

DATE: 07-17-90

CITATION: VAOPGCPREC 27-90  
Vet. Aff. Op. Gen. Couns. Prec. 27-90

**TEXT:**

**Subject:** Determination of Basic Entitlement

(This opinion, previously issued as General Counsel Opinion 18-79, dated February 8, 1979, is reissued as a Precedent Opinion pursuant to 38 C.F.R. §§ 2.6(e)(9) and 14.507. The text of the opinion remains unchanged from the original except for certain format and clerical changes necessitated by the aforementioned regulatory provisions.)

**QUESTIONS PRESENTED:**

- a. Should computation of the period, for which the education allowance is to be granted under title 38, section 1661(a), be based upon actual calendar months or, upon the months as defined by "corresponding days" (from any given day of one calendar month to the corresponding day of the next)?
- b. Should such computation for multiple periods of noncontinuous service be accomplished by combining the periods of service so as to make them continuous for computation purposes, and thus to eliminate intermediate fractions of months; or should periods of service remain discontinuous for computation purposes so that the intermediate fractional months may be counted as whole months for the purpose of computing the period of education allowance to be credited under title 38, section 1661(a) of the United States Code?

**COMMENTS:**

Section 1661, title 38, United States Code, provides in pertinent part as follows:

"(a) Except as provided in subsection (c) and in the second sentence of this subsection, each eligible veteran shall be entitled to educational assistance under this chapter or chapter 36 for a period of one and one-half months (or the equivalent thereof in part-time educational assistance) for each month or fraction thereof of the veteran's service on active duty after January 31, 1955. If an eligible veteran has served a period of 18 months or more on active duty after January 31, 1955, and has been released from such service under conditions that would satisfy the veteran's active-duty obligation, the veteran shall be entitled to educational assistance under this chapter for a period of 45 months (or the equivalent thereof in part-time educational assistance) ..."

The procedures applied by the Department of Veterans Benefits in computing the total period of service upon which eligibility may be based are set forth in chapter 2, Part II, M22-2. For a complete demonstration of these procedures that publication must be consulted. However, the method used for multiple periods of service is, in substance, to combine separate periods of service into a single continuous period of service by creating an artificial beginning date. This is accomplished by counting backwards from the individual's last discharge date as many days as the total days of countable service from all periods of service. (The number of days of countable service in a given month is in effect rounded to 30 regardless of the particular months involved.) The date thus determined becomes the individual's entry on active-duty date. In computing actual entitlement, the difference between the release from active-duty date (rounded up to the next higher month) and the "created" entry on active-duty date (rounded down to nearest month) is converted to months and multiplied by a factor of 1.5. The result is the number of months of entitlement. These procedures have been followed unchanged since the inception of the current GI Bill (see DVB Circular 20-66-36, Appendix F). They are applied regardless of whether the 1 1/2 for 1 formula is used or the automatic 18-month formula is used, except that in the latter case if the computation is a few days short of 18 months the actual days of total service is determined from a count of the days on the calendar instead of using the elapsed time method.

Section 1661(a) quoted above predicates eligibility upon "each month or fraction thereof" of qualifying active-duty service. The term "month" could be defined in a variety of ways. However, an analysis of general legal treatises indicates a general consensus described in 74 AmJur2d 592 as follows:

"At early common law the term 'month' meant a lunar month of 28 days, except in ecclesiastical matters or as applied to commercial paper, or unless a calendar month clearly appeared to be intended. While in the United States the common-law rule was followed in the early days of the republic, the term 'month' is not universally computed by the calendar, unless a contrary meaning is indicated by the statute or contract under construction. In addition, in order to avoid the confusion arising from conflicting constructions of the term, most jurisdictions have declared by legislative enactment that the term 'month,' when used without qualification, means a calendar month."

"A calendar month is the period of time running from the beginning of a certain numbered day up to, but not including, the corresponding numbered day of the next month, and if there is not a sufficient number of days in the next month, then up to and including the last day of that month."

A "calendar month" is defined in 86 C.J.S. 840 as follows:

"Calendar month. The term 'calendar month' is defined as meaning any of the months as adjusted in the calendar, now the Gregorian. April, June, September, and November now contain thirty days, and the rest thirty-one, except February, which has twenty-eight and, in leap year, twenty-nine, a month designated in the calendar, without regard to the number of days it may contain. It is not a month of any given number of days throughout the entire year, but contains the number of days ascribed to it in the calendar, and varies in length according to the Gregorian calendar; it may be twenty-eight, twenty-nine (in leap year), thirty, or thirty-one days."

In an opinion dated February 28, 1963, the General Counsel advised the Chief Benefits Director that "... it is my conclusion that the term 'month' and 'monthly' as used in title 38 U.S.C. must be interpreted as meaning calendar month in the sense of being one of the twelve portions into which the year is divided in the Gregorian calendar ..."

The current educational assistance program was first enacted by PL 89-358 which was in turn based upon S.9, 89th Congress. S. 9 provided:

"(a) Each eligible veteran shall be entitled to education or training under this chapter for a period equal to one- and one-half times the duration of his service on active duty ..."

In keeping with the fact that entitlement under the Korean conflict program was computed on the basis of one and one-half days of entitlement for each day of service, the quoted portion of S. 9 was interpreted to mean:

"The education or vocational training period would be calculated by multiplying 1 1/2 times each day of the veterans' active military service ..." Emphasis added. (Senate Report No. 269, 89th Congress, June 1, 1965).

Subsequently, the House passed S. 9 with amendments including a provision worded substantially as the current section 1661(a) (except providing for 1 month of benefits for each month or fraction of service). It is interesting to note that Senator Ralph Yarborough in commenting on the House language interpreted it as follows:

"Second. The House bill measures the duration of educational benefits available to the veteran by the formula of 1 day of training for each day of service, rather than the formula of 1 1/2 days of training for each day of service used in S. 9 and the Korean GI bill." Emphasis added. (Congressional Record 2-9-66, page 2615.)

Even though the language was based upon months of service rather than days of service, the Senator continued to view the provision as having the same effect. The only change he noted was the 1-to-1 rather than 1 1/2 -to-1 ratio. That is

not surprising since the greatest concern of the Congress at the time was whether benefits for the peacetime veterans covered by the bill should be as great as they had been for Korean conflict veterans. There appears to be no explanation for shifting from a daily to a monthly type standard, however. Thus, there is no explanation for the congressional intent in computing the partial months of service, other than Senator Yarborough's apparent understanding that the partial months would continue to be measured on a daily basis.

In an illustrative case recited in the request for an opinion the Board of Veterans Appeals determined entitlement on the basis of 1 1/2 months of entitlement for each partial Gregorian calendar month of service, as well as for whole Gregorian calendar months. Since the individual had 4 partial months of active duty (one at either end of both of the periods of his service) the effect of that method was to accord 6 months of entitlement for these partial months of service. The effect of such a procedure could be very liberal if, for example, only 1 day of service occurred in each of such 4 calendar months. Four days of actual service would equate to 6 months of entitlement. Of course, that would be an extreme example, but one that illustrates the method of calculation.

Under the DVB method, however, the practical effect of their method of computation is to use a corresponding day computation after first combining separate periods of service into a single term of service. Under that method only the final month of the period would ever be less than a full Gregorian calendar month. Thus, only 1 month of service in which 1 day of active duty occurs could become the basis for benefits.

The essential difference between the DVB method and the BVA method is that the former results in less entitlement. Absent any other considerations and given no clear congressional intent at time of enactment, we would be inclined to rule out the more restrictive DVB method. However, since it has been applied uniformly since 1966 when PL 89-358 was enacted and since Congress could have readily altered this approach and did not, we must conclude that to change the rule now would be inappropriate.

**HELD:**

a. The corresponding days method of defining calendar month, rather than the actual calendar month method, shall continue to be applied in administering 38 U.S.C. § 1661b. All includable periods of active duty should be combined and then the months of service computed as is done by DVB.

VETERANS ADMINISTRATION GENERAL COUNSEL  
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