

**Department of
Veterans Affairs**

Memorandum

Date: January 25, 2002

VAOPGCPREC 1-2002

From: General Counsel (021)

Subj.: Dual Eligibility for Chapter 35 Benefits

To: Under Secretary for Benefits (20/22)

QUESTION PRESENTED:

May an individual receive concurrent Chapter 35 Survivors' and Dependents' Educational Assistance program benefits when both parents are permanently and totally (P&T) disabled due to a service-connected condition?

DISCUSSION:

1. The request for an opinion recites facts of a particular individual's case as a basis for the issue to be addressed. The mother and father of the individual in question are veterans who are both permanently and totally disabled due to a service-connected condition. It is undisputed that the individual, thereby, is entitled to benefits under the chapter 35 program. However, the individual has asked for concurrent payment of education benefits under that chapter based on the dual entitlement derived from each parent.
2. As noted in the incoming memorandum, with regard to nonduplication of benefits, section 3562 of title 38, United States Code, bars receipt of dependency and indemnity compensation or pension benefits after an election of educational assistance under chapter 35 is made. However, the statute is silent as to dual payment of chapter 35 benefits to the same eligible person. We do not believe such silence implies approval, but rather, reflects the absence of any need to address the issue. In other words, as discussed below, the context of the statute simply does not admit of such result.
3. Section 3500 of title 38, United States Code, declares that the chapter 35 program is established for the purpose of "providing opportunities for education to children whose education would otherwise be impeded or interrupted by reason of the disability or death of a parent from a disease or injury incurred or aggravated in the Armed Forces . . . and for the purpose of aiding such children in attaining the educational status which they might normally have aspired to and obtained but for the disability or death of such parent."
4. Section 3501 of chapter 35 defines the term "eligible person" for purposes of that chapter (and chapter 36), in pertinent part, as the "child of a person who . . . has a total disability permanent in nature resulting from a service-connected disability." Chapter 35 also provides, in section 3510, that "[e]ach eligible person shall, subject

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to the provisions of [that chapter], be entitled to receive educational assistance”, and, in section 3511(a)(1), that “[e]ach eligible person shall be entitled to education assistance under this chapter for a period not in excess of 45 months” Further, in regard to benefit payment, section 3531 provides that the Secretary shall, in accordance with chapter 36 requirements, pay “to the parent or guardian of each eligible person [or to the eligible person having attained majority] who is pursuing a program of education under [chapter 35] . . . an educational assistance allowance “to meet, in part, the expenses of the eligible person’s subsistence, tuition, fees, supplies, books, equipment, and other educational costs.”

5. In the instant case, the individual is an “eligible person,” within the meaning of 38 U.S.C. § 3501(a)(A)(1)(ii), since she is, whether based on the circumstances of her mother or father, “a child of a person” who has a permanent and total (P&T) service-connected disability. Yet, in the sense of her having dual chapter 35 entitlement, thereby, it exists, in our view, only in the alternative. That is, the child at any given time may elect the parent on whom to base a claim of eligibility. However, once chapter 35 entitlement is derived from one such parent, qualifying for eligibility based on the other parent becomes superfluous; it creates only cumulative eligibility that neither doubles nor otherwise expands the child’s program entitlement.¹

6. As indicated above, chapter 35 education benefits are intended to help meet the eligible person’s educational expenses. Accordingly, educational assistance allowance under that chapter is payable not simply on the basis of the child’s status as an “eligible person,” but rather, is based on the child’s approved course pursuit. In this regard, we find nothing within the context of chapter 35 to suggest that a child, on the basis of eligibility derivable from more than one parent, should be treated as two separate “eligible persons” pursuing a program of education under that chapter, each individually and concurrently entitled to payment of the same benefit.

7. This situation, we note, is distinguishable from payment of Dependency and Indemnity Compensation (DIC) to a child under chapter 13 of the same title. Chapter 13 provides that, when any veteran dies as a result of a service-connected disability, DIC is payable to the veteran’s surviving spouse, children, and parents. See 38 U.S.C. § 1310. Unlike the chapter 35 benefit, chapter 13 mandates

¹Note, however, that the beginning date of a child’s eight-year eligibility period under chapter 35 is related to the effective date of the P&T disability of the parent from whom eligibility is derived. (See 38 U.S.C. § 3512(a).) Therefore, it may be advantageous for the child to elect to claim eligibility based on the parent whose onset of P&T disability will afford the child the most beneficial period during which to use chapter 35 education benefits.

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payment of compensation to an individual solely on the basis of the individual's familial relationship to the deceased veteran. Thus, an individual who is the child of more than one deceased veteran, for example, clearly may have multiple concurrent entitlements to DIC benefits.

8. However, in view of this otherwise open potential for duplication of compensation benefits, 38 U.S.C. § 5304(b)(2) and (3), respectively, bar concurrent benefit payment to a child by reason of the death of more than one parent in the same parental line and to a surviving spouse by reason of the death of more than one spouse. By contrast, no express provision prohibiting concurrent payment of chapter 35 benefits to an individual exists, or reasonably is needed. Even if the same person could establish chapter 35 benefit eligibility based on the P&T service-connected disability or service-connected death of more than one parent, the benefit is not, like DIC, automatically payable based on the status of the child's parents. Rather, it is payable to each eligible person based on that person's pursuit of an approved program of education. Thus, the child in the instant case, for example, despite her alternative basis for chapter 35 eligibility, still, is but one person, and nothing in chapter 35 or elsewhere suggests a reasonable basis for treating her as two separate eligible persons pursuing the same educational program at double the "subsistence, tuition, fees, supplies, books, equipment, and other educational costs" for which chapter 35 educational assistance allowance is payable. See 38 U.S.C. § 3531.

9. Perhaps a more apt analogy to that of such chapter 35 child is the case of a veteran under the Montgomery GI Bill (38 U.S.C, ch. 30) who has multiple periods of active duty service. Although any one of such service periods may establish the veteran's Montgomery GI Bill (MGIB) entitlement, the MGIB only is concerned with whether, not how many times, the individual qualifies for the benefit. Once MGIB entitlement vests in a particular veteran, that veteran is eligible to be paid the statutory rate of education assistance allowance determined only by his or her pursuit of an approved program of education. See 38 U.S.C. § 3015.

10. Likewise, as we read chapter 35, entitlement to and payment of educational assistance under that chapter is not augmented by how many times over the child may qualify as an "eligible person." Thus, while it is incontrovertible that the child of a "P&T" parent is made eligible, in part, for chapter 35 benefits by the status of that parent, the fact that more than one parent has a P&T service-connected disability status does not make the child eligible for double the education benefits payable for the same course pursuit.

11. For the above reasons, we find that the subject child may not receive concurrent chapter 35 benefit payments.

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HELD:

Chapter 35 educational assistance allowance may not be paid concurrently to a child by reason of the P&T service-connected disability of more than one parent.

Tim S. McClain