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Vet. Aff. Op. Gen. Couns. Prec. 22-92

TEXT:

QUESTIONS PRESENTED:

Does 38 U.S.C. § 5122 require payment of amounts represented by uncashed VA benefit checks to the estate of a deceased beneficiary?

COMMENTS:

1. These questions arose in the case of a veteran who was in receipt during the veteran's lifetime of service-connected disability compensation from VA. Following the death of this veteran, a number of uncashed VA benefit checks totaling \$13,041 were found among the veteran's personal effects. Of that total, \$2,426 represented benefits due and unpaid for the year preceding the veteran's death, and \$1,213 represented payment for the month of death (to which, by law, 38 U.S.C. § 5112(b)(1) (formerly 3012(b)(1)), the veteran was not entitled). The remainder covered periods more than a year before the veteran's death. The administratrix of the veteran's estate returned the uncashed checks to the Department of the Treasury and filed a claim for the proceeds of the uncashed checks on behalf of the estate.

2. Under 38 U.S.C. § 5121, periodic monetary benefits to which a veteran was entitled at death, either by reason of existing administrative determinations or based on evidence in the file on the date of death, are termed "accrued benefits." Following timely filing of a proper claim, such benefits that were due and unpaid by VA for a period not to exceed one year before the veteran's death shall be paid according to a statutorily prescribed order of distribution, which may be paraphrased as follows:

- a. To the veteran's spouse, if living;
- b. To the veteran's children (in equal shares), if living;
- c. To the veteran's dependent parents (in equal shares), if living;
- d. Otherwise, only so much of the accrued benefits may be paid as may be necessary to reimburse the person who bore the expense of the veteran's last sickness and burial.

See also 38 C.F.R. § 3.1000. The distinguishing features of this scheme are the exclusive list of persons eligible for accrued benefits upon the veteran's death

and the retroactive period applicable to recovery; an award of accrued benefits may not exceed one year prior to death.

3. There seems to be no argument that the checks received by the veteran but not cashed prior to death were not negotiated and thus not paid. Of the \$13,041 in compensation checks returned to the Government, \$1,213 was for the month in which the veteran died, and thus was not "due" the veteran. Deduction of that sum leaves \$11,828 in accrued benefits. There being no surviving spouse, children, or parents, and burial expenses of \$1,406 having been reimbursed, the legal question is whether section 5122 mandates disbursement of the remaining \$10,422 to anyone.

4. With regard to the applicability of 38 U.S.C. § 5122, that statute provides:

A check received by a payee in payment of accrued benefits shall, if the payee died on or after the last day of the period covered by the check, be returned to the issuing office and canceled, unless negotiated by the payee or the duly appointed representative of the payee's estate. The amount represented by such check, or any amount recovered by reason of improper negotiation of any such check, shall be payable in the manner provided in section 5121 of this title, without regard to section 5121(c) of this title. Any amount not paid in the manner provided in section 5121 of this title shall be paid upon settlement by the General Accounting Office to the estate of the deceased payee unless the estate will escheat.

Section 5122 provides a means for payment of amounts represented by unnegotiated checks, as opposed to section 5121 which pertains to the payment of accrued benefits where no check was issued before the beneficiary's death. The importance of this distinction will become apparent in the discussion below.

5. Prior to the Act of March 2, 1895, ch. 193, 28 Stat. 964, the amounts represented by all unnegotiated checks outstanding in favor of deceased veteran pensioners were treated as accrued pension, that is, payable only to specified classes of individuals; such checks did not become part of the pensioners' estates. See 19 Op. Att'y. Gen. 1 (1887). The pertinent law in this regard was section 4718 of the Revised Statutes of the United States. Rev. Stat., tit. LVII, s 4718 (1878).

6. The Act of March 2, 1895 substantially reenacted section 4718, but provided further, "the mailing of a pension check, drawn by a pension agent in payment of a pension due, to the address of a pensioner, shall constitute payment in the event of the death of a pensioner subsequent to the execution of the voucher therefor." Act of March 2, 1895, ch. 193, 28 Stat. 964. It could be inferred that such unnegotiated checks, once mailed to the address of a deceased pensioner, would become an asset of the decedent's estate.

7. In contrast, the Act of August 17, 1912, ch. 301, § 3, 37 Stat. 311, 312, made no provision for payment of unnegotiated benefit checks. That statute merely required the return by postal authorities and cancellation of checks mailed to deceased persons. Contemporary opinions issued by the Comptroller of the Treasury determined that unnegotiated checks would not become assets of the payee's estate until delivered. 19 Comp. Treas. 422 (1913) and 19 Comp. Treas. 529 (1913).

8. Neither the World War Veterans Act of 1924 nor its predecessor, the War Risk Insurance Act, contained provisions respecting unnegotiated checks. consequently, the amount of such checks was payable in the same manner as accrued benefits, that is, to an exclusive list of survivors and not to the decedent's estate. A.D. No. 181 (9-23-33); 16 Comp. Gen. 884 (1937).

9. On the other hand, both the Acts of May 1, 1926, ch. 209, § 4, 44 Stat. 382, 383, and June 2, 1930, ch. 375, s 5, 46 Stat. 492, 493 (pertaining to veterans and their survivors of the Boxer Rebellion, Spanish American War, and Philippine Insurrection) contained specific provisions for the payment of sums represented by unnegotiated checks. They provided:

[T]he issue of a check in payment of a pension for which the execution and submission of a voucher was not required shall constitute payment in the event of the death of the pensioner on or after the last day of the period covered by such check, and it shall not be canceled, but shall become an asset of the estate of the deceased pensioner.

See also Act of July 3, 1926, ch. 733, § 5, 44 Stat. 806, 807 (pertaining to veterans and their survivors of the War of 1812, Mexican War, and War Between the States).

10. The Act of March 20, 1933, ch. 3, 48 Stat. 8, made no provision for the disposition of unnegotiated checks. Therefore, the amount of such checks was considered to be accrued benefits, payable only to the list of individuals specified by statute. The patchwork and conflicting nature of the veteran's laws in this regard was discussed in 16 Comp. Gen. 884 (1937).

11. Eventually, the earlier statutes respecting accrued benefits and unnegotiated checks were somewhat consolidated in section 12 of the Act of July 13, 1943, ch. 233, § 12, 57 Stat. 554, 557. Section 12 of this act provided that pension, compensation, or retirement pay to which a person was entitled prior to death, and due but unpaid for a period not to exceed one year prior to death, under existing ratings or decisions or those based on evidence in the file at the date of death, would be payable to the decedent's surviving spouse, surviving child, dependent parent, or to the individual bearing the expense of last sickness and burial. Prior to enactment of section 12, veterans' laws had not limited accrued

benefits to a one-year period prior to death. Also, previous statutes had not permitted such payments to be based on evidence in the file at the time of death, absent ratings or other determinations of entitlement. With regard to unnegotiated checks, the new section provided, " a check received by a payee in payment of pension, compensation, or retirement pay shall, in the event of the death of the payee on or after the last day of the period covered by such check, become an asset of the estate of the deceased payee."

12. By amendment in 1953, Congress expanded the list of accrued benefits to include subsistence allowance or education and training allowance. Act of May 29, 1953, ch. 84, 67 Stat. 39. Furthermore, the procedure for paying accrued benefits and unnegotiated checks was simplified. The amendment provided in part:

A check received by a payee in payment of pension, compensation, retirement pay, subsistence allowance, or education and training allowance shall, in the event of the death of the payee on or after the last day of the period covered by said check and unless negotiated by the payee or the duly appointed representative of his estate, be returned to the Veterans' Administration and cancelled. The amount represented by any check returned and cancelled pursuant to the foregoing or any amount recovered by reason of improper negotiation of any such check shall constitute accrued benefits payable pursuant to the provisions of paragraph V(1): Provided, That the one-year limitations of paragraph V(1) shall not apply: Provided further, That any amount not so paid shall be paid upon settlement by the General Accounting Office to the estate of the deceased payee, if such estate will not escheat: And provided further, That the provisions of this subparagraph in effect prior to the date of approval of this amendment shall be applicable in the case of any payee dying prior to said date.

13. The function and purpose of the amendment made by the Act of May 29, 1953, was explained as follows:

[t]he provisions of paragraph V(1) limiting the payment of accrued benefits to amounts due and not paid for a period not exceeding 1 year prior to death and the time limitations of 1 year for filing and perfecting claims will not be for application under the proposal with respect to the proceeds of checks. Also, if the full amount of any such check cannot be paid under paragraph V(1) the remaining amount will be paid, upon settlement by the General Accounting Office, to the estate of the deceased payee, if such estate will not escheat. ... Certain provisions of law in conflict with paragraph V(2) would be specifically repealed.

Under the existing paragraph V(2) a check received by a payee in payment of pension, compensation, or retirement pay payable by the Veterans'

Administration (by reference in other laws the provision is also applicable to subsistence allowances and education and training allowances) in the event of the death of the payee on or after the last day of the period covered by the check, becomes an asset of the estate of the deceased payee. Such a check is referred to as an "asset" check and the proceeds thereof are payable to the persons entitled under the laws of the State of residence of the payee.... The claims are paid by the General Accounting Office.

In almost every case where a beneficiary dies there is an amount accrued for the fractional part of the last month during which he lived. Also, an additional amount may have accrued prior to his death because of the lapse of time required to process an application for increased benefits. In other cases, a person may die before receiving his first payment under an approved award covering a retroactive period of entitlement. Such accrued amounts, covering a period not to exceed 1 year, are payable by the Veterans Administration in accordance with paragraph V(1), part I, Veterans Regulation No. 2(a), as amended, to the surviving spouse, child or children, dependent mother or father, or the person who bore the expenses of the last illness and burial.

Every case in which an asset check and an accrued amount are both payable results in 2 claims being processed by 2 different agencies--1 for distribution of the proceeds of the asset check in accordance with the laws of the particular State involved and the other for settlement of the accrued amount to the person eligible under paragraph V(1), part I, Veteran Regulation No. 2(a), as amended. While the State laws vary as to who is entitled, and in some cases the proceeds of an asset check must be divided among several heirs, in the vast majority of the cases the same person or persons entitled to receive the proceeds of the asset checks will also be entitled to receive the accrued benefits. In such cases, the filing of two separate claims is confusing to the heirs and creates an unnecessary duplication of administrative work and cost.

(Emphasis added). S. Rep. No. 227, 83d Cong., 1st Sess. (1953), reprinted in 1953 U.S.C.C.A.N. 1665, 1666.

14. In the Veterans' Benefits Act of 1957, Pub. L. No. 85-56, §§ 921 and 922, 71 Stat. 83, 121 (1957), provisions regarding accrued benefits and unnegotiated checks were reorganized and renumbered as part of a general codification of veterans' laws. For the first time, the term "accrued benefits" was used to denote benefits that were due and unpaid at the time of the veteran's death. There was no substantive change in the procedures for payment of sums represented by unnegotiated checks.

15. In 1958, the pertinent provisions were renumbered to become sections 3021 and 3022; at the same time, the list of specific benefits payable as accrued benefits was replaced with the general term "periodic monetary benefits." Pub. L. No. 85-857, 72 Stat. 1105 (1958). Ultimately, sections 3021 and 3022 were

redesignated as 38 U.S.C. §§ 5121 and 5122 by the Department of Veterans Affairs Health-Care Personnel Act of 1991, Pub. L. No. 102-40, § 402(b)(1), 105 Stat. 187, 238.

16. In our view, the genesis of the relevant statutes reflects a crucial distinction between payment of accrued benefits and payment of unnegotiated checks.

Prior to 1895, the amount of unpaid benefit checks was treated as accrued benefits, that is, payable pursuant to a limited order of distribution, but excluding the estate of the decedent. Since 1943, though, specific provisions have permitted payment of amounts represented by unpaid benefit checks to the estate of the deceased payee. Section 5122 applies to benefit checks that were received but not negotiated prior to the payee's death. It pertains to the cancellation and payment upon the negotiable instruments themselves, rather than benefits, and applies equally to deceased veterans or their surviving spouses or dependents. On the death of a payee who has received but not negotiated benefit checks, VA is authorized to make payment of the amount represented by the checks as long as there is an eligible surviving spouse, child, or dependent parent, or person bearing the expense of burial. Any sum not paid in that manner may be distributed to the estate of the payee after settlement by the General Accounting Office (GAO).

17. Under 31 U.S.C. § 3702, and regulations at 4 C.F.R. part 31, the Comptroller General is authorized to settle certain claims against the United States Government. Once the Comptroller General or his designee with the GAO has approved a settlement, the agency involved makes payment out of the appropriation relevant to the claim under the authority of section 5122. In each case, pertinent state law on descent and distribution should be reviewed by VA to insure that there is no danger of escheat.

18. With regard to the effect of the GAO's decisions in accrued benefits claims such as this, the last sentence in section 5122 mandates VA compliance. However, the scope of the GAO's authority goes to the nature of the claim and the general eligibility of the claimant(s), not to the adjudication of the amount of benefits payable. See 31 C.F.R. part 31. It is our opinion that 38 U.S.C. § 511(a) reserves to VA determination of the actual amount of benefits payable.

19. In view of the foregoing, the proceeds of the uncashed checks representing VA disability compensation to which the veteran was entitled at the time of death are payable in accordance with the provisions of section 5122. The total value of the uncashed checks is \$13,041, from which \$1,213 must be deducted for payment of benefits for the month of death to which, by law, the veteran was not entitled. The \$1,406 already paid to the estate to reimburse funeral expenses must also be deducted, leaving a balance of \$10,422. In as much as the veteran was not survived by spouse, children, or dependent parents, this sum is to be paid to the estate of the veteran.

HELD:

Upon the death of a veteran who has received but not negotiated VA benefit checks, VA is authorized under 38 U.S.C. § 5122 to make payment of the amount represented by the checks to the classes of persons designated in 38 U.S.C. § 5121(a), generally, the surviving spouse, child, or dependent parent, or the person bearing the expense of the veteran's last sickness and burial. Under section 5122, any sum not paid in that manner is to be distributed to the estate of the payee after settlement by the General Accounting Office, provided that the amount to be distributed will not escheat.

VETERANS ADMINISTRATION GENERAL COUNSEL
Vet. Aff. Op. Gen. Couns. Prec. 22-92