Date: August 9, 1993 O.G.C. Precedent 6-93

From: General Counsel (022)

Subject: Accrued Benefits--Evidence in the File at Date of Death

To: Chairman, Board of Veterans' Appeals (01)

QUESTION PRESENTED:

a) Under what circumstances, if any, may information contained in an eligibility verification report filed after a beneficiary's death be considered in determining eligibil-ity for accrued benefits under 38 U.S.C. § 5121(a)?

b) May an award of accrued benefits under 38 U.S.C. § 5121(a) be based on logical inferences from information of record at the date of the beneficiary's death?

COMMENTS:

1. This question arose from two cases currently before the Board of Veterans' Appeals (BVA or Board) on remand from the United States Court of Appeals (CVA). Each case involves a claim for accrued benefits by the surviving spouse of a deceased pensioner based on a pension eligibility verifica-tion report (EVR) filed after the veteran's death detailing unreimbursed medical expenses for a period prior to the death of the veteran. Section 5121(a) of title 38, United States Code, authorizes payment as accrued benefits of periodic monetary benefits to which an individual was entitled at death "under existing ratings or decisions, or those based on evidence in the file at date of death." The BVA upheld the denial of these claims because the EVR in each case had been submitted after the date of the veteran's death and therefore could not be considered "evidence in the file at date of death" under 38 U.S.C. § 5121(a) for the purpose of awarding accrued benefits. In Conary v. Derwinski, 3 Vet. App. 109 (1992) (per curiam), the CVA vacated the BVA's decisions and remanded these cases to the Board for "full readjudication."

2. We find no legal authority for considering information in an EVR submitted after the beneficiary's death to be "evidence in the file at date of death." The plain meaning of a statute must govern when it is clear and unambiguous. 2A Norman J. Singer, Sutherland Statutory Construction § 46.01 (5th ed. 1992). The statute provides a narrow liberalization of the requirement that accrued-benefit claims be based on "existing ratings or decisions" in the

situation where a decision establishing entitlement can be based on evidence "in" VA files "at" the date of the bene-ficiary's death. These words indicate that, at minimum, evidence to support a determination of entitlement must be physically in VA's possession coincident with the benefic-iary's death before accrued benefits may be paid. A deci-sion based on new information contained in an EVR submitted after the beneficiary's death does not fall within these clear and specific statutory terms. Therefore, we agree with the implication of Judge Steinberg's concurring opinion in Conary that legislative action would be necessary to authorize an award of accrued benefits based upon such evidence. See 3 Vet. App. at 113, 116.

3. We are aware that in Hayes v. Brown, 4 Vet. App. 353, 360 (1993), a panel of the CVA found that 38 U.S.C. § 5121, taken as a whole, is ambiguous and that, given this perceiv-ed ambiguity, the VA has "wide latitude" to establish policy as to what post-date-of-death evidence may be considered in accrued-benefit claims. The CVA panel based this conclusion on the terms of 38 U.S.C. § 5121(c), which require that a claimant for accrued benefits submit any evidence needed to complete an application for accrued benefits within one year from the date of notification that additional information is needed.

4. We disagree with the CVA's conclusion that section 5121 is ambiguous. In our view, the provisions of subsections (a) and (c) of that statute can be readily harmonized. See 2A Singer, supra, § 46.05 (in interpreting statutory provi-sions, effort must be made to harmonize all provisions). The CVA recognized in Hayes, 4 Vet. App. at 358, that a survivor's claim for accrued benefits is a separate claim from the decedent's claim for the underlying benefit. We believe it is clear that the post-date-of-death evidence referred to in section 5121(c) is evidence required with respect to the accrued-benefit claim, e.g., evidence of the expenses of last illness and burial borne by the claimant, rather than evidence relating to the decedent's underlying benefit entitlement. See generally Conary, 3 Vet. App. at 113-14 (wherein Judge Steinberg analyzed the history and structure of section 5121 and concluded that section 5121(c) is merely an additional requirement which must be met before accrued benefits may be paid).

5. In Hayes, the CVA applied M21-1, Part VI, ch. 5, para. 5.25a, which provides that service department and certain VA medical records are considered as being in the file at the date of death although not physically placed in the file until after the beneficiary's death. 4 Vet. App. at 360. The CVA's holding in Hayes was limited to the issue of whether certain medical evidence could be considered

evidence "in the file" at the date of death in light of the referenced manual provision. There is no comparable regula-tion or manual provision applicable to expense data submit-ted in an EVR. Thus, Hayes is not controlling as to the issue presented here, and, for the reasons noted above, we decline to adopt the views expressed therein concerning the perceived ambiguity of section 5121.

6. With regard to the second question presented, Judge Steinberg, concurring with the remand order in Conary, discussed the BVA's decision in the claim of Warren G. Arnett, BVA Archive No. 9l-40607 (Dec. l8, l99l). In that decision, the BVA interpreted the requirement of section 5l2l(a) that there be "evidence in the file at date of death" to be satisfied where a surviving spouse was able to establish that an EVR submitted after the veteran's death reflected unreimbursed medical expenses that were reasonably estimable because previously submitted EVR's showed them to be recurring and, therefore, predictable. See Conary, 3 Vet. App. at lll. We agree with Judge Steinberg that the BVA's interpretation of section 5l2l(a) in Arnett was "not facially inconsistent . . . with the ordinary meaning of 'evidence in the file at [the] date of death.'" Conary, 3 Vet. App. at ll3.

7. In Arnett, the Board considered the EVR's submitted prior to death and was able to deduce certain facts from that evidence. Conary, 3 Vet. App. at 113. The Board's action in its Arnett decision is essentially an extension of the policy reflected to a limited degree in 38 C.F.R. § 3.l000(d)(4) that, except with respect to original benefit awards, certain prima facie evidence of record prior to death may establish entitlement for accrued-benefits pur-poses where confirming evidence is furnished in support of the accrued-benefit claim. See Hayes, 4 Vet. App. at 358-59 (noting the limited scope of 38 C.F.R. § 3.1000(d)(4)(i) and (ii)); see also M2l-l, Part IV, ch. 27, para. 27.08b (where prima facie evidence of annual income was submitted before death, additional evidence to confirm or explain the income may be accepted after death). Regulatory and administrative provisions of 38 C.F.R. §§ 3.262(l) and 3.272(g) and M2l-1, Part IV, ch. 16, para. l6.3le, authorize the prospective allowance of medical expenses that can be clearly and reasonably estimated. Since EVR's submitted before the beneficiary's death reflecting recurring, predictable, and reasonably estimable medical expenses provide a sufficient evidentiary basis for a prospective computation of medical expenses, such evidence may be considered "evidence in the file at date of death" for purposes of entitlement to accrued benefits. If such evidence makes a prima facie case of entitlement, we do not believe VA would be precluded from considering other evidence, e.g., an EVR submitted after the

beneficiary's death for the limited purpose of verifying the accuracy of its determination.

8. Based on the foregoing, we believe that the BVA would be legally justified in construing section 5121 to permit establishment of entitlement in accrued-benefit claims based on logical inferences from information contained in EVR's submitted prior to the beneficiary's death which are con-firmed by information submitted after the death of the beneficiary.

HELD:

a) Information contained in an eligibility verification report submitted after the beneficiary's death may not be considered "evidence in the file at date of death" for purposes of an award of accrued pension benefits under 38 U.S.C. § 5121(a).

b) An award of accrued benefits under 38 U.S.C. § 5121(a) may be based on logical inferences from information in the file at the date of the beneficiary's death.

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