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Vet. Aff. Op. Gen. Couns. Prec. 04-92

TEXT:

Subj: Child's Right to Receive Improved Death Pension When Surviving Spouse Is in Receipt of Dependency and Indemnity Compensation

QUESTIONS PRESENTED:

- a. May a deceased veteran's child who is not in the custody of the veteran's surviving spouse and who has been awarded an apportioned share of the dependency and indemnity compensation payable to the surviving spouse elect to receive improved death pension benefits, if the child is otherwise eligible?
- b. If such child may be awarded improved death pension benefits, should the amount of dependency and indemnity compensation payable to the surviving spouse be reduced to reflect the award to the child?

COMMENTS:

1. The factual situation which led to the request for this opinion is as follows:
The deceased veteran's surviving spouse is in receipt of dependency and indemnity compensation (DIC) at the rate applicable to a surviving spouse with a child. The deceased veteran's child, who is not in the custody of the surviving spouse, has been awarded an apportionment of the DIC payable to the surviving spouse in the amount of \$91 per month. If the child, who has no income, may elect to receive improved death pension, the child would receive improved death pension benefits in the amount of \$101 per month. We assume, based on the age of the child, that the veteran's death occurred after December 31, 1956.
2. For the reasons discussed below, we conclude that, because the child has been found eligible for an apportionment of the DIC otherwise payable to the surviving spouse, 38 U.S.C. § 1317 (formerly § 417) renders the child ineligible for improved death pension by reason of the veteran's death. However, had such child been found not eligible for an apportionment, or if the child should no longer be eligible for an apportionment under circumstances not giving rise to independent DIC eligibility for the child, neither current statute nor regulations would prohibit an award of improved death pension authorized by 38 U.S.C. § 1542 (formerly § 542) to such child, if otherwise eligible, notwithstanding the surviving spouse's receipt of DIC. We further conclude that if such child were awarded improved death pension, there would be no legal authority to withhold the additional amount of DIC payable to the surviving spouse on account of such

child.

3. Consideration of these questions requires a review of the statutory and regulatory provisions governing distribution of death benefits to the surviving spouse and children under the age of 18. Sections 1310 and 1318 (formerly sections 410 and 418) of title 38, United States Code, authorize payment of DIC to the surviving spouses and children of certain deceased servicemembers and veterans. When there is a surviving spouse who is entitled to DIC, the children of a deceased servicemember or veteran who are under age 18, including those who are not in the custody of the surviving spouse, have no independent entitlement to DIC. 38 U.S.C. § 1313 (formerly s 413). Payments of DIC are made to the surviving spouse at graduated rates based on the military pay grade of the deceased servicemember or veteran with additional amounts payable to the surviving spouse when there are children of the deceased veteran under the age of 18. 38 U.S.C. § 131(a) and (b) (formerly s 411(a) and (b)). This additional amount is payable regardless of whether the children are in the custody of the surviving spouse. 38 C.F.R. § 3.5(e)(3).

4. Section 1541(a) and (c) (formerly section 541(a) and (c)) of title 38, United States Code, authorizes payment of death pension to the surviving spouses of deceased wartime veterans with additional amounts payable to the surviving spouse if the surviving spouse has custody of children of the deceased veteran. Section 1542 of title 38, United States Code, authorizes payment of death pension to children of deceased wartime veterans who are not in the custody of a surviving spouse eligible for pension under 38 U.S.C. § 1541

5. An analysis of the statutory framework of, among other programs, the DIC and death pension programs led the General Counsel to conclude, in Op. G.C. 4-79 (1-30-79), that except where such benefits have been apportioned, the payment of additional amounts of DIC or death pension to a surviving spouse with children vests no entitlement in the children. The General Counsel cited a number of factors in support of this conclusion, among them being the statutory terms calling for payment of the full amount of the benefit to the surviving spouse (this is equally true of the death pension and DIC statutes). The General Counsel also observed that if it had been intended that children's entitlement to a part of an award would lie independently of an apportionment, there would be no need for the apportionment procedure. We find the reasoning of Op. G.C. 4-79 persuasive in this regard, and this opinion was cited with approval in O.G.C. Prec. 74-90.

6. Children of a deceased veteran who are under age 18 and are not in the custody of a surviving spouse who is in receipt of DIC or death pension are not, however, left unprotected. Section 5307(b) (formerly section 3107(b)) of title 38, United States Code, provides that the DIC or death pension otherwise payable to a surviving spouse may be apportioned as prescribed by the Secretary where any children of the deceased veteran are not in the custody of the surviving

spouse. Apportionment is not automatic. No apportionment is made where the surviving spouse is providing for dependents. 38 C.F.R. § 3.450(c). Under regulations governing special apportionments, the amount of DIC to be apportioned to a child is established by VA weighing such factors as the amount of benefits payable and the relative needs of the parties. 38 C.F.R. §§ 3.451. Once VA determines that a child is entitled to an apportioned amount of the DIC otherwise payable to the surviving spouse, the apportioned amount is paid by separate award to or on behalf of the child. The DIC payable to the surviving spouse is reduced by the amount to which the child has become entitled. 38 C.F.R. § 3.461(b)(1).

7. No statutory or regulatory provision specifically prohibits simultaneous payment of DIC to a surviving spouse and death pension to an out-of-custody child who is under age 18 based on deaths occurring after December 31, 1956. Further, the legislative histories of the DIC and death pension programs contain no evidence that Congress intended to prohibit this result. Explicit statutory provisions serving to prohibit duplication of benefits are found in 38 U.S.C. §§ 1316(b) (formerly § 416(b)), 1317, and 5304 (formerly § 3104). While section 1316(b) serves to preclude payment of death pension to the veteran's children once the surviving spouse has been granted DIC, that provision applies only in the case of deaths occurring before January 1, 1957. Section 1317 of title 38, United States Code, provides, in part, that:

No person eligible for dependency and indemnity compensation by reason of any death occurring after December 31, 1956, shall be eligible by reason of such death for any payments under (1) provisions of law administered by the Secretary of Veterans Affairs providing for the payment of death compensation or death pension

This provision and the essentially identical implementing regulation at 38 C.F.R. § 3.5(c) bar payment of death pension to an out-of-custody child only if that child is eligible for DIC. While 38 U.S.C. § 5304 and implementing regulations at 38 C.F.R. § 3.700 bar concurrent payments to the same person under certain circumstances, they do not apply to concurrent payments to different persons based on the same death. Thus, they do not preclude an out-of-custody child's receipt of death pension simultaneously with a surviving spouse's receipt of DIC.

As you pointed out, the General Counsel, in an unpublished memorandum to the Chief Benefits Director dated December 19, 1986, concluded that this statutory provision did not preclude a surviving spouse's receipt of death pension simultaneously with a child's receipt of DIC.

8. The request for opinion references the election provisions at 38 C.F.R. §§ 3.701 and 3.702(f). By their terms, neither of these regulatory provisions precludes a child not in the custody of the surviving spouse from receiving improved death pension as a result of the surviving spouse's election of DIC. Section 3.701 of title 38, Code of Federal Regulations, applies only to election of

benefits in those cases in which individuals are entitled to receive pension or compensation under more than one law administered by VA. Hence, it has no applicability to elections in those cases in which a surviving spouse or child may be eligible for both death pension and DIC. It is clear not only from the context of section 3.701, but from its history that the term "compensation" used in that section refers only to disability and death compensation, not DIC. Other provisions dealing with concurrent payments and elections use the term DIC when reference to that benefit is intended. See 38 C.F.R. §§ 3.700 and 3.703-3.709. Further, section 3.701 was primarily derived from former 38 C.F.R. § 4.52 (1956), which predated establishment of the DIC program. See Transmittal Sheet 200 (May 29, 1959). Section 3.702, in contrast, incorporates terms of former 38 C.F.R. § 4.424, et seq. (1958), which implemented the DIC program. See Transmittal Sheet 200 (May 29, 1959). Also, compare 38 C.F.R. § 3.701(a) (permitting reelection of the other benefit at any time), with 38 C.F.R. § 3.702(d) (election to receive DIC is final and the claimant may not thereafter reelect death pension or compensation).

9. Section 3.702 of title 38, Code of Federal Regulations, governs the right of election of a person who is eligible for both death compensation and DIC. As noted in the request for opinion, section 3.702(f) refers only to the DIC rate payable to a surviving spouse. Section 3.702(f)(1) is based on Pub. L. No. 87-268, 75 Stat. 566 (1961), now codified at 38 U.S.C. § 1312(b), which provided for payment of DIC, subject to application and submission of evidence of entitlement, at the pension rate which would have been payable if the veteran's death had occurred under circumstances authorizing payment of the latter benefit. The purpose of the provision is to assure that payments to survivors of veterans whose deaths are service connected are not less generous than those to survivors of veterans whose deaths are not service connected. S. Rep. No. 850, 87th Cong., 1st Sess. (1961), reprinted in 1961 U.S.C.C.A.N. 2810.

10. The statutory reference to benefits which would have been payable if the veteran's death had occurred under circumstances authorizing payment of death pension merely reflects the absence of pension eligibility, pursuant to what is now 38 U.S.C. § 1317, for a surviving spouse or child eligible for DIC. It does not suggest that death pension may not be paid for service-connected deaths. Neither 38 U.S.C. § 1541 nor 38 U.S.C. § 1542 prohibits such payments. Thus, this rule is consistent with the exclusivity of DIC entitlement for persons eligible for that benefit, but does not suggest that pension cannot be paid to individuals not eligible for DIC.

11. Based on the foregoing, we conclude that, absent eligibility for an apportionment of DIC, an out-of-custody child of the veteran under age 18 is not barred under relevant statutes and regulations from receiving death pension, notwithstanding that the veteran's surviving spouse is receiving DIC. In such a situation, there would be no legal authority to withhold the additional amount of DIC payable to the surviving spouse for the child. The additional amounts of DIC

for a surviving spouse with children are payable whether or not the children are financially dependent upon the surviving spouse, as financial dependency is not a requirement for the status of "child" within the meaning of 38 U.S.C. § 101 (4). Unless apportioned, the additional benefit is the entitlement of the surviving spouse, and there is no requirement that the child or children be in need of support or that the additional funds actually be used for the child(ren)'s benefit.

12. The child in the present case has been found to be eligible for an apportionment of the DIC payable to the surviving spouse. In O.G.C. Prec. 74-90, we considered, among other issues, the question of to whom an apportioned amount of disability compensation or pension belongs. We concluded that the apportioned amount has, in effect, become the separate property of the apportionee, subject to alteration only by changed circumstances. We also concluded that, even though an apportionment is paid to the apportionee as a dependent of a beneficiary, the receipt of the apportionment makes the apportionee a beneficiary. We went on to state that the "payment to a dependent-apportionee represents a portion of the primary beneficiary's total entitlement, divested from that beneficiary and vested in the apportionee by 38 U.S.C. § 3107 now § 5307 ."

Although our discussion in O.G.C. Prec. 74-90 focused on apportionment of disability compensation and pension, the analysis and reasoning of that decision are equally applicable to apportionment of DIC. Hence, so long as the child remains eligible for an apportionment of the DIC payable to the surviving spouse, the child may not be considered eligible for death pension. Under 38 U.S.C. § 1317 and 38 C.F.R. § 3.5(c) (entitled "Exclusiveness of remedy"), DIC is the exclusive remedy available to persons eligible therefor, and the child would, thus, not be entitled to death pension.

13. This conclusion raises a question as to whether the child may renounce his or her right to an apportionment of the DIC payable to the surviving spouse and then apply for and, if otherwise eligible, be awarded improved death pension. Section 5306(a) (formerly 38 U.S.C. § 3106(a)) of title 38, United States Code, provides that any person entitled to pension, compensation, or DIC under laws administered by VA may renounce the right to such benefits. Any renouncement must be in writing over the person's signature, and, upon receipt by VA of a renouncement, payment of and the right to pension, compensation, or DIC is terminated. 38 U.S.C. § 5306(a); 38 C.F.R. 3.106(a)

14. In Op. G.C. 5-83 (2-28-83), the General Counsel held that renouncement of compensation extinguishes entitlement to that benefit. However, 38 U.S.C. § 1317 refers to eligibility, not entitlement, and, as recognized in O.G.C. Prec. 20-90, the two terms may not be synonymous. A.D. No. 760 (8-13-47) addressed the entitlement for vocational rehabilitation of a veteran who had renounced disability compensation. Under the applicable Veterans Regulation, vocational rehabilitation was available for a veteran with a service-connected disability for

which compensation was payable. The Administrator of Veterans Affairs stated that the statute did not require receipt of compensation, but merely eligibility therefor, and renunciation of compensation did not destroy basic eligibility for that benefit. On this basis, the Administrator held that the veteran remained eligible for vocational rehabilitation. In O.G.C. Prec. 65- 90, the General Counsel held that a widow's election of Bureau of Employees' Compensation benefits does not terminate the widow's basic eligibility for DIC. Cf. Op. G.C. 3-61 (1-19-61) (for purposes of determining children's DIC entitlement, widow would be considered eligible for DIC despite never having filed a claim).

15. The above-referenced opinions clearly suggest that a renunciation does not terminate eligibility for DIC, although it does terminate entitlement to that benefit. Therefore, if, in the present case, the child were to renounce his or her right to apportionment of the DIC payable to the surviving spouse, the child would nonetheless remain eligible for such benefits unless other circumstances resulted in termination of that eligibility. Accordingly, section 1317 would bar payment of death pension to the child.

HELD:

a. If a child of a deceased veteran under age 18 and not in the custody of the veteran's surviving spouse has been awarded an apportionment of the dependency and indemnity compensation (DIC) otherwise payable to the surviving spouse, 38 U.S.C. § 1317, which deals with the exclusivity of the DIC remedy, renders the child ineligible for payment of improved death pension by reason of the deceased veteran's death.

b. Neither current statutes nor regulations governing concurrent benefits and elections prohibit an award of improved death pension authorized by 38 U.S.C. § 1542 (formerly § 542) to a deceased veteran's child under the age of 18 who is not in the custody of the deceased veteran's surviving spouse and who is not eligible for an apportionment of the DIC payable to the surviving spouse. If such a child were found to be entitled to pension, there would be no legal authority to withhold the additional amount of DIC payable to the surviving spouse on account of such child.

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