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CITATION: VAOPGCPREC 79-90
Vet. Aff. Op. Gen. Couns. Prec. 79-90

TEXT:

Subject: Offset of Survivors' Benefits under 38 U.S.C. § 351

(This, opinion, previously issued as General Counsel Opinion 1-87, dated November 14, 1986, 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 the amount of dependency and indemnity compensation (DIC) to be withheld pursuant to 38 U.S.C. § 351 to offset a tort recovery against the United States for a veteran's death is dependent on the legal status in which the tort claimant recovers.

COMMENTS:

It is our view that the legal status in which the claimant recovers tort damages must be considered in determining the sum to be offset under section 351. Although this issue is raised as a matter of general interest, the claim giving rise to this question involves the surviving spouse of a veteran whose death qualified the spouse and the veteran's minor child for DIC benefits under section 351. The surviving spouse filed a claim under the Federal Tort Claims Act (FTCA) based on the veteran's death as personal representative of the veteran's estate, individually, and on behalf of the minor child. The claim was settled, and payment was made to the surviving spouse as personal representative. A portion of the recovery was designated as that of the minor child. The issue raised is relevant to determination of the proper sum, if any, to be withheld under section 351 from the DIC benefits of the surviving spouse and child.

Section 351 provides in pertinent part that, where "an individual" is awarded a judgment against the United States or enters a settlement or compromise under the FTCA by reason of death treated under that section as if service connected, no benefits shall be paid "to such individual" on account of that death until the total amount of the judgment, settlement, or compromise has been offset. The plain meaning of this statute, which refers twice to an "individual" recovering under the FTCA, strongly suggests reference to recovery in an individual or personal capacity rather than a representative capacity. Implementing regulations, 38 C.F.R. § 3.800(a)(2), issued shortly after enactment in 1962 of the section 351 offset provision, 27 Fed. Reg. 11886, 11892 (1962), refer to recovery by "any person" and thus are consistent with the interpretation that the statute refers to recovery in a personal capacity.

This interpretation is confirmed by the VA's early implementation of the statute. In particular, on June 4, 1965, VA General Counsel, Robert C. Fable, Jr., wrote the Assistant Attorney General, Civil Division, calling to his attention the Agency's need, in applying section 351, to determine what portion of a tort claim recovery was obtained by a claimant in an individual capacity. While the interpretation of section 351 implied by this memorandum cannot be considered controlling precedent, it is indicative of the VA's contemporaneous construction of the section 351 offset provision.

The contemporaneous construction of a statute by the administrative agency charged with its implementation is generally accorded great deference. E.g., United States v. Clark, 454 U.S. 555, 565 (1982); Udall v. Tallman, 380 U.S. 1, 16 (1965); Edwards' Lessee v. Darby, 25 U.S. (12 Wheat) 206, 210 (1827). This is especially true where the Agency assisted in drafting the legislation and participated in Congressional action leading to its passage. See e.g., Howe v. Smith, 452 U.S. 473, 485-87 (1981); United States v. Board of Commissioners, 435 U.S. 110, 131 (1978); Zuber v. Allen, 396 U.S. 168, 192 (1969). The section 351 offset provision, enacted as s 3 of Pub.L. No. 87-825, 76 Stat. 948, 950 (1962), was developed by the VA General Counsel's office, under Mr. Fable, and was introduced in Congress at the recommendation of the Agency. Thus, the General Counsel's letter to the Assistant Attorney General must be considered an important indication of the correct interpretation of the provision. In our opinion, Op. G.C. 1-75 is not inconsistent with this interpretation, implying only that where a settlement does not specify the capacity in which the claimant obtains recovery, and the claimant is the sole beneficiary of the estate and receives all proceeds of the settlement, the claimant may be presumed to have received the entire recovery individually.

The request for opinion emphasizes the distinction between double payment and double recovery, suggesting that, if section 351 was intended to bar the former, status of the claimant would be of no significance because two payments for the same death, i.e., damages of any nature and survivors' benefits, would be barred regardless of to whom the payments are made or in what capacity they are received. Conversely, if prohibition of double recovery was intended, claimant status would have to be determined in order to ascertain whether the same individual had in fact obtained recovery under both the FTCA and the veterans' benefit statutes.

It is argued that adoption of a double-recovery interpretation would require the VA to delve into the details of estate administration and expose Agency decision-making to inconsistent results under differing state laws. However, as the nature and terms of a judgment or settlement are controlling under a double-recovery theory, the need to review details of estate administration or state intestacy law would be limited. State law would come into play in interpreting the nature of damages recovered and the status of the claimant obtaining the recovery. Application of state law in such situations is apparently administratively feasible, as the Chief Benefits Director has informed us it is the policy of the Department of Veterans Benefits to offset only tort recoveries received in an individual capacity.

Uniformity is, of course, a desirable objective in claim adjudication. However, it must not be obtained at the expense of fairness to beneficiaries or congressional intent. Under the double-payment interpretation as described in the request for opinion, a tort award may be offset against a survivor's DIC benefits even though the award was paid to the survivor as estate representative and may have been distributed at least in part to the deceased's creditors or other heirs. This result would be inequitable in that it would require recovery from the surviving spouse of sums the benefit of which the spouse never enjoyed. Such recovery would also contravene the objective of the DIC program to provide for the economic needs of the surviving dependents of deceased veterans. For the same reasons, the double-payment approach could lead to inequitable results in the case of a dependent child whose benefits could be withheld in an amount far greater than the sum actually received by the child from the tort settlement. Offset from a child's benefits to recover sums paid to the surviving spouse would also conflict with the policy embodied in 38 U.S.C. § 3101(b) that a claim of the United States will not be collected from the veterans' benefits of any person other than the indebted beneficiary or his or her estate.

Finally, and importantly, the interpretation that section 351 bars double recovery by a claimant, rather than double payment by the Government, is clearly supported by the legislative history of Pub.L. No. 87-825. Legislative materials pertaining to that measure repeatedly evidence Congress' intention to preclude "duplicate recoveries" from the United States for the same disability or death under section 351 and the FTCA. S. Rep. No. 2042, 87th Cong., 2d Sess. 2, 9 (1962), reprinted in 1962 U.S. Code Cong. & Ad. News 3260, 3268; H.R. Rep. No. 2123, 87th Cong., 2d Sess. 2, 10 (1962); 108 Cong. Rec. 15623 (1962) (statement of Chairman Teague of the House Committee on Veterans' Affairs, the bill's sponsor); letter from the Administrator to the Chairman, Senate Committee on Finance, August 28, 1962, reprinted in S. Rep. No. 2042 at 3-4; letter from the Deputy Administrator to the Chairman, House Committee on Veterans' Affairs, April 9, 1962, reprinted in H.R. Rep. No. 2123 at 3-4. Thus, we conclude that the offset provision of section 351 was intended to assure that the same individual does not recover twice for the same disability or death. We consider this clear indication of congressional purpose controlling over inconsistent judicial pronouncements on the subject. Compare, Kubrick v. United States, 581 F.2d 1092 (3rd Cir. 1978), rev'd on other grounds, 444 U.S. 111 (1979) (double payment) with Swanson v. United States by and through Veterans Administration, 557 F. Supp. 1041 (D.Id.1983) (double recovery).

Under the terms of the FTCA, 28 U.S.C. § 1346(b), the law of the place where a negligent or wrongful act or omission occurred governs liability. Review of state law principles governing tort recoveries in death cases leads us to conclude that recovery by a surviving spouse as personal representative on behalf of a veteran's estate and receipt of DIC benefits based on the same death cannot be considered a double recovery by the same individual for purposes of section 351.

Typical state wrongful-death statutes permit damage actions on behalf of survivors to recover for injuries incurred by such persons as a result of the death of another.

Damages in wrongful-death actions may include such items as the value of support, services, and other contributions which would have been received by the survivors had the decedent survived. W.P. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser and Keeton on The Law of Torts* s 127 (W.P. Keeton 5th ed. 1984) (hereinafter "Prosser"). A wrongful-death action may typically be brought on behalf of the survivors by a personal representative or, in some cases, by the survivors themselves. *Id.* Where the action is brought by a representative, this person is merely a nominal party serving as trustee for the survivors to whom damages may be due. 22 Am. Jur.2d, *Death* §§ 184, 198 (1965). Recovery under such a statute is unquestionably that of the individual claimants.

In contrast, state survival statutes permit continuation after death of the deceased's own cause of action for personal injuries. Prosser, *supra*, § 126. The decedent's cause of action is transferred to a personal representative who may typically recover the same damages the decedent could have recovered had the decedent survived, e.g., wages lost prior to death, medical expenses, and in some states damages for pain and suffering. *Id.* Certain survival statutes also provide for recovery of future earnings lost to the estate through the decedent's death. Prosser, *supra*, § 127. Damages recovered under either a survival statute or a wrongful-death statute may be distributed by a representative. However, a crucial distinction is that survival-action damages, being those of the decedent, are subject to claims of the decedent's creditors, while wrongful-death damages, being those of the survivors, generally are not. *Id.*; 22 Am. Jur.2d, *Death* § 184. Although a survival action is brought by an administrator or executor, Prosser, *supra*, § 127, who may be the surviving spouse, this person may or may not ultimately benefit from the recovery, as the decedent's estate, not the representative, is the real claimant. 22 Am. Jur.2d, *Death* § 14. Accordingly, recovery by a surviving spouse as personal representative under a survival statute cannot be considered recovery by the surviving spouse as an individual for purposes of section 351.

HELD:

The legal status under which a claimant recovers on a claim under the FTCA based on death is relevant to determination of the amount to be offset from DIC benefits pursuant to 38 U.S.C. § 351. Such status will generally be dependent on the nature of the damages recovered. Amounts recovered by an individual under a typical wrongful-death statute may be offset against DIC otherwise payable to that individual, even if damages are actually paid to a nominal party as trustee for the survivors. Each survivor receiving damages under a wrongful-death statute is subject to offset only to the extent of sums included in the judgment or settlement to compensate for harm suffered by that individual. Damages recovered by a personal representative under a survival statute are not subject to recovery by offset under section 351, although the personal representative to whom payment is made may be the surviving spouse of the decedent. We will advise personnel of the Office of the General Counsel responsible for FTCA matters of the need for specificity in FTCA judgments and settlements to identify the capacities in which claimants receive damages and the sums awarded to each party.

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