

**Department of
Veterans Affairs**

Memorandum

Date: January 22, 2009 VAOPGCPREC 1-2009

From: Acting General Counsel (022)

Subj: Surviving Spouse's Benefit for Month of Veteran's Death--38 U.S.C. § 5310(b)

To: Director, Compensation & Pension Service (21)

QUESTIONS PRESENTED:

a. If a veteran's surviving spouse who was entitled to the 38 U.S.C. § 5310(b) benefit for the month of the veteran's death dies before receiving the benefit, is VA required to pay to the estate of the deceased surviving spouse the amount of the section 5310(b) benefit the surviving spouse would have received but for his or her death?

b. If the answer to Question a. is no, if a surviving spouse entitled to the section 5310(b) benefit dies before receiving the benefit, is the benefit, aside from any portion of the benefit that is payable as accrued benefits under 38 U.S.C. § 5121 pursuant to the terms of section 5310(b)(2), subject to the accrued benefits provisions of section 5121, in which case a non-spouse survivor would be required to file a claim for the section 5310(b) benefit, and, if so, to what extent is VA required to locate the persons identified in section 5121(a)(2)?

HELD:

a. Section 5310(b)(1) of title 38, United States Code, provides a benefit for the surviving spouse of a veteran who dies while in receipt of disability compensation or pension, if the surviving spouse is not entitled to death benefits under chapter 11, 13, or 15 of title 38 for the month of the veteran's death. If a veteran's surviving spouse who was entitled to the section 5310(b)(1) benefit dies before receiving the benefit, VA is not required to pay to the deceased surviving spouse's estate the amount of the section 5310(b) benefit the surviving spouse would have received but for his or her death because entitlement to the benefit would terminate with the death of the surviving spouse.

b. Section 5310(b)(2) provides in part that, if a check or other payment issued to, and in the name of, the deceased veteran as a benefit payment under chapter 11 or 15 of title 38, United States Code, for the month in which death occurs is in an amount less than the amount of the benefit a surviving spouse is eligible to receive under section 5310(b)(1), "the unpaid amount shall be treated in the

same manner as an accrued benefit under section 5121 of [title 38].” If a surviving spouse entitled to the section 5310(b)(1) benefit dies before receiving the benefit, the section 5310(b)(1) benefit, aside from any unpaid portion of the benefit that is payable as accrued benefits under section 5121 pursuant to the provision quoted above, is not subject to the accrued benefits provisions of section 5121 because the section 5310(b)(1) benefit is a one-time payment for the veteran’s month of death and, therefore, cannot be considered “periodic monetary benefits” for purposes of section 5121.

DISCUSSION:

1. The questions presented arise from an amendment to 38 U.S.C. § 5310 made by section 506 of the Veterans’ Benefits Improvements Act of 1996, Pub. L. No. 104-275, § 506(a), 110 Stat. 3322, 3343. Before the amendment, section 5310 provided a minimum amount of death benefits for the month of a veteran’s death if the veteran’s surviving spouse was entitled to death benefits for that month. 38 U.S.C. § 5310(a); 38 C.F.R. § 3.20(a). As amended by section 506(a) of Pub. L. No. 104-275, section 5310 now also provides a benefit for the month of a veteran’s death if the veteran’s surviving spouse is not entitled to death benefits for that month. 38 U.S.C. § 5310(b); 38 C.F.R. § 3.20(c). Specifically, it provides that:

If the surviving spouse of a veteran who was in receipt of compensation or pension at the time of death is not entitled to death benefits under chapter 11, 13, or 15 of [title 38] for the month in which the veteran’s death occurs, that surviving spouse shall be entitled to a benefit for that month in the amount of benefits the veteran would have received under chapter 11 or 15 of [title 38] for that month but for the death of the veteran.

38 U.S.C. § 5310(b)(1); see also 38 C.F.R. § 3.20(c)(1). Thus, the benefit provided to a surviving spouse by section 5310(b) is a one-time payment conditioned on the surviving spouse’s nonentitlement to death benefits for the month of the veteran’s death.

2. You have asked whether, upon the death of a surviving spouse who was entitled to the section 5310(b) benefit, VA is required to pay to the estate of the deceased surviving spouse the amount of the section 5310(b) benefit the surviving spouse would have received but for his or her death. The statutory terms chosen by Congress in enacting the statute authorizing this benefit, read in the context of the statutory scheme for veterans’ benefits, clearly indicate that the section 5310(b) benefit was intended solely for the surviving spouse of a veteran. Therefore, VA is not required to pay the amount of the benefit to the estate of the deceased surviving spouse.

3. When a veteran dies, VA terminates as of the first day of the month of the veteran's death any compensation or pension the veteran may have been receiving. See 38 U.S.C. § 5112(b)(1) (effective date of discontinuance of compensation, dependency and indemnity compensation (DIC), or pension by reason of death of a payee "shall be the last day of the month before such . . . death occurs"); 38 C.F.R. § 3.500(g)(1). In other words, a veteran is not entitled to compensation or pension for the month of his or her death.

4. When a veteran receiving compensation or pension dies, a surviving spouse who is not entitled to death benefits under chapter 11, 13, or 15 of title 38, United States Code, for the month in which the veteran died is eligible for the month-of-death benefit under section 5310(b). If a surviving spouse eligible for the section 5310(b) benefit submits a claim for the benefit but dies before VA awards the benefit to the surviving spouse, entitlement to the section 5310(b) benefit would terminate with the death of the surviving spouse.¹ Section 5310(b)(1) specifically states that a "surviving spouse shall be entitled" to the benefit under that statutory provision. See also Pub. L. No. 104-275, § 506, 110 Stat. at 3343 (section adding subsection (b) to 38 U.S.C. § 5310 is captioned "PAYMENT OF BENEFIT TO SURVIVING SPOUSE FOR MONTH IN WHICH VETERAN DIES"). Thus, Congress clearly intended the benefit for the surviving spouse. Neither the statute nor its legislative history indicates or even suggests in any way that the surviving spouse's entitlement to the section 5310(b) benefit continues after his or her death or that the estate of a deceased surviving spouse may continue to pursue the claim for the section 5310(b) benefit that VA had not yet awarded before the surviving spouse's death. Cf. Pelea v. Nicholson, 497 F.3d 1290, 1292 (Fed. Cir. 2007) (providing similar analysis concerning DIC upon the death of a surviving spouse).

5. The statutory scheme that generally governs veterans' benefits and benefits to deceased veterans' survivors demonstrates Congress' clear intent that a claim for VA benefits terminates at death. See Seymour v. Principi, 245 F.3d 1377, 1379 (Fed. Cir. 2001) (veteran's claim to disability benefits); Richard v. West, 161 F.3d 719, 722 (Fed. Cir. 1998) (same). Although the statutory scheme "does allow certain survivors to seek payment of accrued benefits owed to a veteran at the time of the veteran's death[,] . . . a claim for accrued benefits under [38 U.S.C. §] 5121 is separate from a veteran's claim for disability payments." Seymour, 245 F.3d at 1379. For these reasons, "survivors may not pursue disability compensation claims of a veteran, even as heirs to the veteran's estate." Id. (quoting Haines v. West, 154 F.3d 1298, 1300 (Fed. Cir. 1998)).

¹ The effective date provisions of 38 U.S.C. § 5112(b)(1) do not govern the termination of the section 5310(b) benefit because section 5112 applies to "compensation, [DIC], or pension," and a payment under section 5310(b) is not compensation, DIC, pension, or another type of recurrent benefit. See VAOPGCPREC 10-98, para. 15.

Similarly, in the case of survivors, as the court in Pelea explained in the context of whether a claim for DIC continues after the death of a surviving spouse:

It seems most unlikely that Congress intended to provide more favorable treatment for veterans' widows than it provided for veterans, who are the primary focus of the veterans' benefits legislation. If Congress intended thus to favor the widows, one would expect it either to have so provided explicitly in the statutory provisions or maintained that intent in the legislative history. It did neither.

497 F.3d at 1292. Although Pelea concerned DIC upon the death of a surviving spouse, the same logic would apply to the section 5310(b) benefit upon the death of a surviving spouse who was entitled to the benefit. Accordingly, if a surviving spouse entitled to the section 5310(b) benefit dies before receiving the benefit, VA may not pay the benefit to the surviving spouse's estate.

6. In response to your second question, if a surviving spouse entitled to the section 5310(b) benefit dies after submitting a claim for the benefit but before receiving the benefit, the amount of the benefit owed the deceased surviving spouse cannot be considered for purposes of accrued benefits under 38 U.S.C. § 5121 because that statute concerns only "periodic monetary benefits." Because the section 5310(b) benefit is a one-time benefit for the month of the veteran's death, any unpaid section 5310(b) benefit cannot be considered "periodic monetary benefits" for purposes of section 5121. See Nolan v. Nicholson, 20 Vet. App. 340, 347-48 (2006) (providing generally that "[t]he term 'periodic monetary benefits' in section 5121(a) excludes one-time lump-sum payments"); Black's Law Dictionary 1165 (8th ed. 2004) (defining "periodic payment" as "[o]ne of a series of payments made over time instead of a one-time payment for the full amount"). Therefore, a non-spouse survivor would not be entitled to the section 5310(b) benefit upon the death of the surviving spouse.

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