

September 26, 1996

VAOPGCPREC 8-96

Assistant Regional Counsel (319/02)
1801 Assembly Street
Columbia, SC 29201

022

Subj: Disposition of Unnegotiated Checks upon the Death of
the Guardian of a Beneficiary
XXXXXXXXXX, XXXXXXXX XXXXXX, XC XX XXX XXX

QUESTION PRESENTED:

May the Department of Veterans Affairs (VA) pay the amounts represented by several benefit checks received by the guardian of certain VA beneficiaries but not negotiated prior to the guardian's death, and, if so, to whom should payment be made?

COMMENTS:

1. You have requested our views regarding the disposition of amounts represented by a number of VA benefit checks received by the guardian of two VA beneficiaries but not negotiated prior to the guardian's death. The decedent was the remarried former spouse of a deceased veteran and guardian of their two children. Following the death of the remarried former spouse in 1990, a number of uncashed VA benefit checks dated from 1975 to 1978 were discovered among the decedent's belongings. Those checks were made payable to the order of the decedent, "CUST OF CHILDREN OF [the veteran]" and apparently were issued in payment of dependency and indemnity compensation (DIC) awarded to the veteran's two minor children (who apparently are no longer minors).

2. Section 5122 of title 38, United States Code, provides that the amounts represented by VA benefit checks received by a "payee" but not negotiated prior to the payee's death may, upon return and cancellation of the original checks, be paid "in the manner provided in section 5121" of title 38, United

States Code, but "without regard to section 5121(c)." VA's implementing regulation at 38 C.F.R. § 3.1003(a) provides that the proceeds of unnegotiated checks are payable, upon the death of a "payee," to the living person or persons in the order of precedence listed in 38 C.F.R. § 3.1000(a)(1)-(4) (which tracks 38 U.S.C. § 5121(a)(2)-(5)). The regulation further provides that "[t]here is no limit on the retroactive period for which payment of the amount represented by the check may be made, and no time limit for filing a claim to obtain the proceeds of the check or for furnishing evidence to perfect a claim." 38 C.F.R. § 3.1003(a)(1). Accordingly, the proceeds of checks received but not negotiated by a payee prior to death are payable to the persons identified by statute and regulation at any time and the amount of such proceeds is not limited to such benefits as were due and unpaid to the decedent in the year preceding death.

3. In VAOPGCPREC 19-95, we indicated that, where the amounts of unnegotiated checks are not payable under 38 U.S.C. § 5122, claims for such amounts are subject to the provisions of title 31, United States Code, governing payments by the United States and settlement by the General Accounting Office (GAO) of claims against the United States. Pursuant to 31 U.S.C. § 3328, as amended by the Competitive Equality Banking Act of 1987 (CEBA), Pub. L. No. 100-86, 101 Stat. 552, checks issued by the Department of the Treasury are negotiable for only one year from the date of issuance. Prior to enactment of the CEBA, Treasury checks generally could "be paid at any time." 31 U.S.C.A. § 3328(a)(1) (1983). The CEBA also provided for the cancellation of all outstanding checks issued prior to October 1, 1989. See 31 U.S.C. § 3334(b); 31 C.F.R. § 240.4. As we indicated in VAOPGCPREC 19-95, although a Treasury check may have been canceled pursuant to the CEBA, an individual may file a claim for payment based on the obligation underlying the canceled check, subject to the six-year statute of limitations in 31 U.S.C. § 3702(b)(1). Any such claim which is not filed within six years after the date the claim accrues is barred by section 3702(b)(1). See VAOPGCPREC 19-95; *In re Payment of Unpaid Treasury Checks More Than 6 Years Old*, Op. Comp. Gen. B-244431.2, 2-4 (Sept. 13, 1994).

<Page 3>

4. The provisions of 38 U.S.C. § 5122 and 38 C.F.R. § 3.1003 govern the disposition of amounts represented by checks received by a "payee" but not negotiated prior to the payee's

death. The term "payee" ordinarily means "[t]he person in whose favor a bill of exchange, promissory note, or check is made or drawn; the person to whom or to whose order a bill, note, or check is made payable." Black's Law Dictionary 1129 (6th ed. 1990). Accordingly, the term "payee" may in certain contexts include an individual, such as a guardian, to whom a check is made payable, even though he or she is not the intended beneficiary of the amount paid, but is merely authorized to receive payment as the guardian of the intended beneficiary. Section 5502(a)(1) of title 38, United States Code, authorizes the Secretary of Veterans Affairs to make benefit payments "directly to the beneficiary or to a relative or some other person for the use and benefit of the beneficiary." VA regulations implementing section 5502(a)(1) expressly state that "[a]uthorized payees include," among others, the legal custodian of a beneficiary's VA benefits and a custodian-in-fact of the beneficiary. 38 C.F.R. § 13.55(b). In view of the express statutory authority to pay benefits to a person other than the beneficiary, the use of the term "payee" rather than "beneficiary" in 38 U.S.C. § 5122 may be interpreted as suggesting an intent to encompass all payees in the ordinary sense of that term, including those who receive payment from VA on behalf of a beneficiary. In this regard, we note that the immediately preceding section, 38 U.S.C. § 5121, refers in its caption to the death of a "beneficiary" and by its terms applies only to amounts to which an individual was entitled at death under VA ratings or decisions. The use of the term "payee" in section 5122, and the absence of an express requirement in section 5122 that the payee have been entitled to the payment under VA ratings or decisions, may also suggest that section 5122 was intended to encompass a "payee" who was not a VA beneficiary in his or her own right.

5. Other aspects of the terms, context, and history of section 5122, however, suggest that that provision was not intended to apply in cases involving the death of a guardian or other individual who received VA benefit checks on behalf of a beneficiary but who was not a VA beneficiary in his or her own right. Significantly, section 5122 establishes specific procedures for distributing the amount of uncashed checks in a

<Page 4>

number of circumstances involving the death of a beneficiary, but does not establish any procedures for distributing such amounts upon the death of a guardian or other person receiving benefits on behalf of a beneficiary. Section 5122 provides that, when a payee dies before negotiating a VA benefit check,

the amount of such check "shall be payable in the manner provided in section 5121." Section 5121(a)(1)-(4) identifies the persons entitled to receive accrued benefits upon the death of certain beneficiaries (i.e., a veteran, a surviving spouse or remarried surviving spouse, a child of a veteran, or a person receiving an apportioned share of a veteran's benefits), but does not provide any method of paying such benefits when a guardian who was not an actual beneficiary has died. A residual provision in section 5121(a)(5) states that "[i]n all other cases," accrued benefits may be paid as necessary to reimburse the person who bore the expense of the decedent's last sickness and burial. Although the reference to "all other cases" could be construed to encompass cases where a guardian dies, that provision would authorize payment of the proceeds of uncashed VA checks only as reimbursement for the expenses of the guardian's last sickness and burial. We believe that result would be contrary to the clear intent of sections 5121 and 5122 to provide for payment of accrued benefits or the amount of uncashed VA checks to the survivors of veterans if living.

6. In the instant case, where the deceased guardian was the veteran's remarried former spouse, 38 U.S.C. § 5121(a)(3), which refers to the death of a "remarried surviving spouse," might appear to provide a basis for distributing the amount of the uncashed VA checks upon the guardian's death. In our view, however, the reference in section 5121(a)(3) to a "remarried surviving spouse" is intended to refer to a former spouse who was entitled to VA benefits in his or her own right following the termination of a remarriage and not to a former spouse who was ineligible for VA benefits due to remarriage. Pursuant to 38 U.S.C. § 101(3), a veteran's former spouse who has remarried is not considered a "surviving spouse" for purposes of title 38, United States Code. Prior to October 31, 1990, however, a remarried former spouse could become eligible for VA benefits as the widow of a veteran if the remarriage was terminated by death or valid court decree. See 38 U.S.C.A. § 103(d)(2) (1979). The predecessor to current

<Page 5>

38 U.S.C. § 5121 provided for payment of accrued benefits upon the death of a "widow or remarried widow." Act of July 13, 1943, ch. 233, § 12, 57 Stat. 554, 557 (amending former Veterans Regulation No. 2(a), part I, para. V). VA regulations in effect concurrently with that statute defined "remarried widow" to mean a person previously married to a veteran and

"whose subsequent or successive marriage or marriages has or have been dissolved either by the death of the husband or husbands or by divorce." 38 C.F.R. §§ 4.4(b), 4.6(b), 4.12(b) (1949). Accordingly, we do not believe the term "remarried surviving spouse" in current section 5121(a)(3) is intended to encompass the former spouse of a veteran whose remarriage was not terminated and who, therefore, was not entitled to VA benefits in his or her own right. Section 5121, therefore, does not, by its terms, establish any procedures for paying monetary amounts upon the death of a guardian or other individual who was not a VA beneficiary in his or her own right.

7. Because section 5122 merely adopts, without change, the payment provisions of section 5121, section 5122 does not provide any basis for distributing the amount of uncashed VA benefit checks upon the death of an individual receiving such checks solely as the guardian for a beneficiary rather than pursuant to his or her own entitlement. The fact that section 5122 provides specific procedures for distributing the amount of uncashed checks upon the death of a beneficiary but no procedures for distributing such amounts upon the death of a guardian suggests that the statute was not intended to apply upon the death of a guardian who was not a beneficiary in his or her own right, but merely received VA checks on behalf of a beneficiary. Accordingly, notwithstanding the potentially broad application of the term "payee," the express terms of section 5122, including the provisions of section 5121 incorporated by reference, suggest that section 5122 is not applicable to the proceeds of checks received by a guardian but not negotiated prior to the guardian's death.

8. The legislative history of section 5122 also suggests that that provision was intended to apply only where the individual actually entitled to VA benefits under statute and regulation has died before a VA check in payment of such benefits has

<Page 6>

been negotiated. The history of statutory provisions governing unnegotiated checks was discussed in detail in VAOPGCPREC 22-92 (O.G.C. Prec. 22-92). As stated in that opinion, a 1943 statute provided that "[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." Act of July 13, 1943, ch. 233, § 12, 57 Stat. 554, 557. In 1953, Congress enacted a statute,

similar to current 38 U.S.C. § 5122, providing that the amount represented by unnegotiated benefit checks would be payable to certain individuals in the same manner as accrued and unpaid benefits. Act of May 29, 1953, ch. 84, 67 Stat. 39. Prior to the 1953 statute, claims for the proceeds of unnegotiated checks were paid by the GAO. However, the 1953 statute authorized VA to decide such claims and pay the proceeds to members of specified classes of individuals. The GAO retained the authority to decide and settle claims where no one in the specified classes of individuals was living and the proceeds were, therefore, payable to the estate of the deceased payee.

9. The House and Senate reports on the bill enacted as the Act of May 29, 1953, stated:

The purpose of this bill is to amend the pertinent statutory Veterans' Regulations to provide that a check received by a beneficiary-payee in payment of pension, compensation, retirement pay, subsistence allowance, education, or training allowance, shall, in the event of death of the payee on or after the last day of the period covered by such check, and unless negotiated by the payee or the duly appointed representative of his estate, be returned to the Veterans' Administration for cancellation and payment in the same manner as so-called accrued benefits payable at the time of the beneficiary's death.

S. Rep. No. 227, 83d Cong., 1st Sess. 1 (1953), *reprinted in* 1953 U.S.C.C.A.N. 1665; H.R. Rep. No. 272, 83d Cong., 1st Sess. 1 (1953). That bill, H.R. 1563, 83d Cong., 1st Sess. (1953), was captioned "A bill to amend Veterans Regulation Numbered 2 (a), as amended, to provide that the amount of certain unnegotiated checks shall be paid as accrued benefits

<Page 7>

upon the death of the beneficiary-payee, and for other purposes." The reference in the bill's caption and the congressional reports to a "beneficiary-payee" suggests that the statute was intended to apply only where a beneficiary died before negotiating a check. Although the statute enacted by Congress uses the term "payee" rather than "beneficiary" or "beneficiary-payee," the legislative history strongly suggests that the statute was intended to address the situation where a beneficiary dies before negotiating a VA check. Presumably, use of the term "payee" simply reflects ordinary commercial usage in referring to situations where a check has been issued and

thus does not indicate an intent to encompass individuals who receive payments on behalf of beneficiaries but are not beneficiaries in their own right. Congress may have failed to consider the possibility that the "payee" of a VA check could be someone other than the beneficiary.

10. As the above-quoted legislative history suggests, the provisions of section 5122, like those of section 5121, appear to be directed at the situation where an individual having substantive entitlement to benefits has died. An individual's right to VA compensation, DIC, or pension terminates upon his or her death, and that individual's claim for any amounts accruing prior to death does not survive his or her death. See 38 U.S.C. § 5112(b)(1); *Landicho v. Brown*, 7 Vet. App. 42, 47 (1994). Accordingly, sections 5121 and 5122 provide that accrued benefits and benefits represented by uncashed checks may be paid to certain individuals when the individual originally entitled to those benefits has died and their entitlement to payment has thereby terminated. The death of a guardian, however, does not terminate a minor or incompetent beneficiary's substantive entitlement to benefits. The statute authorizing VA to make payments to a guardian does not vest the guardian with any entitlement to benefits in his or her own right, but merely provides that payment may be made to the guardian "for the use and benefit of the beneficiary." 38 U.S.C. § 5502(a)(1). Accordingly, where the guardian dies, the beneficiary would continue to have substantive entitlement to any VA benefits which may have accrued. Viewed in this context, section 5122 cannot reasonably be construed to apply when the beneficiary for whose benefit a VA check was issued remains alive and entitled to the benefits.

<Page 8>

11. Application of section 5122 in a case where a guardian has died prior to negotiating a check would in some cases result in payment of the amount of the uncashed check to the original beneficiary. However, there are other circumstances in which application of section 5122 would result in payment of the amount of a VA benefit check to someone other than the living beneficiary for whose benefit the check was issued. The facts of the instant case may present such a circumstance. The unnegotiated checks at issue were received by the guardian for the veteran's children. It appears that, at this time, the children, by reason of their age, would not be eligible to receive accrued benefits or the proceeds of unnegotiated

checks under 38 U.S.C. §§ 5121 and 5122, and 38 C.F.R. § 3.1000 and 3.1003, unless they had become permanently incapable of self-support prior to attaining the age of 18. See 38 U.S.C. §§ 5121(a)(3) (accrued benefits payable to children of veteran) and 101(4) (definition of "child"); 38 C.F.R. §§ 3.57(a) (definition of "child") and 3.1000(d)(2) (for purposes of accrued benefits, "child" has the meaning given in section 3.57). Accordingly, section 5122, if applicable, would appear to require the amount of the unnegotiated checks to be paid to the person who bore the cost of the guardian's last sickness and burial, under section 5121(a)(5), or to the guardian's estate, under that last sentence of section 5122, notwithstanding that the benefits were intended to satisfy the entitlement of the veteran's children. Many other circumstances may be postulated where application of section 5122 upon the death of a guardian would require payment to someone other than the living beneficiary for whose benefit a VA check was issued, for example, where the guardian is an individual not referred to in section 5121(a), such as sibling of an adult beneficiary.

12. Application of section 5122 upon the death of a guardian who received a VA check in a purely representative capacity would, as noted, require VA in some cases to pay the amount of a benefit check to the guardian's estate or to the person who bore the expense of the guardian's last sickness and burial. Such payments would conflict with the statutes, regulations, and VA decisions giving rise to the original beneficiary's entitlement to the benefits represented by the uncashed VA check. We do not believe Congress intended to provide that the amount of a check representing VA benefits paid for the
<Page 9>

use and benefit of a particular beneficiary would inure to the benefit of a guardian who is not a VA beneficiary, to the heirs of such guardian, or to individuals who may have expenditures on the guardian's behalf. The fact that application of section 5122 upon the death of a guardian would, in a number of circumstances, be incongruous under the statutory scheme of title 38, United States Code, further suggests that section 5122 was not intended to apply upon the death of a guardian who is not a VA beneficiary.

13. Finally, we note that section 5502(a)(2) provides specific authority to pay a limited commission to a guardian when necessary to secure his or her services. In view of this provision limiting the amount of compensation payable to a guard-

ian, it would appear unreasonable to construe section 5122 as authorizing payment of VA benefits to a guardian's estate or for the expense of a guardian's last sickness and burial.

14. On consideration of the foregoing, we conclude that 38 U.S.C. § 5122 does not apply in cases where a guardian or other individual receiving VA payments in a representative capacity has died. Although, as noted above, the term "payee" may be construed to encompass an individual, such as a guardian, who receives benefit payments on behalf of a beneficiary, numerous other indications in the terms, history, and statutory context of section 5122 indicate that that provision was intended to apply only upon the death of a person who is substantively entitled to VA benefits under the governing statutes, regulations, and VA decisions.

15. Because 38 U.S.C. § 5122 does not provide a basis for paying the amount of the uncashed VA checks to any individual following the death of the guardian who received those checks, any claim for the amount represented by such checks would be subject to the six-year limitation period of 31 U.S.C. § 3702(b)(1) and 4 C.F.R. § 31.5 discussed in VAOPGCPREC 19-95. A claim based on the obligation underlying a Treasury check must be filed within six years after the date the claim accrues or it is barred by 31 U.S.C. § 3702(b)(1) and 4 C.F.R. § 31.5(a). Such claims are to be filed with the administrative department out of whose activities the claim arose 4 C.F.R. §§ 31.4 and 31.5. The Comptroller General has indicated that claims for amounts payable as periodic monetary
<Page 10>

benefits accrue at the time each payment becomes due. *In re Commander Carl D. Swanson, USCGR (Retired)--Claim for Retroactive Increased Reserve Retired Pay*, Op. Comp. Gen. B-270971 (Mar. 27, 1996). Further, the Comptroller General has held that, even where the claimant was unaware that he or she had a claim against the Government, 31 U.S.C. § 3702 precludes consideration of any portion of a claim arising more than six years before the claim was presented. *In re Steven T. Rij--Claim for Retroactive Payment of Retired Serviceman's Family Protection Plan Annuity*, Op. Comp. Gen. B-255963 (June 14, 1994); *In re Betty J. Porter*, Op. Comp. Gen. B-254399 (Dec. 22, 1993). In the *Rij* opinion, the Comptroller General held that the six-year limitation period was applicable to a claim on behalf of an incompetent beneficiary whose benefits had been suspended due to the fault of a guardian, rather than any fault on the part of the beneficiary. Accordingly, any claim

for the proceeds of the checks in the instant case would appear to be barred by 31 U.S.C. § 3702(b) (1) and 4 C.F.R. § 31.5.

HELD:

Section 5122 of title 38, United States Code, does not apply to checks received by a guardian on behalf of a VA beneficiary but not negotiated prior to the guardian's death. Where such checks have been canceled pursuant to the Competitive Equality Banking Act of 1987, individuals claiming entitlement to the proceeds of such checks must file a claim for those amounts with VA. Any such claim not filed within six years after the claim accrues is barred by 31 U.S.C. § 3702(b) (1).

Mary Lou Keener
General Counsel