

**EXEMPTIONS CLAIMED FOR THE SYSTEM:**

5 U.S.C. 552a(j)(2).

[FR Doc. 96-32025 Filed 12-17-96; 8:45 am]

BILLING CODE 4910-62-P

**Surface Transportation Board**

[STB Docket No. AB-364 (Sub-No. 3X)]

**Texas Northeastern Division, Mid-Michigan Railroad, Inc.—Discontinuance of Service Exemption—in Red River and Bowie Counties, TX**

[STB Docket No. AB-3 (Sub-No. 137X)]

**Missouri Pacific Railroad Company—Abandonment Exemption—in Red River and Bowie Counties, TX****AGENCY:** Surface Transportation Board.**ACTION:** Notice of exemption.

**SUMMARY:** Under 49 U.S.C. 10502, the Board exempts from the requirements of 49 U.S.C. 10903 the discontinuance of service by Texas Northeastern Division, Mid-Michigan Railroad, Inc., over, and the abandonment by Missouri Pacific Railroad Company of, a 38.5-mile rail line extending from milepost 23.0 at New Boston, to the end of track at milepost 61.5 near Clarksville, in Red River and Bowie Counties, TX, subject to historic preservation and standard labor protective conditions.

**DATES:** The exemption will be effective January 17, 1997 unless it is stayed or a statement of intent to file an offer of financial assistance (OFA) is filed. Statements of intent to file an OFA<sup>1</sup> under 49 CFR 1152.27(c)(2) and requests for a notice of interim trail use/rail banking under 49 CFR 1152.29 must be filed by December 30, 1996; petitions to stay must be filed by January 2, 1997; requests for a public use condition under 49 CFR 1152.28 must be filed by January 7, 1997; and petitions to reopen must be filed by January 13, 1997.

**ADDRESSES:** An original and 10 copies of all pleadings referring to STB Docket No. AB-364 (Sub-No. 3X) and STB Docket No. AB-3 (Sub-No. 137X) must be filed with: Office of the Secretary, Case Control Branch, Surface Transportation Board, 1201 Constitution Avenue, NW., Washington, DC 20423; in addition, a copy of all pleadings must be served on petitioner's representative: Michael W. Blaszk, Esq., 211 South Leitch Avenue, LaGrange, IL 60525-2162.

**FOR FURTHER INFORMATION CONTACT:** Joseph H. Dettmar, (202) 927-5660.

[TDD for the hearing impaired (202) 927-5721.]

**SUPPLEMENTARY INFORMATION:**

Additional information is contained in the Board's decision. To purchase a copy of the full decision, write to, call or pick up in person from: DC NEWS & DATA, INC., 1201 Constitution Avenue, NW., Room 2229, Washington, DC 20423. Telephone: (202) 289-4357/4359. [Assistance for the hearing impaired is available through TDD services (202) 927-5721.]

Decided: December 4, 1996.

By the Board, Chairman Morgan, Vice Chairman Simmons, and Commissioner Owen.

Vernon A. Williams,  
Secretary.

[FR Doc. 96-32096 Filed 12-17-96; 8:45 am]

BILLING CODE 4915-00-P

**DEPARTMENT OF VETERANS AFFAIRS****Summary of Precedent Opinions of the General Counsel****AGENCY:** Department of Veterans Affairs.**ACTION:** Notice.

**SUMMARY:** The Department of Veterans Affairs (VA) is publishing a summary of legal interpretations issued by the Department's General Counsel involving veterans' benefits under laws administered by VA. These interpretations are considered precedential by VA and will be followed by VA officials and employees in future claim matters. It is being published to provide the public, and, in particular, veterans' benefit claimants and their representatives, with notice of VA's interpretation regarding the legal matter at issue.

**FOR FURTHER INFORMATION CONTACT:** Jane L. Lehman, Chief, Law Library, Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 273-6558.

**SUPPLEMENTARY INFORMATION:** VA regulations at 38 CFR 2.6(e)(9) and 14.507 authorize the Department's General Counsel to issue written legal opinions having precedential effect in adjudications and appeals involving veterans' benefits under laws administered by VA. The General Counsel's interpretations on legal matters, contained in such opinions, are conclusive as to all VA officials and employees not only in the matter at issue but also in future adjudications and appeals, in the absence of a change in controlling statute or regulation or a

superseding written legal opinion of the General Counsel.

VA publishes summaries of such opinions in order to provide the public with notice of those interpretations of the General Counsel that must be followed in future benefit matters and to assist veterans' benefit claimants and their representatives in the prosecution of benefit claims. The full text of such opinions, with personal identifiers deleted, may be obtained by contacting the VA official named above.

VAOPGCPREC 4-96

**Question Presented**

Are the provisions of 38 U.S.C. 110 violated when two service-connected disabilities, which have been erroneously rated as one disability at or above a specific evaluation for 20 or more years, are rerated as two separate disabilities such that the combination of their evaluations equals or exceeds the prior specific evaluation?

Held

The provisions of 38 U.S.C. 110, which prohibit a disability that has been continuously rated at or above any evaluation for 20 or more years for compensation purposes from thereafter being rated at less than such evaluation, are not violated when two or more service-connected disabilities, which have been erroneously rated as one disability (but not as the result of the combination of known or determinable separate disability evaluations under 38 C.F.R. 4.25), at or above a specific evaluation for at least 20 years, are rerated as separate disabilities such that the combination of their evaluations equals or exceeds the prior specific evaluation.

Effective Date: July 18, 1996.

VAOPGCPREC 5-96

**Question Presented**

a. Is the Department of Veterans Affairs (VA) authorized to directly pay an attorney's fee from past-due benefits in a case where the attorney's representation is limited solely to the proceedings before the Court of Veterans Appeals (CVA) and the benefits are awarded to the veteran by VA following a CVA remand for additional development?

b. In a case where an attorney's representation is limited to the CVA proceedings and VA grants benefits to the veteran following a CVA remand for additional development, must the fee agreement specifically mention that it includes benefits awarded for dependents for the attorney to be paid

<sup>1</sup> See *Exempt. of Rail Abandonment—Offers of Finan. Assist.*, 4 I.C.C. 2d 164 (1987).

directly by VA out of a past-due amount paid to the veteran for dependents?

c. Whether a fee agreement must be between the beneficiary of a secondary benefit, e.g., a beneficiary entitled to receive past-due dependent educational assistance (DEA) benefits, and the attorney in order for VA to directly pay attorney fees from the beneficiary's award of past-due benefits?

Held

a. VA is authorized to directly pay an attorney's fee from past-due benefits in an appropriate case where the attorney's representation is limited solely to the CVA proceedings and the benefits are awarded to the veteran by VA following a CVA remand for additional development.

b. Depending on all of the circumstances involved, it may not be necessary for a fee agreement to specifically mention that it includes dependency benefits for an attorney to be paid directly by VA out of a past-due amount paid to the veteran for dependents.

c. A fee agreement must be between the beneficiary of a secondary benefit and an attorney in order for VA to directly pay the attorney a fee from the beneficiary's award of past-due secondary benefits.

Effective Date: July 24, 1996.

#### VAOPGCPREC 6-96

Question Presented

a. Under what circumstances must the Board of Veterans' Appeals (Board) address the issue of entitlement to an extraschedular rating under 38 C.F.R. 3.321(b)(1) or 38 C.F.R. 4.16(b) in reviewing claims for an increased evaluation for a service-connected disability or a total disability rating for compensation based on individual unemployability?

b. In circumstances where the issue of entitlement to an extraschedular rating under § 3.321(b)(1) or 4.16(b) must be addressed, what procedure should the Board follow when the issue was not addressed by the regional office (RO)? Does the Board have jurisdiction over extraschedular claims raised for the first time by the record or the appellant before the Board?

c. Is the issue of entitlement to an extraschedular evaluation inextricably intertwined with the underlying claim for an increased evaluation or a total disability rating based on individual unemployability, such that the issues may not be separated by the Board for purposes of taking final action on appeal?

d. If the appellant or the representative raises the issue of a rating under § 3.321(b)(1) or 4.16(b) but submits no argument or evidence, and the record on appeal contains no evidence that would make such a claim plausible, may the Board dismiss the claim as not well-grounded or conclude that the RO's failure to address the issue of an extraschedular evaluation was harmless error because the claim is not plausible?

Held

a. The Board is required to address the issue of entitlement to an extraschedular rating under 38 C.F.R. 3.321(b)(1) only in cases where the issue is expressly raised by the claimant or the record before the Board contains evidence of "exceptional or unusual" circumstances indicating that the rating schedule may be inadequate to compensate for the average impairment of earning capacity due to the disability. The Board is required to address the issue of entitlement to a total disability rating based on individual unemployability (TDIU rating) under 38 C.F.R. 4.16(b) only in cases where the issue is expressly raised by the claimant or the record before the Board contains evidence that the appellant may be unable to secure or follow a substantially gainful occupation due to his or her service-connected disability.

b. When the issue of entitlement to an extraschedular rating or a TDIU rating for a particular service-connected disability or disabilities is raised in connection with a claim for an increased rating for such disability or disabilities, the Board would have jurisdiction to consider that issue. If the Board determines that further action by the RO is necessary with respect to the issue, the Board should remand that issue.

c. When the issue of entitlement to an extraschedular rating or a TDIU rating arises in connection with an appeal in an increased rating case, the Board is not precluded from issuing a final decision on the issue of an increased schedular rating and remanding the extraschedular-rating or TDIU-rating issue to the RO.

d. Where the appellant has raised the issue of entitlement to an extraschedular rating or a TDIU rating but the record contains no evidence which would render the claim plausible, the Board may, subject to the considerations expressed in VAOPGCPREC 16-92 and *Bernard v. Brown*, determine that the referral to the appropriate officials for consideration of an extraschedular rating or a TDIU rating is not warranted.

Effective Date: August 16, 1996.

#### VAOPGCPREC 7-96

Question Presented

Under what circumstances does an increase in an individual's indebtedness result from "a separate and distinct transaction" for purposes of notification of the right to request a waiver of indebtedness?

Held

Notification of waiver rights is necessary when an increase in indebtedness is based on circumstances not considered in computation of the original indebtedness. Notification is not required when an increase is based on the addition of interest to a debt or on a technical correction concerning the amount of the original indebtedness.

Effective Date: September 9, 1996.

#### VAOPGCPREC 8-96

Question Presented

May the Department of Veterans Affairs (VA) pay the amounts represented by several benefit checks received by the guardian of certain VA beneficiaries but not negotiated prior to the guardian's death, and, if so, to whom should payment be made?

Held

Section 5122 of title 38, United States Code, does not apply to checks received by a guardian on behalf of a VA beneficiary but not negotiated prior to the guardian's death. Where such checks have been canceled pursuant to the Competitive Equality Banking Act of 1987, individuals claiming entitlement to the proceeds of such checks must file a claim for those amounts with VA. Any such claim not filed within six years after the claim accrues is barred by 31 U.S.C. 3702(b)(1).

Effective Date: September 26, 1996.

#### VAOPGCPREC 9-96

Question Presented

a. Whether VA disability compensation must be offset to recoup the amount of Reservists' Special Separation Pay (RSSP) received by a veteran under Public Law 102-484?

b. Whether VA disability compensation must be offset to recoup the amount of Reservists' Involuntary Separation Pay (RISP) received by a veteran under Public Law 102-484?

Held

a. The Department of Veterans Affairs (VA) is not authorized under section 4416(b) of Public Law No. 102-484 to offset VA disability compensation to recoup the amount of Reservists' Special

Separation Pay (RSSP) received by a veteran pursuant to section 4416(b).

b. Section 4418(c) of Public Law 102-484 which provides that the provisions of section 1174(h)(2) are applicable to Reservists' Involuntary Separation Pay (RISP) and 38 C.F.R. 3.700(a)(5) require VA to offset disability compensation to recoup the amount of RISP received by a veteran pursuant to section 4418 provided that the VA compensation is for a disability incurred in or aggravated by service prior to the date of receipt of the RISP.

Effective Date: October 11, 1996.

#### *VAOPGCPREC 10-96*

##### Question Presented

Does the action of the Secretary of a Service Department under 10 U.S.C. 874(b), substituting an administrative discharge for a discharge or dismissal executed in accordance with the sentence of a general court-martial, remove the statutory bar to benefits under 38 U.S.C. 5303(a)?

##### Held

An upgraded discharge issued pursuant to 10 U.S.C. 874(b) does not remove the statutory bar to benefits under 38 U.S.C. 5303(a) for individuals discharged or dismissed by reason of the sentence of a general court-martial.

Effective Date: October 28, 1996.

#### *VAOPGCPREC 11-96*

##### Question Presented

1. Does section 8052 of the Omnibus Budget Reconciliation Act of 1990 prohibit payment of dependency and indemnity compensation under 38 U.S.C. 1310 for a veteran's death where the disability from which the veteran died resulted from the veteran's alcohol or drug abuse, but service connection of the disability was established for disability compensation purposes based on a claim filed on or before October 31, 1990?

2. Does section 8052 of the Omnibus Budget Reconciliation Act of 1990 prohibit payment of dependency and indemnity compensation under 38 U.S.C. 1318 where the disability that was continuously rated totally disabling for an extended period immediately preceding a veteran's death resulted from the veteran's alcohol or drug abuse, but service connection of the disability was established for disability compensation purposes based on a claim filed on or before October 31, 1990?

##### Held

Section 8052 of the Omnibus Budget Reconciliation Act of 1990, Public Law

101-508, section 8052, 104 Stat. 1388, 1388-351, applicable to claims filed after October 31, 1990, precludes an injury or disease that is a result of a person's own abuse of alcohol or drugs from being considered incurred in line of duty and, consequently, precludes resulting disability or death from being considered service connected. Section 8052 therefore prohibits the payment of dependency and indemnity compensation based on a veteran's death resulting from such a disability or on the basis that the veteran was in receipt of or entitled to receive compensation for such a disability continuously rated totally disabling for an extended period immediately preceding death. Even where service connection established for compensation purposes in a claim filed on or before October 31, 1990, for a disability resulting from a veteran's own alcohol or drug abuse has been in effect for ten or more years and would therefore generally be protected from severance under the provisions of 38 U.S.C. 1159 and 38 C.F.R. 3.957, section 8052 prohibits the payment of dependency and indemnity compensation in a claim filed after October 31, 1990, based on a veteran's death resulting from such a disability or on the basis that the veteran was in receipt of or entitled to receive compensation for such a disability continuously rated totally disabling for an extended period immediately preceding death.

Effective Date: November 15, 1996.

#### *VAOPGCPREC 12-96*

##### Question Presented

Whether 38 C.F.R. 3.700(a)(3) or any other legal authority requires withholding of a veteran's Department of Veterans Affairs (VA) disability compensation to recoup the amount of nondisability severance pay received by the veteran from the veteran's armed forces component upon discharge from military service.

##### Held

Section 1174(h)(2) of title 10, United States Code, which provides that there shall be deducted from any disability compensation under laws administered by the Department of Veterans Affairs (VA) an amount equal to the amount of separation pay received under section 1174 or severance pay or readjustment pay received under any other provision of law, requires that VA recoup from a veteran's VA disability compensation the amount of "nondisability severance pay" received by the veteran under section 631 of Public Law 96-513. The

statement in 38 C.F.R. 3.700(a)(3), which reflects the statute requiring recoupment of disability severance pay, that "[t]here is no prohibition against payment of compensation where the veteran received nondisability severance pay" is of no effect as it is inconsistent with 10 U.S.C. 1174(h)(2).

Effective Date: November 21, 1996.

#### *VAOPGCPREC 13-96*

##### Question Presented

a. Does the protection of service connection provided by 38 U.S.C. 1159 apply to disabilities compensated under 38 U.S.C. 1151?

b. Is termination of entitlement to benefits under 38 U.S.C. 1151 subject to the requirements of 38 C.F.R. 3.105(d)?

##### Held

a. The protection of service connection under 38 U.S.C. 1159 is not applicable to disabilities compensated under 38 U.S.C. 1151.

b. Termination of entitlement to benefits under 38 U.S.C. 1151 is not subject to the requirements of 38 C.F.R. 3.105(d), regarding severance of service connection, but is subject to similar requirements under 38 C.F.R. 3.103 and 3.105(a).

Effective Date: November 25, 1996.

#### *VAOPGCPREC 14-96*

##### Questions Presented

a. May the Secretary pay attorney fees from the lump-sum proceeds of a National Service Life Insurance (NSLI) policy due to the beneficiary of that policy pursuant to authority granted in 38 U.S.C. 5604(d) to directly pay attorney fees from past-due benefits?

b. Where the proceeds of a NSLI policy are payable to the beneficiary in monthly installments, may the Secretary withhold a portion of each payment to the beneficiary for purposes of direct payment of attorney fees?

##### Held

a. The statutory and regulatory provisions applicable to payment of attorney fees from past-due benefits, codified at 38 U.S.C. 5904 (c) and (d), and 38 C.F.R. § 20.609(h), do not distinguish payment of attorney fees in insurance cases from other types of benefit appeals. The Secretary may, therefore, directly pay attorney fees from the proceeds of a National Service Life Insurance (NSLI) policy payable in a lump sum, whenever the requirements for direct payment of attorney fees from past-due benefits contained in 38 U.S.C. 5904(c) and (d) are met.

b. The Secretary may directly pay attorney fees from the proceeds of a

NSLI policy payable in monthly installments only from the past-due installments which accrued between the date the policy matured and the date of the decision granting the proceeds to the beneficiary, provided all other requirements for the direct payment of attorney fees from past-due benefits contained 38 U.S.C. 5904 (c) and (d) are met.

Effective Date: November 25, 1996.

By Direction of the Secretary.

Mary Lou Keener,

*General Counsel,*

[FR Doc. 96-32059 Filed 12-17-96; 8:45 am]

BILLING CODE 8320-01-P