

**Department of  
Veterans Affairs**

# Memorandum

Date: September 21, 2004 VAOPGCPREC 10-2004

From: General Counsel (022)

Subj: Effect of Return to Active Duty upon Claims for VA Benefits

To: Director, Compensation and Pension Service (21)

**QUESTIONS PRESENTED:**

- A. In general, what impact does a veteran's return to active duty have on a pending claim for benefits? What is the status of the veteran's claim? What actions should or may the Department of Veterans Affairs (VA) take?
- B. When a veteran's claim has been remanded to a regional office for an examination and the veteran is not available for the examination because of the veteran's return to active duty, what is the status of the veteran's claim? What actions should or may VA take?
- C. When a veteran with a pending claim returns to active duty and is able to attend a scheduled examination while on active duty, what is the status of the veteran's claim? What actions should or may VA take?
- D. If a veteran with a pending claim returns to active duty and dies while on active duty, what is the effect of the pending claim on a subsequent claim for accrued benefits?

**COMMENTS:**

1. Numerous members of the Armed Forces Reserves have been called to active duty over the past two and a half years. See Exec. Order No. 13,223, 66 Fed. Reg. 48,201 (Sept. 18, 2001) (ordering the ready reserve of the armed forces to active duty). Some individuals called to active duty had filed claims for VA benefits based on their prior periods of active duty, which remained pending when they returned to active duty. The opinion request concerns the effect of a veteran's return to active duty on such pending claims.
2. The first question presented asks broadly what impact reentry into active duty has on a pending claim for benefits. As explained below, we conclude that a veteran's reentry

into active duty generally does not alter the legal rights and responsibilities of the veteran and VA with respect to a pending claim for benefits. No statute or regulation establishes special procedures or other limitations governing the adjudication of claims of veterans who have reentered active duty. The statutes and regulations requiring VA to provide notice and assistance to claimants would, by their terms, apply to claimants who have returned to active duty to the same extent as to all other claimants. *See, e.g.*, 38 U.S.C. §§ 5103, 5103A.

3. Reentry into active duty generally does not affect a veteran's potential entitlement to VA benefits. The term "veteran," as used to describe persons eligible for benefits under title 38, United States Code, refers to "a person who served in the active military, naval, or air service, and who was discharged or released therefrom under conditions other than dishonorable." 38 U.S.C. § 101(2). A person who has attained the status of a veteran based on separation from service does not lose that status merely because he or she has entered into a new period of active duty. A veteran who filed a claim for VA benefits before returning to active duty would be potentially entitled to benefits for at least the period between the date of the claim and the date of return to active service. Further, as explained below, such a veteran also may be potentially entitled to VA benefits while the veteran is on active duty. As noted in your opinion request, 38 U.S.C. § 5304(c) states that, "[p]ension, compensation, or retirement pay on account of any person's own service shall not be paid to such person for any period for which such person receives active service pay." *See also* 38 C.F.R. § 3.700(a)(1)(i) (stating same rule). That statute does not bar a veteran who reenters active duty from receiving VA compensation or pension. Rather, it bars such veterans only from receiving both active service pay and VA compensation or pension for the same period. As explained below, veterans who reenter active duty often may elect to receive VA benefits in lieu of active service pay.

4. Section 12316 of title 10, United States Code, governs a reservist's right to elect to receive either pay for their current military duty or benefits from the Federal Government based on a prior period of service. Section 12316(a) states:

Except as provided by subsection (b), a Reserve of the Army, Navy, Air Force, Marine Corps, or Coast Guard who because of his earlier military service is entitled to pension, retired or retainer pay, or disability compensation, and who performs duty for which he is entitled to compensation, may elect to receive for that duty either—

- (1) the payments to which he is entitled because of his earlier military service; or
- (2) if he specifically waives those payments, the pay and allowances authorized by law for the duty that he is performing.

In explaining the purpose of the predecessor to section 12316, the Senate Committee on Armed Services stated that it would "provide permanent authority whereby members of the Reserve components who are drawing disability pay or other compensation from the United States by virtue of prior military service may waive such pay in order to elect

to receive pay for active duty, active duty for training, or drill.” S. Rep. No. 81-569 (1955), *reprinted in* 1955 U.S.C.C.A.N. 2451, 2452. Earlier statutes, as interpreted by the Comptroller General of the United States, had provided in effect that a reservist who received VA compensation and who reentered active duty could not receive active service pay even upon waiver of his VA benefits. See 27 Comp. Gen. 565 (1948); 27 Comp. Gen. 416 (1948).

5. Section 12316(a) makes clear that reentry into active duty ordinarily does not bar a veteran from electing to receive VA benefits. Section 12316(b), however, limits the right of election in certain circumstances that may be relevant to reservists recently called to active duty. That section states:

Unless the payments because of his earlier military service are greater than the compensation prescribed by subsection (a)(2), a Reserve of the Army, Navy, Air Force, Marine Corps, or Coast Guard who because of his earlier military service is entitled to a pension, retired or retainer pay, or disability compensation, and who upon being ordered to active duty for a period of more than 30 days in time of war or national emergency is found physically qualified to perform that duty, ceases to be entitled to the payments because of his earlier military service until the period of active duty ends. While on that active duty, he is entitled to the compensation prescribed by subsection (a)(2). Other rights and benefits of the member or his dependents are unaffected by this subsection.

Accordingly, in times of war or national emergency, a reservist called to active duty for more than 30 days may elect to receive VA compensation or pension for that period only if the amount of such benefits is greater than the active service pay to which the reservist would be entitled. Even in cases covered by section 12316(b), a limited right of election may exist, and the existence of the right of election is contingent on the outcome of any pending claim for VA benefits. Accordingly, we conclude that 38 U.S.C. § 5304(c) and 10 U.S.C. § 12316 provide no basis for denying claims or otherwise altering VA’s actions with respect to claims solely because the veteran claimant has returned to active duty. Rather, section 12316 suggests a reason for continuing to develop and adjudicate such veterans’ claims even after they have returned to active duty.

6. Section 3.654(b)(1) of title 38, Code of Federal Regulations, states that, “[w]here the veteran returns to active duty status, the award [of compensation, pension, or retirement pay] will be discontinued effective the day preceding reentrance into active duty status.” To the extent this regulation may suggest that discontinuance of VA benefits is mandatory without regard to the veteran’s right of election, it would conflict with 10 U.S.C. § 12316. Other provisions of VA regulations and procedural manuals acknowledge the veteran’s right to elect VA payments in lieu of active service pay in accordance with 10 U.S.C. § 12316. See 38 C.F.R. § 3.700(a)(1)(iii); Veterans Benefits Administration Adjudication Procedures Manual M21-1, Part IV, para. 20.21. To the extent there may be a conflict between 38 C.F.R. § 3.654(b)(1) and the right of election

provided in 10 U.S.C. § 12316 and 38 C.F.R. § 3.700(a)(1)(iii), we believe the latter provisions must govern. Accordingly, section 3.654(b) provides no basis for concluding that a veteran's pending claim for VA benefits is rendered moot by his or her return to active duty.

7. Section 12316 of title 10, United States Code, applies only to duty performed by a reservist. The opinion request refers more broadly to any veteran who reenters active duty and thus may include a veteran who is not a reservist when reenlisting for active duty. We have found no statutes or other authorities governing the right of such veterans to elect VA benefits in lieu of active duty pay. However, there is no reason to assume that such veterans would have lesser rights of election than other veterans who reenter active service. Further, as noted above, they may be entitled to benefits for periods preceding their reenlistment. For purposes of this opinion, it is sufficient to note that no statute or regulation limits the rights of such veterans to pursue claims for VA benefits or otherwise imposes a change in the status of their benefit claims based on their return to active duty.

8. The opinion request notes that a veteran's return to active duty may practically limit VA's ability to develop and adjudicate a claim, particularly if the veteran's duties limit VA's ability to communicate with the veteran or to provide a medical examination or a hearing to which the veteran is entitled. See 38 U.S.C. §§ 5103A(d), 7107(b); 38 C.F.R. § 3.103(c). We do not believe that such practical difficulties require or permit any alteration of the rights or responsibilities of the claimant and VA under any statute or regulation with respect to the veteran's claim. VA may forego an otherwise required action if the claimant has waived a right to such action or the action has been rendered impossible. *See United States v. Mezzanatto*, 513 U.S. 196, 200-01 (1996) (parties generally may waive statutory rights); *Union Pacific Railroad Co. v. Hall*, 91 U.S. 343, 346-47 (1875) (it would be unreasonable to construe a statute to require an impossibility). However, the mere anticipation of delay in carrying out a necessary action due to the claimant's temporary unavailability would not provide a basis for denying the veteran's claim without taking the required action. In such circumstances, VA necessarily may defer its action on the claim until such time as the required actions can be taken, but could not deny the claim without providing the assistance or other actions required by statute.

9. Section 5103A of title 38, United States Code, directs VA to assist claimants in obtaining the evidence needed to substantiate their claims, including obtaining records and providing a medical examination or obtaining a medical opinion when necessary. VA may decline to provide such assistance if there is no reasonable possibility that such assistance could aid in substantiating the claim. 38 U.S.C. § 5103A(a)(2). If VA assistance could possibly aid in substantiating the claim, however, VA ordinarily may not, consistent with section 5103A, deny the claim without providing such assistance. A denial of the veteran's claim, unless appealed and reversed, would bar further consideration of the claim except upon submission of new and material evidence or a claim of clear and unmistakable error. *See* 38 U.S.C. §§ 5108, 7104(b), 7105(c). Although a veteran whose claim was denied without full development could seek to

reopen his or her claim following return from active duty, the veteran would be placed in a less favorable position than if VA had developed the original claim as required by statute. VA would assist the claimant in seeking records that may warrant reopening, but the claimant would not be entitled by statute or regulation to a medical examination in connection with a claim to reopen. See 38 C.F.R. § 3.159(c). Further, if the veteran's claim were reopened and granted, the effective date of the award ordinarily could be no earlier than the date of the reopened claim, rather than the date of the original claim. See 38 U.S.C. § 5110(a); 38 C.F.R. § 3.400(a), (q)(1)(ii). In view of those consequences, and in the absence of any statute or regulation allowing VA to forego a required procedure or duty based on circumstances that would merely delay but not preclude compliance with the requirement, we conclude that VA generally may not deny a claim solely because the claimant's return to active duty temporarily prevents VA from conducting an examination or other required procedure.

10. With respect to the "status" of the claim in the circumstances described above, we conclude that a veteran's return to active duty would not alter the status of a pending claim within the meaning of any statute or regulation. VA regulations at 38 C.F.R. § 3.160 describe a claim's status in terms of both the general nature of the benefit sought, see 38 C.F.R. § 3.160(b), (f) (referring to original claims and claims for increase), and the procedural posture of the claim, see 38 C.F.R. § 3.160(c)-(e) (referring to pending claims, finally adjudicated claims, and reopened claims). As explained above, a veteran's reentry into active service generally does not preclude entitlement to any VA benefit. Further, reentry into active service generally would not alter the procedural posture of the claim in terms of the categories of status recognized by current VA regulations. As a practical matter, where a claimant's return to active duty prevents VA from taking a necessary action, VA may have to defer action on the claim until the veteran becomes available for examination. To the extent this suspension or deferral of further action distinguishes such claims from other types of claims, VA may describe or categorize such claims in any manner that will assist it in managing its workload. For example, if VA considered it helpful to describe such cases as being in deferred or suspended status pending the veteran's return from active duty, it is free to do so, provided that the classification of the claim in that fashion is consistent with applicable regulations and does not adversely affect the claimant.

11. The second question presented asks what actions VA may or should take, and what the status of a veteran's claim is, when a claim has been remanded to a regional office for a medical examination and the veteran is unavailable for the examination because he or she has returned to active duty. As stated above, the veteran's return to active duty would not affect the status of the veteran's claim within the meaning of any applicable statute or regulation. If the veteran is unavailable for an examination that is necessary to a decision on the claim, VA may suspend its actions on the claim until the veteran is available for an examination, but it may not deny the claim solely because the veteran is unavailable. VA regulations provide that, when a claimant fails, "without good cause," to report for a necessary VA examination, VA may: decide the claim based on the evidence of record in original compensation claims; deny the claim if it is an original claim for a benefit other than compensation, a reopened claim for a benefit previously

disallowed, or a claim for increase; and initiate actions to terminate a running award. 38 C.F.R. § 3.655. Failure to report for an examination due to the performance of mandatory military duties would appear to constitute good cause for missing the examination, and section 3.655 would thus be inapplicable in those circumstances. In similar fashion, 38 C.F.R. § 3.158(b) states that, when a veteran fails, “without adequate reason,” to respond to an order to report to a VA examination within one year from the date of the order and payments have been discontinued, the claim will be considered abandoned. If the veteran’s military duties prevented the veteran from responding to an order for a VA examination, the veteran would seem to have an “adequate reason” for not responding. Not in every case would the fact that a veteran is serving on active duty compel the conclusion that there is good cause for missing a scheduled examination or adequate reason for failing to respond to an order for examination. Rather, VA may determine, on a case-by-case basis, whether the veteran’s military duties prevented the veteran from reporting for the examination or responding to an order for examination.

12. When the Board remands a case to a regional office with instructions to take some further action, the claimant is entitled to compliance with the remand instructions. See *Stegall v. West*, 11 Vet. App. 268, 271 (1998). If the Board has ordered the regional office to obtain a medical examination of the veteran, the regional office generally must obtain such an examination whenever it can be obtained. Although section 302 of Pub. L. No. 103-446, 108 Stat. 4645, 4658 (1994), requires that remanded cases be given expeditious treatment, we do not believe that delays due to circumstances beyond VA’s control would contravene that requirement. Cf. *Dambach v. Principi*, 14 Vet. App. 307, 309 (2001) (declining to impose time limit for completing remand proceedings and noting that completion of such proceedings depended in part on cooperation of Department of Defense); *Belton v. Principi*, 13 Vet. App. 200, 204 (1999) (finding that VA failed to conduct examination on remand expeditiously, but noting that veteran’s incarceration and frequent transfers within prison system may have contributed to delays). We recommend, however, that any determination that a veteran is unavailable for a necessary examination be documented and explained in the claims file, to provide a record of the cause of any delays on remand. Cf. *Bolton v. Brown*, 8 Vet. App. 185, 191 (1995) (discussing VA’s failure to explain why incarcerated veteran could not be examined or to document its efforts to examine him).

13. The opinion request notes that, when a veteran is unavailable for examination for an extended period due to service on active duty, the lapse of time may make it difficult to determine the nature and extent of the veteran’s disability for past periods relevant to the claim. For example, an examination conducted following the veteran’s return from active duty might not accurately reflect the veteran’s condition for periods before he or she returned to active duty. Those concerns must be addressed in the context of the facts of each case. Medical records from the veteran’s most recent period of active duty may assist in evaluating the disability for periods relevant to the claim for VA benefits. When the veteran becomes available for an examination, VA may ask the examiner to express an opinion, to the extent possible, concerning the veteran’s disability over the relevant past periods. Additionally, VA should seek records of treatment by private physicians during the period relevant to the claim. If, after full development, there is no

evidence of medical examination or treatment for the claimed condition for the relevant period, that fact itself may bear upon the existence and extent of the claimed disability for such period. *Cf. Maxson v. Gober*, 230 F.3d 1330, 1333 (Fed. Cir. 2000) (evidence of prolonged periods without treatment may be considered along with other factors in determining whether disability increased in severity during service). VA may also consider non-medical evidence, including lay statements and evidence concerning the veteran's duties during his or her most recent period of service, to the extent relevant to the claimant's physical or mental condition during such periods.

14. The third question presented asks what actions VA should or may take, and what the status of a veteran's claim is, when a veteran returns to active duty while his or her claim is pending but can attend an examination while on active duty. As explained above, a veteran's return to active duty generally does not alter the veteran's potential entitlement to VA benefits and does not affect a veteran's procedural right to assistance from VA. Accordingly, we conclude that, if the veteran is available for a VA examination, VA should continue to process the claim in the same manner as it would if the veteran had not returned to active duty. We further conclude, for the reasons set forth above, that the veteran's return to active duty would not affect the status of the veteran's claim within the meaning of any applicable statute or regulation, although VA remains free to categorize the claim in any manner it finds helpful for purposes of internal case management, provided that the categorization is consistent with regulations and the veteran is not adversely affected.

15. The fourth question presented asks what effect a veteran's pending claim for benefits has upon a survivor's claim for accrued benefits if the veteran dies following his or her return to active duty but before the veteran's pending claim is decided. A claim for periodic monetary benefits pending at the time of a veteran's death may provide the basis for an award of accrued benefits to the veteran's survivors under 38 U.S.C. § 5121(a). *See Jones v. West*, 136 F.3d 1296, 1300 (Fed. Cir.), *cert. denied*, 525 U.S. 834 (1998). Generally, when a claimant dies while his or her claim for benefits is pending, VA should notify any known survivors who may be eligible to claim accrued benefits of their potential eligibility for such benefits. *See* 38 C.F.R. § 3.150(b); *Landicho v. Brown*, 7 Vet. App. 42, 50-51 (1994). If VA receives from an eligible survivor an application for accrued benefits, or an application that may be construed as an application for accrued benefits, *see* 38 C.F.R. § 3.152(b), VA must determine whether the veteran was entitled to periodic monetary benefits based on the claim that was pending at the time of the veteran's death. These generally applicable principles would apply in cases where the veteran died on active duty while his or her claim was pending.

16. Section 5121(a) authorizes payment to survivors only of periodic monetary benefits that were "due and unpaid" to a beneficiary. Because VA is prohibited by 38 U.S.C. § 5304(c) from paying compensation or pension to a veteran for any period in which the veteran received active service pay, no compensation or pension could have been "due" to a veteran for any period in which he or she actually received active service pay. The term "due" is commonly understood to mean "owed or owing as a debt" or "having

reached the date at which payment is required.” WEBSTER’S THIRD NEW INT’L DICTIONARY 699 (1996). If a veteran received active service pay for any period, no compensation or pension would be owed to the veteran for such period. This principle would also apply in cases where the veteran did not die on active duty, but some portion of the retroactive benefits claimed by the survivor under 38 U.S.C. § 5121(a) consists of compensation or pension benefits allegedly owed to the veteran for a period in which the veteran received active service pay. Accordingly, for purposes of determining the amount of benefits payable to a survivor under section 5121(a), compensation or pension benefits could not have been “due and unpaid” to the veteran for any period for which the veteran received active service pay.

**HELD:**

A. A veteran’s return to active duty while his or her claim for benefits from the Department of Veterans Affairs (VA) is pending does not alter the rights and duties of the claimant and VA under any statute or regulation with respect to the development and adjudication of the claim or the status of the claim within the meaning of any statute or regulation. VA should process the claims of such veterans in the same fashion as it would had the veterans not returned to active duty. If a veteran’s return to active duty temporarily prevents VA from providing a necessary medical examination or taking other action necessary to a proper decision on the claim, VA may suspend or defer action on the claim until the necessary actions can be accomplished. VA may not deny a claim solely because the veteran has returned to active duty or solely because the veteran is temporarily unavailable for a necessary examination due to his or her return to active duty.

B. When a veteran’s claim has been remanded to a regional office for an examination and the veteran is not available for the examination because of the veteran’s return to active duty, VA may defer action on the claim until the required examination can be conducted. VA may not deny the claim solely because the veteran is temporarily unavailable for examination due to his or her return to active duty. The veteran’s return to active duty does not alter the status of the veteran’s claim within the meaning of any statute or regulation.

C. When a veteran has a pending claim and returns to active duty, but is able to attend a VA examination while on active duty, VA should process the claim in the same manner as it would if the veteran had not returned to active duty. The veteran’s return to active duty does not alter the status of the veteran’s claim within the meaning of any statute or regulation.

D. If a veteran with a pending claim returns to active duty and dies on active duty before the claim is decided, the pending claim may provide the basis for an award of accrued benefits to a survivor under 38 U.S.C. § 5121(a). Accrued benefits consist only of amounts “due and unpaid” to the deceased beneficiary. Because 38 U.S.C. § 5304(c) prohibits VA from paying compensation or pension to a veteran for any period



in which the veteran received active service pay, accrued benefits under 38 U.S.C. § 5121(a) may not include compensation and pension amounts for any period for which the veteran received active service pay.

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