

Date: November 25, 1996

VAOPGCPREC 14-96

From: General Counsel (022)

Subj: Request for Opinion, Payment of Attorney Fees from Proceeds
of a National Service Life Insurance Policy
XXXXX, XXXX X., XX XX XXX XXX

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

QUESTIONS PRESENTED:

a. May the Secretary pay attorney fees from the lump-sum proceeds of a National Service Life Insurance (NSLI) policy due to the beneficiary of that policy pursuant to authority granted in 38 U.S.C. § 5904(d) to directly pay attorney fees from past-due benefits?

b. Where the proceeds of a NSLI policy are payable to the beneficiary in monthly installments, may the Secretary withhold a portion of each payment to the beneficiary for purposes of direct payment of attorney fees?

COMMENTS:

1. As a preliminary matter we note that this case involves a dispute between the veteran's surviving spouse and his former spouse as to the proper beneficiary of the veteran's NSLI policy. This dispute is currently in litigation before the United States Court of Veterans Appeals (CVA). *Gloria J. Jones v. Jesse Brown, Secretary of Veterans Affairs*, Vet. App. No. 96-0345 (filed Apr. 17, 1996). However, the analysis and resolution of the questions posed are not dependent on any disputed facts or issues currently pending before the CVA.

2. You first ask whether attorney fees may be directly paid by the Department of Veterans Affairs (VA) to an attorney from the proceeds of a NSLI policy. As you are aware, there are two avenues of appeal for claimants who wish to contest a VA determination concerning their eligibility for the proceeds of a VA insurance policy. A claimant may either file suit in Federal district court, or pursue an appeal using the Board of Veterans' Appeals (BVA) and CVA

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process. *Young v. Derwinski*, 1 Vet. App. 70, 72 (1991). VA insurance, which is based on contract, has long been considered a "VA benefit" on par with non-contractual VA benefits like compensation and pension. This is evident in the case law holding that proceeds of VA insurance are subject to the same nonassignability and federal-taxation protections (currently codified at 38 U.S.C. § 5301(a)) applicable to other VA benefits. *U.S. Trust v. Helvering*, 307 U.S. 57, 59 (1939) ("proceeds or benefits of a War Risk policy are exempt from taxation"). *McElhany v. United States*, 101 Ct. Cl. 286, 291-92 (1944) (payments due to a beneficiary under a War Risk Insurance Policy are exempt from all creditors). See also VA Op. Sol. 347-51 (Sept. 6, 1951) (NSLI proceeds must be paid to the beneficiaries of the policy, as opposed to the creditors of the insured's estate).

3. Moreover, the statutory and regulatory provisions applicable to payment of attorney fees from past-due benefits, codified at 38 U.S.C. § 5904(c) and (d), and 38 C.F.R. § 20.609(h), do not distinguish payment of attorney fees in insurance cases from other types of benefit appeals. Indeed, where an appellant uses the BVA/CVA route to appeal an insurance decision, the definition of past-due benefits contained in the BVA Rules of Practice must be used. That definition states that a past-due benefit is a "nonrecurring payment resulting from a benefit, or benefits, granted on appeal or awarded on the basis of a claim reopened after a denial by the [BVA] or the lump sum payment which represents the total amount of recurring cash payments which accrued" 38 C.F.R. § 20.609(h)(3). Lump sum payments of NSLI proceeds may fall squarely within that definition. Accordingly, VA may directly pay attorney fees from such proceeds of NSLI policies, provided that all other requirements for direct payment of fees are met. See 38 U.S.C. § 5904(c) and (d).

4. You also inquire how the payment of NSLI proceeds in monthly installments would affect VA's obligation to directly pay attorney fees from past-due benefits. Pursuant to 38 U.S.C. § 1917(b), a beneficiary due proceeds from a NSLI policy may receive them in a lump-sum payment or in monthly installments under a variety of options.

5. Withholding of attorney fees from future VA benefits is expressly prohibited by statute. 38 U.S.C. § 5904(d)(3). As a result, VA may not directly pay attorney fees from NSLI installment payments becoming payable *after* the date of the decision (normally by BVA or CVA) that results in payment of the proceeds. Installment payments to a NSLI beneficiary payable subsequent to the final benefit award simply would not qualify as "past-due benefits" under VA's definition of that term. 38 C.F.R. § 20.609(h)(3).

6. A NSLI policy matures on the date of death of the insured. See VAOPGC 25-79 (7-27-79). The proceeds of a NSLI policy may be paid to the beneficiary as soon thereafter as VA is provided with evidence sufficient to establish that the policy in question has matured. VA, however, may be unable to pay the beneficiary until after any uncertainty concerning the correct beneficiary is resolved. Once the correct beneficiary is determined, and the applicable appellate period for challenging the beneficiary determination has expired, VA is obligated to pay the beneficiary in a lump sum the amount of any unpaid installments that accrued between the date the policy matured and the date of the grant of the proceeds to the beneficiary. Distribution of NSLI proceeds in this manner qualifies as the payment of past-due benefits. See 38 C.F.R. § 20.609(h)(3). Attorney fees would, therefore, be payable from such a payment, if all other requirements for payment of attorney fees from past-due benefits are met. See 38 U.S.C. § 5904(c) and (d).

HELD:

a. The statutory and regulatory provisions applicable to payment of attorney fees from past-due benefits, codified at 38 U.S.C. § 5904(c) and (d), and 38 C.F.R. § 20.609(h), do not distinguish payment of attorney fees in insurance cases from other types of benefit appeals. The Secretary may, therefore, directly pay attorney fees from the proceeds of a National Service Life Insurance (NSLI) policy payable in a lump sum, whenever the requirements for direct payment of attorney fees from past-due benefits contained in 38 U.S.C. § 5904(c) and (d) are met.

b. The Secretary may directly pay attorney fees from the proceeds of a NSLI policy payable in monthly installments only from the past-due installments which accrued between the date the policy matured and the date of the decision granting the proceeds to the beneficiary, provided all other requirements for the direct payment of attorney fees from past-due benefits contained 38 U.S.C. § 5904(c) and (d) are met.

Mary Lou Keener