

Date: December 9, 1997

VAOPGCPREC 35-97

From: Acting General Counsel (022)

Subj: Effective Date of Award of Dependency and Indemnity
Compensation -- XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX

To: Director, Compensation and Pension Service (213)

QUESTION PRESENTED:

Does the failure of the Department of Veterans Affairs (VA) to render a timely decision regarding entitlement to service-connected burial benefits following a veteran's death in 1977 provide a basis for awarding dependency and indemnity compensation (DIC) retroactive to the date of death?

DISCUSSION:

1. The claimant, as the surviving spouse of a veteran, filed a claim for burial benefits on March 22, 1977, one day after the veteran's death. On March 30, 1977, a VA regional office forwarded the claimant a VA Form 21-534 (Application for Dependency and Indemnity Compensation, Death Pension and Accrued Benefits), and informed her that "[i]t is important that the completed application be returned within one year of the date of the veteran's death." By letter dated May 9, 1977, the regional office informed the claimant that it had authorized payment of the non-service-connected burial allowance and stated that "you will be informed at a later date about your claim for the service connected burial allowance." No further action was taken by VA or the claimant until July 1996, when the claimant submitted a request to "reopen[]" her claim for DIC. The claimant submitted a completed application for DIC in January 1997. In an April 1997 decision, the regional office established service connection for the cause of the veteran's death. The claimant has been awarded DIC, effective August 1, 1996, and has been paid the service-connected burial allowance. You have requested our opinion regarding whether VA's failure to take timely action on the 1977 claim for service-connected burial benefits may provide a basis for payment of DIC retroactive to the date of the veteran's death.

2. Section 5110(a) of title 38, United States Code, provides that "[u]nless specifically provided otherwise in this chap-

ter, the effective date of an award . . . of . . . dependency
and indemnity compensation . . . shall be fixed in accordance

<Page 2>

with the facts found, but shall not be earlier than the date of receipt of application therefor." (Emphasis added.) A limited exception to that rule is provided in 38 U.S.C. § 5110(d)(1), which states that "[t]he effective date of an award of dependency and indemnity compensation for which application is received within one year from the date of death shall be the first day of the month in which the death occurred." The "application" referred to in sections 5110(a) and (d)(1) is that required by 38 U.S.C. § 5101(a), which provides that "[a] specific claim in the form prescribed by the Secretary . . . must be filed in order for benefits to be paid or furnished to any individual under the laws administered by the Secretary." See *Kluttz v. Brown*, 7 Vet. App. 304, 308 (1994). Accordingly, to be eligible for DIC from the month of the veteran's death, a claimant must file a claim for DIC, in the form prescribed by VA, within one year after the date of the veteran's death. Otherwise, the effective date of a DIC award may be no earlier than the date on which VA received the application for DIC.

3. Pursuant to 38 C.F.R. § 3.155(a), an application for benefits may, under certain circumstances, be deemed to have been filed at the time VA first received an "informal claim" for such benefits. Section 3.155(a) provides:

Any communication or action, indicating an intent to apply for one or more benefits under the laws administered by [VA], . . . may be considered an informal claim. Such informal claim must identify the benefit sought. Upon receipt of an informal claim, if a formal claim has not been filed, an application form will be forwarded to the claimant for execution. If received within 1 year from the date it was sent to the claimant, it will be considered filed as of the date of receipt of the informal claim.

Accordingly, if the claimant had submitted an informal claim for DIC within one year after the veteran's death and thereafter filed a formal DIC application within one year after VA sent the appropriate application form to her, then VA would have authority under 38 U.S.C. § 5110(d)(1) and 38 C.F.R. § 3.155(a) to award DIC effective from the month of the veteran's death.

4. The determination as to whether the claimant submitted a formal or informal claim for DIC within one year after the

veteran's death is essentially a factual question for resolution by the Veterans' Benefits Administration personnel

<Page 3>

authorized to decide claims for benefits. The following precedents of the United States Court of Veterans Appeals (CVA), however, may be pertinent to that determination. Pursuant to 38 C.F.R. § 3.155(a), an informal claim must "indicate an intent to apply for one or more benefits" and "must identify the benefit sought." 38 C.F.R. § 3.155(a). The CVA has held that the claimant need not "specifically" identify the benefit but must, at a minimum, evidence a belief of entitlement to a particular benefit and an intention to apply for the benefit. See *Shields v. Brown*, 8 Vet. App. 346, 349 (1992); *Servello v. Derwinski*, 3 Vet. App. 196, 199 (1992). In *Shields*, 8 Vet. App. at 349, and *Herzog v. Derwinski*, 2 Vet. App. 502, 503 (1992), the CVA concluded that the claimants' applications for burial benefits, filed within one year after the dates of the veterans' deaths, did not constitute informal claims for DIC. In *Shields*, the CVA noted that the claimant had neglected to respond to a question on the burial-benefits application regarding whether she was claiming that the cause of death was service connected and, further, had subsequently stated that she did not intend to apply for DIC at the time of her application for burial benefits. Those decisions suggest that an application for burial benefits which does not allege that the veteran's death was due to service-connected disabilities generally would not constitute an informal claim for DIC. In view of the fact-based nature of the inquiry, however, those decisions would not preclude a conclusion that the claimant in the present case raised an informal claim for DIC, if any of the claimant's communications or actions indicated an intent to apply for DIC.

5. When an informal claim has been submitted, VA is required to forward the appropriate application form to the claimant. The CVA has held that, if VA fails to forward the appropriate application form to the claimant, the one-year period for filing a formal application does not begin to run, and the informal claim maybe accepted as the application for effective-date purposes. See *Servello*, 3 Vet. App. at 200; *Quarles v. Derwinski*, 3 Vet. App. 129, 137 (1992). If, however, VA forwards the application form and the claimant fails to return the completed application form within one year, then no benefits may be paid on the basis of the informal claim. See *Fleshman v. Brown*, 9 Vet. App. 548, 551 (1996); *Kluttz*, 7 Vet. App. at 306-07.

6. If it is determined that the claimant in this case did not, within one year after the veteran's death, file either

a formal application or an informal claim supplemented by a formal application within the time required by 38 C.F.R.

<Page 4>

§ 3.155(a), then VA would have no authority to award DIC retroactive to the month of the veteran's death. In the absence of a valid DIC application within one year after the date of death, the plain language of 38 U.S.C. § 5110(a) prohibits VA from assigning an effective date prior to the date on which the claim for DIC was received.

7. VA's failure to render a timely decision on the issue of entitlement to service-connected burial benefits does not provide any basis for disregarding the express effective-date provisions of 38 U.S.C. § 5110(a). Even if VA had rendered a decision, within one year after the veteran's death, establishing service connection for the cause of death, DIC benefits could not have been paid retroactive to the month of death unless the claimant had filed a separate DIC application within one year after the date of death. See *Herzog*, 2 Vet. App. at 503. It may be argued that VA's failure to render a timely decision was error and that such error deterred the claimant from filing a DIC application within one year after the date of the veteran's death. However, VA has no authority to assign an effective date earlier than the date of the claim based on such error.

8. It is well established that an agency's authority is limited to that expressly provided by statute, see *Killip v. OPM*, 991 F.2d 1564, 1569 (Fed. Cir. 1993), and that money may be paid from the Federal Treasury only in the manner expressly authorized by statute. See *Office of Personnel Mgmt. v. Richmond*, 496 U.S. 414, 424 (1990). Section 5110(a) unambiguously provides that "[u]nless specifically provided otherwise in this chapter" the effective date of a DIC award "shall not be earlier than the date of receipt of application therefor." Pursuant to that statute, VA may not award a retroactive effective date prior to the date it receives an application unless there is specific statutory authority for such retroactive effective date. No statutory provision permits VA to assign an effective date prior to the date of application based on a conclusion that VA error deterred the claimant from filing an application at an earlier date. In this regard, we note that in VAOPGCPREC 17-95, we concluded that VA's failure to provide claimants with notice of their potential eligibility for benefits in accordance with 38 U.S.C. § 7722(c) could not provide a basis for assigning an effective date prior to

<Page 5>

the date on which VA received an application for benefits. Similarly, the United States Court of Appeals for the Federal Circuit and the CVA have held that alleged errors by VA which deterred claimants from filing claims at an earlier date could not provide a basis for awarding retroactive benefits in a manner inconsistent with the express effective-date provisions of 38 U.S.C. § 5110. See *McCay v. Brown*, 106 F.3d 1577, 1581-82 (Fed. Cir. 1997); *McTighe v. Brown*, 7 Vet. App. 29, 30 (1994).

9. In VAOPGCPREC 17-95, we noted that the Secretary of Veterans Affairs has discretionary authority, under 38 U.S.C. § 503(a), to provide equitable relief, including monetary payments, when the Secretary determines "that benefits administered by [VA] have not been provided by reason of administrative error on the part of the Federal Government or any of its employees." We concluded that section 503(a) would permit the Secretary to award retroactive benefits without regard to 38 U.S.C. § 5110 in such cases. We stated, however, that "[w]e do not believe that VA has any authority apart from the Secretary's section 503(a) equitable authority which would permit a retroactive award, contrary to 38 U.S.C. § 5110" on the basis of VA error. If you conclude that administrative error was responsible for the delay in authorizing DIC benefits, we advise you to initiate an equitable-relief recommendation as provided at 38 C.F.R. § 2.7.

HELD:

The failure of the Department of Veterans Affairs to render a timely decision regarding entitlement to service-connected burial benefits following a veteran's death may not provide a basis for awarding retroactive payment of dependency and indemnity compensation (DIC) in a manner inconsistent with the express requirements of 38 U.S.C. § 5110, except insofar as the Secretary may order such benefits pursuant to his equitable-relief authority under 38 U.S.C. § 503(a). Pursuant to 38 U.S.C. § 5110(a) and (d)(1), an award of DIC may be made effective from the month of death only if the claimant filed an application for DIC within one year after the date of death, or filed an informal claim for DIC within such period, followed by a timely formal application for DIC which may, under 38 C.F.R. § 3.155(a), be deemed to have been filed within one year after the date of death.

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