

Date: March 1, 1994

O.G.C. Precedent 7-94

From: General Counsel (022)

Subj: Setoff of Federal Tort Claims Act Damages--38 U.S.C. § 1151

To: Chairman, Board of Veterans' Appeals (01)

QUESTION PRESENTED:

Does the amount of a Federal Tort Claims Act settlement to be set off against benefits payable under 38 U.S.C. § 1151 include the amount of attorney fees paid out of the settlement proceeds?

COMMENTS:

1. You have requested our opinion as to whether the amount of a Federal Tort Claims Act (FTCA) settlement which must be offset under 38 U.S.C. § 1151 against a veteran's disability compensation for the disability giving rise to the settlement includes a portion of the settlement that was paid to an attorney as attorney fees. In the subject case, the veteran is entitled to disability compensation under 38 U.S.C. § 1151 for disability resulting from medical treatment provided by the Department of Veterans Affairs (VA). In December 1987, the veteran obtained a settlement under 28 U.S.C. § 2677 of an FTCA claim based on the same disability. Under the settlement agreement, the United States agreed to pay the veteran \$165,000 in settlement of the claim. The veteran reports having received only \$4,884 of the settlement amount, the rest having been used to pay various debts of the veteran, including \$22,000 which was paid to an attorney as fees for representation in the FTCA claim. The veteran has requested that the amount to be offset under section 1151 not include, among other amounts, the amount which was used to pay attorney fees.

2. Section 1151 provides that a veteran who has suffered disability as the result of VA medical treatment is entitled to compensation as if the disability were service connected. That section further states:

Where an individual is . . . awarded a judgment against the United States in a civil action brought pursuant to section 1346(b) of title 28 or

. . . enters into a settlement or compromise under section 2672 or 2677 of title 28 by reason of a disability . . . treated pursuant to this section as if it were service-connected, then no benefits shall be paid to such individual for any month beginning after the date such judgment, settlement, or compromise on account of such disability . . . becomes final until the aggregate amount of benefits which would be paid but for this sentence equals the total amount included in such judgment, settlement, or compromise.

(Emphasis added.)

3. In O.G.C. Prec. 52-91, we observed that the plain language of what is now section 1151 (formerly section 351) requires offset of benefits equal to "the total amount" of any judgment, settlement, or compromise entered into by an individual on an FTCA claim. We further noted that the legislative history of section 1151 evidences a clear purpose to require offset of the total amount of any FTCA judgment or settlement to an individual without distinction as to the bases for various portions of the total amount. See S. Rep. No. 2042, 87th Cong., 2d Sess. 2 (1962), reprinted in 1962 U.S.C.C.A.N. 3260; H.R. Rep. No. 2123, 87th Cong., 2d Sess. 2 (1962). Accordingly, we concluded that, under the statute, the full amount of damages recovered by an individual in an FTCA settlement is subject to offset against benefits, regardless of whether those damages were intended as compensation for economic or non-economic losses. See Morgan v. United States, 968 F.2d 200, 205-08 (2d Cir. 1992).

4. The veteran here asserts that offset should not include the portion of the settlement award which was paid to the veteran's attorney as fees, because the veteran did not actually receive that portion of the award. It is well established that the clear and unambiguous language of a statute must be read to mean what it plainly expresses. See Chevron U.S.A. Inc. v. National Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984). As we indicated in O.G.C. Prec. 52-91, the language of what is now section 1151 clearly and unambiguously requires offset of "the total amount" of any FTCA settlement recovered by an individual based on the same disability for which VA benefits are payable. The statute expressly requires such offset to be made once the individual "enters into a

settlement or compromise under section 2672 or 2677 of title 28." The statute does not condition offset upon whether an individual has actually received or retained the entire amount of the settlement. Therefore, the entire amount of the settlement must be offset, without regard to whether the veteran actually received the entire amount or assigned a portion of the settlement to an attorney or other creditors.

5. It is clear that the amount paid to the attorney is a part of "the total amount" of the settlement recovered by the veteran. Pursuant to the so-called "American rule," a prevailing litigant in the United States bears his or her own attorney fees and cannot look to the opposing party for reimbursement. See Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 247 (1975). Therefore, the payment of attorney fees to the veteran's attorney from the settlement proceeds in this case is in essence a payment by the veteran, from the settlement funds, used to satisfy the veteran's contractual obligation to the attorney; it is not a separate award to the attorney.

6. This point is recognized in the settlement agreement, which states:

[A]n attorney's fee not to exceed Forty-one Thousand Two Hundred Fifty dollars (\$41,250.00) will be paid to . . . the plaintiffs' attorney of record, pursuant to 28 U.S.C. § 2678. The amount for an attorney's fee as agreed upon between plaintiffs' [sic] and their lawyer shall be paid out of the proceeds of the settlement amount payable to the plaintiffs and not in addition thereto.

Because the attorney had no statutory entitlement to the payment of attorney fees by the Government, the amount paid to the attorney must be considered a payment from the veteran out of the settlement proceeds. Thus, the veteran has made a disposition of a portion of the settlement proceeds to pay a contractual obligation. Such disposition, whether by prior agreement or otherwise, does not affect the amount of the settlement award for purposes of section 1151. In using the settlement proceeds to pay attorney fees, the veteran has clearly enjoyed the benefit of those proceeds.

7. Although there are some limited exceptions to the "American rule," none is applicable in the instant case. One such exception is the Equal Access to Justice Act, which mandates awards of attorney fees against the Government in certain cases, but which, by its terms, does not authorize such awards in tort actions. 28 U.S.C. § 2412(d). The FTCA itself does not authorize Government payment of attorney fees; it merely limits, in 28 U.S.C. § 2678, the amount of the fee an attorney may charge in an FTCA action to twenty-five percent of any judgment or settlement. See Bergman v. United States, 844 F.2d 353, 355 (6th Cir. 1988); Joe v. United States, 772 F.2d 1535 (11th Cir. 1985) (per curiam). Accordingly, the attorney fees in the instant case were paid by the veteran out of the settlement award and not by the Government pursuant to a separate statutorily-authorized award to the attorney. The amount of the fees must therefore be included as part of the total amount of the settlement subject to offset under section 1151.

8. Nothing in O.G.C. Prec. 79-90 suggests a contrary result. In that opinion, we held that the legal status in which a beneficiary recovered an FTCA award or settlement for a veteran's death is relevant to the amount of the FTCA recovery to be offset against dependency and indemnity compensation (DIC). We reasoned that, where an FTCA award or settlement contains amounts to compensate for harm suffered

by a deceased veteran and is paid to a person in the capacity of representative of the deceased veteran's estate, the representative does not receive that amount as an "individual," as that term is used in what is now section 1151, but rather receives it as a representative for the creditors and heirs entitled under law to a portion of the estate. Accordingly, we concluded that the DIC benefits of each survivor receiving FTCA damages would be offset only to the extent sums included in the judgment or settlement compensate for harm suffered by that individual.

9. The holding in O.G.C. Prec. 79-90 is applicable in situations arising under many state survival statutes, applicable in FTCA cases, where, under state law, a judgment or settlement is paid to one person (i.e., the representative of the decedent's estate), but the legal right to the use and enjoyment of the funds paid inures to other persons (i.e., the decedent's creditors and heirs). It does not apply in cases such as the present one, where a veteran files an FTCA claim and enters into a settlement agreement in his or her own right and not as a representative for others. In such cases, the plain meaning of section 1151 requires offset of the entire settlement amount, and VA has no discretion to exclude a portion of the settlement from offset based on the disposition of those funds by the veteran. We held in O.G.C. Prec. 79-90 that it would be inequitable to offset a person's benefits by amounts of an FTCA award "the benefit of which the [individual] never enjoyed." ¹ In contrast, the veteran here has enjoyed the

¹ In a November 1988 letter responding to a congressional inquiry, we indicated that offset of the portion of an FTCA award used to pay attorney fees would be required even in the type of case described by O.G.C. Prec. 79-90. The General Counsel, citing the "American rule," stated that, where a DIC recipient had received a portion of an FTCA wrongful-death judgment in her individual capacity, the amount to be offset from her DIC benefits under what is now section 1151 must include her pro rata share of the attorney fees paid out of the judgment.

benefit of the amount paid to his attorney because that amount was used to pay a debt owed by the veteran for services rendered to the veteran by the attorney.

HELD:

When an individual is awarded a judgment or enters into a compromise on a Federal Tort Claims Act claim subject to 38 U.S.C. § 1151, that individual's future veterans' disability compensation benefits based on the same disability must be offset by the entire amount of the judgment or settlement proceeds, including the amount of any attorney fees paid out of such proceeds.

Mary Lou Keener