

DATE: 03-11-91

CITATION: VAOPGCPREC 05-91
Vet. Aff. Op. Gen. Couns. Prec. 05-91

TEXT:

SUBJECT: Payment of Charges to State Soldiers' Homes from Appropriated Funds when Payments have been Discontinued under the Provisions of Public Law 86- 146.

(This opinion, previously issued as Opinion of the General Counsel 23-60, dated December 8, 1960, 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.)

Text:

1. This is in reply to your memorandum of June 6, 1960, asking the following questions:

"1. Is the amount payable under the provisions of PL 86-146 to be considered amounts retained by such home from any payments of pension or compensation made to such veteran?

"2. Are such payments made under PL 86-146 to be considered collections from any source on behalf of the veteran?

"3. Can simultaneous payments of the \$700 and the amount payable under the provisions of PL 86-146 be made?" The change to a \$2.50 per diem payment from the former \$700 per annum effected by PL 86-625, which was approved July 12, 1960, has no bearing on the discussion herein.

"4. If the answer to question 3 is in the negative, can the home, by not making application on behalf of the veteran or withdrawing the application which must be made under Section 643, Title 38, U.S.C. §, be entitled to receive the full payments which can be made under PL 86-146 for the veteran's care and maintenance?"

2. 38 U.S.C. § 3203(b)(3), as amended by PL 86-146, reads as follows:

"Where any benefit is discontinued by reason of paragraph (2) of this subsection the Administrator may nevertheless apportion and pay to the dependent parents of the veteran on the basis of need all or any part of the benefit which would otherwise be payable to or for such incompetent veteran. Paragraph (2) of this subsection shall not prevent the payment, out of any remaining amounts

discontinued under that paragraph, on account of any veteran of so much of his pension, compensation, or retirement pay as equals the amount charged to the veteran for his current care and maintenance in the institution in which treatment or care is furnished him, but not more than the amount determined by the Administrator to be the proper charge as fixed by any applicable statute or valid administrative regulation." (Emphasis supplied)

38 U.S.C. § 641 provides:

"(a) The Administrator shall pay each State at the per diem rate of \$2.50 per diem for each veteran of any war cared for in a State home (whether or not he is receiving hospitalization or domiciliary care therein) in such State who is eligible for such care in a Veterans' Administration facility; however, such payment shall not be more, in any case, than one-half of the cost of such veteran's maintenance in such State home.

"(b) The amount payable on account of any State home pursuant to subsection (a) for any veteran cared for therein shall be reduced—

(1) by one-half of any amounts retained by such home from any payments of pension or compensation made to such veteran; and

(2) unless the widows or wives of veterans of any war are admitted and maintained in such State home, by any other amounts collected in any manner from such veteran to be used for the support of such State home.

"(c) * * *

38 U.S.C. § 643 states:

"Payments on account of any veteran of any war cared for in a State home shall be made under this subchapter only from the date the Administrator receives a request for determination of such veteran's eligibility; however, if such request is received by the Administrator within ten days after care of such veteran begins, payments shall be made on account of such veteran from the date care began."

3. The pension or compensation which is discontinued pursuant to Public Law 86-146 is pension or compensation attributable to the veteran. Although the amount of the direct payment to an institution consistent with Public Law 86-146, is manifestly not a payment made directly to the veteran and thereafter retained by the home, this does not change the character of the transaction nor the source of the funds so paid. VA Regulation 5108(b) states:

"In any case in which a veteran, without wife or child, is hospitalized by the United States or a political subdivision thereof and his award of compensation, pension or Emergency Officers' retirement pay has been discontinued because his estate equals or exceeds \$1,500, an apportionment of the award otherwise

payable may nevertheless be made to a dependent parent, if any, based upon actual need as determined by the Chief Attorney. So much of any monthly remainder of the discontinued payments as equals the amount charged to the veteran for his current care and maintenance in the institution in which treatment or care is furnished, but not more than the amount determined by the Chief Attorney to be the proper charge as fixed by statute or valid administrative regulations, may be paid to the institution. The Chief Attorney shall recommend to the Adjudication activity the amount of either award." (Underscoring supplied.)

This is similar to the language of VA Regulation 5071(B) which reads:

"By Direct Payment. When payment of compensation, pension or emergency officers' retirement pay in behalf of a veteran rated incompetent by the VA who has no wife or child and is being furnished hospital treatment, institutional or domiciliary care by a political subdivision of the United States, has been stopped because his estate has reached \$1,500, the Chief Attorney may certify to the adjudication agency the amount to be released to the responsible official to pay for the cost of the veteran's current care and maintenance. The amounts paid in such cases shall not exceed the amount of the benefit otherwise payable less any amounts apportioned to dependent parents and in no even exceed the amount which the Chief Attorney shall determine to be the proper charge as fixed by statute administrative regulation."

It is clear from the foregoing that the source of payments to such institution is the remainder of the discontinued payments of pension or compensation. Accordingly, for purposes of 38 U.S.C. § 641(b)(1), such payments are to be considered "amounts retained by such home from any payments of pension or compensation made to such veteran." See Comp.Gen.Dec., B-120775, July 18, 1956. Your first question is answered accordingly.

4. Although the language contained in your second question differs slightly from the language of 38 U.S.C. § 641(b)(2), it is assumed that your question related thereto. 38 U.S.C. § 641(b)(2) provides for the reduction of amounts payable to State homes, unless the widows or wives of veterans of any war are admitted and maintained therein, "by any other amounts collected in any manner from such veteran to be used for the support of such State home." (Underscoring supplied.) In view of the answer to your first question, it is unnecessary to consider this aspect.

5. Federal aid payments to the States as provided by 38 U.S.C. § 641 have long been recognized as a supplement to the VA domiciliary system. Certain limitations, i.e., shall not be more than one-half of the cost of maintenance in the State home, for such payments have been incorporated in the Act, and have been part thereof for many years. It must be presumed that the Congress was aware of the limitations applicable to these Federal aid payments at the time PL

86-146 was enacted, but did not see fit to further limit or exclude the amount which might be paid in accordance with the provisions of 38 U.S.C. § 3203(b)(3) as amended by PL 86-146. In view of the fact that 38 U.S.C. § 641(b)(1), supra, clearly contemplates that State homes may retain amounts of the veteran's pension or compensation and 38 U.S.C. § 3203(b)(3) contains no limitation, by reason of the Federal aid payments, on the amount of discontinued benefits payable to the institution for the care and maintenance of the veteran, this office is of the opinion that there is no legal objection to the simultaneous payments of the \$700 (now \$2.50 per diem) and the amount payable under the provisions of PL 86-146, subject, of course, to the reduction provided for in 38 U.S.C. § 641(b)(1). Your third question is answered accordingly.

6. Although your fourth question, as stated, would not require an answer in view of the foregoing, we consider it advisable to comment thereon. 38 U.S.C. § 643, supra, provides for the application by the recognized State home for benefits under 38 U.S.C. § 641. Plainly, the statute is permissive not mandatory. Whether a State home elects to make application for this Federal aid on account of any veteran has been for individual State home determination. There is nothing in PL 86-146 which warrants a departure from the discretionary right heretofore exercised by State homes in making or withdrawing application for benefits provided by 38 U.S.C. § 641.

HELD:

1. Payments of pension or compensation to an incompetent veteran having neither wife nor child and being furnished domiciliary care in a State Home that is discontinued because his estate equals or exceed \$1500 are to be considered "amounts retained by such Home from any payments of pension or compensation made to such veteran."

2. There is no legal objection to the simultaneous payments to the State Home of the \$700 (now \$2.50 per diem) payable under 38 U.S.C. § 641(a) & the amount payable under the provisions of PL 86-146, subject to the reduction provided for in 38 U.S.C. § 641(b)(1).

3. 38 U.S.C. § 643 which provides for the making of an application by a State Home for benefits under 38 U.S.C. § 641, is permissive and not mandatory. There is nothing in PL 86-146 which warrants a departure from this discretionary right exercised by State Homes in making or withdrawing applications for benefits provided by 38 U.S.C. § 641.

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