

**Department of
Veterans Affairs**

Memorandum

Date: July 25, 2000

From: General Counsel (022)

VAOPGCPREC 8-2000

Subj: Status of Surviving Spouse to Receive Death Benefits

To: Director, Compensation and Pension Service (21)

QUESTIONS PRESENTED:

- A. The veteran's surviving spouse seeks eligibility for dependency and indemnity compensation (DIC) under 38 U.S.C. § 1304 and 38 C.F.R. § 3.54(c)(1). Where the veteran contracted a fatal disease during the first or second enlistment of three consecutive enlistments, may the date of termination of his last enlistment be considered the termination date of the enrollment in which the fatal disease was incurred?
- B. If the surviving spouse does not qualify for DIC, would the lapse of time between termination of the period of service and the date of the surviving spouse's marriage to the veteran be a bar to an award of death pension to the surviving spouse?

DISCUSSION:

- 1. The pertinent facts as they appear from documents in the claim file are as follows. The veteran served as an enlisted member in the United States Armed Forces for three consecutive periods: (1) from November 30, 1965, to September 28, 1969; (2) from September 29, 1969, to July 8, 1976; and (3) from July 9, 1976, to June 7, 1982. The veteran's service records, which include three different DD Forms 214, indicate that the veteran was honorably discharged from each of the first two enlistments and was honorably discharged for final separation from service on June 7, 1982. The veteran married on June 24, 1995, and died on April 12, 1996, of lung cancer, which may be attributable to the veteran's Vietnam service during the first two enlistment periods. The veteran's surviving spouse has filed an application for DIC.
- 2. Section 3.54(c) of title 38, Code of Federal Regulations, provides that DIC 'payable under 38 U.S.C. § 1310(a) may be paid to the surviving spouse of a veteran . . . who was married to the veteran: (1) [b]efore the expiration of 15 years after the termination of the period of service in which the injury or disease causing the death of the veteran was incurred or aggravated, or (2) [f]or 1 year or more, or (3) [f]or any period of time if a child was born of the marriage, or was born to them before the marriage."¹ This regulation essentially reflects the terms of 38 U.S.C. §

¹ Section 3.54 was amended on January 21, 2000, to redesignate paragraphs (c)(1), (c)(1)(i), (c)(1)(ii), and (c)(1)(iii) as paragraphs (c), (c)(1), (c)(2), and (c)(3), respectively.

1304. Apparently, the veteran and the surviving spouse were married for less than one year and did not have any children. Therefore, the surviving spouse could qualify for DIC only if the marriage took place within fifteen years after termination of the period of service in which the disease causing death was incurred. Since evidence in the claim file indicates that the veteran served in the Republic of Vietnam from August 24, 1969, to August 15, 1970, and died of lung cancer, service connection for the cause of the veteran's death potentially may be established under the provisions of 38 C.F.R. §§ 3.307(a)(6) and 3.309(e) based on a presumption that the disease was incurred as a result of service in Vietnam during the specified period. However, if, for purposes of 38 C.F.R. § 3.54(c)(1), the termination date of the period of service in which the disease was incurred is considered to be July 8, 1976, the date on which the veteran's second enlistment ended, rather than June 7, 1982, the date on which the veteran's final enlistment ended, the termination date would be more than fifteen years prior to the date of the veteran's marriage, and 38 U.S.C. § 1304 and 38 C.F.R. § 3.54(c) would bar payment of DIC to the surviving spouse. Thus, eligibility for DIC appears to depend on whether the veteran's consecutive enlistments are considered one period of service or three distinct periods of service for purposes of section 3.54 (c) (1) .

3. The term 'period of service' is defined in neither title 38, United States Code, nor title 38, Code of Federal Regulations. Neither the history of 38 U.S.C. § 1304, nor that of 38 C.F.R. § 3.54(c)(1), sheds any light on the meaning of the term. Vet. Reg. 10, para. 5 (1933), which first defined the term "widow" for death benefits purposes in terms of marriage within a specified time after completion of a veteran's service, used the term 'enlistment' instead of period of service. The term 'period of service' was employed in section 4 of the Act on August 16, 1937, ch. 659, § 4, 50 Stat. 660, 661, governing death compensation. Although the history of that statute and subsequent enactments dealing with death compensation do not suggest Congress' intention in choosing that term, it may be presumed to have been considered preferable to 'enlistment' for purposes of consideration of the service of commissioned officers. Although the term could be interpreted to refer to the term of a particular enlistment, the term may also refer to the entire continuous period between entry on duty and final discharge from service. In this regard, we note that section 831.2103 of title 5, Code of Federal Regulations, defines 'period of service' for purposes of civil service annuity deposits based on military service as 'the total years, months, and days from date of initial entry on active duty . . . to date of final discharge for enlisted military personnel.' That regulation further provides that, "[p]eriod of service' includes consecutive periods of service where there is no break in service."
 4. VA has considered the effect of consecutive enlistments in a variety of contexts. For example, in Administrator's Decision No. 725 (Oct. 19, 1946), the Administrator of Veterans Affairs concluded that a discharge to accept a commission or to change status prior to the time a servicemember was eligible for discharge under the length of service system was not considered termination of the servicemember's service such as to give rise to eligibility for education benefits under Title II of the Act of June 22, 1944, ch. 268, 58 Stat. 284, conditioned on discharge or release from service. In VAOPGC 43-58 (Dec. 19, 1958), VA's General Counsel indicated that, for purposes of eligibility for certain outpatient dental treatment conditioned on application within one year of discharge or release from service, where a veteran voluntarily reenlisted the day after discharge from an enlistment period from which the
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veteran was eligible for complete separation, application was required within one year of completion of the first enlistment period. In that opinion, the General Counsel also concluded that, under the same circumstances, a veteran whose disability compensation claim for a disability incurred in the first of two consecutive enlistment periods was filed within one year of discharge from the second enlistment period would not be considered to have filed a claim within one year of discharge from the period of service in which the disability was acquired.

5. These conclusions have for many years been reflected in VA regulations, now codified at 38 C.F.R. § 3.13, and titled "Discharge to change status." In general, under section 3.13(a), a discharge to reenlist, issued prior to the date an individual is eligible for unconditional discharge based on length of service, is considered a conditional discharge. Section 3.13(b) provides that, under such circumstances, the service member's entire period of service will be considered one period of service and entitlement to veterans' benefits will be determined based on the character of the final termination of that service period. We conclude that service members who received conditional discharges to reenlist and who were subsequently discharged under conditions other than dishonorable may, under 38 C.F.R. § 3.13(a) and (b), be considered to have had one period of service for the period of their consecutive enlistments. This would hold true for purposes of determining eligibility for DIC pursuant to 38 U.S.C. § 1304(l) and 38 C.F.R. § 3.54(c)(1), or for other compensation or pension benefits.
6. We do not believe that this analysis is affected by 38 C.F.R. 5 3.13(c). Under 38 C.F.R. § 3.13, as in effect prior to the enactment of Pub. L. No. 95-126, § 3, 91 Stat. 1106, 1108 (1977), if a service member was discharged to reenlist, prior to completing the original obligated period of service, and the service member's ultimate discharge was under dishonorable conditions, that discharge would be controlling for purposes of determining entitlement to VA benefits even though the service member had served honorably throughout the original obligated period of service. In order to correct this perceived inequity and restore such service members who were ultimately discharged under dishonorable conditions to the position they would have been in had they not agreed to extend their active duty service prior to completion of their original service commitment, Congress amended the law to treat the honorable completion of the original obligated period of service as though it had resulted in an unconditional discharge or release. H.R. Rep. No. 580, 95th Cong., 1st Sess. 18 (1977), reprinted in 1977 U.S.C.C.A.N. 2844, 2861. In order to accomplish this, Congress, in Pub. L. No. 95-126, expanded the definition of the term "discharge or release" under 38 U.S.C. § 101(18) to include "the satisfactory completion of the period of active . . . service for which a person was obligated at the time of entry into such service in the case of a person who, due to enlistment or reenlistment, was not awarded a discharge or release from such period of service at the time of such completion thereof and who, at such time, would otherwise have been eligible for the award of a discharge or release under conditions other than dishonorable." In order to implement section 3 of Pub. L. No. 95-126, VA added a new subsection (c) to 38 C.F.R. § 3.13, providing that a service member will be considered to have been unconditionally discharged, even though no unconditional discharge may have been issued, if the member: (1) served the full period the member was obligated to serve at the time of service entry; (2) was not discharged at the time of completing that period due to an intervening reenlistment; and (3) would have been eligible for a discharge under conditions other than dishonorable at that time except for the intervening reenlistment. Section 3.13(c) suggests that, under these circumstances, the

initial obligated period of service and the reenlistment period beyond the initial obligated period may be considered distinct periods of service. Its regulatory history, however, indicates that that section should be construed to be applicable only when the last period of service is terminated under dishonorable conditions.² Thus, we do not believe that Section 3 of 38 C.F.R. § 3.13(c), which has the effect of establishing a constructive unconditional discharge, is applicable because that regulation should only be construed to apply in cases in which a service member was ultimately discharged under dishonorable conditions.

7. In the instant case, a factual question exists as to whether the veteran: (1) was unconditionally discharged upon the completion of each of the first two enlistment periods, and then immediately reenlisted; or, (2) was conditionally discharged prior to the completion of those periods of service for purposes of reenlistment. If the former, the veteran's periods of service must be seen as distinct periods of service for purposes of establishing eligibility for VA benefits. In this circumstance, if the veteran's death is found to have resulted from an injury or disease incurred during the first or second period of service, the surviving spouse's marriage to the veteran on June 24, 1995, would not have been within the requisite fifteen-year period from the termination of the period of service in which the injury or disease causing the death of the veteran was incurred or aggravates for purposes of 38 C.F.R. § 3.54(c) (1).³ On the other hand, if the veteran's discharges prior to his reenlistments were obtained prior to the date on which he was eligible for discharge, 38 C.F.R. § 3.13(a) would apply and would render the veteran's discharges on September 28, 1969, and July 8, 1976, conditional discharges. Section 3.13(b) of title 38, Code of Federal Regulations, would then establish that the veteran's entire period of service constitutes one period of service and his entitlement to VA benefits would be

² The regulatory history of 38 C.F.R. § 3.13(c) indicates that VA intended to depart from the then-existing provisions of section 3.13 only to the extent necessary to fulfill the objective of Pub. L. No. 95-126 to provide relief to persons who reenlisted under conditional discharges and were ultimately discharged under dishonorable conditions. First, in amending section 3.13 to reflect section 3 of Pub. L. No. 95-126, VA retained subsections (a) and (b) of the then-existing regulation, making subsection (b) applicable "[e]xcept as provided in paragraph (c) of this section." Second, the transmittal sheet signed by the Deputy Administrator, which accompanied the amendment of section 3.13 indicates that subsection (c) was intended to apply "[o]nly when it is determined that the whole period of service was terminated under dishonorable conditions." Veterans Administration Compensation and Pension Transmittal Sheet 641, pp. v and vi (Apr. 5, 1978) (emphasis added). While this transmittal sheet is not regulatory in nature, it does give a clear indication of the contemporaneous construction of section 3 of Pub. L. No. 95-126 by the agency charged with its implementation. Pub. L. No. 95-126 and 38 C.F.R. § 3.13(c) were intended as liberalizing amendments to avoid a harsh result when a veteran who had extended his or her service and had honorably completed an initial obligated period of service received a dishonorable discharge from a subsequent period of service. They were not intended to change the law as it applied to veterans who served honorably throughout their service.

³ Although we defer to adjudication officials as to the resolution of the factual issue presented, we note that a review of the veteran's DD Forms 214 suggests that the veteran's first two discharges may have been issued somewhat in advance of the dates on which the veteran was eligible for an unconditional discharge.

determined on the basis of one period of service from November 30, 1965 through June 7, 1982. In that case, the surviving spouse's marriage to the veteran would have occurred within a fifteen- year period from the date of termination of the period of service in which the fatal disease was incurred for purposes of 38 U.S.C. § 1304(l) and 38 C.F.R. § 3.54(c)(1).

8. Regarding the second question, concerning the surviving spouse's potential eligibility for death pension benefits based upon the veteran's wartime service, 38 U.S.C. § 1541(f) provides in pertinent part that, "[n]o pension shall be paid under this section to a surviving spouse of a veteran unless the spouse was married to the veteran-(1) before . . . May 8, 1985, in the case of a surviving spouse of a Vietnam era veteran . . . ; (2) for one year or more; or (3) for any period of time if a child was born of the marriage, or was born to them before the marriage." See also 38 C.F.R. § 3.54(a). In this case, the available information indicates that the surviving spouse and the veteran were married on June 24, 1995, were married for less than one year, and did not have a child born to them. Therefore, 38 U.S.C. § 1541(f) and 38 C.F.R. § 3.54(a) appear to bar the surviving spouse from eligibility for death pension benefits notwithstanding the veteran's war- time service.

HELD:

- A. In a case where the veteran served consecutive enlistments and was discharged from each under conditions other than dishonorable, if the veteran was unconditionally dis- charged from the earlier enlistments at the end of the obligated periods of service, then the veteran's enlistments would be considered distinct periods of service for purposes of determining eligibility for VA compensation or pension benefits. However, if the veteran's discharges from the earlier enlistments are considered conditional discharges under 38 C.F.R. § 3.13(a), then the consecutive enlistment periods ending in discharges under conditions other than dishonorable may be considered one period of service under 38 C.F.R. § 3.13(b) for purposes of determining eligibility for VA compensation or pension benefits.
- B. Under 38 U.S.C. § 1541(f) and 38 C.F.R. § 3.54(a), where a surviving spouse married a Vietnam-era veteran on or after May 8, 1985, was married to the veteran for less than one year, and had no child with the veteran, the surviving spouse is barred from eligibility for death pension benefits based on the marriage to the veteran, notwithstanding the veteran's wartime service.

Leigh A. Bradley

Attachment: C-file