



# OVERPAYMENTS AND ADMINISTRATIVE ERROR HYPOTHETICAL

# HYPOTHETICAL

- The issue is whether a debt was properly created.
- **38 U.S.C. § 5112 - Effective dates of reductions and discontinuances**
  - (a) Except as otherwise specified in this section, the effective date of reduction or discontinuance of compensation, dependency and indemnity compensation, or pension shall be fixed in accordance with the facts found.
  - (b) The effective date of a reduction or discontinuance of compensation, dependency and indemnity compensation, or pension . . . . .

# HYPOTHETICAL

- (b)(4) by reason of
  - (A) change in income shall (except as provided in section 5312 of this title [38 USCS § 5312]) be the last day of the month in which the change occurred; and
  - (B) change in corpus of estate shall be the last day of the calendar year in which the change occurred;

# HYPOTHETICAL

- **(b)(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**
- **(b)(10) by reason of an erroneous award based solely on administrative error or error in judgment shall be the date of last payment.**

# FACTS

- The vet served on active duty in the U.S. Navy from September 1974 to July 1977.
- On February 12, 2008, the vet submitted a VA application for compensation and pension.
- The vet indicated that, at that time, he was not receiving any recurring monthly income.
- In November 2008, the RO awarded the veteran non-service-connected pension benefits in the monthly amount of \$931, effective February 12, 2008, the date of his claim.

# FACTS

- The letter explained that the veteran was “responsible to tell [VA] right away if . . . [his] income or the income of [his] dependents changes (e.g., earnings, Social Security benefits, lottery and gambling winnings).”
  - VA Form 21-8768, enclosed with the award letter sets forth several conditions that affect the right to pension payments, the first of which is a change in income. [VA form 21-8768]. With respect to that condition, the form states:

# FACTS

- “Your rate of pension depends upon the amount of family income and the number of dependents. Your benefits may be affected by any changes in the amount of family income and marital or dependency status of you or your dependents.”
  - a. Change in family income and net worth: You are required 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.”

# FACTS

- At the bottom of the form, under the heading “IMPORTANT,” is the following instruction: “Notify us immediately if there is a change in any condition affecting your right to continued payments. Failure to notify us of these changes immediately will result in an overpayment which is subject to recovery.”

# FACTS

- In January 2009, the veteran sent the RO a copy of a December 2008 Social Security Administration (SSA) decision awarding Supplemental Security Income (SSI).
- This letter indicated the veteran would receive SSDI benefits.
- In January 2009, the vet sent the RO a copy of the SSA award letter, his VA pension check dated December 31, 2008, which he voided, and a letter explaining why he was returning that check.

# FACTS

- That letter stated:
  - I was instructed by the local VA office to send you this. As I understand it[,] I am only to receive the difference between the VA disability and my SSDI [(Social Security Disability Insurance)].
  - (I do not know how much of my SS[A] check is SSI and how much is SSDI.)

# FACTS

- I believe though that I am only to receive from you  $[\$]985 - [\$]927 = \$58.00$  from your office. Please correct me if I am wrong. (I did not cash the check you sent me for January because I also received an SSA check.)
- I am writing VOID on the check I am returning.
- SSDI is an insurance-like program that pays a disabled person benefits from Social Security taxes.

# FACTS

- VA did not respond to that letter until September 2009, and the veteran continued to receive and cash VA pension checks at the full, unadjusted rate following his return of the December 2008 VA check.
- Five months later, in June 2009, the RO alerted the Milwaukee office of the VA Pension Management Center (PMC) that, according to an SSA “share screen,” the veteran had been awarded SSI retroactive to December 2007, that he “switched” from SSI to another Social Security disability benefit in December 2008, and that he was subsequently paid a lump-sum amount of \$24,484.11 in retroactive Social Security disability benefits.

# FACTS

- The RO indicated that the veteran had been receiving non-service-connected pension “with no income” since March 2008, and instructed the PMC to “take the appropriate steps in this case.”
- “For current-law pension [(i.e., Improved Pension)] purposes, SSI income is considered to be income from welfare and is not countable.”
- SSDI, however, is considered income that is countable. See 38 C.F.R. § 3.262(f) (2015).
- In September 2009, the PMC sent the vet a letter informing him that SSA benefits were considered countable income for VA pension purposes.

# FACTS

- The PMC proposed to substantially reduce his monthly non-service-connected pension payments effective January 1, 2009—the date that he began receiving monthly RSDI payments—and to stop pension payments altogether retroactive to May 1, 2009—the date that his total income exceeded the maximum allowable amount for pension payments by virtue of the April 2009 award of retroactive RSDI payments in the amount of \$24,484.11.
- The PMC explained that this adjustment would result in an overpayment of benefits; that the veteran would subsequently be notified of the exact amount of the overpayment and be given information regarding repayment; and that, if he continued to accept pension payments at the current rate, he would have to repay all or part of those payments.

# FACTS

- The PMC also informed him that he had 60 days to submit evidence and argument to dispute the proposed reduction and discontinuance of his pension benefits and that, if he failed to do so, the proposed adjustment would take effect.
- The PMC did not, however, acknowledge that the veteran in January 2009 had informed the RO of an award of Social Security benefits or that the RO in June 2009 had accessed information directly from SSA regarding his benefits.

# FACTS

- SSA maintains a real-time data sharing system, the Federal Online Query (FOLQ) system, that allows federal agencies to electronically access and obtain information regarding an individual's SSA benefits payments.
- The vet did not timely respond to the September 2009 PMC letter, and, in November 2009, the PMC contacted SSA to verify the amount of Social Security disability benefits that had been paid.

# FACTS

- The SSI calculation came to \$8,201.11, which included a \$7,951.11 lump-sum retroactive payment in December 2008 and an unexplained one-time payment of \$250 in May 2009.
- In December 2009, the PMC implemented the reduction and discontinuance of VA pension benefits proposed in September 2009.

# FACTS

- Specifically, the PMC notified the veteran that his monthly pension payments would be retroactively adjusted from \$985 per month to \$108 for January 2009, to \$58 per month from February 2009 to April 2009, and to \$0 thereafter.
- The PMC also informed him that, as a result of this adjustment, he had “been paid too much” and would be contacted shortly regarding the amount of the debt and how to repay it.

# FACTS

- The next month, the veteran sent the PMC a letter disputing those reductions and the resultant debt. He stated that, in January 2009, he had voided and returned his December 2008 pension check and had contacted the RO to clarify whether he might receive concurrent payments from VA and SSA, but did not receive a response.
- He explained: “When I received another \$985 check for January 2009, I figured I had been given the wrong information and that I was to receive both checks. . . .
- In retrospect[,] I did alert you when I received a check I did not think I was supposed to get. Your offices kept sending them.”

# FACTS

- Later in January 2010, the PMC sent the veteran a letter notifying him that he had been overpaid \$11,538 and needed to repay that debt.
- That letter indicated that VA Form 0748, “Notice of [Debtor] Rights and Obligations,” was enclosed in the mailing, but the record also does not appear to contain a copy of that form. That form, which the Secretary appended to his brief, states that the debtor has the right to dispute the existence or the amount of the debt or request a waiver of the debt.

# FACTS

- In February 2010, the veteran submitted a statement expressing disagreement with that debt. He recounted actions he took in January 2009 and his belief at that time that VA was only supposed to pay him the difference between his regular pension rate and the rate of his monthly Social Security disability benefits.

# FACTS

- He explained: My first check came at the end of December of 2008. From the rumors I had heard I was only supposed to receive the difference between my SS disability and the VA check. Therefore I voided out the December check and returned it along with a letter explaining what I just said.
- The next month (the end of January 2009), I received another check. I figured the rumors I heard were wrong. The checks kept coming.

# FACTS

- I then received a letter dated September 1, 2009. I responded to that letter. I[t] wasn't until December of 2009 that I received any more letters. At that time my checks stopped.
- He also stated that VA first alerted him of the payment error in September 2009 and asserted that he “should only have to pay back the money paid after. . . September.”
- In September 2010, the RO issued an SOC determining that the overpayment debt was validly created

# FACTS

- The RO acknowledged the veteran's January 2009 letter and stated that, “[u]nfortunately the PMC did not process this information immediately, but instead processed it beginning on September 1, 2009, when the proposal letter was sent to you.”
- Nevertheless, the RO concluded that he was indebted to VA because “income from [SSA] is countable income.”

# FACTS

- The next month, the vet submitted a Substantive Appeal, which stated, in pertinent part: Based on my current finances, I cannot repay the VA pension that I received. I called the VA when I was awarded my Social Security [benefits and] was told that I could keep both.
- I also called back [and] was told that I [may] keep the difference meaning if SS is greater than [] VA, then nothing [and] if the VA is less than SS, the[n] the VA would pay me the difference.

# FACTS

- I called the RO again [and] was convinced by the Call Center in St. Louis that I could keep both [and] for me to disregard everything else. Repaying the money back to the VA would be a hardship on me.
- Both benefits were granted the same month [and] I didn't want to do wrong, but the VA counselor told me it was ok.
- In August 2011, the vet attended a Travel Board hearing and testified that, when he began receiving SSA benefits, he asked representatives at a veterans service organization whether he may receive payment from VA and SSA at the same time and got “three different answers.”

# FACTS

- The vet stated that the answer that “sounded most logical” was that he was only entitled to VA pension in the amount that exceeded his SSA benefits, prompting him to void the December 2008 VA pension check and return it to the RO for “adjustment.”
- The vet explained that, when the RO did not make an adjustment and instead continued to pay him at his regular pension rate, he assumed that he was entitled to full payment from both agencies. He also testified that he never received the check back from VA after he voided it and returned it to VA.

# FACTS

- In April 2013, the Board issued the decision currently on appeal, which found that a debt for overpayment of non-service-connected pension benefits was properly created.
- The Board focused solely on the validity of the debt because it explicitly found that it did not have jurisdiction at that time to address entitlement to waiver of the debt.
- The Board further acknowledged that the “exact amount of the overpayment” was not contained in the claims file.

- What would you do?