Veterans Affairs Opinion Office of General Counsel Precedent 01-92

Date: 1/17/1992

**TEXT:**

**Subj:** Claim for Death Benefits

**QUESTION PRESENTED:**

Under 38 U.S.C. §§ 101(b) and 5105 (formerly §§ 3001(b) and 3005), should either an application for death benefits, filed by a veteran's surviving spouse on a VA Form 21-534, wherein the surviving spouse indicated that the veteran's death was not alleged to have resulted from military service, or an application for Social Security Administration (SSA) benefits on VA Form SSA-24, submitted simultaneously to the same VA regional office, be considered a claim for dependency and indemnity compensation (DIC)?

**COMMENTS:**

1. The veteran died on August 13, 1979. In October 1979, the veteran's surviving spouse submitted a completed application for VA death benefits to the VA regional office on VA Form 21-534, Application for Dependency and Indemnity Compensation or Death Pension by Widow/er or Child. On the same day, the surviving spouse submitted a claim for SSA survivors benefits on VA Form SSA- 24, Application for Survivors Benefits, to the same VA regional office. On February 4, 1980, the surviving spouse also submitted an application to the SSA (Form SSA-5 F6) claiming insurance benefits under the Social Security Act. No information was included or attached to any of the forms indicating that the veteran's death was service connected. Rather, the surviving spouse checked "no" in block 11b of VA Form 21-534, which asks whether the claimant is alleging that the veteran's death was service connected. Improved-pension benefits were awarded effective August 1, 1979.

2. On January 2, 1987, the VA regional office received a letter from the surviving spouse requesting "reconsideration" of DIC entitlement. On February 3, 1987, VA informed the surviving spouse that "no determination has been made regarding your entitlement to dependency and indemnity compensation (DIC)," but that the request for reconsideration would be treated as a claim for that benefit. Subsequently, VA obtained the veteran's service medical records, and service connection of the veteran's death was established by the VA rating board on October 9, 1987. Consistent with the rating board's determination, the surviving spouse was granted DIC benefits effective January 1, 1987. The surviving spouse has appealed to the Board of Veterans' Appeals seeking an earlier effective date for DIC benefits.

3. Turning first to the statute that governs the filing of claims for veterans' benefits, 38 U.S.C. § 5101(b)(1) (formerly § 3001(b)(1)) provides in pertinent part that "a claim by a surviving spouse ... for death pension shall be considered to be a claim for death compensation (or dependency and indemnity compensation)." Implementing regulations at 38 C.F.R. § 3.152(b)(1) contain a virtually identical statement. The above-referenced statute and regulation suggest that the surviving spouse's initial application for death benefits, filed on VA Form 21-534 in October of 1979, must be considered a claim for DIC benefits. However, the surviving spouse's statement on the form that service connection of cause of death was not being alleged could be interpreted as evidencing an intention to claim only death pension.

4. In any event, however, simultaneous submission of a completed VA Form SSA-24 leads us to the conclusion that the surviving spouse did file a claim for DIC in October 1979. Section 5105(a) of title 38, United States Code, directs the Secretary of Veterans Affairs and the Secretary of Health and Human Services (HHS) to jointly prescribe forms for the use of survivors of members and former members of the uniformed services in claiming benefits under chapter 13 of title 38 and title II of the Social Security Act. That section directs the development of forms that "request information sufficient to constitute an application for benefits under both chapter 13 of title 38 and title II of the Social Security Act." Under 38 U.S.C. § 5105(b), the filing of such a form with either the Secretary of Veterans Affairs or the Secretary of HHS shall be deemed an application for benefits under both chapter 13 of title 38 and title II of the Social Security Act. See also 38 C.F.R. § 3.153 (application on jointly prescribed form, filed with SSA, will be considered a claim for death benefits). Section 5105 had its origin in the Servicemen's and Veterans' Survivor Benefits Act, Pub. L. No. 881, s 601, 70 Stat. 857, 886 (1956). Although the purpose of the provision was to obviate the need for a claimant "to file more than one basic application for benefits" under the Social Security and DIC programs, S. Rep. No. 2380, 84th Cong., 2d Sess., reprinted in 1956 U.S. Code Cong. & Admin. News 3976, 4000, the provision is for the convenience of the claimant and does not preclude the filing of separate Social Security and DIC claims. See also Akles v. Derwinski, 1 Guardian Federal Savings & Loan Association, 1 Vet.App. 118, 121 (1991) (claimants not required to enumerate statutory sections under which benefits are claimed). The surviving spouse's application for Social Security survivors' benefits on VA Form SSA-24 was a claim for benefits under title II of the Social Security Act on a jointly prescribed form and as such constituted a claim for DIC within the terms of 38 U.S.C. § 5105(b) regardless of the status of the claim on VA Form 21-534 for VA death benefits. FN1

5. Given that the surviving spouse may be considered to have filed a claim for DIC in October 1979, the question is raised whether that claim was resolved prior to receipt of the surviving spouse's request for reconsideration of DIC ntitlement. The answer to this question bears directly on the effective date of the surviving

spouse's DIC. Generally, once a claim has been denied, and either the Board of Veterans' Appeals has rendered a final decision or the time for an appeal has expired, if the claim is reopened, the effective date of benefits is the date of the reopened claim. 38 U.S.C. § 5110(a) (formerly s 3010(a)); 38 C.F.R. § 3.400(q)(1)(ii).

6. We have located no contemporaneous evidence in the claim file establishing that the surviving spouse's initial DIC claim was ever finally denied. Section 3.160(d) of title 38, Code of Federal Regulations, provides that a finally adjudicated claim is an application which has been allowed or disallowed by the agency of original jurisdiction and with respect to which action has become final by the expiration of one year from the date of notice of allowance or disallowance or by denial on appellate review. Under former 38 C.F.R. § 3.103(e) (currently s 3.103(f)), dealing with procedural due process, a claimant was and is entitled to notice in writing of a decision affecting the payment of benefits. This notification advises the claimant of appellate rights and provides the claimant the opportunity to pursue an appeal by filing a notice of disagreement.

7. VA's February 3, 1987, letter responding to the request for reconsideration informed the surviving spouse that no determination had been made with respect to DIC entitlement. In a letter dated September 9, 1980, VA did inform the veteran's child that the child's claim for educational benefits had been denied "because the veteran's death was not the result of a service- connected disease or injury." However, this determination pertained to the claim of the child, not the surviving spouse, and, further, did not deal with the question of entitlement to DIC. We also note that the DIC claim cannot be considered to have been abandoned under 38 C.F.R. § 3.158(a), since that regulation applies only where a claimant has failed to respond to a VA request for evidence pertaining to a claim. See Morris v. Derwinski, 1 Vet. App. 250, 264 (1991).

8. The July 24, 1980, letter notifying the surviving spouse of the pension award contained the notation that a VA Form 21-6895 (Death Pension Original Award) was enclosed with the award letter. We have been unable to locate in the claim file a copy of the VA Form 21-6895 that was sent to the surviving spouse. Among the eleven blocks which may be checked on the August 1979 version of the form is one (block 8) indicating the recipient is not entitled to service-connected death benefits. (Compare the Adjudication Officer's reference to block 5 of the form in his March 20, 1989, memorandum to the Senior Adjudicator.) The VA Form 21-6798d, Death Award, completed July 8, 1980, contained the notation in block 16, Remarks, "NSC DEATH NO INDICATION OF S/C DEATH." However, the "Special Instructions" on the back of this form relative to notification of the claimant contain only apparent references to blocks 5 and 11 of the VA Form 21-6895 and contain no reference to service connected benefits. (Block 5 of the August 1979 version of VA Form 21-6895 refers to Social Security benefits.) Although the original statement of the case contained no reference to the VA Form 21-6895, the supplemental statements of the case

issued on May 25, 1990, and August 7, 1990, indicated that this form had been used to notify the surviving spouse that service connected benefits had been denied. The surviving spouse took issue with this statement in a letter to the Adjudication Officer dated June 4, 1990. (See also VA's February 3, 1987, letter stating that no determination had been made with respect to DIC entitlement.) We leave to the Board resolution of the factual issue of whether the surviving spouse was notified of disallowance of service- connected benefits prior to the filing of the request for reconsideration.

9. VA Manual 21-1, para. 34.08 a., lists situations where a claim for service-connected benefits may be disallowed without a rating decision. Among these is the situation where " s ervice connection was not specifically claimed and there is no reasonable probability that the cause ... of death after separation from service was related to service." VA Manual M21-1, para. a.(3). This exception may be applied where complete service records are not available in the claim folder and are not requested "because there is no reasonable possibility that death is related to service." VA Manual M21-1, para. a. (3)(c). Even if, in light of the notation in block 11b of the VA Form 21-534, it could be concluded that there was no reasonable possibility of service- connected death, the manual provision in question merely provides that a claim may be disallowed without issuance of a rating decision, not that it may be denied without notice to the claimant. In fact, paragraph 34.08 e. of the Manual specifically refers to appropriate notification of the disallowance. (The terms of VA Manual M21-1, para. 34.09, as in effect in 1980, at the time of the death-pension award, see M21-1, change 168, June 20, 1977, were essentially the same as those of current paragraph 34.08.) In any event, denial without notification would have been in violation of controlling regulations, referenced above, governing procedural protections, and, to the extent the above-referenced notation in block 16 of the VA Form 21-6798d purports to represent such a denial, it is ineffective.

10. Unless the Board concludes that the surviving spouse was previously notified of the denial of the October 1979 claim for DIC, that claim must be considered to have been a pending claim, i.e., an application not finally adjudicated, under 38 C.F.R.§ 3.160(c) at the time of VA's 1987 award of DIC benefits. Accordingly, 38 U.S.C. § 5110(d)(1) (formerly s 3010(d)(1)) would be for consideration with regard to establishment of an effective date for the award.

**HELD:**

The VA Form SSA-24, Application for Survivors Benefits under the Social Security Act, filed by the surviving spouse of a veteran at a VA regional office, constitutes a claim for dependency and indemnity compensation (DIC) despite the fact that the claimant indicated on a simultaneously filed VA Form 21-534, Application for Dependency and Indemnity Compensation or Death Pension by a Widow/er or Child, that service connection of the veteran's death was not

being alleged. Unless it is determined that this claim was finally denied prior to VA's later award of DIC benefits, it must be considered to have been pending on that date for purposes of determination of the effective date of DIC benefits.

1 We note that VA has long assumed an affirmative duty under 38 C.F.R. § 3.103(a), now codified at 38 U.S.C. s 5107(a) (formerly § 3007(a)), to assist a claimant in developing the facts pertinent to a claim. See, e.g., Akles, 1 Vet. App. at 121. However, under section 5107(a), this affirmative duty does not pertain unless the claimant has first "submitted evidence sufficient to justify a belief by a fair and impartial individual that the claim is well grounded." Murphy v. Derwinski, 1 Vet App. 78, 81 (1990); Gilbert v. Derwinski, 1 Vet. App. 49, 55 (1990). A "well-grounded claim" has been defined by COVA as "a plausible claim, one which is meritorious on its own or capable of substantiation. Such a claim need not be conclusive but only possible to satisfy the initial burden of s 5107 (a) ." EF v. Derwinski, 1 Vet. App. 324, 325 (1991), quoting from Murphy, 1 Vet. App. at 81-82. In Sussex v. Derwinski, 1 Vet. App. 526, 529-30 (1991), COVA found a DIC claim well grounded where the claimant submitted the medical opinions of two treating physicians that the veteran's disease may have had its origin in service. In that the only evidence pertaining to service connection in the file associated with the surviving spouse's claims filed in October 1979 was the surviving spouse's own statement that the veteran's death was not alleged to be due to service, we would question whether a well-grounded claim for DIC had been submitted requiring VA to assist in factual development.

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