

February 8, 1994

O.G.C. Precedent 4-94

VA District Counsel (372/02)
941 N. Capitol St., N.E.
Washington, D.C. 20421

Subj: Claim for Benefits Withheld from Individual in Foreign
Country

QUESTION PRESENTED:

Under what circumstances may withheld pension benefits be paid to the children of a veteran's surviving spouse (now deceased) where the surviving spouse's benefits were withheld due to the surviving spouse's residence in the People's Republic of China?

COMMENTS:

1. A review of information in the reconstructed claim file shows that the surviving spouse of a Spanish-American War veteran received pension benefits from VA for periods prior to May 1950. Because the surviving spouse resided in the People's Republic of China, benefits were withheld beginning in May 1950 pursuant to laws restricting payment of Federal benefits to persons in certain foreign countries. The surviving spouse died on June 20, 1977. In December 1979, the surviving spouse's children, the youngest of whom was born in 1934, wrote to the American Consulate General in Hong Kong reporting the death of the surviving spouse and indicating their desire to claim accrued pension benefits due the surviving spouse. They also submitted an itemization of the surviving spouse's funeral expenses. The children's correspondence was forwarded to the VA Regional Office in Washington, D.C. Years later, a formal application for accrued benefits was filed with that office.

2. The Act of October 9, 1940, ch. 796, 54 Stat. 1086, placed restrictions on sending Federal-government checks for delivery in foreign countries. Those restrictions, currently codified, as amended, at 31 U.S.C. §§ 3329 and 3330, prohibit a check drawn

on public money from being sent from the United States to a foreign country when the Secretary of the Treasury determines that postal, transportation, or banking facilities in general, or local conditions in the foreign country, do not reasonably assure that the payee will actually receive the check and be able to negotiate it for full value. Pursuant to 31 U.S.C. §§ 3329(b)(4) and 3330(b), the amount of non-contractual-VA-benefit checks withheld as a result of this prohibition, up to \$1,000, is to be placed in a special deposit account with the Secretary of the Treasury. Amounts in excess of \$1,000 are to be deposited in the Treasury as miscellaneous receipts. In the case of payments of veterans' benefits, section 3329(c) provides for payment of amounts deposited in the special deposit account if a claimant satisfies the Secretary of Veterans Affairs of his or her right to the amount of the check and the Secretary of the Treasury determines that there is reasonable assurance that the claimant will actually receive the check and be able to negotiate it for full value.

3. During World War II, Congress enacted section 5 of the Act of July 13, 1943, ch. 233, 57 Stat. 554, 555, currently codified, as amended, at 38 U.S.C. § 5308, which required the termination of awards of compensation, pension, or other gratuity under laws administered by VA to any person not a citizen of the United States who was located in the territory of or under military control of an enemy of the United States, or of any of its allies, and provided that such person would not be entitled to any such benefits except upon the filing of a new claim accompanied by satisfactory evidence showing that the claimant was not guilty of mutiny, treason, sabotage, or rendering assistance to the enemy. This law was intended to bar accrued or future payments of non-contractual benefits to persons guilty of mutiny, treason, sabotage, or rendering assistance to the enemy and to alien enemies and to prevent the building up of large estates in favor of those residing in countries at war with the United States or in countries under the military control of the enemy. S. Rep. No. 403, 78th Cong., 1st Sess. 8 (1943); 89 Cong. Rec. App. A4334 (daily ed. Sept. 28, 1943) (statement of Rep. Rankin). In enacting this legislation, Congress made clear its understanding that payments already deposited in the special deposit account in the Treasury of the United States pursuant to the Act of October 9, 1940, as amended, would not be affected by the new law, but that later retroactive payment of benefits which, but for the new law, would have been paid to persons located in territory controlled by the enemy would be barred, as

benefits payable on the basis of a new claim may only be paid prospectively. Id.

4. Following World War II, Congress recognized that the withholding or termination of benefits in the two above-cited enactments was required solely because of conditions which were brought about by World War II and that many payees were deprived of benefits under these laws through no fault of their own but merely because of their location in a foreign country. See H.R. Rep. No. 2428, 79th Cong., 2d Sess.(1946), reprinted in 1946 U.S.C.C.S. 1429, 1430. In view of this, and in an effort to assist in post-war rehabilitation, id., Congress, while not repealing the prior enactments, enacted the Act of August 7, 1946, ch. 777, 60 Stat. 874, an act "[t]o provide for the payment of pension or other benefits withheld from persons for the period they were residing in countries occupied by the enemy forces during World War II." This law, now codified, as amended, at

38 U.S.C. § 5309, provided generally that persons who would have been entitled to VA benefits but for the provisions of section 5 of the Act of July 13, 1943, or the Act of October 9, 1940, and who were not guilty of mutiny, treason, sabotage, or rendering assistance to the enemy, would be paid those benefits, including amounts covered into the Treasury as miscellaneous receipts and amounts in the special deposit account. The law further provided that, in the event of the death of such person prior to receipt of the amount therein authorized, payment would be made under

the provisions of section 12 of the Act of July 13, 1943 (the predecessor to the current accrued-benefit statute codified at 38 U.S.C. § 5121), "except the one-year limitation,"¹ if a claim therefor, together with satisfactory evidence that neither the claimant nor the deceased person was guilty of the above-referenced offenses, was filed within one year after the effective date of the act. The provision regarding payment of back benefits after the claimant's death was not retained in the major consolidation and simplification of the veterans' benefit laws under the Veterans' Benefits Act of 1957, Pub. L. No. 85-56, §§ 2106, 2202(192), 71 Stat. 83, 156, 171, presumably due to

¹ While section 12 of the Act of July 13, 1943, contained one-year limitations on both the filing of claims and the payment of retroactive benefits, paragraph 4 of VA Administrator's Instruction No. 1, dated September 19, 1946, concerning the 1946 legislation made clear that the "one-year limitation" reference was to "the period covered by the award."

the time-restricted nature of its application. Implementing VA regulations governing retroactive payment to aliens of benefits not paid pursuant to what are now 38 U.S.C. § 5308 and 31 U.S.C. §§ 3329 and 3330 provide, in essence, that any amount not paid to an alien as a result of those statutes will be paid to him or her on the filing of a new claim and that such claim should be supported with evidence that the alien has not been guilty of mutiny, treason, sabotage, or rendering assistance to an enemy. 38 C.F.R. § 3.653(b) and (c) (3).

5. In the claim at issue, it appears that the surviving spouse's benefits were withheld, beginning in May 1950, under the Act of October 9, 1940, because the surviving spouse resided in the People's Republic of China, which was listed in Department of the Treasury Circular No. 655 as one of the countries in which there was no reasonable assurance that a payee would actually receive checks drawn against funds of the United States and be able to negotiate the same for full value. It appears further that, pursuant to section 5 of the Act of July 13, 1943, the surviving spouse's entitlement to pension terminated when the People's Republic of China entered the Korean conflict and became an enemy of the United States and its allies. At the close of that conflict, the surviving spouse became potentially eligible for payment of withheld benefits under the Act of August 7, 1946, subject to the restrictions imposed by the Act of October 9, 1940, on the sending of government checks to certain foreign countries. The surviving spouse resided until death in a country which was listed in the Department of the Treasury's Circular No. 655.²

6. For purposes of payment of withheld benefits under 31 U.S.C. §§ 3329 and 3330, section 3330(c) and (d) of title 31, United States Code, prescribes the procedures for disposition of amounts in the special deposit account upon the death of the payee. Section 3330(c)(2) provides that, in the case of death of a surviving spouse, such amounts are payable "to children of the spouse under 18 years of age at the time of the spouse's death." Where there are no children under age 18 at the time of death of the surviving spouse, section 3330(c)(4) provides for payment "only to the extent necessary to reimburse a person for

² The People's Republic of China was removed from the Department of the Treasury's list on August 29, 1979. Dep't of the Treasury Circular No. 655 (3d rev. Aug. 29, 1979); see 44 Fed. Reg. 51,567 (1979) (amending 31 C.F.R. § 211.1).

burial expenses." Section 3330(d)(1) provides that such payments may be made only if a claim for payment is filed with VA by the end of the first year after the date of death of the individual entitled to payment and any necessary evidence in support of the claim is submitted by the sixth month after the date VA requests the evidence.³ Section 3330(d)(2) provides that payment shall include only amounts due at the time of death under ratings or decisions existing at that time. Until 1982, similar provisions were codified at former 31 U.S.C. § 125 (1976).⁴

7. In the instant case, since the claim by the surviving spouse's children appears to have been filed more than one year following the surviving spouse's death, benefits would not be payable under 31 U.S.C. § 3330(c) due to the untimeliness of the claim. See 31 U.S.C. § 3330(d)(1)(A). Further, even if the claim by the children had been filed in a timely manner, since they were all over age 18 at the time of the surviving spouse's death and therefore not within the coverage of 31 U.S.C. § 3330(c)(2), they could only have claimed reimbursement for burial expenses under 31 U.S.C. § 3330(c)(4). Finally, the provisions of 31 U.S.C. § 3330(d)(2) would establish an additional impediment to payment of accrued benefits under section 3330. It appears from the record that the surviving spouse submitted a letter to the United States Liaison Office in Peking in 1974 or 1975 stating a desire to file a claim for accrued benefits. However, regardless of whether that letter could be considered an informal claim, see generally 79 Op. Sol. 365 (4-17-45), it does not appear that the surviving spouse had, at the time of death, established entitlement to retroactive benefits. See 31 U.S.C. § 3329(c) (providing for payment of

³ VA regulations at 38 C.F.R. § 3.1008 provide that, in the case of the death of the payee of any check in payment of non-contractual, periodic, VA monetary benefits, while the amount thereof remains in the special deposit account, such amount will be payable under what is now 31 U.S.C. § 3330(c) and (d). This section also provides that the amount will be payable only if the person upon whose behalf checks were issued and the person claiming the payment have not been guilty of mutiny, treason, sabotage, or rendering assistance to an enemy of the United States or its allies.

⁴ Pub. L. No. 97-258, 96 Stat. 877 (1982), completely recodified title 31, United States Code, substituting section 3330(c) and (d) for the pertinent provisions of former section 125.

veterans' benefits deposited in the special deposit account when the person claiming payment satisfies VA of his or her right to the amount in question and the Secretary of the Treasury is reasonably assured that the person will receive the check in payment and be able to negotiate it for full value). Thus, there was no rating or decision existing of the time of death under which payment was due, as required under 31 U.S.C. § 3330(d)(2).

8. The accrued-benefit provisions of 31 U.S.C. § 3330 apply, under the terms of that section, only to sums deposited in the Department of the Treasury's special deposit account. Those provisions do not apply to sums deposited as miscellaneous receipts, see generally VA Administrator's Decision No. 667 (9-26-45) (decision issued prior to enactment of the Act of August 7, 1946, indicating that payment of amounts withheld under the Act of October 9, 1940, was limited to \$1,000), or to payments not made as a result of 38 U.S.C. § 5308. Although 38 U.S.C. § 5309 authorizes payment of such sums, that section contains no provision authorizing payment of those sums as accrued benefits following the claimant's death. The only existing authority for payment of such amounts is the general accrued-benefit statute at 38 U.S.C. § 5121.⁵ Under subsection (a) of that statute, benefits may only be paid for a period "not to exceed one year." Further, under 38 U.S.C. § 5121(c) (formerly 38 U.S.C. § 3021(c), as in effect at the time of the surviving spouse's death), a claim for accrued benefits must be filed within one year after the date of death. It does not appear that this was done in this case.

9. In addition, section 5121(a) only authorizes payment of benefits "to which an individual was entitled at death under existing ratings or decisions, or based on evidence in the file at date of death" (emphasis added). In this case, the surviving spouse, in order to establish entitlement, was required, under what is now section 5309 and under 38 C.F.R. § 3.653, to show the absence of participation in the prohibited activities referred to in that statute and in 38 C.F.R. § 3.653(b). See generally VA Administrator's Instruction No. 1 to the Act of

⁵ In this regard, we agree with VA's essentially contemporaneous construction of the Act of August 7, 1946, as stated in Op. Sol. 714-48 (11-22-48), that that statute was intended to provide an additional means by which benefits may be paid and was not intended to bar payments otherwise authorized under the general accrued-benefit statute.

August 7, 1946, para. 3 (Sept. 19, 1946) (requiring prima facie showing that the applicant has not been guilty of a prohibited activity). In the absence of such a showing, the surviving spouse could not have established entitlement to benefits under the referenced statutes and regulations. The existing record does not indicate that the surviving spouse made the required showing to establish entitlement at the time of death to accrued benefits pursuant to what is now 38 U.S.C. § 5121. In addition, since 31 U.S.C. § 3330(b) provides that funds deposited as miscellaneous receipts under that provision are "deemed to be payment for all purposes to the individual entitled to payment," such sums cannot be considered accrued benefits under 38 U.S.C. § 5121(a), which authorizes payment of benefits "due and unpaid," unless the beneficiary, prior to death, establishes entitlement to benefits under 38 U.S.C. § 5309(a). This apparently was not done in this case.

In view of the foregoing, it does not appear that payment of benefits under 38 U.S.C. § 5121(a) is authorized in this case.

HELD:

a. Following the death of a veteran's surviving spouse, payment of pension benefits withheld from the surviving spouse under 31 U.S.C. § 3329 (which bars sending Government checks to certain foreign countries) and deposited in the special deposit account in the Department of the Treasury is governed by the provisions of 31 U.S.C. § 3330(c) and (d). Under section 3330(d)(1)(A), payment of such benefits is precluded where a claim is not filed within one year following the surviving spouse's death. Further, under 31 U.S.C. § 3330(d)(2), payment may only be made on the basis of a rating or decision existing at the time of the surviving spouse's death.

b. After the death of the surviving spouse, amounts withheld due to the surviving spouse's foreign residence and deposited in the Treasury as miscellaneous receipts pursuant to 31 U.S.C. § 3330(b), and amounts not paid as a result of 38 U.S.C. § 5308 (which bars payment of non-contractual veterans' benefits to aliens located in the territory of an enemy of the United States), may only be paid in accordance with the accrued-benefit provisions of 38 U.S.C. § 5121. Those provisions require that an application have been filed within one year of the surviving spouse's death. They also limit benefits to those to which the surviving spouse was entitled at death based on existing ratings or decisions or on evidence in the file on the date of death and only authorize payment of benefits due and unpaid for a period not to exceed one year.

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