

**Department of
Veterans Affairs**

Memorandum

Date: March 7, 2002

VAOPGCPREC 3-2002

From: General Counsel (022)

Subj: Disposition of Request for Waiver of Indebtedness in the Event of Death of the Veteran

To: Associate Deputy Assistant Secretary for Financial Policy (047G)

QUESTION PRESENTED:

Can a Committee on Waivers and Compromises continue to consider a veteran's request for waiver of indebtedness if the veteran dies while the waiver request is pending?

DISCUSSION:

1. This issue arises in the context of a decision issued by the United States Court of Appeals for Veterans Claims (CAVC) in DeLandicho v. Brown, 7 Vet. App. 42 (1994), in which the CAVC held that it could not continue to consider the compensation claims of veterans who died while their appeals of adverse Board of Veterans' Appeals (BVA) decisions were pending before it. You have requested our opinion as to the impact of this decision on consideration by a Committee on Waivers and Compromises of a request for waiver of indebtedness brought by a veteran-debtor who dies while the request is pending.

2. The statute authorizing the Secretary of Veterans Affairs to waive indebtedness is 38 U.S.C. § 5302. Section 5302(a) precludes recovery of a debt if the Department of Veterans Affairs (VA) determines that such recovery would be against equity and good conscience, if an application for relief is made within 180 days of the notice to the debtor of the debt. Section 5302(c) prohibits waiver where there is an indication of fraud, misrepresentation, or bad faith on the part of the person or persons having an interest in obtaining a waiver of indebtedness. Section 5302 does not address the possibility of continuation of waiver consideration following the debtor's death. However, the terms of that section do not appear to prohibit such continued consideration, nor does anything in the legislative history of the statute suggest an intention on the part of Congress to limit such consideration.

3. Section 1.962 of title 38, Code of Federal Regulations, which implements 38 U.S.C. § 5302, does explicitly provide for continuation of the waiver-consideration process after the death of the debtor. That regulation states, in pertinent part, “[t]he death of an indebted payee . . . during Committee [on Waivers and Compromises] consideration of the waiver request, shall not preclude waiver consideration.” This regulatory provision is reflected in VA Financial Policy Manual MP-4, Part I, ch. 8, para. 8B.05c.(2)b, which provides that the Committee should continue consideration of a waiver request and reach a decision despite the death of the debtor during the decisionmaking process. Although the manual provides for contact with the surviving spouse or estate representative concerning confirmation of continued consideration, the manual goes on the state that, “[u]nder no circumstances will a Committee cease consideration of a waiver request . . . solely because the debtor has died.” Id.

4. In DeLandicho, the CAVC examined the statutory scheme governing the award of compensation benefits under chapter 11 and concluded that that statutory scheme specifically provided for the termination of disability compensation upon a veteran’s death. See DeLandicho, 7 Vet. App. at 47. The CAVC also noted that the issues involved in an accrued benefits claim brought by a veteran’s survivors are not identical to those presented in a claim for compensation. 7 Vet. App. at 48. The CAVC found that a BVA decision on the compensation claim, which was in a state of non-finality due to an appeal to the CAVC, is rendered a nullity upon the veteran’s death. 7 Vet. App. at 52. The CAVC concluded that those seeking to be substituted for the decedents, because they could not be harmed by a nullified adverse BVA decision, had no standing to pursue the decedent’s appeal before the CAVC. DeLandicho, 7 Vet. App. at 53. Finally, the CAVC concluded that, upon the death of a veteran whose compensation claim was pending before the court, there remained no “case or controversy” for the court to decide. 7 Vet. App. at 48-49.

5. We do not consider DeLandicho controlling for purposes of continuation of consideration of a pending waiver request upon the death of the veteran requesting waiver. The DeLandicho decision turned on principles of jurisdiction and standing applicable to the CAVC’s consideration of an appeal of a BVA decision matters not pertinent in a VA regional office proceeding. Furthermore, the CAVC’s decision in DeLandicho was based in large part on the court’s conclusion that a veteran’s compensation claim terminates upon the death of the veteran. Merely because a claim seeking benefits under a statutory scheme providing prospective compensation for living veterans dies with the veteran, it does not follow that a waiver request pertaining to collection of an existing indebtedness that may be charged against the veteran’s estate also dies with the veteran. In the former case, continued consideration of the claim may be viewed as inconsistent with the statutory scheme, which provides periodic monetary benefits to meet the

subsistence needs of living veterans. In the latter case, VA is affirmatively attempting to collect a debt, the existence of which continues after the veteran's death and which may be chargeable to his or her estate. Collection of the indebtedness in such a case may under the circumstances be against equity and good conscience, and the objective of the waiver statute to permit forbearance in such cases would be furthered by continued consideration of the waiver request.

6. We also note that in Zevalkink v. Brown, 102 F.3d 1236, 1244 (Fed. Cir. 1996), cert. denied, 521 U.S. 1103 (1997), the United States Court of Appeals for the Federal Circuit affirmed the CAVC's dismissal of an appeal of a veteran's compensation claim upon the death of the veteran, observing that a claim for disability compensation does not survive the veteran. See also Richard ex rel. Richard v. West, 161 F.3d 719, 722 (Fed. Cir. 1998) (stating, in rejecting attempt by estate representative to pursue veteran's compensation claim, that, "a veteran's claim to disability benefits terminates at death"). However, the Zevalkink decision, like DeLandicho, was based on jurisdictional and standing considerations pertaining to judicial review. 102 F.3d at 1243. Further, as with DeLandicho, the different circumstances surrounding a compensation claim and a waiver request render such matters distinguishable for purposes of our analysis.

7. Of potentially greater significance to the issue presented is the CAVC's brief, per curiam, three-judge order in Penton v. Brown, 9 Vet. App. 368 (1996), a case in which a veteran had appealed a decision of the BVA denying his request for a waiver of recovery of an overpayment of pension and then died while the appeal was pending before the CAVC. The Secretary moved to dismiss the appeal based on the principle underlying the DeLandicho decision, and the CAVC granted the Secretary's motion. Penton is a published order authored by a panel of three judges and, as such, may be entitled to precedential effect as to its holding. See Bethea v. Derwinski, 2 Vet. App. 252, 254 (1992) (CAVC panel decisions are "binding precedent" in that court); U.S. Vet. App. Rule 30(a) (suggesting that published panel decisions of the CAVC may be cited as precedent). In any event, however, we believe that the precedential effect of Penton is rather limited.

8. The CAVC did not provide independent reasons for its decision in Penton, but rather simply summarized the Secretary's arguments in support of the motion to dismiss. These included: 1) if VA decided to pursue a claim against a veteran's estate, then an estate representative or a relative could request a waiver of the indebtedness under 38 C.F.R. § 1.965 and the evaluation of the application would be based on different facts from those relevant to the deceased veteran's waiver claim; and 2) in any event, the claim against the veteran became moot upon the veteran's death. Penton, 9 Vet. App. at 368-69. We regard these arguments to be of questionable

validity. First, while it is true that a waiver request by an estate representative or a relative of the deceased veteran may involve different facts and equities than those pertinent to the veteran's waiver request, current procedures, in particular VA Financial Policy Manual MP-4, Part I, ch. 8, para. 8B.05c.(2)b, contemplate continued consideration of the veteran's waiver request, without need of submission of a new request for waiver by a third party. Second, it does not appear that a claim against a veteran-debtor for payment of an indebtedness becomes moot on the veteran-debtor's death. See VA Financial Policy Manual MP-4, Part VIII, ch. 3, para. 3.04 (procedures for collection of debts from the estates of deceased debtors). In any event, although the CAVC related arguments made by the Secretary in support of his motion to dismiss, it is not clear that the court adopted those arguments as the basis for its decision.

9. The precise legal basis for the Penton decision is unclear. Although the court related several arguments made by the Secretary in support of his motion to dismiss, it did not indicate which if any of these arguments formed the basis for its decision. Furthermore, the court dismissed the case for lack of jurisdiction, indicating that the controlling factor in its decision was application of the statutory limitations on its own jurisdiction. Any other legal principles that may have led the court to the conclusion that it lacked jurisdiction are not stated in the court's order. Because the court did not explain the basis for its decision that it lacked jurisdiction, that basis cannot be considered as having any precedential effect.

10. Section 1.962 of title 38, Code of Federal Regulations, which was not mentioned in Penton, directs the Committees on Waivers and Compromises to continue consideration of a waiver request even if the veteran dies during the dependency of a request. Although the BVA is affirmatively precluded by regulation, 38 C.F.R. § 20.1302, from further consideration of an appeal upon the death of the appellant, there appears to be no legal principle or court precedent precluding continued consideration of a waiver request by a Committee on Waivers and Compromises after the death of the debtor.

HELD:

A Committee on Waivers and Compromises can continue consideration of a request for waiver of indebtedness brought by a veteran-debtor notwithstanding the death of the veteran-debtor while the waiver proceeding is pending.

Tim S. McClain