

DATE: 10-24-90

CITATION: VAOPGCPREC 97-90
Vet. Aff. Op. Gen. Couns. Prec. 97-90

TEXT:

Review of Refunding Decision;

QUESTION PRESENTED:

Is the decision by VA not to take an assignment of a guaranteed loan in default from the loan holder a decision "that affects the provision of benefits" by the Secretary within the meaning of 38 U.S.C. §211(a)(1).

COMMENTS:

1. The Secretary is empowered to guarantee housing loans made to veterans by private lenders. 38 U.S.C. §§ 1803, 1810. If a guaranteed loan has been in default for 60 days, the holder must notify the VA. 38 U.S.C. § 1823(a)(1). 38 C.F.R. §36.4315. When the holder intends to foreclose such a loan, it must provide the VA with 30 days' notice. 38 U.S.C. § 1823 (a)(2). 38 C.F.R. § 36.4317.

2. Upon receipt of this notice:

(T)he Secretary may, at the Secretary's option, pay the holder of the obligation the unpaid balance of the obligation plus accrued interest and receive an assignment of the loan and security.

38 U.S.C. § 1823 (a)(2). See also 38 C.F.R. §36.4318.

3. Taking an assignment of the loan is sometimes referred to as "refunding" the loan. The refunding provisions of the statute were originally "enacted solely in the interest of the government as surety, not of defaulting obligors." *Gatter v. Nimmo*, 672 F.2d 343, 347 (3d Cir.1982). Nevertheless, VA has provided in an internal manual that refunding may also be used "to avoid the liquidation of the loan ... to assist a veteran in retaining the property." VA Manual M26-3, para. 2.38 a.

4. In the instant case, the Loan Guaranty Officer at the regional office has decided not to refund the loan. The veteran wishes to appeal that decision to the Board of Veterans Appeals. You have requested our opinion on whether such review is proper.

5. The starting point of our inquiry is 38 U.S.C. § 4004(a) which provides that

All questions in a matter which under section 211(a) of this title is subject to decision by the Secretary shall be subject to one review on appeal.... Final decisions ... shall be made by the Board of Veterans Appeals ."

Section 211(a)(1) provides that the Secretary shall decide all questions of law and fact necessary to a decision under a law "that affects the provision of benefits ... to veterans or the ir dependents...." Accordingly, the threshold question is whether refunding affects the provision of benefits to veterans. As explained below, we have concluded it does not.

6. VA's failure to refund a veteran's loan has been the subject of numerous lawsuits. "Every federal court of appeals that has considered whether a cause of action lies for judicial review of the VA's alleged failure to take foreclosure avoidance measures or to take assignment of ('refund') an insured mortgage has held that a mortgagor does not have such a right of action." *First Family Mortgage Corp. of Florida v. Earnest*, 851 F.2d 843, 844 (6th Cir.1988).

7. "Nothing in the statutory language or history of ... the provision now codified 38 U.S.C. § 1832(a)(2) indicates that Congress intended to require the VA to exercise the assignment-refunding option.... Rather, the language ... indicates that Congress simply intended to empower the VA to refund, at its discretion, loans that are in default *Rank v. Nimmo*, 677 F.2d 692, 700 (9th Cir. 1892) (emphasis in original). The statute is drawn in wide terms, stating that "the Secretary may, at the Secretary's discretion," refund a loan. Emphasis added. The law contains no standards for exercising the refunding option. Thus, the decision to refund a loan "is left to the expertise of the agency.... VA is free to adopt a stringent policy with respect to assignment-refunding, reserving the option for the exceptional or unusual case, or, indeed, to adopt no program at all." *Rank* at 700.

8. In addition to *Rank* and *First Family Mortgage*, claims that a veteran has a right to have a loan refunded were rejected in *Bright v. Nimmo*, 756 F.2d 1513 (11th Cir. 1985), *Laughlin v. Walters*, 718 F.2d 513 (1st Cir. 1983), *Gatter v. Nimmo*, 672 F.2d 343 (3d Cir.1982), and *Simpson v. Cleland*, 640 F.2d 1354 (D.C.Cir.1981). We are not aware of any reported decision holding to the contrary, with the exception of the district court opinion in *Rank*, 460 F.Supp. 920 which was reversed by the Ninth Circuit.

9. While refunding may be used in a manner which is beneficial to a veteran, such beneficial use is provided for only in internal VA manuals. *Rank*, 677 F.2d at 698. However, these manuals are merely general policy statements, and do not have the force and effect of law. Therefore, they do not create any enforceable duty on VA to refund a loan. *First Family Mortgage* , 851 F.2d at 845, *Rank*, 677 F.2d at 698. *Gatter*, 672 F.2d at 347.

10. Refunding, therefore, is clearly not a benefit provided by law for veterans. Rather, refunding is one option available to VA which may be used in the process of foreclosing a loan and paying the claim under the guaranty contract with the holder. VA must be free to act in a cost-effective manner in dealing with loans in default in order to reduce

the loss to the veteran, the loan holder, and the Federal Treasury. Providing lengthy delays in foreclosure while various loan servicing options are appealed through an administrative process is not consistent with the policy of the home loan statute to reduce the risk of loss upon foreclosure. Cf. *United States v. Shimer*, 367 U.S. 374, 383 (1961).

11. In view of the above, we conclude that refunding is not a question of fact or law related to the provision of benefits to veterans within the meaning of 38 U.S.C. § 211(a)(1). Accordingly, the decision by the local VA Loan Guaranty Officer not to refund a loan would not be appealable to the Board of Veterans Appeals.

HELD:

A determination by a VA Loan Guaranty Officer not to take an assignment, or "refund" a guaranteed loan in default is not a question of fact or law related to the provision of benefits to veterans within the meaning of 38 U.S.C. § 211(a)(1).

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