DATE: 5-28-92

CITATION: VAOPGCPREC 12-92
Vet. Aff. Op. Gen. Couns. Prec. 12-92

TEXT:

Subj: Entitlement to chapter 35 benefits

QUESTION PRESENTED:

Whether a claim for dependency and indemnity compensation and pension may be considered as a claim for chapter 35 benefits?

COMMENTS:

1. We have completed our review of your request for an opinion concerning whether VA may consider a claim for dependency and indemnity compensation pension as a claim for chapter 35 benefits. As discussed more fully below, the Secretary lacks the authority to administratively implement such a policy. Accordingly, amendatory legislation would be necessary.

2. By way of background, you have indicated that this issue arises when VA issues a regulation that has retroactive application or when VA decides that a certain illness or disease is service connected effective retroactively to a particular date for purposes of entitlement to compensation or dependency and indemnity compensation benefits.

3. In O.G.C. Precedent Opinion 69-91, issued September 27, 1991, we discussed how retroactive payment of dependency and indemnity compensation (DIC) effects chapter 35 benefits. That issue was prompted by VA's 1990 promulgation of 38 C.F.R. § 3.313, a regulation which provides that, effective August 5, 1964, a person who served in Vietnam during the Vietnam era and who subsequently developed non-Hodgkin's lymphoma (NHL) shall be deemed to have service connection for that disease. The fact pattern given assumed that a veteran died in 1976 as the result of NHL and that, subsequent to the issuance of the mentioned regulation, VA rated the death of the veteran from NHL as being service connected. It further assumed that the surviving spouse filed a claim for death benefits in 1976 which was denied.

4. One of the questions presented in that opinion was whether a surviving child, age 19 at the time of the veteran's death, may be accorded chapter 35 benefits retroactively for training between his or her 19th and 27th birthdays if the child filed an original claim for chapter 35 benefits in 1990, at age 33, following issuance of the enabling regulation?

5. In response to that question, we stated that, if that child or an individual on behalf of the child, as specified in 38 C.F.R. §§ 3.152(c)(2), 3.152(c)(3) and 3.155, did not file a claim for chapter 35 in 1976 at the same time as the surviving spouse, then the child's period of eligibility from 1976 to 1984 would have expired more than 1 year prior to filing the initial chapter 35 application in 1990. See 38 U.S.C. § 3512. Thus, no chapter 35 benefits could be awarded. If, however, an application had been filed by or on behalf of the child in 1976, benefits could be awarded for the period beginning on the later of the date of the veteran's death or 1 year prior to the date of application, and ending not later than the date in 1984 that was 8 years after the veteran's death (unless the child qualified for an extension as provided in other provisions of section 3512).

6. Assuming here that the same child did not file a claim for chapter 35 benefits in 1976, you now ask whether the claim for death/benefits filed by the surviving spouse in 1976 may be treated as a claim for chapter 35 benefits on behalf of the child. You indicate that answering this question in the affirmative would be equitable and necessary for VA to meet its obligations to claimants in compliance with recent Court of Veterans Appeals' (CVA) decisions. See Akles v. Derwinski, U.S. Vet. App., No. 90-390 (1990); Littke v. Derwinski, U.S. Vet. App., No. 89-68 (1989).

7. Both CVA cases, cited above, expound on VA's duty to assist a claimant in developing the facts pertinent to the claim and to render a decision which grants every benefit that can be supported in the law. See 38 U.S.C. § 3007(a) and 38 C.F.R. § 3.103.

8. In Littke, the veteran appealed from BVA's denial of his claim for total disability on the grounds that his arthritic condition prevented him from obtaining gainful employment. CVA held that given the inadequacy of the initial examination (the VA physician's examination failed to comport with the requirements delineated in the VA Physicians Guide for Disability Evaluation Examiners) and the existence of new medical evidence (recent x-rays by a private physician revealed marked deterioration in claimant's condition), VA failed to fulfill its duty to assist the veteran in obtaining and developing available facts and evidence to support his claim. CVA stated that VA, at a minimum, had a duty to advise the veteran to submit the results of his private medical examination and to make them a part of the record on appeal. Accordingly, CVA remanded the case to BVA for further action consistent with its decision.

9. In Akles, the veteran's reopened claim for an increase in service- connected benefits to a compensable rating for testicular atrophy due to mumps was denied by BVA without the benefit of a physical examination. CVA stated although the veteran's condition may be noncompensable under the diagnostic codes, BVA had a duty, even though the veteran did not raise the issue, to determine whether the veteran was eligible for a special monthly compensation. CVA reminded VA that there is no requirement that a veteran specify precisely the statutory

provisions or corresponding regulations upon which he or she is seeking benefits; that the essence of the VA system is nonadversarial; and that VA has the duty to assist and distribute full information to veterans. Accordingly, the case was remanded to BVA so that proper clinical evidence can be gathered through a VA physical and a determination made as to whether the veteran is entitled to special monthly compensation.

10. Such holdings by the CVA turned on the particular, distinguishable facts presented. In our view, they are inapposite to the matter before us.

11. In any adjudication, even one necessitating a retroactive application of the law, we must take the facts as we find them. In the instant case, unlike in Akles, no claim was ever filed by or on behalf of the child for chapter 35 benefits in 1976. (See 38 C.F.R. §§ 3.152(c)(2), 3.152(c)(3), and 3.155). Plainly, VA cannot be found to have neglected its obligations to the claimant in perfecting and adjudicating his claim where no claim had been filed.

12. Further, adopting the policy you suggest (retroactively considering a claim for DIC as a claim for chapter 35, as well) would circumvent 38 U.S.C. § 5101(a) which provides that:

A specific claim in the form prescribed by the Secretary ... must be filed in order for benefits to be paid or furnished to any individual under the laws administered by the Secretary.

13. Clearly, no single form existed in 1976 that was prescribed by VA for filing a combined claim for DIC and chapter 35 education benefits. Nor, in our view, is there any basis for implying the existence of such a prescription through a legal fiction designed to accommodate perceived equities. In this regard, we note that Congress has expressly provided in section 5101(b)(1) that:

A claim by a surviving spouse or child for compensation or dependency and indemnity compensation shall also be considered to be a claim for death pension and accrued benefits ....

Certainly, had Congress desired similar consideration for chapter 35 benefits, it would have specifically included language to that effect.

14. We believe such statutory provisions obviously reflect important legal and policy considerations. Requiring a specific claim from a claimant promotes a "meeting of the minds" between the claimant and VA as to what benefits are being sought and what issues adjudicated. This serves to avoid controversy over the nature of the claim where, for example, timely filing is at issue. The specific form for a claim also avoids unnecessary factual development and adjudication relating to benefits not actually sought. Moreover, such record documentation

helps assure that a truthful and accurate statement is made of facts material to the claim to prevent fraud, waste, and abuse.

15. It may be noted that, while the chapter 35 benefits here are derivative in the sense that they are based on the service-connected death of the veteran, it does not necessarily follow that a dependent's claim for such benefits is, as the inquiry seems to suggest, likewise derivative in the sense of being dependent upon an initial claim for DIC/death pension. Indeed, submitting only a claim for chapter 35 benefits would be warranted in the case of a married child, for instance, who has no potential DIC entitlement. We are aware of no statutory or regulatory impediment to a claimant's filing in first order a chapter 35 claim or even filing such a claim concurrently with a DIC claim.

16. We recognize your concern that DIC claims most frequently are filed first and, if denied, can abort subsequent filing of a chapter 35 claim. Under such circumstances, a VA administrative issue having the effect of granting retroactive service connection for cause of death, for example, may not afford all deceased veterans' dependents an opportunity to timely file for retroactive chapter 35 benefits based on that administrative issue. However, VA is not at liberty to address such equitable concerns by issuing a regulation that exceeds VA's statutory authority under title 38, United States Code. Rather, VA must defer to the statutory mandates which govern the administration of education assistance allowance benefits. Thus, we suggest that, should you so desire, the appropriate course to address your concerns would be to seek the requisite legislative amendment.

HELD:

In view of the mandates of 38 U.S.C. § 5101(a) and (b)(1), VA lacks administrative authority to promulgate a regulation or other administrative issue retroactively providing that a claim for dependency and indemnity compensation and pension shall also be considered a claim for chapter 35 benefits.

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