 compensation payments, we answer in the negative. The fact that VA erroneously paid the veteran \$222,128 in section 1151 compensation for that period from April 1997 through July 2005 or that the Board determined that \$222,128 overpayment to be an "invalid" debt does not obviate the statutory prohibition against paying section 1151 compensation until the aggregate amount of compensation that would otherwise have been paid equals the total amount of the tort claim settlement. Section 1151(b)(1) unambiguously prohibits duplication of payments following a tort claim settlement and operates independently of the laws governing overpayments and debt collection. No law authorizes VA to reduce, due to a failure of VA to timely suspend benefit payments, the amount of benefits required to be offset. Therefore, VA must discontinue paying tort compensation to the veteran until the amount of compensation that would otherwise have been paid equals \$775,000. Furthermore, we can discern no reason for distinguishing between an "invalid" debt and a waived debt. In either case, the veteran is permitted to keep compensation payments to which he was not rightfully entitled. The law prohibits VA from paying compensation until the entire amount of the tort settlement, \$775,000, is offset, and payments that the veteran is permitted to keep cannot be considered payments that were not made for purposes of this offset.t



Will A. Gunn

Attachment (claim folder)

<sup>4</sup> Consequently, the issue of waiver regarding the \$222,128 overpayment amount is moot.