

CITATION: VAOPGCPREC 21-90  
Vet. Aff. Op. Gen. Couns. Prec. 21-90

DATE: 06-29-90

**TEXT:**

**SUBJECT:** Effective Date for Adjustment of Improved Pension Benefits  
Based on Change of Income Due to Social Security COLA

**QUESTIONS PRESENTED:**

A. Is a Social Security cost-of-living adjustment (COLA) distinguishable from other types of income for purposes of rate computation in the improved pension program? In other words, is there any basis for counting Social Security COLA income from the statutory effective date of the increased entitlement rather than from the date of actual receipt by the pensioner?

B. If Social Security COLA adjustments are not distinguishable from other income, what date does 38 C.F.R. § 3.660(a)(2) require as the effective date of a change in a VA pension due to a Social Security COLA?

**COMMENTS:**

1. In our opinion, Social Security COLA's are distinguishable from other types of income for purposes of counting income in the pension program. You cited a line of recent General Counsel opinions in your request in each of which it was held that income from a variety of sources, including Social Security lump sum payments as well as Social Security payments based on attained age, are countable for pension purposes from the date of actual receipt. You indicated that the rationale underlying these opinions, if applicable to Social Security COLA's, suggests that such increases should not be counted for pension purposes until the recipient actually receives the increased Social Security benefit. Such a conclusion, however, would overlook the distinguishing factor governing Social Security COLA's which is not present in the cited opinions.

2. Each of these earlier opinions dealt solely with the issue of the treatment of an increase in annual income. In the present case, the issue involves not only the treatment of an income increase, but a simultaneous increase in the veteran's maximum annual pension rate as well. Thus, the factor distinguishing this case from our earlier opinions is the special treatment for Social Security COLA's expressly mandated by Congress. In pertinent part, 38 U.S.C. § 3012(b)(4) provides that the effective date of a reduction of pension "by reason of--(A) change in income shall (except as provided in section 3112 of this title) be the

last day of the month in which the change occurred...." (Emphasis added).  
Section 3112 is, of course, the statutory provision indexing VA pension rates to Social Security COLA's.

3. Under the prior pension program, many VA pensioners (according to a 1977 Library of Congress Legislative Research Service study more than 80% of VA pensioners also received Social Security benefits) found themselves after a Social Security COLA receiving larger Social Security checks, but reduced VA pension checks. In many instances, a Social Security COLA required VA to recompute and reduce pensions because of the beneficiary's resulting increased annual income. The Government was accused of giving with one hand and taking back with the other.

4. In part as a solution to this situation, in 1978 Congress established the improved pension program. The remedy adopted by Congress, set forth in 38 U.S.C. § 3112(a), mandates that the Secretary of Veterans Affairs, whenever there is a Social Security COLA, "shall, effective on the date of such increase in Social Security benefit amounts, increase each maximum annual rate of pension...." (Emphasis added).

5. Under the statutory scheme devised by Congress, the benefit rate payable to a pensioner who also receives Social Security benefits is to be recomputed at the same percentage as a Social Security COLA and at the same time. Any doubt as to congressional intent in this regard is completely dispelled by references throughout the legislative history of the improved pension program. Perhaps most illustrative is the following statement in the conference report accompanying H.R. 10173 which ultimately was enacted as the "Veterans' and Survivors Pension Improvement Act of 1978." H.R. Conf. Rep. No. 1768, 95th Cong., 2d Sess. 29 (1978) states:

In the case of persons receiving pension benefits ... which are increased in accordance with the annual Social Security cost-of-living increase, the Senate amendment provides for the re-computation of the amount of pension to which a person is entitled under the restructured program at the same time that Social Security benefit payments are increased.... The Senate recedes, with the understanding that the purpose of the re-computation provision is fully achieved under the indexing and other provisions.

The conferees note that under both the House bill and the Senate amendment, there would be assurance that not only would such pensioners no longer suffer reductions in benefits attributable to cost of living increases in such non-VA benefits.... Under the restructured program, the benefit rate payable to pensioners who also receive Social Security benefits (or any benefits under any other Federal program indexed like Social Security) would be increased by the same percentage increase as Social Security benefits, and at the same time...." (Emphasis added).

6. The provisions of 38 C.F.R. § 3.660(a)(2) have no bearing on resolution of the matter at issue here. Rather, the regulation implementing section 3112(a) and the congressional intent upon which it is based is 38 C.F.R. § 3.273(b)(1). Section 3.273(b)(1) provides as follows:

Change in maximum annual pension rate. Whenever there is a change in a beneficiary's applicable annual pension rate, the monthly rate of pension payable shall be computed by reducing the new applicable maximum annual pension rate by the beneficiary's annual rate of countable income on the effective date of the change in the applicable maximum annual pension rate, and dividing the remainder by 12. (Latter emphasis added).

Thus, for pension computation purposes under section 3.273(b)(1), the effective date of a pension rate reduction occasioned by a Social Security COLA is not the date of actual receipt of the increased Social Security benefits, but rather it is the date of the change in the maximum annual pension rate mandated under 38 U.S.C. § 3112(a).

7. In the instant case, the veteran was assessed an over-payment of improved pension for the period October 1986 through February 1987. The overpayment was determined on the basis that the veteran, whose countable income for pension purposes was calculated solely on his own Social Security income, had failed to report in timely fashion that his spouse had also begun receiving Social Security benefits. In determining the amount of the overpayment, VA must take into account the increase in the veteran's annual pension rate resulting from the December 1, 1986 pension COLA. In computing the new pension rate, under 38 U.S.C. § 3112(a) and its implementing regulation, 38 C.F.R. § 3.273(b)(1), the increased Social Security benefits must be included in the beneficiary's annual income as of the date the increase occurred, i.e. December 1, 1986, notwithstanding the fact that actual receipt of the increased Social Security payments did not occur until January 1987.

**HELD:**

A Social Security COLA is distinguishable from other types of income changes for improved pension rate computation purposes under the provisions of 38 U.S.C. § 3012(b)(4) which expressly exclude such changes to income from the treatment mandated for all other types of income. Under 38 U.S.C. § 3112(a) and its implementing regulation, 38 C.F.R. § 3.273(b)(1), the effective date of a pension rate reduction occasioned by a Social Security COLA is not the date the increased Security benefits are actually received, but the date of the increase, i.e., the same date as pension rate increase mandated under section 3112.

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