DATE: 07-18-90

CITATION: VAOPGCPREC 62-90
Vet. Aff. Op. Gen. Couns. Prec. 62-90

TEXT:

Subject: Waiver of National Service Life Insurance Premiums Under 38 U.S.C. § 712

(This opinion, previously issued as Administrator's Decision 990, dated February 16, 1968, is reissued as a Precedent Opinion pursuant to 38 C.F.R. §§ 2.6(e)(9) and 14.507. The text of the opinion remains unchanged from the original except for certain format and clerical changes necessitated by the aforementioned regulatory provisions.)

QUESTION PRESENTED:

Whether waiver of National Service Life Insurance premiums may be granted under 38 U.S.C. § 712 for a total disability commencing while insurance was "deemed not to have lapsed" under subsection 602(m)(2) of the National Service Life Insurance Act of 1940, as amended.

COMMENTS:

The veteran entered active service on March 19, 1941. He was granted $2,000 National Service Life Insurance, effective May 1, 1941, and an additional $8,000, effective April 1, 1943. Premiums were paid through July 31, 1944, by an allotment from his active service pay. The allotment was discontinued July 31, 1944, by reason of his absence without leave, for which he was court-martialed. The allotment was never resumed. Following the court- martial, the veteran was returned to active duty, and required to engage in combat. While in combat, on March 3, 1945, he sustained severe wounds to both legs and eyes. He was continuously hospitalized from March 3, 1945, to the date of his honorable discharge, February 25, 1946, on a certificate of disability. He is presently rated 100 percent service-connected disabled for amputation of both lower extremities and defective vision. There is no evidence in the claims folder that the veteran was informed after his return to duty that he would have to authorize a new allotment in order to maintain his insurance in force.

The veteran filed a timely application for waiver of premiums on April 5, 1947. One of the statutory prerequisites to the granting of a waiver under the provision of subsection 602(n) of the National Service Life Insurance Act of 1940, as amended, infra, is that the insured's total disability must have commenced "while the insurance was in force under premium-paying conditions." The Disability Insurance Claims Division found that the veteran was continuously totally disabled on and after March 3, 1945, for premium waiver purposes because of the total permanent disability resulting from the double amputation. Moreover, his insurance was "deemed as not lapsed" at the time the total disability commenced and until his separation from service, pursuant to subsection

602(m)(2) of the National Service Life Insurance Act of 1940, as amended, infra, under the facts of this case. Nevertheless, the veteran's premium waiver application was denied because of the provisions of VA Technical Bulletin 9-34, dated July 8, 1947, wherein it was determined that insurance deemed not to have lapsed pursuant to subsection 602(m)(2) of the Act would not be considered in force under "premium-paying conditions" during the period of deemed non-lapse, and therefore would not be subject to waiver of premiums. FN* *This Technical Bulletin has been rescinded, and the provisions referred to above are not included in M29-3, part VI, Ch. 13, section 1302.07.

The denial of the veteran's application was affirmed by the Board of Veterans Appeals in 1948. Several years later the then Solicitor of the Veterans Administration considered the same question in an opinion dated June 15, 1951, Op. Sol. 241-51, in the case of another veteran whose policy was deemed under subsection 602(m)(2) not to have lapsed at the time his total disability commenced. The Solicitor concluded that since his policy was not "factually" in force under premium-paying conditions on the date of incurrence of total disability, the provisions of subsection 602(n) could not be invoked. However, upon careful reconsideration of the matter, it now appears that a denial of premium waiver under section 602(n) under circumstances such as those in this case is not required by the literal language of the laws or their legislative history, and the interpretation in Technical Bulletin 9-34 is inconsistent with later interpretations of laws governing premium waiver under analogous circumstances.

Subsection 602(m)(2) was added to the National Service Life Insurance Act of 1940 by section 6 of Public Law 589, 79th Congress, August 1, 1946, and section 7 of the law restated provisions of subsection 602(n) which are now codified in 38 U.S.C. § 712. Subsection 602(m)(2) was amended by section 11 of Public Law 23, 82d Congress, April 25, 1951, to extend the provisions to cover certain forfeiture cases. While this section was not restated in the codification of title 38, United States Code, effective January 1, 1959, section 12(d) of Public Law 85-857 protected any right of any person based on a contract entered into before the effective date of the codification Act.

The pertinent provision of subsection 602(m)(2) and subsection 602(n) of the National Service Life Insurance Act requiring interpretation read as follows:

"(2) In any case in which the insured provided for the payment of premiums on his insurance by authorizing in writing the deduction of premiums from his service pay, such insurance shall be deemed not to have lapsed or not to have been forfeited because of desertion under section 612, so long as he remained in active service prior to the date of enactment of the Insurance Act of 1946, notwithstanding the fact that deduction of premiums was discontinued because--

"(A) the insured was discharged to accept a commission; or

"(B) the insured was absent without leave, if restored to active duty; or

"(C) the insured was sentenced by court-martial, if he was restored to active duty, required to engage in combat, or killed in combat.

"In any case in which the insured under any insurance continued in force by the provisions of this paragraph died while such insurance was so continued in force, any premiums due on such insurance shall be deducted from the proceeds of the insurance. Any premiums deducted or collected on any such insurance shall be credited to the national service life insurance appropriation and any payments of benefits on any such insurance shall be made directly from such appropriation.
* *
"(n) Upon application by the insured and under such regulations as the Administrator may promulgate, payment of premiums on such insurance may be waived during the continuous total disability of the insured, which continues or has continued for six or more consecutive months, if such disability commenced (1) subsequent to the date of his application for insurance, (2) while the insurance was in force under premium-paying conditions, and (3) prior to the insured's sixtieth birthday: Provided, That upon application made within one year after the date of enactment of the Insurance Act of 1946 the Administrator shall grant waiver of any premium becoming due not more than five years prior to the date of enactment of such Act which may be waived under the foregoing provision of this subsection: ..." (Underscoring supplied.)

There is nothing in the legislative history of subsection 602(n) indicating an intention to give a narrow meaning to the words "in force under premium- paying conditions." This statutory provision prerequisite to waiver was, in effect, incorporated in all National Service Life Insurance policies by the promulgation of VA Regulation 3508. The policy provisions merely specify that in addition to the other conditions total disability must have started "(2) While this policy is not lapsed." This policy provision is consistent with subsection 602(n). Moreover, the legislative history of subsection 602(m)(2) shows the payment of premiums was not intended to be denied when insurance is "deemed not to have lapsed" and to have been "continued in force" under the provisions of subsection 602(m)(2).

The legislative history of subsection 602(m)(2) of the National Service Life Insurance Act shows that its provisions were drafted in part by the veterans' organizations at the specific request of members of the House Committee on World War Veterans' Legislation. The subsection was designed to protect the insured status of servicemen (including others than those who died) so long as they remained in the active service prior to August 1, 1946, if they had authorized in writing the deduction of premiums from their service pay and the deduction was discontinued because (A) the insured was discharged to accept a commission; or (B) the insured was absent without leave if restored to duty; or (C) the insured was sentenced by court-martial, if he was restored to active duty, required to engage in combat, or killed in combat.

The legislative history of subsection 602(m)(2) is contained in part in House Report No. 2002, 79th Congress, 2d Session, from the Committee on World War Veterans'

Legislation; and Senate Report No. 1705, 79th Congress, from the Senate Committee on Finance, both reports to accompany H.R. 6371, the bill which became Public Law 589, 79th Congress, adding subsection (m)(2) of the National Service Life Insurance Act. Both of these committee reports contain the statement that "Your committee is of the opinion that payment of insurance premiums should not be denied under the circumstances stated" in subsection 602(m)(2). (Underscoring supplied.) This is a clear indication that the Congress intended that insurance "deemed not to have lapsed" under that subsection was to be treated as through in force under premium-paying conditions.

H.R. 6371 was a clean bill introduced to incorporate proposals previously considered by the House Committee on World War Veterans' Legislation, such as those contained in H.R. 2379, H.R. 4965, H.R. 5772, H.R. 5773, and H.R. 6173. The House Committee on World War Veterans' Legislation held hearings on H.R. 4965 (revised and later introduced as H.R. 5773) and H.R. 2379 (revised and later introduced as H.R. 5772) on February 28, March 1, 13, and 14, 1946. The Subcommittee on Insurance of that Committee took testimony on H.R. 5772 and H.R. 5773 on March 27, 29, 30, April 1, 3, 4, 5, 9, and 10, 1946.

Pertinent excerpts from these hearings follow:

(A) Mr. Kenneth Bradley, National Insurance Officer, Disabled American Veterans, testified in part:

"We propose that those allotments once established and discontinued through no fault of the insured be automatically continued, while the insured is in service."

(B) Mr. Charles W. Stevens, representing the Joint Committee of the American Legion, Veterans of Foreign Wars, and Disabled American Veterans, testified in part:

"Can I answer your question, Mr. Cunningham, by also answering the chairman's requirement that we state the purposes of this section? It is this:

"There were enlisted men who authorized deduction through a class N allotment. And they did that in writing. Later they went to officers' candidate schools and were commissioned and did not understand that they needed to make a further written requirement that there be a deduction, and they were killed in action, thinking they were protected, or they became totally disabled thinking they were protected. And it was not until after the death in action that the beneficiary found that there was no insurance in force at time of death, and it was not until the serviceman became totally disabled that he found that he had no insurance protection." (Underscoring supplied.)

"We have taken the language of the law, subsection (m), section 602, as it reads today in the National Service Life Insurance Act of 1940, as amended, and made that subsection (m)(1) verbatim, as section 602(m) reads in the act. We have then added a new subsection (m)(2) which would provide the protection which should be provided for

certain unfortunates, * * *--some of them died believing--that their insurance was in force. * * * We did not intend to protect the individual who voluntarily, in writing, discontinued his allotment for the premium payment deduction from his service pay. We intended to protect those whose allotments were set up, because in writing, they had asked for it. They had believed that as long as they themselves did not cancel that allotment, that the insurance was being paid by the service department ... fully protecting them.

"We have had a number of cases in the first category, the insured who was discharged to accept a commission....

"We have the men who were absent without leave, who, after 15 days of absence, had their allotment for payment of premiums stopped * * * who came back to active duty within a very short time after the 15-day period and they did not know their allotment was stopped...

" * * * We thought that if a man was absent for a longer time without leave and that absence was forgiven and he came back to active duty and went on to combat service or continued to perform full duty, assuming that he was still protected by insurance, that he should be protected.

"We also felt that even if sentenced by court-martial, the man whose allotment was stopped, perhaps because his pay was terminated or reduced to an extent that there was not sufficient to cover the premium payment, should be protected on the basis that if he was restored to active duty without knowing that his allotment was stopped, he still thought himself protected because he went back on active duty.

"We had the rehabilitation centers of the Army and Navy for these men, many even though sentenced by court-martial, were forgiven, put back, and did the same duties as the other men. Also, we had these men who were court-martialed and were taken right out of the brig and put into combat with rifles in their hands and told, maybe with a guard behind them, to go up there and fight, thinking they were just as good cannon fodder as another man. They were required to engage in combat. We had others killed in combat. We had on ships men who had been sentenced by court- martial and were in the brig of the ship, and the ship was sunk. They were exposed to combat conditions and they went down without any insurance.

"We have not wanted to do violence to the fund. We think that the protection of men who performed active service is the great obligation of Congress. We would provide that this be charged to the national service life insurance appropriation, and not to the fund, in any case in which the insurance matured by virtue of this subsection (m)(2) of section 602. We think that this will be but a very minute or infinitesimal cost of this last war.

"... they (court-martial cases) are entitled to be considered fully insured if they were restored to active service and required to do combat duty ..."

(C) The Assistant Administrator for Insurance, Veterans Administration, testified in part:

"I think it covers such persons with certain limitations. As I understand the situation the intention only was to cover the short-term a.w.o.l. case.

"I think, as drawn, the section would do what was intended to be done except for the proposition I brought up regarding the man who became totally disabled from a cause not attributable to the extra hazards of military and naval service, and I think that an amendment could be made to lower those cases. (Underscoring supplied.)

"I am not advocating the section; I am just saying what I think it means."

(D) Honorable Clair Engle, Chairman, Subcommittee on Insurance, House Committee on World War Veterans' Legislation, stated in part:

"Now, section 8 undertakes to take care of those situations where a man has authorized a deduction from his pay to take care of his insurance and through one circumstance or another, such, for instance, as indicated in the proposed amendment, the insured was discharged to accept a commission or was, or, was absent without leave, if restored to active duty; or was sentenced by court-martial, if he was restored to active duty, or was required to engage in combat, or was killed in combat.

"In such instances this amendment would be to prevent lapse of his insurance." (Underscoring supplied.)

It seems clear that Congress intended that payment of premiums should not be denied by the Veterans Administration and that insurance should be treated by the Veterans Administration as though in force under premium-paying conditions so as to avoid the effect of lapse as to all policyholders who met the conditions under which insurance is deemed not to have lapsed under subsection 602(m)(2), so long as they remained in active service prior to August 1, 1946. It also seems clear that this includes those who became totally disabled as well as those who died. If follows that insurance "deemed not to have lapsed" should be treated as in force under premium-paying conditions for premium- waiver purposes under subsection 602(n) in order to give full effect to Congressional intention to protect insurance of persons who died or became totally disabled after their allotments had been discontinued under circumstances discussed in the legislative history.

The Solicitor’s Opinion of June 15, 1951 (Op. Sol. 241-51) was based primarily on the fact that Technical Bulletin 9-34 had been approved by the Administrator. One of the arguments advanced in the opinion to reach the same conclusion as Technical Bulletin 9-34 was that subsection 602(m)(2) provided for a deduction of the unpaid premiums in death cases but not in the live cases. Upon reconsideration of this opinion, I can find no satisfactory reason for concluding that this omission permits a result contrary to the purpose of subsections 602(n) and 602(m)(2) --the preservation of insurance protection.

Provision for collection of premiums from matured benefits in death cases but not in cases in which insurance protection was continued after expiration of the protection provided by subsection 602(m)(2) was perfectly logical in the light of all the circumstances involved. Since there was a matured liability in death cases, it was reasonable to charge the amount of back premiums which would otherwise have accrued during the period of subsection 602(m)(2) protection against the death benefits payable to beneficiaries. On the other hand, in all other cases in which insurance was to be carried by insured beyond the period of protection provided by subsection 602(m)(2), the soundest approach, in order to encourage insured to continue their insurance protection, was to not charge back premiums for the period of statutory protection and merely collect premiums for future protection as premiums fell due commencing as of the date of discharge or as of July 31, 1946, whichever was the earlier, unless a waiver of premiums had been granted for total disability. This had the effect of encouraging reinstatement of policies which lapsed after discharge because the amount required for reinstatement would be considerably less. Also, in view of the foregoing legislative history, which clearly shows that the Congress in enacting subsection 602(m)(2) intended to grant protection to those who became totally disabled as well as those who died, it seems clear that Congress intended that a waiver of premiums be granted for total disability commencing during the period of subsection 602(m)(2) protection without collection of premiums for the period of such protection where prerequisites of subsection 602(n) were met.

The conclusion reached herein concerning the existence of a right to waiver of premiums under subsection 602(n) (38 U.S.C. § 712) on the basis that insurance deemed under subsection 602(m)(2) not to have lapsed must be treated as in force under premium-paying conditions for purposes of subsection 602(n) is consistent with the administrative determination made in 1951 under analogous circumstances, when Veterans Administration Regulation 3440 (38 C.F.R. § 8.40) was amended to add the sentence reading, "Where an insured meets the requirements of this paragraph, waiver of premiums hereunder on his National Service Life Insurance shall not be denied for the reason that premiums on such insurance are or have been waived under 38 U.S.C.§ 724." See also Veterans Administration Regulation 3513(J), 38 C.F.R. § 8113(j). This was an implicit determination that insurance maintained in force under an in- service waiver of premiums granted pursuant to section 622 of the National Service Life Insurance Act (38 U.S.C. § 724) is in force under "premium-paying conditions" for purposes of subsection 602(n) (38 U.S.C. § 712). Although there is no express legislative authority for granting premium waiver under subsection 602(n) for total disability commencing either while insurance is maintained in force under subsection 602(m)(2) or while maintained in force under an in-service waiver pursuant to section 622, it seems manifest that when Congress enacted legislation permitting insurance contracts with servicemen to be continued in force under either of these sections without actual payment of premiums as they became due, it never intended to deprive the policyholders of their contractual rights to premium waiver benefits for total disability commencing while the policies were maintained in force by reason of the forementioned

laws.

It may be pertinent to note, however, that the "deemed" coverage extended by subsection 602(m)(2) would have been extinguished in any given case if, upon restoration to active duty, the insured had voluntarily signed a statement to the effect that he did not desire insurance. See Sawyer v. United States, 211 F.2d 476. As previously pointed out, there is no evidence in the claims folder that the veteran in this case was informed after his return to active duty that he would have to authorize a new allotment in order to maintain his insurance in force.

HELD:

A total disability which commenced while an insured's National Service Life Insurance policy was deemed not to have lapsed by reason of provisions of subsection 602(m)(2) must be treated as one commencing while the insurance was in force under premium-paying conditions within the purview of subsection 602(n) of the National Service Life Insurance Act (38 U.S.C. § 712). Op. Sol. 241-51 is overruled to the extent that it is inconsistent with this conclusion. (Opinion of the General Counsel dated February 9, 1968, approved February 16, 1968, C-XXXXXXXXX.)

This opinion is hereby promulgated for observance by all officers and employees of the Veterans Administration".

VETERANS ADMINISTRATION GENERAL COUNSEL
Vet. Aff. Op. Gen. Couns. Prec. 62-90