UNITED STATES COURT OF VETERANS APPEALS

NO. 96-299

DONALD R. KEEN, APPELLANT,

V.

TOGO D. WEST, JR.,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

On Appeal from the Board of Veterans' Appeals

(Decided February 5, 1999)

Lisa M. Myers was on the brief for the appellant.

Robert E. Coy, Acting General Counsel; *Ron Garvin*, Assistant General Counsel; *Carolyn F. Washington*, Deputy Assistant General Counsel; and *Karen P. Galla* were on the brief for the appellee.

Before NEBEKER, *Chief Judge*, and KRAMER and HOLDAWAY, *Judges*.

NEBEKER, *Chief Judge*, filed the opinion of the Court. KRAMER, *Judge*, filed an opinion concurring in the result.

NEBEKER, *Chief Judge*: The appellant, Donald R. Keen, appeals the February 15, 1996, decision of the Board of Veterans' Appeals (BVA or Board) which determined that, effective January 1, 1993, Mr. Keen was not entitled to non-service-connected disability pension benefits under section 306 of the Veterans' and Survivors' Pension Improvement Act of 1978 (VSPIA), Pub. L. No. 95-588, 92 Stat. 2497 (1978), because his 1992 income exceeded the statutory limit. For the reasons stated below, the Court will vacate the BVA decision and remand the matter.

I. FACTS

In 1971, Mr. Keen was granted a non-service-connected disability pension. Record (R.) at 44-45. As a recipient of non-service-connected disability pension when the VSPIA became effective on December 31, 1978, he was eligible to elect to receive an "improved" pension under the new Act,

or, under section 306 of that Act, to continue to receive a pension as provided under the earlier pension program, i.e., a "section 306 pension." Mr. Keen chose to continue to receive pension under section 306.

In December 1992, the veteran submitted a VA Eligibility Verification Report which reflected that he and his wife had received Social Security benefits (although she had also worked for part of the year), and his wife had been paid a lump sum of $10,642.48 from her two retirement accounts. R. at 85, 87-88. He also claimed unreimbursed medical expenses for 1992 in the amount of $5,776.22. *Id*. The VA regional office (RO) terminated the section 306 disability pension effective January 1, 1993, based on a finding that the lump sum payment from Mrs. Keen's retirement plan caused Mr. Keen's income to exceed the eligibility level. R. at 92. Mr. Keen appealed that determination to the BVA. R. at 94, 111. After performing various calculations, including determining the amount to be deducted from the veteran's countable income for unreimbursed medical expenses under 38 C.F.R. § 3.262(l) (1998), the BVA concluded that the veteran's total countable income in 1992 exceeded the limit set in 38 C.F.R. § 3.26(a) (1998), and that the RO had properly terminated section 306 pension benefits. R. at 9. This appeal followed.

II. ANALYSIS

There are three types of non-service-connected pension programs under which VA pays eligible veterans: "old law" pension, "section 306" pension, and "improved" pension. The first type, "old law" pension, is available to veterans who were in receipt of non-service-connected pension on June 30, 1960, under the pension program preserved by section 9(b) of the Veterans' Pension Act of 1959 (VPA), and who have had no break in eligibility. Pub. L. No. 86-211, § 9(b), 73 Stat. 432, 436 (1959). The 1959 VPA excluded from countable income "payments to an individual under public or private retirement, annuity, endowment, or similar plans or programs equal to his contributions thereto." *Id*., § 2(a), 73 Stat. 432 (amending provision codified at 38 U.S.C. § 503, subsequently renumbered as 38 U.S.C. § 1503). Further statutory amendments that became effective December 31, 1964, eliminated full recoupment of personal contributions for payment from retirement plans and excluded only 10% of any such payment. *See* Pub. L. No. 88-664, § 1, 78 Stat. 1094 (1964). However, the 1964 legislation preserved this recoupment feature, i.e., exclusion from

countable income of personal contributions to public or private retirement plans, for eligible individuals. *Id*., §§ 10, 11(b), 78 Stat. 1096.

The second type of pension program is the "section 306" pension. That term applies to the pension program as it existed after Public Law No. 88-664 became effective on December 31, 1964, until the "improved" pension program came into being on December 31, 1978, when the VSPIA became effective. The VSPIA put into effect the third type of pension, "improved" pension. VSPIA, *supra*. However, section 306 of the VSPIA grandfathered certain provisions that had been applicable to veterans in receipt of pension on December 31, 1978, for those pension recipients who chose not to go into the "improved" pension program. Pub. L. No. 95-588, § 306(a), 92 Stat. 2508. According to the Secretary, many beneficiaries chose to stay with section 306 because there are fewer income exclusions under the improved pension program. Secretary's Brief (Br.) at 5. The VSPIA also continued "old law" pension for veterans who continuously maintained their eligibility for that pension program, that is, those individuals in receipt of pension on December 31, 1964, who had never opted out of that program and had never exceeded the income limits for "old law" pension so as to lose eligibility. Pub. L. No. 95-588, § 306(b)(2), 92 Stat. 2509. Because Mr. Keen applied for and received non-service-connected pension in 1971, and was continuing to receive that pension on December 31, 1978 (when the law creating "improved" pension became effective), he qualified as a section 306 pensioner. R. at 44.

Section 306(a)(2) provides that beneficiaries, such as Mr. Keen, who did not elect to receive improved pension would continue to receive pension at the rate in effect at the time the program was phased out, December 31, 1978, so long as their annual countable income does not exceed the annual income limitation that is set by statute each year for recipients of that type of pension. Pub. L. No. 95-588, § 306(a)(2), (b)(3). However, if the countable income of a section 306 pension recipient ever exceeds the income limitation established for a given year, that person is precluded from establishing entitlement under any other pension program except the improved pension program. *See Bone v. Brown*, 9 Vet.App. 446, 449-50 (1996) (citing 38 C.F.R. § 3.960, and finding regulation "entirely consistent with [section 306 of] the 1978 Act").

Under the provisions for section 306 pensions, countable annual income is determined by the amount of income received during the calendar year from January 1 through December 31 of any given year. 38 C.F.R. § 3.252(c) (1998). Income is generally defined as payments of any kind or

from any source, unless specifically excluded, *see* 38 U.S.C. § 1503; 38 C.F.R. § 3.260 (1998). By regulation, "[i]ncome of the spouse will be determined under the rules applicable to income of the claimant." 38 C.F.R. § 3.262(b) (1998). The income of a section 306 pension recipient's spouse is defined as countable income, except for the amount of the spousal income exclusion provided under 38 C.F.R. § 3.262(b)(2), or the actual amount of spousal income where it is greater than the "standard" income exclusion for that year and failure to exclude the greater amount would work a hardship on the veteran. *Id.* The Secretary points out that the BVA excluded Mrs. Keen's actual earned income of $ 6,734.08 from countable income for 1992, and had excluded her earned income each year under the regulations applicable to section 306 pensions. Secretary's Br. at 8-9.

In support of its decision that Mr. Keen's countable income for 1992 exceeded the limit for section 306 pension recipients, the BVA cited 38 C.F.R. § 3.262(e)(1) (1998). That provision is as follows:

> *Protected pension*. Except as provided in this paragraph (e)(1), effective January 1, 1965, in determining income for pension purposes under laws in effect on June 30, 1960, 10 percent of the retirement payments received by a veteran, surviving spouse, or child will be excluded. The remaining 90 percent will be considered income as received. Where the retirement benefit is based on the claimant's own employment, payments will not be considered income until the amount of the claimant's personal contribution (as distinguished from amounts contributed by the employer) has been received. Thereafter, the 10 percent exclusion will apply.

38 C.F.R. § 3.262 (e)(1). Subparagraph (e)(1) states an exception to the general rule (that 90% of retirement payments must be included as income) for individuals in receipt of "old law" protected pension, the first type discussed above. *Id.*; *see also* 38 C.F.R. § 3.1 (v) (defining old law pension as that under "disability and death pension programs that were in effect on June 30, 1960. . . . protected under section 9(b) of the Veteran's [sic] Pension Act of 1959 (Pub. L. [No.] 86-211, 73 Stat. 432)"). On its face, therefore, the regulation provides that, for certain qualifying individuals--"old law" protected pension recipients--personal contributions to retirement funds will not be counted as income until fully recouped, after which a 10% exclusion will apply. This subparagraph addresses retirement payments to a "veteran, *surviving* spouse, or child," but does not list the category to which Mrs. Keen belongs, that is, the living spouse of a living veteran. *See* 38 C.F.R. § 3.262 (e)(1) (emphasis added).

On the other hand, subsection (e)(2) of section 3.262 is as follows:

> *Pension; Pub. L. 86-211.* Except as provided in this subparagraph, effective January 1, 1965, in determining income for pension purposes, under Pub. L. [No.] 86-211 (73 Stat. 432), 10 percent of the retirement payments received by a veteran, *the veteran's spouse*, surviving spouse, or child will be excluded. The remaining 90 percent will be considered income as received. Where a person was receiving or entitled to receive pension and retirement benefits based on his or her own employment on December 31, 1964, the retirement payments will not be considered income until the amount of the claimant['s] personal contributions (as distinguished from amounts contributed by the employer) has been received. Thereafter the 10 percent exclusion will apply.

38 C.F.R. § 3.262 (e)(2) (emphasis added). Subparagraph (e)(2) is applicable to Mr. Keen for two reasons: it is the provision applicable to section 306 pension recipients, and it pertains to retirement payments received by a living veteran's spouse. *Id.*; see also 38 C.F.R. § 3.1 (u) ("*Section 306 pension* means the disability and death pension programs in effect on December 31, 1978, which arose out of Pub. L. [No.] 86-211; 73 Stat. 432." (emphasis in original)). The applicable subparagraph, like subparagraph (e)(1), provides a limited recoupment exclusion from earned income for one category of section 306 pension recipients, those "receiving or entitled to receive pension and retirement benefits based on his or her own employment on December 31, 1964." 38 C.F.R. § 3.262 (e)(2).

Mr. Keen does not dispute payment of $10,642.48 to Mrs. Keen during 1992, but argues that the payout was earned income paid to his spouse, excludable under 38 C.F.R. § 3.262(b)(2) on the basis that it was reported as income (and excluded) during the years while Mrs. Keen was employed. *See* Appellant's Br. at 7-9. The appellant further argues that 38 C.F.R. § 3.262(e), which contains the provisions governing retirement benefits, does not require inclusion of lump sum payouts of aggregated amounts of money, contributed by the spouse from her income over the years, and reported contemporaneously to VA. Appellant's Br. at 13-14 n. 10. According to him, the lump sum payout was not an employer-conferred benefit, but a return of wages previously held. *Id.*

The Secretary responds that the BVA properly characterized the lump sum payout as a retirement benefit. Secretary's Br. at 4. It is true that, as the Secretary points out, this Court has held that receipt of a lump sum retirement benefit could be considered as income in one calendar year for the purpose of determining whether a claimant has exceeded the maximum allowable income, even

though payment was rendered for services over many years of employment. *Hermogenes v. Brown*, 9 Vet.App. 75, 76-77 (1996). However, in *Hermogenes*, the retirement payment was specifically identified as "gratuity benefit payments," *id*. at 76, and that opinion does not address retirement payments that are purely a return of aggregated payments from wages. Here, the parties agree that the payment to the appellant's spouse was on consideration of her retirement; however, the appellant has consistently maintained that the lump sum was, in fact, a return of his spouse's contributions from her earned income. Although the BVA acknowledged this contention, it erroneously relied upon 38 C.F.R. § 3.262(e)(1) as authority for its decision to exclude only 10% of the payout, failed to make a factual determination concerning the source of the retirement payment, and did not address the effect, if any, of the language that appears in both subparagraphs (e)(1) and (e)(2) of that subsection which excludes as countable income retirement payments to certain categories of "claimant" where those payments are actually a direct return of contributions from earned income. R. at 5, 8. (Under section 3.262(b), *see supra,* income of a claimant's spouse is treated under the rules applicable to income of the claimant.)

Our colleague, concurring in the result, would hold the BVA's application of subparagraph (e)(1) to be harmless error, but would nevertheless remand on another ground. However, on this record, we cannot agree. The Secretary's failure to find the underlying facts called for by his regulations and to apply the operative language of the regulations to these facts makes it impossible to determine that the error was harmless. *See* 38 U.S.C. § 7261.

Moreover, in his brief arguing for affirmance of the BVA's decision, the Secretary cites a precedential opinion of the VA General Counsel (GC), issued nearly a year after the BVA decision here on appeal, which would treat disbursements from Individual Retirement Accounts (IRAs) as countable income subject to the 10% exclusion for section 306 pension purposes. Secretary's Br. at 8; VA Gen. Coun. Prec. 1-97 (Jan. 8, 1997) (Secretary's Br. at App. II). The Secretary characterizes these IRAs as "essentially nonemployer funded retirement plans." Secretary's Br. at 8. As the Secretary points out, the precedential opinions of the VAGC are binding on the BVA. *Id.*, *citing* 38 U.S.C. § 7104(c). Because the January 8, 1997, VAGC opinion was, however, issued eleven months after the BVA decision here on appeal, the BVA could not have relied upon it or applied its analysis in issuing its February 15, 1996, decision. Lacking, for example, is a factual finding by the BVA that Mrs. Keen's retirement accounts were IRAs. Accordingly, the Court does

not address the merits of the VAGC opinion. *See Nagler v. Derwinski*, 1 Vet.App. 297, 306-07 (1991) (Court, created under Article I, lacks power to issue declaratory judgments). Moreover, if the applicable regulations on their face, or as applied by VA before the VAGC's precedential opinion was issued, had offered a broader exclusion of payments from employee-funded retirement plans, the more favorable construction must apply, unless contrary to legislative authority. *See Karnas v. Derwinski*, 1 Vet.App. 308 (1991).

The Court is constrained to note, however, that the VAGC precedential opinion fails to address the language in the regulation that appears to exclude--for at least some categories of claimants--personal contributions to retirement funds. The Court notes that 38 C.F.R. § 3.262(e)(1) and (e)(2) have not been amended since the VAGC opinion was issued, and the VAGC opinion does not cite to any legislation more recent than the 1978 VPSIA. The current versions of 38 C.F.R. § 3.262(e)(1) and (e)(2) both continue to contain language purporting to exclude from income "claimant personal contributions" to pension and retirement benefit plans for at least certain categories of pension recipients.

On this record and on these pleadings, this case is unripe for dispositive judicial review, and remand is necessary. Both legal and factual issues remain to be addressed by the Secretary. On remand, the BVA is to apply the appropriate subparagraph of section 3.262 to Mrs. Keen's retirement payout. In addition, the BVA is to address whether the reasoning contained in VA Gen. Coun. Prec. 1-97, issued 11 months after the BVA decision here on appeal, nevertheless states the Secretary's construction of subparagraph (e)(2) for the type of retirement payment Mrs. Keen received in 1992. *See Hodge v. West*, 155 F.3d 1356, 1361 (Fed. Cir. 1998); *Gilpin v. West*, 155 F.3d 1353 (Fed. Cir. 1998) (Court of Veterans Appeals gives deference to regulatory construction of statute that is adopted by Secretary). The Secretary must initially resolve this conflict in the time context of the applicable statutes and regulations at the time of the BVA decision here on appeal, before the VAGC opinion was issued, although as noted above, the relevant language in subparagraphs (e)(1) and (e)(2) has not altered. Further factual findings are required concerning the source of the retirement funds paid to Mrs. Keen in 1992, and whether she belongs to any category of person to whom a recoupment exclusion applies. *See* 38 C.F.R. § 3.262(e)(2). The Secretary acknowledges errors in arithmetic which the BVA and the RO made in the calculation of income, but argues that these discrepancies are minor and that their correction would not have changed the

BVA's conclusion that the veteran's countable income exceeded the section 306 limits for 1992. Secretary's Br. at 10; *see* 38 U.S.C. § 7261(b) (rule of prejudicial error). On readjudication, the Secretary will have the opportunity to correct the calculations, as well as address the issues of statutory and regulatory interpretation raised on this record. *See Tucker v. West*, 11 Vet.App. 369, 374 (1998) (remand necessary to permit Board to make required determinations under correct legal standards); *see also* 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995) (Board required to provide written statement of reasons or bases for findings and conclusions on all material issues of fact and law presented on record; statement must be adequate to enable claimant to understand precise basis for Board's decision, as well as to facilitate judicial review); *Gilbert v. Derwinski*, 1 Vet.App. 49, 57 (1990).

III. CONCLUSION

The BVA decision is VACATED, and the matter REMANDED for readjudication.

KRAMER, *Judge*, concurring: Although I agree with the majority that the Board's legal and factual determinations are inadequate, my view of the necessary determinations to be made upon remand is somewhat different.

I.

In April 1971, the appellant was awarded VA pension. R. at 44-45. In December 1992, he submitted a "Section 306 Eligibility Verification Report" (EVR), wherein he reported, inter alia, that in 1992 his spouse had received $10,642.48 from a "cash pay out on two retirement plans." R. at 88. In response to the question, "Did any income change . . . during the past 12 months," the appellant answered "yes" and noted that "wages" had increased in June 1992 because his "wife retired." R. at 88. A VA regional office (RO), in January 1993, then terminated the appellant's section 306 pension benefits, effective January 1, 1993, stating that his countable income exceeded the income limit for pension eligibility. R. at 92. In February 1993, the appellant submitted a Notice of Disagreement, stating, in essence, that his spouse's income should not have been included in his countable income. R. at 94. A Statement of the Case was issued, and the appellant submitted

a substantive appeal, stating, inter alia, that "the 'pay out' income" was "simply a pay out of wages withheld from previous earnings." R. at 101.

In the February 15, 1996, BVA decision here on appeal, the Board noted that in 1992 the appellant's spouse had received "retirement income" in the amount of $10,642.48. R. at 8. The Board stated that "[a]lthough the [appellant] contends that this sum was not retirement income, it was clearly, even by the [appellant's] account, money [his spouse] received as a consequence of retiring." R. at 8. The Board then determined that, pursuant to 38 C.F.R. § 3.262(e)(1), 10% of that sum should be excluded from the appellant's countable income for 1992. R. at 8. After performing various calculations, the Board concluded that the appellant's countable income in 1992 was excessive for purposes of section 306 pension eligibility and that his pension benefits had been properly terminated, effective January 1, 1993. R. at 6, 9. This appeal followed.

On appeal, the appellant, through counsel, contends that the $10,642.48 received by the appellant's spouse in 1992 constituted a return of amounts previously withheld from his spouse's salary and therefore should be categorized as "earned income," rather than as a retirement benefit, because 38 C.F.R. § 3.262(e), which governs retirement benefits, is only applicable to "employer-paid, non-salary payments." Appellant's Brief (Br.) at 7, 9. The appellant thus contends that the payments should have been excluded from his 1992 countable income pursuant to 38 C.F.R. § 3.262(b)(2) and that such exclusion would have caused his 1992 countable income to be "well below the maximum income allowed for [section] 306 pension eligibility." Appellant's Br. at 7, 9, 13. The appellant further points to several errors made by the Board in calculating his countable income. Appellant's Br. at 13-14.

The Secretary concedes that the Board made several minor errors in calculating the appellant's countable income for 1992, but contends that such errors were harmless. Specifically, the Secretary notes that the Board applied the incorrect figure for the maximum allowable income in 1992. Secretary's Br. at 5-6. The Secretary further concedes that the Board committed minor factual errors with regard to the amount of Social Security benefits to be included in the appellant's countable income for 1992. Secretary's Br. at 7. However, with regard to the $10,642.48 payment received by the appellant's spouse in 1992, the Secretary avers that the Board "correctly characterized this sum as retirement benefits subject only to a 10[%] exclusion under 38 C.F.R. § 3.262(e)" because, under *Hermogenes v. Brown*, 9 Vet.App. 75 (1996), and VA General Counsel

Precedent Opinion 1-97 (Jan. 8, 1997), any "essentially nonemployer funded retirement plan[]," including a lump sum distribution, is a retirement benefit governed by 38 C.F.R. § 3.262(e). Secretary's Br. at 7-8. In sum, the Secretary avers that, after correcting the minor factual errors made the Board, the appellant's countable income still would be excessive for purposes of section 306 pension eligibility.

II.

In the present case, the pension in question is a "section 306" pension. *See* Pub. L. No. 95-588, § 306(a)(2), 92 Stat. 2497, 2508 (1978); *Lewis v. Brown*, 8 Vet.App. 287, 288 (1995); 38 C.F.R. § 3.1(u) (1998). Eligibility for a section 306 pension turns on whether the pensioner's annual or "countable" income is within limits set by statute and regulation. *See* 38 U.S.C. §§ 1521, 1522; 38 C.F.R. §§ 3.3(a)(2)(vi), 3.26(a), 3.252(b) (1998). In determining the pensioner's annual income, "[p]ayments of any kind or from any source will be counted as income unless specifically excluded. Income will be counted for the calendar year in which it is received." 38 C.F.R. § 3.252(c); *see also* 38 C.F.R. § 3.260. "Where a veteran and spouse are living together, the separate income of the spouse will be considered as the veteran's income as provided in § 3.262(b)." 38 C.F.R. § 3.252(b); *see also* 38 C.F.R. § 3.262(b) (income attributable to pensioner's spouse is calculated "under the rules applicable to income of the claimant"). As relevant to the income of the spouse, 38 C.F.R. § 3.262(b)(2) provides:

> Where [a section 306] pension is payable . . . to a veteran who is living with a spouse there will be included as income of the veteran all income of the spouse in excess of whichever is the greater, the amount of the spouse income exclusion . . . or the total earned income of the spouse, which is reasonably available to or for the veteran, unless hardship to the veteran would result.

In addition, pursuant to 38 C.F.R. §§ 3.262(e)(1) (not applicable to section 306 pensions) and 3.262(e)(2) (applicable to section 306 pensions), 90% of retirement payments received by a veteran's spouse will be included in the veteran pensioner's countable income (and thus 10% of such payments will be excluded). However, sections 3.262(e)(1) and 3.262(e)(2) both contain recoupment provisions, pursuant to which retirement benefits attributable to personal contributions are excluded from countable income. For purposes of § 3.262(e)(1), the recoupment provision applies "[w]here the retirement benefit is based on the claimant's own employment." The recoupment provision

contained in § 3.262(e)(2), on the other hand, is applicable only "[w]here a person was receiving or entitled to receive pension and retirement benefits based on his or her own employment on December 31, 1964."

In the decision on appeal, the Board implicitly determined that the $10,642.48 received by the appellant's spouse in 1992 was not earned income within the meaning of 38 C.F.R. § 3.262(b)(2) and explicitly determined that the payments constituted retirement benefits, which, pursuant to 38 C.F.R. § 3.262(e)(1), are includable in the appellant's countable income, subject only to a 10% exclusion. R. at 8. For purposes of this paragraph, I will assume that the Board's implicit determination with respect to 38 C.F.R. § 3.262(b)(2) is correct (*but see* discussion *infra* at __, slip op. at 12-13) and that the only matter to be addressed is the proper treatment of retirement benefits received by the appellant's spouse. In that context, although I agree with the majority that 38 C.F.R. § 3.262(e)(2), rather than 38 C.F.R. § 3.262(e)(1), is the appropriate provision when dealing with a section 306 pension--the type of pension at issue in the present case--I believe that, on the facts of this case, any error committed by the Board in applying the incorrect section was nonprejudicial. That is because the only pertinent difference between § 3.262(e)(1) and § 3.262(e)(2) is the criteria for application of the recoupment provisions, and the appellant has not satisfied any such criteria. Although the recoupment provision, which was not addressed by the Board, contained in 38 C.F.R. § 3.262(e)(1), applies, without other limitation, "where the retirement benefit is based on the claimant's own employment," that provision, as indicated above, is not applicable to a section 306 pension. Moreover, the recoupment provision of 38 C.F.R. § 3.262(e)(2) is applicable only "[w]here a person was receiving or entitled to receive [VA] pension *and* retirement benefits based on his or her own employment on December 31, 1964" (emphasis added). *See* Pub. L. No. 88-664, § 11(b), 78 Stat. 1094, 1096 (1964) (amendment eliminating recoupment provision "shall not apply to any individual receiving pension on December 31, 1964, under chapter 15 of said title, or subsequently determined entitled to such pension for said day, until his contributions have been recouped under the provision of that paragraph in effect on December 31, 1964"). Consequently, because the pensioner, inter alia, must have been receiving, or subsequently been determined entitled to receive, *VA pension* on December 31, 1964, in order for the recoupment provision of 38 C.F.R. § 3.262(e)(2) to be applicable; because, in the present case, the appellant's VA pension did not commence until 1971; and because no averment has been made that he was entitled to receive VA pension as of

December 31, 1964, the recoupment provision of § 3.262(e)(2) simply is not applicable. Thus, with respect to any retirement benefits received by the pensioner's spouse, the pensioner would be permitted to exclude only 10% of the payments. Consequently, the Board's application of § 3.262(e)(1) and its failure to consider the recoupment provision, at most, constituted harmless error. Nevertheless, I note that if the appellant were to aver on remand that he was entitled to receive VA pension on December 31, 1964, the Board would be required to address the meaning of the "entitled to receive" language of 38 C.F.R. § 3.262(e)(2). *Cf. Carpenter v. Gober*, 11 Vet.App. 140, 145-47 (1998) (interpreting the "entitled to receive" language contained in 38 U.S.C. § 1318(b)). Further, if the appellant were found entitled to receive VA pension as of December 31, 1964, it would be necessary for the Board to address whether the requirement in § 3.262(e)(2) that "*a person* was receiving or entitled to receive pension and retirement benefits based on *his or her own employment* on December 31, 1964," precludes eligibility for recoupment where the *veteran* was in receipt of or entitled to receive VA pension and the *veteran's spouse* was receiving retirement benefits. 38 C.F.R. § 3.262(e)(2) (emphasis added).

Although, based on the above, I believe that the recoupment provision is inapplicable in the present case, and that remand is thus not necessary to address that provision, that is not the end of the inquiry. That is because the Board erred in failing to address adequately whether the payments received by the pensioner's spouse--which were included in the pensioner's countable income, resulting in the termination of section 306 pension benefits--should have been characterized as earned income of the spouse, which would be governed by 38 C.F.R. § 3.262(b)(2), rather than as a retirement benefit, governed by 38 C.F.R. § 3.262(e)(2). The only evidence of record from which a determination could be made as to which category the payment belongs consists solely of conflicting statements made by the appellant. In making its determination that the payments received by the pensioner's spouse were retirement benefits, the Board apparently relied on the appellant's characterization of the payments in his December 1992 EVR as "cash pay out on two retirement plans" that were received because his "wife retired." R. at 88. The Board, however, did not address the appellant's characterization of the payments, in the same EVR, as "wages" (R. at 88), nor did the Board address his subsequent statement that the payments were "simply a pay out of wages withheld from previous earnings" (R. at 101). The proper characterization of the payments received may have a significant bearing on whether the pensioner's countable income in 1992

exceeded the income limitations because it appears that, under 38 C.F.R. § 3.262(b)(2), a payment characterized as earned income of the spouse may be excluded from the appellant's countable income. Consequently, the Board should have obtained the underlying documentation necessary to make a proper determination as to the character of the payments and then should have made a determination, supported by an adequate statement of reasons or bases, as to the appropriate characterization of the payments. *See* 38 U.S.C. § 7104(d)(1). Moreover, in my view, if on remand the Board were to determine that the payments received by the appellant's spouse constitute "earned income" within the meaning of § 3.262(b)(2), the Board should further address the meaning of the language from this section quoted above, addressing in particular whether the phrase "which is reasonably available to or for the veteran" modifies the phrase "all income of the spouse" or rather modifies only "the total earned income of the spouse." The Board should further address, with appropriate references to statutory or other authority, the basis for any exclusion created by such language.