DATE: 03-11-91

CITATION: VAOPGCPREC 27-91
Vet. Aff. Op. Gen. Couns. Prec. 27-91

TEXT:

SUBJECT: Application of 38 United States Code § 210(c)(3)(A).

(This opinion, previously issued as Opinion of the General Counsel 8-74, dated May 20, 1974, is reissued as a Precedent Opinion pursuant to 38 C.F.R. §§ 2.6(e)(9) and 14.507. The text of the opinion remains unchanged from the original except for certain format and clerical changes necessitated by the aforementioned regulatory provisions.)

To: Administrator

QUESTIONS PRESENTED:

A question has arisen as to the proper interpretation and application of 38 United States Code 210(c)(3)(A). This law authorizes the Administrator to provide equitable relief to any person who suffers a loss on account of an erroneous determination by the VA that someone was entitled to benefits when, in fact, he was not so entitled. It reads:

"(3)(A) If the Administrator determines that any veteran, widow, child of a veteran, or other person, has suffered loss as a consequence of reliance upon a determination by the Veterans' Administration of eligibility or entitlement to benefits, without knowledge that it was erroneously made, he is authorized to provide such relief on account of such error as he determines equitable, including the payment of monies to any person whom he determines equitably entitled thereto."

COMMENTS:

VAR (7) is a mere restatement of the law and adds nothing to section 210(c)(3)(A). It is interesting to note that in the Appellate Procedure for Professional Services--BVA Chapter 9-15-18, subparagraph (d), the word "actual" has been inserted before the word "loss." It is also recommended in that paragraph that since providing this type relief is a discretionary power vested in the Administrator, the number of submissions for approval should be limited in number. This seems to be an indication that the Board of Veterans Appeals requires some actual or tangible loss to be suffered under section 210(c)(3)(A) before it will consider recommending administrative relief. It is understood that BVA almost without exception looks for a loss which is measurable in dollars and cents although they can conceive of situations wherein a loss might not be strictly monetary.

2. Section 210(c)(3)(A) does not deal directly with what constitutes a "loss" which would, upon being suffered, permit the Administrator to grant equitable relief. Instead, what constitutes a loss is left to the complete discretion of the Administrator. It is the function of the General Counsel to review submissions and recommend either granting or denial of applications for relief, but authority to grant equitable relief has not been delegated and is reserved to the Administrator (VAR 7). It was said in United States v. City National Bank of Duluth, 31 F.Supp. 530 (at 533, 534) that:

" * * * Statutes are to be construed to give effect to the intention of the legislature. 'The intent of the legislature' is to be ascertained in the language of the statute itself, unless the language is so obscure, indefinite, or ambiguous that the effect intended by the legislature is left in doubt.
* *

" * * * the court is at liberty to advert to the view expressed by individual members in debate or by a committee in its report and gather therefrom as from any other source the history of the times or of the evil which the legislation was intended to remedy."

This case involved the interpretation to be given to the word "loss" coming from a federal law which provided that the United States would pay claims for "loss" on account of fire originating from operation of railroads by the United States in the State of Minnesota on or about October 12, 1918. The court held that "loss" meant loss growing out of the fire, of whatsoever nature, and not only of those who suffered property loss, irrespective of contrary administrative interpretation.

3. Looking to the legislative history of section 210(c)(3)(A), (P.L. 92-328), gives some insight into what meaning Congress (and the VA) intended the word "loss" to have:

a. In letters to the Speaker of the House and to the President of the Senate dated May 8, 1972, the Administrator discusses errors in a determination of eligibility which would cause a person to rely on the determination "to his detriment." As a basic illustration of a situation in which this would arise, the Administrator presented the case of a veteran purchasing a new vehicle with adaptive equipment after erroneously being informed by the VA that he was entitled to benefits to enable him to make such a purchase. The dealer makes delivery of the new car in reliance upon the erroneous certificate of eligibility and the veteran thereby incurs further indebtedness which he may not be able to afford and may not have incurred, but for the erroneous decision by the VA (emphasis added). The Administrator also stated in these letters that such remedial legislation would be a logical and reasonable extension of his present authority under 38 U.S.C. § 210(c)(2), and was in line with the philosophy of that section.

b. The House Veterans' Affairs Committee Report accompanying the legislation reflects the same points set forth by the Administrator in his letters, i.e., reliance by a person on an erroneous determination by the VA, which reliance causes that person to incur further indebtedness which he may not be able to afford and may not have incurred otherwise. It is also noted therein that other situations have arisen involving reliance upon erroneous findings of eligibility for other benefits with resulting losses to innocent veterans, their dependents or third parties. Looking to our own legislative files on P.L. 92-328, we find:

c. In a letter dated November 4, 1971, from the General Counsel to the Administrator, proposing equitable relief from administrative error (such as 210(c)(3)(A) now provides), the situation is mentioned where a person finds, as a result of administrative error, he has been placed in "a worse position" or a "detrimental position."

The legislative intent as to what should constitute a "loss" is then helpful in clarifying this question. It is obvious that the VA and Congress intended, when formulating section 210(c)(3)(A),that a person who relies on an erroneous determination by the VA and then finds himself in a "worse position" or a "detrimental position," or "who has incurred further indebtedness which he may not be able to afford and would not have incurred otherwise," has, in effect, suffered a loss. It was intended that persons who are in such a position could be afforded equitable relief.

4. The word "loss" is not easy to define. Words and Phrases, 25A, Loss, contains the following:

"A 'loss' is the unintentional parting with something of value." Providence Journal Co. V. Broderick, 104 F.2d 614.

"A 'loss' is the expiration or disappearance of any recognizable resource or economic factor without full compensation or recovery. Owen v. U.S., F.Supp. 855, 859.

" 'Loss' is a generic term. 'Damage' is a species of loss. 'Loss' signifies the act of losing or the thing lost. 'Damage' * * * signifies the thing taken away, the lost thing which a party is entitled to have restored to him so that he may be made whole again. 'Loss' is not a word of limited, hard and fast meaning, and may mean either the act of losing or the thing lost. The term has been held to be synonymous with, or equivalent to, other terms, as for instance, damage, damages, deprivation, detriment,inquiry, privation." U.S. v. City National Bank of Duluth, 31 F.Supp. 530, 534, 535.

Since the word "loss" is, in general, incapable of being defined with a precise hard and fast meaning it would seem improper for this office to limit its meaning.

This is especially true in light of the previously discussed legislative intent which indicates desire for a fairly broad interpretation and application of the word.

5. It appears that section 210(c)(3)(A) was an attempt by Congress to remedy a particular problem by providing an approach that has been judicially recognized for many years when the interaction is between private parties. That approach is to grant relief to a person who, in reliance on a promise from another, has acted or forbode from acting to his detriment. The common-law doctrine of assumpsit was regarded as an action for damages for a wrongful injury. Assumpsit, a variation on the action of trespass on the special case, was the first action used and intended for the enforcement of informal promises. The breach of promise was regarded as a sort of deceit; and the remedy was compensatory damages for the injury caused by the promisee's action in reasonable reliance. See Ames, "History of Assumpsit." 2 Harvard L.Rev., 1, 53 (1889). The element of harm for which the action of assumpsit was maintained was harm that resulted from the breach (the misperformance of the promisor), not harm that was incurred as an inducement of the promise. It was not a detriment given in exchange for the promise, but a detriment that was caused by non-performance of the promise. Furthermore, the harm for which the plaintiff sought compensation was always harm that consisted of an affirmative loss--a subtraction from the plaintiff's property or personal capacity and integrity. See Corbin on Contracts, Vol. 1, § 122, p. 526. Historically, action in reliance was the basis for enforcing informal promises in assumpsit. Presently assumpsit is a contract action for damages due to breach or non- performance of a contract or promise. It is presently extended to nearly all cases where there is a money obligation not payable as damages.

6. Between private parties, it is clear that an informal promise may be enforceable by reason of action in reliance upon it, even though that action was not bargained for by the promisor and was not performed as an agreed exchange for the promise. This is evidenced by the decisions of the courts of common-law as to assumpsit and more recently by the decrees of the courts of equity making a very flexible use of the doctrine of estoppel. Section 90 of the Restatement of Contracts provides:

"A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise."

Section 90 defines the limits of promissory estoppel as a substitute for consideration. Action or forbearance in reliance on a promise is not consideration as such, but is a reason for enforcing the promise. For a change in position in reliance on a gratuitous promise to constitute sufficient reason for enforcement, it must be of a substantial nature. For example, a generous promise of $100 will not be made enforceable by the fact that the promisee walks

a few blocks to the bank in reasonable expectation that the promise will be performed there. Plowman v. Indian Refining Co. 20 F.Supp. 1 (1937). However, it seems that if the promisee obligates himself in some way so as to incur a liability which he would otherwise not have had, the promise would then be enforceable. What constitutes a substantial change in position, however, is a question of fact that in terms of contract law must be determined by the courts under the circumstances of each case under appellate supervision as in other cases. Not only is it a matter of fact, it has no absolute standard of measurement. It is relative to the content of the promise and the cost to the promisor of his promised performance:

"In determining whether or not the action is substantial, a court should face its responsibilities with open eyes, knowing that here, at least, the just answer cannot be arrived at by any deductive logic or by mechanical jurisprudence." Corbin, Vol. 1A, § 200, p. 216.

Aside from a substantial change of position, for an estoppel to exist it is necessary to determine:

a. Whether the action or forbearance was of such a nature as to be reasonably foreseeable to the promisor in his position when the promise was made.

b. Whether an actual promise was made and whether it did induce the action or forbearance in reliance on it.

In applying the action in reliance doctrine, the court should consider the merits and defects of all the possible remedies that are available. Enforcement of a promise does not mean specific performance. It does not necessarily mean damages for breach. Moreover, the amount allowed as damages may be determined by the plaintiff's expenditures or change of position in reliance as well as by the value to him of the promised performance. Restitution is also an enforcing remedy although it is often said to be based upon some kind of rescission. In determining what justice requires, the court must remember all of its powers, derived from equity, law merchant, and other sources as well as the common law. Corbin, Vol. 1A, § 200, p. 221.

7. It appears likely, then, that section 210(c)(3)(A) was intended to be a means of allowing relief under the "action in reliance doctrine" which, as discussed, has its history in various legal actions from early common-law assumpsit to the later day estoppel. Section 210(c)(3)(A) can be said to be in the nature of legislative estoppel. Past court decisions have held that the Federal Government is not subject to an estoppel for acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit. Any person entering into an arrangement with the government takes the risk of having accurately ascertained that he who purports to act for the government stays within the bounds of his authority. See

Wilbur National Bank v. United States, 79 L. ed. 798, 294 U.S. 120; Federal Crop Insurance Company v. A.A. Merrill and N.D. Merrill, 92 L. ed. 10, 332 U.S. 380; Jackson v. United States, 234 F.Supp. 586 (1964). However, section 210(c)(3)(A) provides a path for relief in situations with the Veterans Administration where, if private parties only were involved, an estoppel might arise. An estoppel arises when one is precluded and forbidden by law to speak against his own act or deed. The elements of estoppel include change of position of parties so that the party against whom estoppel is invoked has received a profit or benefit or the party who invoked estoppel has changed his position to his detriment. As a general thing, not only must the party claiming the estoppel have believed and relied upon the words or conduct of the other party, but also he must have been thereby induced to act, or to refrain from acting, in such a manner and to such an extent as to change his position or status from that which he would otherwise have occupied. Am.Jur.2d Vol. 28, Estoppel and Waiver, p. 712. This rule does not mean that in order to invoke the doctrine of estoppel one must, as a result of the inequitable conduct of the other party, have suffered some detriment or injury without regard to whether or not the estoppel is allowed, but only that he will be prejudiced if the estoppel is not given effect. In other words, to entitle a party to the benefit of an estoppel, he must have been misled and induced to alter his position or status in such a way that he will suffer injury if the estoppel is denied and the other person is not held to the representation or attitude on which the estoppel is predicated. 77 Am.Jur. p. 717. Under the law of estoppel, where one of two innocent persons must suffer, he whose act occasioned the loss must bear it. An estoppel is proper when a person is induced to change or alter his position or to do that which he would not otherwise have done, Babcock v. McKee, 18 N.W.2d 750.

8. It is apparent that equity must be considered heavily when contemplating administrative error since section 210(c)(3)(A) states that relief given must be equitable and is available only to those whom the Administrator determines are equitably entitled. Thus, the recipients of the relief under 210(c)(3)(A) need not have any legal right to benefits provided by the VA, yet such benefits (or other relief) can be and will be provided to the person when equity so dictates. The whole doctrine of action in reliance is a creature of equity and is governed by equitable principles. A long established maxim of equity states that, "equity regards that done which ought to be done." This principle involves the notion of an equitable obligation existing from some cause; of a present relation of equitable right and duty subsisting between two parties, a right held by one party, from whatever cause arising, that the other should do some act. Equity does not regard an act as done what might be done, or what could be done, but only what ought to be done. See Pomeroy's Equity Jurisprudence, Vol. 2, § 365, p. 14. It is also said, that equity is to do justice and not by halves.

HELD: When a case arises involving section 210(c)(3)(A), the following

determinations must be made in order to properly recommend to the Administrator that relief be granted:

a. That an erroneous determination as to eligibility for benefits was made by the VA.

b. That an individual has acted to his detriment based on the erroneous determination.

c. That the individual who has acted to his detriment was not aware that the determination of eligibility was made in error.

d. The extent of the loss suffered by the individual and the remedy to be afforded.

Upon making the first three determinations, it is then necessary to make a detailed factual examination to establish the extent of the loss in each case. Evidence should be submitted by the individual who acted to his detriment, and, while a high standard of proof is not required, the proof should be sufficient to establish, with reasonable certainty, that a loss has occurred or will occur if relief is not granted. As stated earlier in this opinion, the relief recommended may be the benefit which was promised or something else, if equitable. Based on the above four determinations, the Administrator may exercise his discretionary authority under Section 210(c)(3)(A) to provide administrative relief should he deem it appropriate. In order that the Administrator may properly evaluate submissions for relief from the head of the department responsible for the benefit, it is my opinion that the accompanying report should include information which establishes that a loss has been suffered, information from the person who has acted to his detriment to show the extent of the loss, and a specific recommendation as to the kind and amount of relief to be granted.

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