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Vet. Aff. Op. Gen. Couns. Prec. 28-90

**TEXT:**

**Subject:** Qualifying Service Necessary for Obtaining Maximum Educational Assistance Entitlement

(This opinion, previously issued as General Counsel Opinion 17-79, dated April 25, 1978, 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) If a veteran has two periods of active duty for training pursuant to 10 U.S.C. § 511(d) followed by a period of active duty of 1 year or more, may both periods of active duty for training be combined in determining the veteran's total entitlement?

(b) Is a veteran entitled to 45 months of educational assistance allowance pursuant to chapter 34, title 38, United States Code, if he or she has less than 18 continuous months of active-duty service and less than 30 months of active duty overall (provided the issue is determined under the law prior to the enactment of Public Law 94-502)?

(c) If the answer to question two is yes, did the enactment of Public Law 94- 502 require a reduction of entitlement for these veterans?

**COMMENTS:**

Section 1652(a)(3), title 38, United States Code, provides:

"(3) For purposes of paragraph (1)(A) and section 1661(a), the term 'active duty' does not include any period during which an individual (A) was assigned full time by the Armed Forces to a civilian institution for a course of education which was substantially the same as established courses offered to civilians, (B) served as a cadet or midshipman at one of the service academies, or (C) served under the provisions of section 511(d) of title 10 pursuant to an enlistment in the Army National Guard or the Air National Guard or as a Reserve for service in the Army Reserve, Naval Reserve, Air Force Reserve, Marine Corps Reserve, or Coast Guard Reserve unless at some time subsequent to the completion of such period of active duty for training such individual served on

active duty for a consecutive period of one year or more (not including any service as a cadet or midshipman at one of the service academies)."

Subsections (a) and (c) of section 1661, title 38, United States Code, provided, in pertinent part, before the amendment of those subsections by Public Law 94-502, 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 his 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 his active duty obligation, he shall be entitled to educational assistance under this chapter for a period of 36 months (or the equivalent thereof in part-time educational assistance) plus an additional number of months, not exceeding nine, as may be utilized in pursuit of a program of education leading to a standard undergraduate college degree." (Emphasis added.)

"(c) Except as provided in subsections (a) and (b) and in subchapter V and VI of this chapter, no eligible veteran shall receive educational assistance under this chapter in excess of thirty-six months."

Subsections (a) and (c) of section 1661, title 38, United States Code, provide, subsequent to amendment by Public Law 94-502, in 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) ...." (Emphasis added.)

"(c) Except as provided in subsection (b) and in subchapters V and VI of this chapter, no eligible veteran shall receive educational assistance under this chapter in excess of 45 months."

VA Regulation 11021(B) provides as follows:

"(B) 'Active Duty'--means active duty as defined in VA Regulation 1006(B), except (B)(4). It also includes the initial period of active duty for training in the Reserves or National Guard pursuant to Section 511(d), title 10, United States Code, served subsequent to January 31, 1955 provided that at some time subsequent to the completion of such period of active duty for training the veteran serves on active duty for a consecutive period of 1 year or more (excluding service as a cadet or midshipman at one of the service academies). (38 U.S.C. 1652(a)(3), § 1682(b)). See VA Regulations 11040, 11042, 14136. This term does not include periods of excess leave without pay."

VA Regulation 11041(A)(1) and (2) provide:

"(A) General

"(1) A veteran with less than 18 months active duty service or a person on active duty who meets the requirements of VA Regulation 11040 will be entitled to full-time educational assistance for a period computed on the basis of 1 1/2 months (or the equivalent in part-time educational assistance) for each month or fraction of month of service on active duty on or after February 1, 1955, but not in excess of 36 months, except as provided in subparagraph (D). There will be excluded from the period of entitlement the periods specified in VA Regulation 11040(B) and (C).

"(2) A veteran who has served a continuous period of not less than 18 months on active duty on or after February 1, 1955, and who has been released from such service under conditions that satisfied his or her active-duty obligation, will be entitled to full-time educational assistance for a period of 36 months (or the equivalent in part-time educational assistance) and any additional period authorized under subparagraph (D). The periods specified in VA Regulation 11040(B) will be excluded in computing the 18-months period."

Section 511(d), title 10, United States Code, provides in pertinent part as follows:

"... Each person under this subsection shall perform an initial period of active duty for training of not less than twelve weeks to commence insofar as practicable within 180 days after the date of that enlistment."

An example of a case involving the issues raised by the question is as follows: The veteran had ACDUTRA under 10 U.S.C. § 511(d) for the periods from June 10, 1966, to September 2, 1966, and from October 2, 1966, to May 19, 1967. This service was followed by active duty from September 23, 1967, to December 11, 1968. The VARO authorized original entitlement of 34 1/2 months, but the Board of Veterans Appeals determined that under the law prior to Public Law 94-502 a veteran with 18 months of total active-duty service was entitled to 36 months of entitlement and up to 9 additional months of entitlement

to pursue a standard undergraduate college degree.

VR & E Transmittal Sheet 419, dated July 21, 1975, should also be considered.

The provisions found in section 1652(a)(3), title 38, United States Code, as to inclusion of periods of ACDUTRA were added by Public Law 93- 508.

Transmittal Sheet 419 was issued to amend VA Regulation 11021(B) to implement that change in law. We have reviewed the legislative history of Public Law 93-508 and we find no specific congressional intent for the application of the ACDUTRA provision other than the reference to 10 U.S.C. § 51(d) which restricts the period to the "initial period."

As Transmittal Sheet 419 provides:

"The amendment to VA Regulation 11021 specifies that the period of ACDUTRA to be includable shall be restricted to the initial period. This is intended to mean that the basic or primary first period of ACDUTRA is to be considered rather than other short periods such as periods for weekly meetings, summer camps or even extended periods such as assignment to the JAGC (Judge Advocate General's Corps) course for legal officers after completion of the 'initial' period. However, in some cases a person may have enlisted for the requisite 4-month minimum ACDUTRA period and after a month or two may have been returned to reserve status. The balance of the required ACDUTRA may then be completed at a later date. For the purposes of this regulation the longer of these two periods shall be considered to be the 'initial' period and shall qualify. The shorter shall be excluded and not qualify even though it shall have been served first, except as provided in example (G) below. Furthermore, it is not contemplated that the period of ACDUTRA to be includable shall exceed the 7-month maximum specified in section 511(d), title 10, U.S. Code."

The clear intent of this statement of policy is that only the period of ACDUTRA which is longest or most to the advantage of the veteran shall be included.

Therefore, the answer to the first question is in the negative, or the reason that only the "initial" period of ACDUTRA is included, as provided in section 511(d), title 10, United States Code, and VA Regulation 11021(B). In determining which of two periods of ACDUTRA is the "initial" one, the longest is usually so considered (unless it would be more advantageous to use the shorter period).

An example would be as indicated in example (G), Transmittal Sheet 419, where the shorter period is continuous with the subsequent mandatory 1-year period of active duty and, when so combined, the two periods equal 18 or more continuous months of active-duty service.

The second question requires a determination of maximum entitlement under the law prior to Public Law 94-502. Section 1661(a) provided that a veteran could receive a basic maximum of 36 months of benefits, plus up to 9 additional months under certain conditions if "... an eligible veteran has served a period of

18 months or more on active duty...." It should be noted that the additional 9 months is not provided for in the first clause of section 1661 wherein the individual earns entitlement on the basis of 1 1/2 months for each month of service, up to a maximum of 36 months. Also, it should be noted that the second clause grants the automatic basic maximum of 36 months plus conditional 9 months only if the individual served "a period" of 18 months or more.

The precise meaning of the phrase "a period" has not previously been determined as related to the 18-month period of service contemplated by section 1661. However, a similar requirement of "a period of" more than 180 days of service is specified for the purpose of basic eligibility for educational and loan guaranty benefits in section 1652, title 38, U.S.C., and has been considered. (OP.G.C. 9-74; OP.G.C. 1-68.) In each of these two decisions the regulatory requirement of continuity was held to be proper despite the omission of the word "continuous" in the statute. As the opinions state: "The statutory language 'a period of more than 180 days' is neither vague nor ambiguous. It clearly prescribes a single period of active duty." (38 U.S.C. § 1652(a).)

It is reasonable to assume that the same meaning shall be given to that portion of section 1661, title 38, United States Code, which requires "... a period of 18 months or more on active duty...." In both cases the statutory language refers to a single period. The addition of the word "continuous" in the VA Regulation 11041(A)(2) does not restrict the statutory language but merely emphasizes that the period shall be a single period.

Thus, under the provisions of law prior to Public Law 94-502, the person with a total of 30 or more months of active duty (which does not include a continuous 18-month period), qualified for 36 months of benefits under the formula in the first sentence of 38 U.S.C. § 1661 not 45 under the automatic provision of the second sentence of that section. If during the total 30-month period of active duty the person had a period of 18 continuous months of service, the individual qualified automatically for 36 months of basic entitlement, plus up to 9 additional months under the circumstances required by section 1661(a). Based upon the facts assumed in the second question, the individual could not have acquired 45 months of entitlement. The individual could only have obtained entitlement equal to 1 1/2 times the number of months of total active duty, up to a maximum of 36 months.

Although the question is restricted to the law prior to Public Law 94-502, it should be noted that the same logic applies after the adoption of that law. The only difference is that the person with a continuous 18 month or more period of active duty automatically gets 45 months of entitlement instead of the qualified 36 months plus 9 under the earlier provisions. The answer to question three is moot due to the answer to question two.

The question does not directly inquire whether the ACDUTRA period to be counted must be continuous with the insuring 1 year or more of active duty, but from the foregoing discussion it should be clear that it must. As was stated in Transmittal Sheet 419:

"... Certain criteria should be kept in mind. In order to qualify for 36 months of entitlement under VA Regulation 11041(A)(2) the 18 months of required service must be 'continuous.' Therefore, the period of ACDUTRA which is not immediately followed by a period of active service will only qualify under VA Regulation 11041(A)(1), but not under VA Regulation 11041(A)(2), because the service was not continuous."

With all due respect to the Board of Veterans Appeals we must disagree with the findings of the Board in the example recited above. In our opinion, based upon the analysis above, the VARO was correct in awarding basic entitlement of 34 1/2 months. The veteran could only be entitled to that amount of entitlement since even with the longest period of ACDUTRA, he never had 18 continuous months of service on active duty. (The shorter ACDUTRA period may not be included). The result would be the same under the law both prior to, and subsequent to, the enactment of Public Law 94-502.

**HELD:**

(a) If a veteran has two periods of active duty for training pursuant to 10 U.S.C. § 511(d) followed by a period of active duty of 1 year or more, only the "initial" period of active duty for training may be used in determining the veteran's entitlement.

(b) Under the law prior to PL 94-502, a veteran with less than 30 months of active-duty service and with less than 18 continuous months of such service is only entitled to 1 1/2 times the number of months of active-duty service up to a maximum of 36 months.

(c) The response given to question two (see holding (b) above) renders the third question moot and no holding is required as to that question.

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