

DATE: 10-13-92

CITATION: VAOPGCPREC 21-92  
Vet. Aff. Op. Gen. Couns. Prec. 21-92

**TEXT:**

**QUESTION PRESENTED:**

Is the burial allowance authorized by 38 U.S.C. § 2302 payable on behalf of an incompetent veteran whose compensation payments were in suspension at the time of the veteran's death pursuant to section 8001 of the Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, 104 Stat. 1388, 1388-341, because the value of his or her estate exceeded \$25,000?

**COMMENTS:**

1. The factual situation which led to the request for this opinion is as follows. The veteran was awarded disability compensation at the 100-percent rate for a service-connected disability effective from May 4, 1962. Effective May 1, 1991, compensation payments to which the veteran would otherwise have been entitled were suspended pursuant to 38 U.S.C. § 5505 because the veteran was rated as incompetent, had no spouse, child, or dependent parent, and the value of the veteran's estate exceeded \$25,000. The veteran died on July 21, 1991, and, shortly thereafter, a claim for payment of nonservice-connected burial benefits was received by VA.
2. Section 2302(a) of title 38, United States Code, provides that an allowance for the expenses of burial (not to exceed \$300) is payable on behalf of a veteran who dies of nonservice-connected causes and who, at the time of death, was "in receipt" of compensation or pension. This burial allowance is also payable on behalf of a veteran who, at the time of death, was receiving retirement pay in lieu of compensation. 38 U.S.C. § 2302(a). The meaning of the statutory term "in receipt" is crucial to determination of the question at hand.
3. The Act October 6, 1917, ch. 105, § 301, 40 Stat. 398, 405, and the Act of March 4, 1923, ch. 291, § 3, 42 Stat. 1521, 1523, authorized payment of burial benefits, respectively, on behalf of persons who died before discharge from service and indigent wartime veterans who died after discharge. In a letter to the President of the United States dated December 19, 1923, the Director of the Veterans' Bureau proposed that authority be sought to pay necessary burial expenses within a maximum of \$150 in all compensable cases to obviate the necessity of an inquiry as to indigency, which had proven to be administratively difficult. Subsequently, the Veterans' Bureau recommended to Congress that payment of burial expenses be made in all cases involving wartime veterans who die "while receiving" disability compensation or vocational training and in cases

involving wartime veterans hospitalized at VA facilities at the time of death, without regard to the indigency of the deceased. See Veterans' Bureau Codification Act: Hearings Before the Subcomm. of the Senate Comm. on Finance, 68th Cong., 1st Sess., on S. 2257 172 (Recommendations of the Director of the United States Veterans' Bureau - Submitted in the Form of Drafts of Proposed Amendments to Senate Bill 2257). The Bureau justified this change on the basis of the cost of making indigency determinations in individual cases. Id. at 103 (statement of Frank T. Hines, Director, Veterans' Bureau). Such a provision was enacted as part of the World War Veterans' Act, 1924, ch. 320, § 201(1), 43 Stat. 607, 617. There is, however, no discussion in the congressional committee reports concerning the World War Veterans' Act of 1924 of Congress' reasons for extending burial benefits to certain veterans who die while receiving compensation.

4. The term "in receipt" as it appears in 38 U.S.C. § 2302(a) had its origin in the Vet. Regs. issued pursuant to section 17 of the Economy Act of 1933, ch. 3, title I, § 17, 48 Stat. 8, 11. Paragraph II of Vet. Reg. No. 9(a), which was promulgated by Exec. Order No. 6158 (June 6, 1933), had authorized the Administrator of Veterans Affairs to pay an allowance for burial and funeral expenses for an honorably discharged veteran of any war who died after discharge, provided the veteran's net assets at the time of death did not exceed \$1,000. Vet. Reg. No. 9(c), promulgated by Exec. Order No. 6695 (May 2, 1934), added language extending eligibility for payment of the allowance, subject to the net-asset limitation, to the situation where "a veteran of any war in receipt of pension or compensation dies after discharge." In the Act of June 29, 1936, ch. 867, § 401, 49 Stat. 2031, 2034, Congress provided, without explanation in the committee reports, that, notwithstanding the terms of the Vet. Reg., burial and funeral expenses would not be denied by reason of a veteran's net assets. The Act of October 5, 1940, ch. 743, 54 Stat. 963, extended eligibility for the burial allowance to the situation where a veteran of the Army, Navy, Marine Corps, or Coast Guard "in receipt of pension for service-connected disability dies after discharge." The Act of October 5, 1940, was superceded by the Act of October 17, 1940, ch. 893, § 2, 54 Stat. 1193, which contained identical language. The "in receipt" language was retained during the consolidation and codification of the veterans' benefit laws accomplished by Pub. L. No. 85-56, 71 Stat. 83 (1957), and Pub. L. No. 85- 857, 72 Stat. 1105 (1958).

5. Effective for deaths occurring after September 30, 1981, section 2001(a) of the Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 357, 781, restricted eligibility for the burial allowance authorized by what is now 38 U.S.C. § 2302(a) (then § 902(a)) to a veteran "who was in receipt of compensation ... or in receipt of pension" or was receiving retirement pay in lieu of compensation. The Senate Budget Committee Report on this measure indicated that it was adopted in lieu of a "needs test," which was considered too difficult to administer. S. Rep. No. 139, 97th Cong., 1st Sess. 1018 (1981), reprinted in 1981 U.S.C.C.A.N. 396, 998-99. However, the Committee made

clear its intention to restore to a certain extent the original purpose of the burial-allowance program of avoiding burial of war veterans in "potter's fields" and to direct limited available funds to the most needy. Id., reprinted in 1981 U.S.C.C.A.N. at 999. Consistent with certain VA legal opinions discussed below, the House Conference Report suggested that actual receipt of compensation or pension was not intended to be a prerequisite for payment of the burial allowance if the evidence on file at date of death was sufficient to support a determination of entitlement. H.R. Conf. Rep. No. 208, 97th Cong., 1st Sess. 944, reprinted in 1981 U.S.C.C.A.N. 1010, 1306.

6. In 1982, section 902 (now section 2302) was amended to restore burial-benefit entitlement to certain destitute veterans who had wartime service or were discharged for a disability incurred or aggravated in line of duty. Pub. L. No. 97-306, § 403, 96 Stat. 1429, 1443 (1982). That act was the source of the current language of the statute referring to "a deceased veteran ... who at the time of death was in receipt of compensation ... or was in receipt of pension."

7. Certain Administrator's Decisions and opinions of this office have indicated that the term "in receipt" need not be construed literally in all circumstances.

However, the circumstances in which exceptions have been allowed are narrowly circumscribed. A.D. No. 498 (7-28-42) addressed the question of whether the phrase "in receipt of pension or compensation" in Vet. Reg. No. 9(c) must be literally construed or may be interpreted as including a case in which determination of entitlement to pension had been made prior to the veteran's death but payment had not commenced. The Administrator stated that the phrase "in receipt of pension or compensation" had been incorporated into the regulation on the recommendation of the Veterans Administration. In an attempt to shed light on the meaning of the phrase, the Administrator quoted from a memorandum from the Director of the Widows and Dependents Claims Service to the Assistant Administrator, as follows:

If a veteran is considered entitled during his lifetime to pension or compensation, he surely should be entitled to the lesser benefit for burial, if other conditions requisite thereto are met, and such cases can be thus taken care of by the proposed addition to paragraph II of Veterans' Regulation No. 9 (b), "or a veteran of any war in receipt of pension or compensation."

The Administrator concluded that because the pension rating was made prior to the veteran's death, and an award had been approved for payment of an accrued amount, the case was "clearly within the spirit of Veterans' Regulation No. 9 (c) and so nearly within the letter thereof as to reasonably justify the payment of the burial expenses of the deceased veteran."

9. In 69 Op. Sol. 228 (7-28-43), the question presented was whether a veteran should be considered to have been "in receipt of pension for service-connected disability" for purposes of burial benefits under Vet. Reg. No. 9(c), as amended

by the Act of October 5, 1940. In this case, the veteran died after an initial rating denying benefits, but before the reversal of that decision by the Central Disability Board. The Solicitor determined that, if accrued benefits were payable based on evidence of record at the time of death, the veteran could be considered to have been in receipt of pension for purposes of the statutory burial allowance. See also Op. Sol. 241-52 (9-12-52) (burial allowance payable where the veteran was receiving benefits under a special act of Congress in lieu of compensation to which the veteran had been found entitled).

10. Certain opinions interpreting the terms "receiving" or "in receipt" of compensation or pension as found in other portions of title 38, United States Code, or its predecessors have also recognized limited exceptions to the literal meaning of the terms. In Op. G.C. 18-57 (5-13-57), an opinion involving reimbursement for hospital expenses incurred in an emergency for treatment of a service-connected disability, the General Counsel held that, under a liberal interpretation, the phrase "in receipt of compensation" could be read to include a veteran who later received a retroactive award of compensation for the period in question. In O.G.C. Prec. 7-91, the General Counsel held that, notwithstanding the nonreceipt of pension by reason of the receipt of a greater compensation benefit, a veteran who is adjudicated to be presently eligible for a disability pension based upon the need for regular aid and attendance may be furnished an invalid lift pursuant to what is now 38 U.S.C. § 1717 (authorizing provision of an invalid lift to a veteran "receiving" pension by reason of need for aid and attendance). Similarly, in O.G.C. Prec. 13-91, the General Counsel held that, notwithstanding the nonreceipt of pension by reason of the receipt of a greater compensation benefit, a veteran who is adjudicated as presently eligible for increased pension under what is now 38 U.S.C. § 152(d) based on need of regular aid and attendance may be furnished drugs or medicine under what is now 38 U.S.C. § 1712(h) (authorizing furnishing of drugs or medicine to a veteran "receiving" pension under such circumstances), so long as the veteran continues to meet the eligibility requirements for increased pension. It is significant that, in all of the cited cases, the veteran did in fact meet all applicable criteria for entitlement to compensation or pension at the time the veteran was considered to be in receipt of or receiving the benefit. Such is not the case here.

11. Section 5505(a) of title 38, United States Code, requires that further compensation payments to which an incompetent veteran having no spouse, child, or dependent parent would otherwise be entitled may not be made when the value of his or her estate (excluding the value of the veteran's home) exceeds \$25,000, until the value of the estate is reduced to less than \$10,000. Use of the words "would otherwise be entitled" in section 5505(a) strongly indicates that a veteran falling within the scope of that provision is not entitled to benefits for the period during which the statute is in operation. The incompetent veteran's entitlement to compensation ceases until his or her estate is reduced to less than \$10,000, he or she acquires a dependent in the designated class, or he

or she is rated competent for a period of at least 90 days. 38 U.S.C. § 5505(a) and (b). The fact that the veteran may receive a lump-sum payment equal to the benefits "denied" under this section if competency is restored does not change this result. The lump-sum payment is an entitlement which may or may not arise at a later date upon the happening of a contingency, not a payment of funds which VA was accumulating on the veteran's behalf. Thus, the terms of the statute indicate that an incompetent veteran whose compensation payments were suspended pursuant to 38 U.S.C. § 5505(a) prior to death cannot be said to have been "in receipt" of compensation at the time of death.

12. This conclusion is bolstered by an analysis of the objectives of the statutes in question. The primary objectives of section 5505, which was added by section 8001 of the Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, 104 Stat. 1388, 1388-341, included reduction of the Federal budget deficit and prevention of inheritance of large sums of money comprised mainly of VA benefits by persons who may have had little contact with the deceased veteran. See Disabled American Veterans v. United States Department of Veterans Affairs, 962 F.2d 136, 138-39, 143 (2<sup>nd</sup> Cir. 1992); H.R. Rep. No. 101- 881, 101st Cong., 2d Sess. 217, reprinted in 1990 U.S.C.C.A.N. 2017, 2221. Our conclusion that incompetent veterans whose benefits have been suspended because their estates exceed \$10,000 and they have no spouse, child, or dependent parent are not entitled to payment of the burial allowance furthers these objectives by avoiding unnecessary Federal payments and by encouraging expenditure to meet the veteran's burial needs of funds which may otherwise pass to nondependent heirs.

13. This result is also consistent with the objectives of 38 U.S.C. § 2302 as amended by the Omnibus Budget Reconciliation Act of 1981. As discussed above, the legislative history of the burial allowance indicates that that benefit was originally intended to provide assistance to indigent veterans and that the eligibility criterion based on receipt of compensation or pension was intended as a complement to or a rough substitute for a needs test. The legislative history of the 1981 act clearly shows that the current burial- allowance provision was intended to steer the program in the direction of its origins as an aid to truly needy veterans. Certainly, providing a burial allowance to veterans whose estates are so sizable as to result in suspension of their compensation payments would run counter to the statutory goal of directing benefits to those most in need. Accordingly, we conclude that both the terms of the statutes at issue and the legislative history of those statutes support exclusion from eligibility for burial benefits under 38 U.S.C. § 2302(a) of veterans whose compensation was in suspension at the time of death under 38 U.S.C. § 5505.

**HELD:**

A veteran whose compensation payments were in suspension at the time of his or her death pursuant to section 8001 of the Omnibus Budget Reconciliation Act

of 1990, Pub. L. No. 101-508, 104 Stat. 1388, 1388-341 (1990), which generally prohibits payment of compensation to an incompetent veteran having no spouse, child, or dependent parent and having an estate in excess of \$25,000 (exclusive of the value of the veteran's home), was not in receipt of compensation for purposes of determining eligibility for the burial allowance authorized by 38 U.S.C. § 2302.

VETERANS ADMINISTRATION GENERAL COUNSEL  
Vet. Aff. Op. Gen. Couns. Prec. 21-92