IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

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

SECRETARY'S MEMORANDUM OF LAW IN RESPONSE TO THE COURT'S DECEMBER 20, 2018, ORDER

Pursuant to the Court's December 20, 2018, Order, Robert L. Wilkie, Secretary of Veterans Affairs, respectfully submits this response. The Order directed the parties to address five questions, as listed below.

1. **Is the one-time payment of accrued benefits an "award" under 38 U.S.C. § 5112(b)(10) 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)?**

A one-time payment of accrued benefits is not an "award" under 38 U.S.C. § 5112(b)(10) and 38 C.F.R. § 3.500(b)(2), and the holding in *Dent* does not control because the Court was not confronted with a one-time payment in that case. *See Dent*, 27 Vet.App. at 372-74 (noting that "award" is not universally defined in Title 38 of the U.S. Code). The reasoning in *Dent*, however, suggests that § 5112(b)(10) and section 3.500(b)(2) do not apply to one-time payments.

The payments at issue in *Dent* stemmed from a grant of non-service-connected pension. The pension payments were made on a recurring monthly basis. VA reduced and discontinued the monthly payments when it determined that the claimant was being overpaid. *Id.* at 368. The Court held that the reduction of pension payments was subject to the effective date rules in § 5112(b)(9)-(10) because those provisions applied to both the initial award of benefits and "errors affecting *a running award that consists of recurring payments*." *Id.* at 365, 380 (emphasis added) (holding that, "in circumstances involving a running award" VA may consider "whether the continued payment of the running award" was based on VA error). The Court reasoned that "it is VA's policy that running awards consisting of recurring monthly payments made as a result of VA administrative error" do not create valid debts. *Id.* (citing § 3.500(b)(2)). The Court in *Dent* did not hold that any payment constitutes an "award" under § 5112(b)(10) and section 3.500(b)(2).

The plain language of § 5112 does not apply to one-time payments. *See Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984); *Mason v. Shinseki*, 26 Vet.App. 1, 9 (2012) (noting that "the meaning of statutory language, plain or not, depends on context"). Section 5112 is titled "[e]ffective dates of reductions and discontinuances." The statute does not define "reductions" or "discontinuances," but these words have ordinary meanings. *See Prokarym v. McDonald*, 27 Vet.App. 307, 310 (2015) ("In the absence of an express definition, words are given their ordinary meaning."). Discontinuance means "the act or an

instance of discontinuing," and discontinuing means "to break the continuity of." *See Merriam-Webster*, https://www.merriam-webster.com/dictionary (last visited Mar. 11, 2019). Reduction is "the act or process of reducing," and reducing is defined most relevantly as "to diminish in size, amount, extent, or number." *See id.* A one-time payment cannot have its continuity broken. A one-time payment also cannot diminish in size. Such a payment may be partially recovered, but any recovery does not diminish the initial payment. Thus, a one-time payment cannot be reduced or discontinued, and § 5112 does not apply. *See O'Connell v. Nicholson*, 21 Vet.App. 89, 93-94 (2007) (holding that § 5112(b)(6) does not apply to the assignment of a staged rating where the "disability rating is not reduced"). *See also infra*, response to question 4 (discussing deductions from future benefits).

Legislative history also shows that Congress did not intend § 5112 to apply to one-time payments. Congress enacted § 5112(b)(10) to prevent an overpayment when an error is solely administrative, but also so "there would be no perpetuation of the erroneous action." S. Rep. No. 2042, 87th Cong., 2d Sess., at 9, *reprinted in* 1962 U.S.C.C.A.N. 360, 3266-67. Perpetuation of an error is not a concern when there is only a single payment. The Court in *O'Connell* also explained that, by enacting § 5112(b)(6), "Congress desired to provide a veteran receiving disability compensation benefits a reasonable amount of time to adjust to a reduction or termination of those benefits." *O'Connell*, 21 Vet.App. at 93 (citing S. Rep. No. 2042, 87th Cong., 2d Sess., at 8). Although subsection (b)(6) is not at issue here, the congressional intent described in *O'Connell* is relevant because it

shows that the effective dates in § 5112 apply to ongoing awards. In other words, a recipient of a one-time payment does not expect additional payments, and thus would not need time to adjust to a reduction or discontinuance.

Importantly, paying an attorney fee from a past-due benefit also does not result in a reduction or discontinuance of a benefit. By statute, VA may pay an attorney fee "from any past-due benefits awarded." 38 U.S.C. § 5904(d). When VA pays an attorney fee under § 5904(d), however, it does not reduce or discontinue the past-due benefits awarded. VA's payment to the attorney is merely an allocation of a single award to different payees. *See* [Record of Proceedings (R.) at 136 (134-44)] (fee agreement authorizing VA to "withhold such payment [of attorney fees] from any award . . . and to disburse the same to Attorney"). In other words, the quantity of veterans benefits awarded does not change when VA pays an attorney fee under § 5904(d) out of the appellant's past-due benefits. *See In re Smith*, 4 Vet.App. 487, 495-96 (noting, "[b]y statute, the fee agreement serves to divide and define the fund of past-due benefits," and the Secretary may recoup an overpayment "from the one to whom it was mistakenly paid"), *reh'g en banc denied*, 5 Vet.App. 307 (1993), *vacated in part on other grounds and remanded sub nom. Wick v. Brown*, 40 F.3d 367 (1994).

VA's failure to pay Appellant's attorney from the past-due benefits awarded, therefore, did not alter the award of benefits to Appellant. Nor would VA correctly paying Appellant's attorney have reduced the amount of benefits awarded to Appellant. Rather, had VA distributed money between Appellant and her attorney

consistent with the terms of the contract between them, it would not have overpaid or underpaid either party in distributing the benefits awarded to Appellant. VA's mistake in paying Appellant all of the benefits awarded to her in violation of the terms of the contract between her and her attorney merely resulted in an overpayment to Appellant, not a change to her award. *See id.* at 496 (describing a failure to divert attorney fees under § 5904(d) as "mistakenly pa[ying] a claimant more than his or her entitlement under the fee agreement").

Notably, Appellant seems to agree that § 5112 does not plainly apply to one-time payments. Appellant's Supplemental Brief (App. Supp.) at 3. She instead posits that "even though the payment in this case was a single lump sum payment," it is subject to § 5112 because it "constitutes a recurring monetary benefit." *Id.* (citing *Nolan v. Nicholson*, 20 Vet.App. 340, 348 (2006) (holding that retroactive awards of disability compensation are "periodic monthly benefits" under 38 U.S.C. § 5121(a) even though they are paid in a one-time lump sum because the benefits "would have been paid monthly" during the claimant's lifetime)); *see also Snyder v. Nicholson*, 489 F.3d 1213, 1218 (Fed. Cir. 2007).

This argument is a red herring because the definition of "periodic monthly benefits" under § 5121 is irrelevant here. The parties do not dispute that VA properly awarded accrued benefits to Appellant, that the amount granted was correct, or that the award represents the monthly payments that the Veteran was entitled to receive during his lifetime. Rather, at issue here is whether VA's payment of the total accrued benefits awarded to Appellant—rather than in part to

her attorney—is subject to provisions governing the reduction or discontinuance of an award. For reasons stated above, the answer to that question is no, because a one-time payment cannot be reduced or discontinued and the payment of attorney fees under § 5904(d) is not a reduction of a benefit.

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?

If the Court rejects the Secretary's response to question one, and it determines that a one-time payment is an "award" under provisions applying to discontinuances and reductions, the Court should hold that the term "erroneous" does not contemplate the facts of this case.

As stated by the Court in this question, the initial award of accrued benefits to Appellant was not erroneous and the total amount paid matched the amount initially awarded and was not, therefore, erroneous. Thus, neither the initial grant nor the payment made were "erroneous awards." *See* § 5112(b)(9)-(10); § 3.500(b)(2). The error here relates only to how the payment was distributed between two potential payees. Pursuant to the qualifying fee agreement here, Appellant and her attorney "share[d] a joint entitlement to the fund" of accrued benefits "with the exact amount of each's entitlement governed by the fee agreement." *In re Smith*, 4 Vet.App. at 495; *see Aronson v. Derwinski*, 3 Vet.App. 162, 163 (1992) (per curiam order) (holding that the non-assignability of benefits

provision, 38 U.S.C. § 5301, does not limit the Secretary's obligation to pay attorney fees under § 5904(d)). VA mistakenly paid the entire fund to Appellant, rather than directing 20% of the fund to her attorney. But the total *amount* that was paid, assuming that a one-time payment is an "award," was not erroneous.

If the Court determines that the one-time payment was an "erroneous award," the Court should hold that VA was not solely at fault for the error. This case is analogous to *Jordan v. Brown*, in which the Court affirmed a Board decision finding that a debt was valid. 1 Vet.App. 171, 172 (1997). In *Jordan*, a surviving spouse improperly continued to receive DIC payments after she had remarried. The Court noted that the spouse continued to receive the payments even though she had received information that "plainly instructed that remarriage would preclude additional compensation." *Id.* at 174. The Court reasoned that, despite any VA error in failing to investigate her marital status, "such VA error [did] not excuse the continued acceptance of DIC payments . . . where she was in receipt of the rules governing such compensation." *Id.* at 174-75 (noting appellant professed ignorance of the law and did not read the relevant materials).

Similarly, VA's error here does not excuse Appellant's acceptance of the entire accrued benefits payment. Appellant and her attorney entered into a valid fee agreement in February 2013. [R. at 134-44]. The parties agreed that the attorney would receive 20% "of any award made by VA" and authorized VA "to withhold such payment from any award." [R. at 136]. In July 2013, VA awarded accrued benefits to Appellant. [R. at 158 (158-60)]. The award letter informed

Appellant that she was entitled to $91,066, "which represents benefits owed the veteran at death but unpaid." *Id.* The letter stated that the initial amount "minus any withholdings" would be paid, but it listed no withholdings. *Id.* Because Appellant had signed the attorney fee agreement when she received the July 2013 letter, she knew or should have known that a 20% withholding should have been withheld, but it was not. The elapsed time between Appellant's receipt of the letter and VA's payment does not change the fact that Appellant had knowledge of the mistaken payment. *See Dent*, 27 Vet.App. at 384.

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?

Whether the Board erred in determining the validity of a debt is a question of law that the Court reviews *de novo*. *Jordan*, 10 Vet.App. at 174. Whether the payment here qualifies as an "erroneous award" under § 5112(b)(9)-(10) and section 3.500(b)(2) is also a question of law. *See id.* The Board's determination that a distribution error is not the "type of action" subject to § 5112 and section 3.500 is a legal conclusion. *See* [R. at 11].

The Board's determination that VA erred by not distributing 20% of the lump-sum payment to Appellant's attorney is a favorable finding of fact. *Id.* But the Board also found that the "erroneous distribution" was not solely a result of administrative error. [R. at 11] (assuming arguendo that § 5112 and section 3.500 applied). Rather, the Board found that Appellant was also at fault because she and her attorney knew, or should have known, that the 20% attorney fee was not withheld.

[R. at 11-12]. These findings are not favorable to Appellant, and they may not be disturbed unless they are clearly erroneous. *See Dent*, 27 Vet.App. at 380.

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?

Section 5112 and section 3.500 do not apply to deductions of future unrelated payments to offset indebtedness, and interpreting those provisions as applying to collections by offset would render other statutory and regulatory provisions superfluous. *See Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 386 (2013) ("[T]he canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme.").

As an initial matter, when VA collects a debt by offsetting VA benefits payments, it deducts the payment but does not reduce the award. *See Merriam-Webster*, https://www.merriam-webster.com/dictionary/deduction (last visited March 14, 2019) (defining deduction as "an act of taking away" and "something that is or may be subtracted"). In other words, although a deduction results in less money flowing to a claimant, it does not constitute a reduction of awarded benefits.

Deductions in benefits to offset indebtedness are governed by 38 U.S.C. § 5314 and its implementing regulation, 38 C.F.R. § 1.912A. Under Section 5314:

> [T]he Secretary shall . . . deduct the amount of the indebtedness of any person who has been determined to be indebted to the United States by virtue of such person's participation in a benefits program administered by the Secretary from future payments made to such person under any law administered by the Secretary.

38 U.S.C. § 5314. Section 5314 and section 1.912A do not instruct the Secretary to consider administrative error prior to implementing a deduction. However, § 5314 permits the Secretary to waive recovery of the debt. *See id.* Waiver of debt is not on appeal here but, when VA adjudicates an application for waiver of recovery of an overpayment, VA considers "equity and good conscience." *See* 38 U.S.C. § 5302. The phrase "equity and good conscience" is defined by regulation as "arriving at a fair decision between the obligor and the Government." 38 C.F.R. § 1.965. In rendering that determination, VA considers several factors, including "fault of debtor against Department of Veterans Affairs fault." *See id.* § 1.965(a)(2).

As the statutory and regulatory scheme contains provisions that govern debt recovery through the deduction of benefits payments—and those provisions permit the Secretary to consider VA fault—the Court should not interpret § 5112 and 3.500 as relating to the recovery of overpayments. *See Marx*, 568 U.S. at 386. The Court should instead determine that the provisions pertaining to deductions control the recovery of an overpayment. *See Beverly v. Nicholson*, 19 Vet.App. 394, 402 (2005) (explaining that "the more specific [statute] trumps the general").

The Court in *Dent* also did not apply § 5112 and section 3.500 to non-erroneous benefits payments unrelated to the erroneous award. In *Dent*, the Court determined that § 5112 and section 3.500 applied to the reduction or discontinuance of an initial award and "*errors affecting a running award*." 27 Vet.App. at 380 (emphasis added). The Court, however, determined that the erroneous running award was not due solely to administrative error. *Id.* at 384-85.

The Court thus upheld the debt created by VA, and explained that the "overpayment is, therefore, subject to recovery." *Id.* at 385.

5. How do provisions that would govern the effective date of a reduction in 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.

Insofar as the Court asks the parties to compare DIC to accrued benefits, the Secretary responds that they are different entitlements. Accrued benefits are derivative benefits, meaning that a claimant "stands in the place of a veteran or other survivor" to receive the periodic monetary benefits that were due and unpaid to a veteran at the time of his death. *Burris v. Principi*, 15 Vet.App. 348, 352 (2001). A survivor may also be entitled to "benefits in his or her own right, when a veteran dies from a service-connected disability," in the form of DIC. *Id.* Entitlement to one does not necessitate entitlement to the other. *See id.*

The debt created in this case relates to a one-time payment of accrued benefits, rather than DIC. For reasons stated above, § 5112 does not apply to a one-time payment of accrued benefits, and thus neither subsection (b)(9) nor (b)(10) apply here.

If the Court determines that subsections (b)(9) and (b)(10) apply to a one-time payment, however, the effective date of the purported reduction of the "erroneous award" would depend on why the error occurred. If the one-time payment was based "solely on administrative error," the effective date of a reduction would be the date of the one-time payment, and thus no debt would be

created. *See* § 5112(b)(10). If VA was not solely at fault, meaning the award was made "with the beneficiary's knowledge," the effective date of the reduction would be the date of the initial award and VA could create a debt for payments made after the initial grant. *See* § 5112(b)(9); *see also Dent*, 27 Vet.App. at 385 (upholding the debt created by overpayments made with the claimant's "knowledge that these payments were issued in error").

Notably, applying subsection (b)(10) to a one-time payment would lead to unintended results. Consider the following example: VA determines that a surviving spouse is owed $10,000 in accrued benefits. As a result of an accounting error, however, a VA employee accidentally adds one extra zero to that sum and mistakenly transfers $100,000 to the surviving spouse's bank account. If the surviving spouse had no knowledge of this accounting error and subsection (b)(10) applied, VA would have no recourse to recover the $90,000 it overpaid, resulting in a detriment to taxpayers who fund the VA benefits system. Congress did not intend for such a result in enacting § 5112, and no such result is required from a plain reading of the statute. *See* S. Rep. No. 2042, 87th Cong., 2d Sess., at 8-9.

WHEREFORE, Appellee Robert L. Wilkie, Secretary of Veterans Affairs, respectfully responds to the Court's December 20, 2018, Order.

Respectfully submitted,

JAMES M. BYRNE
General Counsel

MARY ANN FLYNN
Chief Counsel

/s/ Kenneth A. Walsh
KENNETH A. WALSH
Deputy Chief Counsel

/s/ Jessica K. Grunberg
JESSICA K. GRUNBERG
Senior Appellate Attorney
Office of General Counsel (027J)
U.S. Department of Veterans Affairs
810 Vermont Avenue, N.W.
Washington, D.C. 20420
(202) 632-6745

Attorneys for Appellee Secretary
of Veterans Affairs