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TEXT:

Administrative Error Decisions--38 C.F.R. § 3.500(b)(2); 38 U.S.C. § 3012(b)(9) and (10) (was O.G.C. Advisory Opinion 37-89 dated July 19, 1989)

QUESTION PRESENTED:

Whether "administrative error" under 38 U.S.C. § 3012 (b)(10), as implemented by 38 C.F.R. 3.500(b)(2), which provides for determining the effective date of reduction or discontinuance of benefits by reason of an erroneous award based solely on administrative error, is limited in scope to improper interpretation by the Department of Veterans Affairs (VA) of law, regulations, or existing agency instructions; thus, excluding errors of fact.

COMMENTS:

1. Public Law 87-825 amended 38 U.S.C. § 3012 to provide in relevant part as follows:

(b) The effective date of a reduction or discontinuance of compensation, dependency and indemnity compensation, or pension--

....

(9) by reason of an erroneous award based on an act of commission or omission by the beneficiary, or with the beneficiary's knowledge, shall be the effective date of the award; and

(10) by reason of an erroneous award based solely on administrative error or error in judgment shall be the date of last payment.

2. These two paragraphs were added to section 3012 simultaneously as part of a comprehensive congressional revision of sections 3010 and 3012 of title 38 to clarify, codify, and expand the various rules for determining the effective dates of awards of VA benefits. The practical effect of the two quoted paragraphs is to create three categories of error which must be considered: (a) errors based upon an act of commission or omission by the beneficiary; (b) an administrative error by the VA; or (c) an error in judgment by the VA. If an error is caused in whole or part by the beneficiary, an overpayment of benefits results. No overpayment is charged based upon a VA administrative error or error in judgment.

3. A careful analysis of the two paragraphs and their history reveals that the distinction between them is not whether the error is founded in a mistake of fact as opposed to a

mistake in law but, rather, upon which of the two parties, beneficiary or VA, is responsible for causing an erroneous payment of benefits. In this latter regard, either party could have made an "error of fact."

4. The legislative history of Public Law 87-825 indicates that the paragraph (10) "error in judgment" category was intended to include errors arising from a misunderstanding of instructions, regulations, or the construction of statutes. (S. Rep. No. 2042, 87th Cong., 2d Sess., reprinted in 1962 U.S. Code Cong. & Ad. News 3263, 3267.) Congress also indicated that new paragraph (9) was "a restatement of existing law as it relates to fraud broadened to include other acts or failure to act on the part of the claimant, not necessarily fraudulent in nature, which constitute misrepresentation or other furnishing of incorrect information or failure to furnish correct information " (Id. 3267.)

5. The same legislative history explains that the paragraph (10) provisions were necessary because:

Existing law is silent in this regard. The provision, with certain exceptions, follows current administrative practices. It is to be distinguished from paragraph 9 in that it may not be applied in any case where the erroneous payment results from an act of commission or omission by the beneficiary. (Id.)

6. We note that, although not expressly named as the actor under paragraph (10), the VA, alone, has the ultimate responsibility to administer benefits and to interpret and apply statutes, regulations, and existing instructions in adjudicating the claimant's right to benefits. It reasonably follows, therefore, that both categories described in paragraph (10) relate to errors in these areas made by the Department, not by the beneficiary or some third party. Thus, the law recognizes that no benefit overpayment should result if sole responsibility for the award error rests with the VA.

7. The Public Law 87-825 statutory scheme for allocating fault between the parties for an erroneous award was implemented through VA regulation (38 C.F.R. § 3.500(b)(2)) reflecting a liberal policy. The Compensation and Pension Transmittal Sheet for the regulation (TS 271, dated December 1, 1962), at iii, states: "An error which cannot be identified as a payee error (e.g., as to knowledge) will be classified as an administrative error." In other words, it was determined as a matter of policy that, as between the beneficiary and the VA, if fault could not clearly be ascribed to the beneficiary, it would be assumed by the VA. Moreover, whenever the evidence of record was equally susceptible of being interpreted as showing a lack of knowledge by the beneficiary and as showing that he or she knew but failed to disclose material facts to the VA, the doubt would be resolved in the beneficiary's favor.

8. The same transmittal, at iv, also states that category (b)(10) errors (administrative errors and errors in judgment) "include all administrative decisions of entitlement, whether based on a mistake of fact, misunderstanding of controlling regulations or instructions, or misapplication of law " (Emphasis added.) While not regulatory, this expression by the VA reflects both its understanding of congressional intent in

enacting section 3012(b)(10) and its own regulatory intent in implementing that provision. In this regard, we find it enlightening that the VA contemplated that administrative error under that section would include errors of fact. In our view, this position is eminently reasonable, appropriate, and consistent with the law.

9. We note section M-13, revised, PG 21-1, contains examples of acts or omissions with which the individual is chargeable and errors for which the Department is responsible. We have reviewed these examples and find that they accord with the Department policy discussed above.

10. We, however, note the inconsistent result reached in Administrator's Decision No. 61 (A.D. 61), dated June 22, 1931. This decision held that an erroneous VA adjudication based upon a defective review of the facts of record in a claim file may create an indebtedness against the veteran. We find that this decision was superseded by the aforementioned 1962 statute and, thus, is no longer for application. Clearly, whenever the VA makes an error in reviewing evidence of record which results in an erroneous award for which the veteran is totally blameless, the date of reduction/discontinuance would be fixed pursuant to section 3012(b)(10) based on "administrative error."

11. While administrative error should not further be applied in the restrictive manner earlier posited by A.D. 61, we would interject the caveat that neither should its use be extended beyond the scope of section 3012(b)(10) out of perceived equitable considerations.

12. It must be recognized that an overpayment can result from application of the reduction/discontinuance provisions of section 3012 other than paragraphs (b)(9) and (10) (or those same provisions as incorporated by section 3013), in accordance with the facts found. Thus, the statutory scheme contemplates establishing overpayment liability against the recipient for benefits paid, to which he or she was not entitled, when material fault in the creation of the debt lies neither with the beneficiary nor the VA, but with a third party. (Note: in some instances the third party; e.g., a school which has erroneously certified a veteran's enrollment, may be held jointly and severally liable for the overpayment. See 38 U.S.C. § 1785.) In other words, as between the blameless Federal benefits provider and blameless recipient of an overpayment, the law allocates responsibility therefor to the latter who actually reaped the benefit.

13. Nevertheless, the law, through a distinct set of provisions, provides an equitable mechanism for mitigating unduly harsh results in the aforementioned circumstances. Pursuant to 38 U.S.C. § 3012 recovery of a benefits overpayment may be waived if recovery would be against equity and good conscience. Congress specifically noted the availability to the beneficiary of this remedy at the time of enactment of 3012(b)(9) and 10. In this way, Congress has provided a just allocation of debt accountability.

14. Finally, we have reviewed OP.G.C. 7-72, and a September 18, 1972, memorandum for file, included with your submission, and find them consistent with the views of this opinion.

15. HELD:

A reduction or discontinuance of benefits based on an erroneous award will be made in accordance with 38 U.S.C. § 3012(b)(10) when it is determined that:

1. The beneficiary was not guilty of an act of commission or omission which, in whole or in part, caused the erroneous award of benefits and had no knowledge thereof; and

2. the VA either:

a. committed an administrative error, including an error of fact (e.g., the VA mistakes or overlooks the facts of record or makes a purely clerical error), or

b. committed an error of judgment (e.g., the VA fails to properly interpret, understand and follow existing Department instructions or regulatory or statutory requirements).

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