



**OVERPAYMENTS AND
ADMINISTRATIVE ERROR
HYPOTHETICAL ANSWER**

HYPOTHETICAL

- This hypo comes from a recent case decided by the U.S. Court of Appeals for Veterans Claims
 - *Dent v. McDonald*, 2015 U.S. App. Vet. Claims LEXIS 963
 - Decided on July 15, 2015

VET'S ARGUMENT

- The vet argues that the Board erred in finding that the debt created by VA's overpayment of non-service-connected pension benefits was valid because "payments from January 2009 through September 2009 were the result of VA's administrative error."

VET'S ARGUMENT

- Specifically, he contends that
 - (1) when he was initially granted pension, VA failed to notify him of the effect a subsequent award of SSA benefits would have on the amount of pension he was entitled to receive; and
 - (2) in light of his actions in January 2009 to alert VA of a possible overpayment and VA's failure to address the situation for nine months thereafter, he should be given the benefit of the doubt and all fault should be ascribed to VA.

VET'S ARGUMENT

- In the alternative, the vet argues that the debt was valid only from April 9, 2009—the date that he received the lump sum payment of retroactive RSDI benefits—because, prior to that date, there is no evidence that he “should have known” that he was not entitled to his pension benefits.
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- The vet asserted that, given his January 2009 letter, it was “VA’s own administrative delay in addressing new information that created a debt in this case, not [his] failure to disclose material facts.”

APPLICABLE LAW

- The relevant authority for determining the effective dates of reductions and discontinuances of pension is 38 U.S.C. § 5112 (formerly section 3012).

- This section provides in pertinent part:
 - (a) Except as otherwise specified in this section, the effective date of reduction or discontinuance of . . . pension shall be fixed in accordance with the facts found. (b) The effective date of a reduction or discontinuance of . . . pension—

 - (4) by reason of— (A) change in income shall (except as provided in section 5312 of this title [“Annual adjustment of certain benefit rates”]) be the last day of the month in which the change occurred; . . .

APPLICABLE LAW

- (9) by reason of an erroneous award based on an act of commission or omission by the beneficiary, or with the beneficiary's knowledge, shall be the effective date of the award; and (10) by reason of an erroneous award based solely on administrative error or error in judgment shall be the date of the last payment. 38 U.S.C. § 5112(b)(4), (9)-(10).

APPLICABLE LAW

- Based on the provisions above, under 38 U.S.C. § 5112(b)(4)(A), when reduction or discontinuance of a pension award is required because of an increase in income, the reduction or discontinuance is required to be made effective at the end of the month in which the increase occurred.
- Under 38 U.S.C. § 5112(b)(9), however, when reduction or discontinuance of a pension award is required because the “award” was erroneous based on an act of commission or omission by the beneficiary, or with the beneficiary’s knowledge, the reduction or discontinuance shall be the effective date of the award.

APPLICABLE LAW

- Further, under 38 U.S.C. § 5112(b)(10), when reduction or discontinuance of a pension award is required because the “award” was erroneous based on administrative error or error in judgment, the reduction or discontinuance is required to be made effective on the date of last payment.
- It is undisputed that the appellant had a “change in income.” The parties dispute, however, whether sections 5112(b)(9) and (10) are for consideration in circumstances **where, subsequent to the initial award of pension, there has been a “change in income”** and an assertion that VA made an “erroneous” payment of the “award.”

APPLICABLE LAW

- The answer to this question depends on whether “award” in sections 5112(b)(9) and (10) refers to a running award (i.e., recurring payments made subsequent to an initial award) or is limited, as the Secretary suggests, to the initial award of pension. **The dispute, therefore, lies in the meaning of “award.”**

STATUTORY INTERPRETATION

- The CAVC concluded that Congress intended that the latter two provisions apply to “the establishment or continuation of an award of payments which should not have been made” and to “an erroneous action”.
- Accordingly, congressional intent garnered from those two provisions is that “award” includes not only the establishment of an award but also award payments made subsequent to the initial grant of the award.
- In addition, there is nothing in the history of subsection (b)(4) of section 5112 that indicates an intent to carry a contrary definition of the term “award” or that precludes application of subsection (b)(9) or (b)(10) to running award payments made subsequent to a change in the beneficiary’s income.

STATUTORY INTERPRETATION

- In addition to the term used in the relevant subsections of section 5112, the Court looks to the overall structure of section 5112 for guidance in determining the plain meaning of the statute.
- In this regard, section 5112(b)(4)—as well as section 5112(b)(5), which contains the term “award”—is compatible with reading the term “award” as including “payments of the award.”
- **If there is a change in income and an erroneous payment of a pension award by VA based solely on administrative error, the effective date described in section 5112(b)(10) will apply.**

STATUTORY INTERPRETATION

- **If, however, the erroneous payment of the award is not based solely on VA administrative error, the effective date described in either section 5112(b)(4) or (b)(9) will apply.**
- Thus, after employing traditional tools of statutory construction, we hold that Congress has directly spoken to the precise question of the meaning of “award” and conclude that the term “erroneous award” as used in section 5112(b)(9) and (10) includes erroneous payments made subsequent to the initial award.

STATUTORY INTERPRETATION

- Accordingly, when erroneous payments of a pension award are made solely as a result of VA administrative error or error in judgment under section 5112(b)(10), no debtor overpayment is created because the reduction or discontinuance is required to be made effective on the date of the last payment. 38 U.S.C. § 5112(b)(10);
- When the erroneous payments are not solely the result of VA error, a debt or overpayment is created because the reduction or discontinuance is required to be made effective either the last day of the month in which the increase in income occurred (38 U.S.C. § 5112(b)(4)) or the date of the erroneous award (38 U.S.C. § 5112(b)(9)), not the date that VA made the last payment to the beneficiary (38 U.S.C. § 5112(b)(10)).

VALIDITY OF THE DEBT

- An error resulting in an overpayment will not be classified as a VA administrative error or error in judgment if the error is “based on an act of commission or omission by the beneficiary, or with the beneficiary’s knowledge.” 38 U.S.C. § 5112(b)(9); *see* 38 C.F.R. § 3.500(b)(1);
- “Knowledge” is “[a]n awareness or understanding of a fact or circumstance; a state of mind in which a person has no substantial doubt about the existence of a fact.”

HOLDING

- The Court held that the Board did not err in concluding that VA was not solely responsible for the erroneous payments to the veteran and that the creation of an overpayment was valid.
- The Board found that the vet had knowledge in January 2009 that “the amount of his pension benefits would change” following an award of SSI, as evinced by his “appropriate action to inform VA” of that award.
- The Board determined that the vet’s knowledge precluded a finding of sole administrative error because “[s]ole administrative error . . . entails no knowledge or fault on the part of the debtor.”

HOLDING

- In this case, the vet was notified at the time that he applied for pension that recurring monthly income from any sources “will be counted, unless the law says that they don’t need to be counted” and that receipt of monthly benefits is used by VA to “determine the amount of benefits you should be paid.”
- VA included Social Security as a potential source of recurring monthly income that should be disclosed in order for VA to determine the amount of benefits he would be paid.

HOLDING

- The veteran was also notified when he was awarded non-service-connected pension benefits that a change in income may affect his entitlement and may result in an overpayment that is subject to recovery.
- Although the vet was not specifically instructed to return any pension checks should his income increase, that was the logical action to take to avoid an overpayment and he did so.

HOLDING

- The cover letter enclosing the November 2008 RO decision granting pension benefits notified the veteran that he was awarded the benefit “because [he had] no income from February 12, 2008.”
- The cover letter further stated that it was his responsibility to inform VA right away if his “income or the income of [his] dependents changes (e.g., earnings, Social Security benefits, lottery and gambling winnings)” and if his “net worth increases (e.g., bank accounts, investments, real estate).”
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HOLDING

- In addition, an enclosed VA Form 21-8768 informed the vet that his rate of pension was dependent “upon the amount of family income” and that his benefits “may be affected by any changes in the amount of [that] income.”
- VA Form 21-8768 also specifically notified the vet of his responsibility “to report the total amounts and sources of all income and net worth for you and your dependents for whom you have been awarded benefits,” and explained that “[s]ome income is not countable” in determining the rate of pension and that “[b]enefit rates and income limits change frequently; however, you can find out what the current income limitations and rates of benefits are by contacting VA.”
- The vet did not assert that he did not receive a copy of VA Form 21-8768.

HOLDING

- Upon receiving the Social Security benefits in December 2008, The vet's income changed, and he notified VA in January 2009 by letter. VA did not respond to that letter until September 2009, and between 12/08 and 9/09 the veteran proceeded to receive and cash VA pension checks at the full, unadjusted rate.
- On this record, the Court cannot say that the erroneous payments to the veteran were the result solely of VA administrative error, pursuant to section 5112(b)(10).

QUESTIONS?