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Vet. Aff. Op. Gen. Couns. Prec. 65-90

TEXT:

Subject: Concurrent Payment of Employees' Compensation to Widow and Dependency and Indemnity Compensation to Child When He Attains Age 18

(This opinion, previously issued as Administrator's Decision 974, dated February 3, 1961, 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 a child who is between the ages of 18 and 21 and attending school is eligible to receive dependency and indemnity compensation when the widow has elected and is receiving compensation from the Bureau of Employees' Compensation based on the veteran's military service.

FACTS:

The question involves a factual situation where a widow with a minor child was eligible for either death compensation or dependency and indemnity compensation from the Veterans' Administration, or for benefits from the Bureau of Employees' Compensation, because of the death of her husband, due to military service, prior to January 1, 1957. The widow elected to receive benefits from the Bureau of Employees' Compensation, which includes an additional amount for the child. When the child becomes 18, Bureau of Employees' Compensation benefits for the child will no longer be authorized. The question arises as to whether, under these circumstances, the child will be eligible to receive dependency and indemnity compensation, assuming entitlement otherwise, after becoming 18, notwithstanding the widow's continued receipt of benefits from the Bureau of Employees' Compensation.

COMMENTS:

Authority for the payment of dependency and indemnity compensation to a widow is contained in 38 U.S.C. § 411. If there are "two or more children below the age of eighteen" the total of the monthly benefits to which such widow and children are entitled is determined, under the conditions stated in the section, on the basis of the number of children in excess of one. Section 411 definitely does not authorize dependency and indemnity compensation to a child in his own right. The benefits of a child thereunder are indirect and wholly dependent on the widow's rights. Section 413, title 38, United States Code, authorizes dependency and indemnity compensation to children,

"Whenever there is no widow ... entitled to dependency and indemnity compensation." Stated conversely, a child does not have entitlement under that section when there is a widow "entitled to dependency and indemnity compensation."

Section 414, title 38, United States Code, which authorizes supplemental dependency and indemnity compensation to children, reads, in pertinent part, as follows:

"(c) If dependency and indemnity compensation is payable monthly to a woman as a 'widow' and there is a child (of her deceased husband) who has attained the age of eighteen and who, while under the age of twenty-one, is pursuing a course of instruction at an educational institution approved under section 104 of this title, dependency and indemnity compensation shall be paid monthly to each such child, concurrently with the payment of dependency and indemnity compensation to the widow, in the amount of \$35." (Emphasis supplied.)

As concerns children, it will be noted that section 411 applies to "children below the age of 18" and that section 414(c) applies to "a child who has attained the age of 18," whereas section 413 is silent as to age qualification. Thus, under section 413 in determining the eligibility of a school child, "whenever there is no widow entitled," resort is had to section 101(4)(C), title 38, United States Code, defining the term "child," which includes provisions comparable to those stated in section 414, supra, regarding continued entitlement after age 18 of a child "pursuing a course of instruction."

It was held in Op. Sol. 425-51 that an election by a widow to receive Bureau of Employees' Compensation benefits precluded allowance of a VA death compensation claim on behalf of a child who, being over 18, was no longer entitled to Bureau of Employees' Compensation benefits but would otherwise have had eligibility to death compensation by reason of school attendance. This opinion was on the basis of precedents of long standing to the effect that the widow has a primary right or title to pension or compensation, the right or title of any child or children being secondary, even with respect to amounts otherwise payable after 18. In holding that so long as the widow continues to receive bureau of employees' Compensation benefits in lieu of death compensation from the Veterans' Administration, the child does not have any right or title to death compensation from the Veterans' Administration, it was stated, in part:

"This follows for the reason that the pension or compensation payable on account of the child after his or her 18th birthday is a part of the same pension or compensation to which the widow has the primary right or title, of there be a widow."

The statutory provisions in effect at the time of that opinion specified a certain amount of death compensation to be paid to a "widow with ... child"; and the definition of "child" included a person between 18 and 21 "pursuing a course of instruction." The present law respecting death compensation also provides for payment to a "widow with ... child" (38 U.S.C. § 322) and the pertinent statutory definition of "child" (38 U.S.C. § 322) and the pertinent statutory definition of "child" (38 U.S.C. s 101(4), supra) is to the same

effect as the definition in the prior law.

The rationale of the cited Op. Sol. 425-51 is applicable, under the dependency and indemnity compensation laws, to the case of a child under 18 when there is a widow receiving death benefits, because, as indicated above, 38 U.S.C. § 411 similarly contemplates that the compensation payable on account of such a child is predicated on, and a part of, the widow's compensation. It is specifically provided in section 411(b) that the compensation shall be paid "to the widow." However, a different legal situation exists regarding payment of dependency and indemnity compensation on account of a child who has attained age 18, but is under 21, pursuing a course of instruction at an approved educational institution, even where there is a widow. A change in the payment status of such a child is effectuated by 38 U.S.C. § 414(c), supra, which specifically provides for payment of the compensation "to each such child" who is so pursuing a course of instruction.

This change in status is recognized in the provisions of VA Regulation 1502(A)(1), to the effect that the additional allowance of dependency and indemnity compensation to a widow, for children, will be discontinued the day preceding the child's marriage or 18th birthday, whichever is earlier. There is further recognition by the Veterans' Administration, for the purposes of dependency and indemnity compensation, of a change in the status of a school child, when there is a widow and the child has reached 18, in the provisions of the new VA Regulation 1152(C)(1). In this regulation it is stated in pertinent part that "Where a child's entitlement to dependency and indemnity compensation arises by reason of termination of a widow's right to dependency and indemnity compensation or by reason of attaining the age of 18 years a claim will be required." (Emphasis supplied.) The quoted language previously appeared in the former VA Regulation 2931(D)(1).

When H.R. 7089, which was later enacted as Public Law 881, 84th Congress (the original dependency and indemnity compensation provisions), passed the House of Representatives, the language of section 209(a) thereof was as follows:

"Section 209(a). This title shall be administered by the Administrator. Except as otherwise provided in this Act, the administrative, definitive, and regulatory provisions under Public, Numbered 2, Seventy-Third Congress, as amended, shall be for application under this title."

In its report of December 30, 1955, to the Senate, respecting H.R. 7089, the Veterans' Administration included a recommendation that section 209(a), as passed by the House, be amended by adding thereto the following:

"Dependency and indemnity compensation which is otherwise payable to a child shall commence effective the date on which the child's entitlement arose if application is filed within one year from that date; otherwise, from the date of filing application."

As to this recommendation, it was stated in the VA report, as follows:

"This amendment would protect the child from the consequence of a reasonable delay in filing claim in cases where the widow dies or remarries or the child becomes entitled in his own right by virtue of having attained age 18 to the benefits provided by section 204(b) and (c) of the bill." (Emphasis supplied.)

The provisions of the cited section 204(b) and (c) are now contained in subsections (b) and (c) of section 414, title 38, United States Code, supra. Since section 209(a), as enacted by Public Law 881, 84th Congress, contained in its entirety the language proposed by the Veterans' Administration, it is reasonable to conclude that the Congress accepted the views of the Veterans' Administration regarding the purpose of the provisions added thereto. Said language now appears, in substance, in section 3010(d), title 38, United States Code.

Consequently, it seems most apparent that under the dependency and indemnity compensation provisions of the laws administered by the Veterans' Administration, children of 18 or more, pursuing a course in an approved educational institution while under 21, have a different payment status, even where there is a widow receiving dependency and indemnity compensation benefits, from that of such children under the death compensation provisions, as discussed in Op. Sol. 425-21. Under the pertinent law, as implemented by VA regulations, any dependency and indemnity compensation benefits for which school children are eligible are payable directly to the children, in their own right.

It has been suggested, however, that 38 U.S.C. § 416(b)(1) precludes payments of dependency and indemnity compensation to a child, even though attending a school between the ages of 18 and 21, if the widow is receiving Bureau of Employees' Compensation benefits. That statutory provision reads as follows:

"Whenever the widow of a veteran has been granted dependency and indemnity compensation by reason of this section, payments to her and to the children of the veteran shall thereafter be made under this chapter, and shall not thereafter be made to them by reason of the death of the veteran under (A) other provisions of law administered by the Veterans' Administration providing for the payment of compensation or pension, or (B) the Federal Employees' Compensation Act."

It is easily perceived that the quoted subsection of 38 U.S.C. § 416 does not specifically relate to the case of receipt of Bureau of Employees' Compensation benefits by a widow. According to its express terms, it applies only to the case of election of dependency and indemnity compensation by a widow; but some persons have expressed a belief that the underlying theory of the provision is one of "unitizing" claims, on a family basis, and that in enacting 38 U.S.C. § 416 (b)(1), Congress intended that said theory should also apply to situations converse to the one specifically dealt with in the statute.

An exhaustive review of the legislative history of Public Law 881, 84th Congress, the predecessor of the present chapter 13 of title 38, United States Code, relating to

dependency and indemnity compensation, has failed to reveal anything whatsoever indicating an intention on the part of Congress that section 416(b)(1), supra, should apply to any case other than one involving an election of dependency and indemnity compensation by a widow.

Aside from the specific language of the statutory provision here under consideration, and the lack of any indication of a Congressional intent for broad application, equity would weigh against a construction of applicability of the provision to the present case. Congress has specifically provided, statutorily, for Government assistance with respect to certain children of veterans who pursue a course of education after reaching 18 years of age. The provision with respect to such children, "wherever there is no widow of a deceased person entitled to dependency and indemnity compensation," was made in section 203(a)(1) of Public Law 881, 84th Congress (now 38 U.S.C. § 413 (1), in the amount of \$70 per month of "one child." For the purpose of said provision the term "child" was defined in section 102(7) of Public Law 881 as having the meaning set forth in Veterans Regulation No. 10, as amended, which now appears in 38 U.S.C. § 101(4), and reads in pertinent part:

"The term 'child' means ... a person who is unmarried and—

* * * * *

(C) who, after attaining the age of eighteen years and until completion of education or training (but not after attaining the age of twenty-one years), is pursuing a course of instruction at an approved educational institution; ..."

The assistance for a "child" student between 18 and 21 years of age, where "dependency and indemnity compensation is payable monthly to a woman as a 'widow'", was provided in section 204(c) of Public Law 881, supra (now 38 U.S.C. § 414(c)), in the specified amount of \$35 per month.

Senate Report No. 2380 and House Report No. 993, both on H.R. 7089, which was enacted as Public Law 881, supra, describe the aforementioned section 204(c) in identical language, viz.:

"Subsection (c) provides that where there is a widow entitled to dependency and indemnity compensation, and a child attains the age of 18, and is attending school, a supplemental payment will be made to that child (to compensate for his loss of social security) in the amount of \$35. This payment will continue until the child leaves school, attains the age of 21, or until the widow's entitlement terminates, whichever first occurs. If the widow's entitlement terminates, the child will then be entitled to benefits under Section 203." (Emphasis supplied).

It seems clear from a reading of the foregoing excerpt from the Senate and House Committee reports that Congress had taken cognizance of the fact that under laws other than those administered by the Veterans' Administration no death benefits were available to assist children of veterans who wished to continue in school after reaching the age of 18, and that, in enacting sections 203(a)(1) and 204(c) of Public Law 881

(now 38 U.S.C. §§ 413(1) and 414(c)), Congress definitely intended that assistance in the form of death benefits should be given such children, either in the amount of \$70 a month, or \$35 per month, dependent upon circumstances. The parenthetical phrase, "(to compensate for his loss of social security)," as used in the report excerpt, above, is considered as merely being an example with respect to nonexistence of such assistance beyond age 18, rather than being intended to establish prior receipt of social security benefits as a condition precedent. It seems only reasonable to assume that Congress meant to give death benefits to a veteran's child pursuing a course after 18, where no similar benefits are available, irrespective of whether benefits previously received were paid by the Social Security Administration or the Bureau of Employees' Compensation, or even if no such benefits were previously paid to or for the child.

An interpretation of 38 U.S.C. §416(b)(1) within its specific terms--to bar benefits to a "child" under other laws where the widow elects dependency and indemnity compensation--does not create a hardship on a "child" student over the age of 18, because the \$34 per month additional payable to a widow, for one child, under the death compensation provisions, 38 U.S.C. § 322 (wartime rate), is replaced by a payment of \$35 per month where a widow elects to receive dependency and indemnity compensation. Congress' intention of monetary assistance, in the form of death benefits, for veterans' children attending school would be thwarted, however, by construing 38 U.S.C. § 416(b)(1) as barring dependency and indemnity compensation benefits to the child in the present case--because no similar death benefits are available to a child who has attained 18 years of age, and is attending school, where the widow is in receipt of Bureau of Employees' Compensation benefits.

In view of all of the foregoing, it is concluded that dependency and indemnity compensation benefits which may be otherwise payable to a "child" attending school, directly to the child and in its own right, are not barred by 38 U.S.C. § 416 (b)(1) where the widow is receiving benefits from the Bureau of Employees' Compensation. This conclusion leaves for determination the question as to which of the two dependency and indemnity compensation benefits described above (\$70 under 38 U.S.C. §§ 413(1) and 101(4)C); or \$35 under 38 U.S.C. § 414(c)), is payable to the "child" in the submitted situation.

To be considered first is the matter of applicability of the \$70 provision of 38 U.S.C. § 413(1) to the present case. Having concluded, above, that 38 U.S.C. §416(b)(1) does not apply to a situation where the widow decides to accept Bureau of Employees' Compensation benefits, it reasonably follows, in the absence of any statutory reference to such a case, that Congress either did not contemplate a situation of this sort, or, if it did, felt that no special provision was necessary to cover it. Whichever may have been the case, the structure of the law does require certain legal conclusions regarding such a case. For instance, the language of the statutory provisions, and the legislative history thereof, impel a belief that basic eligibility of a widow, rather than the matter of actual receipt of dependency and

indemnity compensation, controls as to whether children of 18 years or over shall be paid as if there were no widow.

Section 413(1) provides the \$70 benefit "Whenever there is no widow of a deceased veteran entitled to dependency and indemnity compensation." (Emphasis supplied.) On page 2 of Senate Report No. 2380 on the bill, H.R. 7089, which became Public Law 881, supra, the benefits provided by section 413 are described as being for "children where there is no eligible widow." (Emphasis supplied.) On page 11 of the cited report, section 203 (now 38 U.S.C. § 413) is described as providing benefits "whenever there is no widow." (Emphasis supplied). On page 9 of House Report No. 993, Part 1, supra, the \$70 school child benefit of section 413 is described as relating to "an orphan child." (Emphasis supplied.)

From a reading of the foregoing excerpts, it seems evident that Congress intended that the benefits provided by section 413 should be payable to children of a veteran only in the event there is no widow with eligibility for dependency and indemnity compensation. Eligibility of a widow may be terminated by death or by remarriage; but the continuing right of a widow to elect dependency and indemnity compensation is not terminated by receipt of Bureau of Employees' Compensation benefits. Consequently, it is believed that the \$70 benefit provided by 38 U.S.C. § 413(1) may not properly be paid in the present case.

For ease of reference the remaining provision respecting payment of dependency and indemnity compensation to children of 18 to 21 years while attending school—38 U.S.C. § 414(c)—is again quoted in pertinent part, as follows:

"If dependency and indemnity compensation is payable monthly to a woman as a 'widow'.... dependency and indemnity compensation shall be paid monthly to each such child, concurrently with the payment of dependency and indemnity compensation to the widow, in the amount of \$35." (Emphasis supplied.)

The underscored portions of the foregoing language give rise to a thought as to whether, as a matter of law, actual receipt of dependency and indemnity compensation by the widow is a prerequisite for payment of the \$35 benefit to a child under section 414(c).

Respecting the meaning of the underscored word "payable," it is noted that on page 3 of the aforementioned Senate Report No. 2380, the benefit provided by section 414(c) is described as "involving an eligible widow." (Emphasis supplied.) On page 11 of the Senate report the same benefit is described as relating to a situation, "where there is a widow entitled to dependency and indemnity compensation." (Emphasis supplied.) Consideration of the different terms used in the legislative history to describe the application of a statutory provision containing the word "payable," justifies a belief that Congress did not use the quoted term as requiring actual payments to a widow, but, instead, intended it to mean the existence of a widow with basic eligibility, the converse condition to the one required by the provision of 38 U.S.C. § 413 as to nonexistence of

an eligible widow, as discussed above.

As to the meaning of the underscored phrase of 38 U.S.C. § 414(c) relating to concurrent payment, the legislative history delineated in the immediately foregoing paragraph gives support to a view that the phrase in question was no more intended to establish actual payment as a condition precedent than was the term "payable." Also, the concurrent payment phrase can reasonably be interpreted as merely emphasizing the independent right of a school "child" of 18 or more to dependency and indemnity compensation, and as making clear the point that a child is entitled to the payment notwithstanding that the widow might also be receiving dependency and indemnity compensation. Another possible, and reasonable, purpose of the concurrent payment phrase is to explain why a benefit of only \$35 is provided in section 414(c), as compared with \$70 specified in section 413(1). On page 10 of House Report No. 993, supra, the reason for the difference between allowance of \$95 per month of a helpless child without a widow, and allowance of only \$70 where there is a widow, was set forth as follows:

"... It was the thought of the committee that both children should be provided for, but at different rates because the parent, perhaps a widow, un-remarried, would be the recipient of the dependency and indemnity compensation as well as possible social security."

The quoted Committee explanation, which is logically applicable to the school child provisions of sections 413(1) and 414(c) reflects an intention to pay less to a child where there is a widow, because of receipt of death benefits by the widow, and presumably, a belief that the widow will normally assume such a proportion of housing and other maintenance costs as to result in less living expense for such a child than would be the case with respect to a child without a widow. It would be unreasonable to suggest that Congress meant the section 414(c) benefit to be payable only if the widow is receiving dependency and indemnity compensation; the important factor is the probable receipt by the widow of some type of death benefits from the Federal Government. In the present case, the receipt of Bureau of Employees' Compensation benefits, rather than dependency and indemnity compensation, does not create a situation of a type other than what Congress reasonably contemplated, and wherein it was intended that monetary assistance be furnished, in the form of death benefits, to a child attending school between the ages of 18 and 21.

Further persuasion is found in the fact that a denial of benefits under section 414(c), in the light of the foregoing determination of non-applicability of section 413(1) (\$70 benefit) would thwart the established intention of Congress to provide a special Federal death benefit for veterans' children of 18 and over while attending school.

HELD:

Dependency and indemnity compensation benefits provided by 38 U.S.C. § 413 for children of veterans are payable only in the event there is no widow with eligibility for dependency and indemnity compensation. Widow's eligibility may be terminated by death or remarriage; but receipt of Bureau of Employees' Compensation benefits does not terminate widow's basic eligibility for dependency and indemnity compensation.

HELD FURTHER:

The dependency and indemnity compensation benefit authorized by 38 U.S.C. § 414(c) may be properly paid to a school child, if the child is otherwise eligible, notwithstanding the continuing receipt of Bureau of Employees' Compensation benefits by the widow. (Opinion of the General Counsel, dated December 13, 1960, approved February 3, 1961.)

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

VETERANS ADMINISTRATION GENERAL COUNSEL
Vet. Aff. Op. Gen. Couns. Prec. 65-90