

CITATION: VAOPGCPREC 10-89
Vet. Aff. Op. Gen. Couns. Prec. 10-89

DATE: 4-11-89

TEXT:

Treatment of Provisional Income--Improved-Pension Program

1. You have requested our opinion as to whether: (a) payments of 'provisional' benefits, such as Black Lung benefit payments, must be counted as income when received for improved-pension purposes; (b) if so, whether benefit payments received through administrative error should be counted in the same manner; and, (c) if provisional payments are countable, whether the amount of such payments which is repaid may be deductible under 38 C.F.R. § 3.271(g).
2. The veteran was awarded improved-pension benefits, effective November 1, 1984. The award was based upon the veteran's report that his retirement pay from the United Mine Workers was his only source of income. Through a comparison of computer data with the Department of Labor (DoL), the VA discovered, in March 1988, that the veteran had been receiving payments under the Black Lung Benefits Act, 30 U.S.C. § 901, et seq., in addition to his retirement pay, since January 1986. The Black Lung payments were not reported by the veteran on his 1986, 1987, or 1988 EVRs.
3. The veteran asserts that the Black Lung payments should not be counted as income for improved-pension purposes because such benefits were awarded on a temporary basis pending a final decision on his claim and would have to be returned if it were later determined that the veteran was ineligible for the benefits. The veteran alleges putting the Black Lung payments in a bank account pending a final determination by DoL and not drawing on those sums for support. Upon learning of the Black Lung benefits, the VA, in April 1988, retroactively terminated pension benefits, thereby creating a pension overpayment of \$3,638. Subsequently, DoL denied the veteran's claim for Black Lung benefits and requested return of all provisional payments. The veteran apparently did not appeal the basic entitlement decision.
4. Title 38, U.S. Code, section 503(a) provides, with certain specified exceptions, that 'in determining annual income for improved-pension purposes, all payments of any kind or from any source . . . shall be included.' Implementing regulations at 38 C.F.R. § 3.271(a) further provide that such payments 'shall be counted as income during the 12-month annualization period in which received.' There is no exception in the statute or regulations for payments of a provisional nature. Furthermore, 38 C.F.R. § 3.271(g) specifically provides that 'compensation paid by the United States Department of Labor, . . . or pursuant to any worker's compensation or employer's liability statute, or damages

collected because of personal injury or death, will be considered income as received.'

5. Consistent with these provisions, our previous opinions have uniformly held that income is countable for improved-pension purposes according to the date of receipt, not the date entitlement arose. For example, in an unpublished opinion to the Chairman, Board of Veterans Appeals, Undigested Opinion, 7-29-86 (8-25 Income), we indicated that Social Security disability payments should be counted as income from the date of their actual receipt, rather than from the effective date of the award. See also Undigested Opinion, 8-19-87 (8-25 Income) (same result in case of Social Security benefits based on attained age). In another matter involving Social Security benefits, the Social Security Administration was withholding a part of a claimant's Social Security payments in order to recover a previous overpayment. We held that the net amount of Social Security payments, rather than the gross amount to which the claimant was entitled, was countable as income for improved-pension purposes. Digested Opinion, 10-19-82 (8-25 Income). See generally Digested Opinion, 3-11-64 (8-25 Income) (profit from the sale of a house payable in installments over several years counted as income (for section-306 pension) as received rather than entirely in the year of sale).

6. While not controlling, these opinions are consistent with published opinions of this office which have held that it is the availability of, not the entitlement to, payments that determines whether they are to be counted as income for improved-pension purposes. In Op. G.C. 1-88 (2-10-88), we held that income from property held in a discretionary trust is not countable until it is actually allocated for the claimant's use, where the claimant lacks any control over such allocation. And in Op. G.C. 3-88 (6-14-88), we held that interest credited to a claimant's IRA should not be counted as income for improved-pension purposes where such interest could not currently be obtained without substantial penalty.

Given the emphasis in these opinions on actual availability of funds and the statutory objective of assuring that veterans' subsistence needs are met, it seems a logical corollary that payments of Government benefits in general should be counted as income as received, even though the possibility exists that the claimant may later be determined not to be entitled to part or all of such payments. In the case under review, there is no evidence that the Black Lung payments were in any way unavailable for the veteran's use, had the veteran chosen to use them. We are, therefore, of the opinion that these payments may be treated as countable income for improved-pension purposes, when received.

However, this does not mean that no adjustment is in order later, should the claimant be required to repay the amounts in question.

7. Section 3010(h), 38 U.S. Code, provides that:

Where an award of pension has been deferred or pension has been awarded at a rate based on anticipated income for a year and the claimant later establishes

that income for that year was at a rate warranting entitlement or increased entitlement, the effective date of such entitlement or increase shall be fixed in accordance with the facts found if satisfactory evidence is received before the expiration of the next calendar year.

Section 3.660(b)(1) of title 38, Code of Federal Regulations, similarly provides that, where payments were not made or were made at a lower rate because of anticipated income, pension may be awarded or increased not earlier than January 1 of the year in question if evidence is received within the same or the next calendar year.

8. Provisional payments which must be repaid are in the nature of anticipated income which fails to materialize. In both cases the recipient ends up with less income than expected and, if otherwise entitled to improved pension, less than the amount of income upon which pension computation was based. The same logic which supports retroactive adjustment of improved- pension benefits under section 3010(h) when expected income fails to materialize would seem to apply when that income is received on a provisional basis but later must be repaid.

9. In the instant case, the claimant was erroneously paid Black Lung benefits from January 1986 until October 1988. This created an overpayment by DoL of \$17,138.70. We have been informed that, by way of compromise, DoL has accepted repayment of \$15,000 in complete settlement of the indebtedness. Therefore, that part of the \$15,000 attributable to Black Lung payments received within the year prior to the calendar year in which evidence of repayment is received should be subtracted from the claimant's income for that year and improved-pension entitlement retroactively adjusted accordingly. In order to provide the veteran every benefit supportable by law, it may be presumed, in the absence of evidence to the contrary, that the portion of the Black Lung overpayment written off by DoL was received by the veteran in a year prior to 1988. Thus, if the claimant submits evidence this calendar year that he repaid \$15,000 of the DoL overpayment, the total amount of the Black Lung payments he received during 1988 may be subtracted from his income for that year and a retroactive adjustment made to his improved-pension eligibility for that year.

However, since proof of actual repayment was not received prior to this year, no portions of the Black Lung payments received in 1986 and 1987 may be subtracted from those years' income under s 3010(h).

10. In answer to your second question, we find no basis for distinguishing between provisional payments and payments received through administrative error but not immediately returned to the paying agency. Once the payment is received by the claimant and is available for his/her use, it may properly be treated as countable income for improved-pension purposes. In either situation, the claimant may or may not have to repay the provisional or erroneous payment.

If payments resulting from administrative error are waived or collection action is unsuccessful, the claimant will have had those amounts available for support

without later penalty. When and if the benefits are repaid, a retroactive adjustment may be warranted in accordance with 38 U.S.C. § 3010(h) and 38 C.F.R. § 3.660(b)(1).

11. You also ask whether any amounts repaid by the claimant to DoL may be deducted from the gross award under 38 C.F.R. § 3.271(g). We assume you mean by this whether such amounts can be deducted from countable income in determining entitlement to an award of improved pension. We find no authority or precedent which would permit use of section 3.271(g) unless the payments have been used for payment of 'medical, legal or other expenses incident to the injury or death, or incident to the collection or recovery of the amount of the award or settlement' within the meaning of the cited regulation. The quoted language derived from a Solicitor's opinion, Op. Sol. 216-49 (6-2-49), holding that an attorney's fee incurred in obtaining an employees'-compensation award for a work-related injury and deducted from the award payable could be deducted from the total award for pension-income computation purposes. Pension regulations were amended the following year to reflect this interpretation. 17 Fed. Reg. 5909 (1950). The deduction was later expanded to include medical and other expenses incident to the injury or collection. 17 Fed. Reg. 7123 (1952). It is thus evident from the history of the provision that the terms 'collection or recovery' in section 3.271(g) refer to the claimant's collection or recovery of the amount from the agency or employer, not the agency's collection of the amount back from the claimant or the claimant's repayment of the amount to the agency. As the veteran has not reported any expenses within the terms of the regulation, we find no basis under s 3.271(g) for excluding any portion of the payments in question from countable income.

HELD:

In summary, it is our opinion that provisional payments, such as the Black Lung payments received by the veteran from DoL, as well as payments received by reason of administrative error, may be treated as countable income for improved-pension purposes as received. If it is later found that there was no entitlement to the payments, and evidence of repayment is submitted, the amount repaid may form the basis for a retroactive adjustment of the veteran's improved-pension award, if evidence of repayment is received before expiration of the calendar year following the year in which the veteran received the payment.

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