IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

NETTIE CASEY, Appellant, v. ROBERT L. WILKIE, Secretary of Veterans Affairs, Appellee.	No. 18-1051

APPELLANT'S SUPPLEMENTAL MEMORANDUM OF LAW PURSUANT TO COURT ORDER DATED DECEMBER 20, 2018

On December 20, 2018, the Court issued an order directing the parties to file a memorandum of law to address the following questions:

(1) Is the one-time payment of accrued benefits (in the Secretary's terms, a "distribution") an "award" under 38 C.F.R. § 5112(b)(1) and 38 C.F.R. § 3.500(b)(2), considering the Court's holding in *Dent v. McDonald*, 27 Vet.App. 362, 374 (2015) (holding that the term "award" includes not only the establishment of an award but also award payments made subsequent to the initial grant of the award)(emphasis removed)?

(2) Assuming the one-time payment is an "award", does the term "erroneous" in 38 U.S.C. § 5112(b)(10) and 38 C.F.R. § 3.500(b)(2) contemplate a situation in which an award and payment correctly reflected a claimant's total benefits and the only error was VA's failure to withhold attorney's fees from the payment to the claimant as it should have pursuant to a fee agreement?

(3) To the extent that the Board conceded that this payment was an "erroneous distribution", is this a favorable finding of fact that the Court may not disturb or rather a conclusion of law?

(4) Do 38 U.S.C. § 5112 and 38 C.F.R. § 3.500 apply to "reductions" in recurring payments that serve to recoup an unrelated erroneous payment?

(5) How do provisions that would govern the effective date of a reduction in dependency and indemnity compensation (DIC) – making the reduction effective either as of the date of the award of DIC or the date of the last payment of DIC – apply to a one-time payment of accrued benefits? 38 U.S.C. § 5112(b)(9) (date of award), (b)(10)(date of last payment); *see e.g. Dent*, 27 Vet.App. at 374 (noting that, "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 debt or overpayment is created because the reduction or discontinuance [of pension benefits] is required to be made effective on the date of the last payment").

I. The one-time payment of accrued benefits is an "award" as contemplated by 38 U.S.C. § 5112(b)(10) and 38 C.F.R. § 3.500(b)(2).

As explained in *Dent v. McDonald*, 27 Vet.App. 362, 374 (2015), a term as general as "award" within 38 U.S.C. § 5112 "does not have a single plain meaning." *Dent* at 373. The Court held that the term "award" under 38 U.S.C. § 5112(b)(9) and (10) includes not only the initial award, but also "erroneous payments made subsequent to the initial award." *Dent* at 374. This holding was based upon a finding that the legislative history of subsections 5112(b)(9) and (10) reflects "that an 'erroneous award' includes the erroneous payment of an award." *Dent* at 377.

The issue in this case turns on whether the one-time payment of accrued benefits falls within the intended meaning of an "erroneous award" under 38 U.S.C. § 5112(b)(10) and 38 U.S.C. § 3.500(b)(2). The Secretary's argument is premised on the fact that 38 U.S.C. § 5112(b)(10) and 38 C.F.R. § 3.500(b)(2) are not applicable because those provisions "do not apply to the lump sum payment at issue here." Sec. Br. at 6-8. However, in *Nolan v. Nicholson*, 20 Vet.App. 240, 348 (2006), the Court explained that "periodic monetary benefits" include retroactive awards of disability compensation benefits because "*even though the actual payment of retroactive benefits is made in a one-time lump-sum payment…the*

benefits that the claimant had been entitled to receive during his or her lifetime would have been paid monthly." (emphasis added). Thus, even though the payment in this case was a single, lump sum payment of accrued benefits, it constitutes a recurring monetary benefit.

Accordingly, because the payment of accrued benefits is considered a recurring payment, and because recurring payments are contemplated by the term "award" as held in *Dent*, the one-time payment of accrued benefits in this case is an "award" as contemplated by 38 U.S.C. § 5112(b)(10) and 38 C.F.R. § 3.500(b)(2).

II. As the one-time payment of accrued benefits is an "award", the term "erroneous" in 38 U.S.C. § 5112(b)(10) and 38 C.F.R. § 3.500(b)(2) contemplates a situation in which the only error was VA's failure to withhold attorney's fees from the payment to the claimant pursuant to a fee agreement.

In *Dent*, the Court held that Congress has directly spoken to the precise question of the meaning of "award" and concluded that the term "erroneous award", as used in 38 U.S.C. §§ 5112(b)(9) and (10), "includes erroneous payments made subsequent to the initial award." *Dent* at 374. The Court in *Dent* discussed the legislative history, to include the explanatory statement provided to clarify the purpose of the addition of sections (b)(4), (b)(9), and (b)(10). Regarding section (b)(10), Congress explained that it is intended to "include cases in which an erroneous action was predicated on a misunderstanding of existing instructions or regulations or the applicable construction of statute." *Dent* at 374. Based upon this explanatory statement, the Court held that Congress intended for section (b)(10) to apply to "the establishment or continuation of an award of payments which should not have been made" and to "an erroneous action". *Id*.

In this case, pursuant to 38 C.F.R. § 14.636(g) and (h), once Appellant timely submitted a valid fee agreement, and when the award of past-due benefits resulted in a cash payment to Appellant,VA was required to provide direct payment to the attorney out of any past-due benefits awarded. 38 C.F.R. § 14.636(h); *see also* 135-40 (134-44). As VA failed to withhold attorney's fees, this constituted a misunderstanding of the instructions or regulations as was contemplated by the Congressional explanatory statement discussed above. *Dent* at 374. Thus, the failure to withhold attorney's fees was either an erroneous payment or an erroneous action, both of which are contemplated by the phrase "erroneous award".

III. The Board conceded that the VA's failure to withhold attorney fees from the one-time payment was an "erroneous distribution", and this is a favorable factual finding that cannot be disturbed by the Court.

In the Board decision on appeal, the Board found that VA failed to withhold 20 percent of the accrued benefits awarded and stated that VA's action was clearly erroneous. R. at 11 (2-12). The Board also referred to this error as an "erroneous distribution". *Id*. However, it should be noted that whether it is referred to as an erroneous distribution, an erroneous payment, or an erroneous action, these terms all fall within the definition of an "erroneous award" under 38 U.S.C. § 5112(b)(10).

Whether an award is erroneous is a substantially factual determination which involves review of the evidence pertaining to the total retroactive award, the validity of the fee agreement, the amount(s) due, and the amount(s) paid. What evidence can and should be considered in the interpretation of regulations are legal questions; however, the actual determination of whether the evidence indicates that the amount paid was erroneous is a substantially factual determination which the Court is not permitted to disturb. *See Medrano*

v. Nicholson, 21 Vet.App. 165 (2009). Thus, the Board's finding that this was an "erroneous distribution" (or "award") was based upon a determination that the payment made by VA to Appellant was in excess of the amount that should have been paid in light of the valid fee agreement. Therefore, this is a factual finding that cannot be disturbed.

IV. 38 U.S.C. § 5112 and 38 C.F.R. § 3.500 apply to "reductions" in recurring payments that serve to recoup an unrelated erroneous payment.

In this case, VA notified Appellant that it would reduce her monthly benefit (DIC) to recoup the erroneous payment. R. at 106 (103-06). The plain language of 38 U.S.C. § 5112(b)(10) states that it applies (except as otherwise specified) to all cases which involve a reduction or discontinuance of compensation, dependency and indemnity compensation, or pension. Further, the plain language of 38 C.F.R. § 3.500(b)(2) provides that the effective date of a rating which results in the reduction or discontinuance of an award will be the date of last payment of an erroneous award which was based solely on administrative error. The only requirement set forth in the statute and the regulation is that the reduction or discontinuance be by reason of an erroneous award. Neither the statute nor the regulation limit its applicability to only reductions of related benefits. Further, Congress and VA made no distinction between the reduction caused by recoupment of a related versus unrelated award.

As neither the language of the statute nor the language of the regulation provides that the benefit reduced must be the same as the benefit which was erroneously paid, 38 U.S.C. § 5112(b)(10) and 38 C.F.R. § 3.500(b)(2) apply to reductions in recurring payments that serve to recoup an unrelated erroneous payment.

V. The provisions governing the effective date of a reduction would require that no debt or overpayment be created in this case.

The provisions require that, when an erroneous payment is made solely as result of VA administrative error, the effective date of any reduction or discontinuance will be the date of the last payment. 38 U.S.C. § 5112(b)(10); 38 C.F.R. § 3.500(b)(2). This would apply in the same way to a one-time payment of accrued benefits as to a payment of DIC.

In the question posed by the Court, the Court notes that the effective date for the reduction of DIC would either be the date of the award of DIC or the date of last payment of DIC. However, the relevant consideration in determining the appropriate effective date for a reduction is not based upon the last date of payment of the benefit being reduced, but rather the date of the last payment of the erroneous award. As the statute and regulation do not make a distinction about the type of benefit reduced, but rather base the effective date on the date of last payment of the erroneous award, the rules governing the effective date for a reduction are the same for both DIC and accrued benefits.

The Court noted in Dent that, "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 debt or overpayment is created because the reduction or discontinuance [of pension benefits] is required to be made effective on the date of the last payment." *Dent* at. 374. While the reduction or discontinuance in that case pertained to the same benefit as the erroneous award, as addressed in the response to question four, section 5112(b)(10) and section 3.500(b)(2) are not limited solely to reductions in related benefits.

If this case involved an instance in which Appellant bore some fault for the erroneous award, then section (b)(9) would apply. As the effective date for the reduction pursuant to that section is the date of the erroneous award, then the date of the award would be controlling for purposes of establishing the effective date for the reduction. Thus, VA would be able to recoup an erroneous payment in situations where Appellant carried some fault in the erroneous award. However, as the erroneous payment in this case was made as a result of VA's sole administrative error, the effective date for the reduction is based upon the date of last payment of the award, which is the date of the accrued benefit payment. This means that, because the erroneous payment was the sole result of VA administrative error, VA cannot reduce the award prior to the date of the last payment and therefore, cannot recoup in this case.

As the effective date for the reduction or discontinuance is based upon the date of last payment of an erroneous award, and as the erroneous payment in this case was the accrued benefit payment, the governing provisions require that no debt or overpayment be created.

Counsel has endeavored to answer the questions posed by the Court, and to provide as much relevant information and analysis as possible. However, in light of the complexity of the questions asked, and to the extent the question(s) may have been misunderstood, Counsel is happy to provide a supplemental response which provides clarification.

Respectfully submitted,

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