

**Department of
Veterans Affairs**

Memorandum

Date: December 2, 2002

VAOPGCPREC 7-2002

From: General Counsel (022)

Subj: Termination of Benefits of Fugitive Felons Under Section 505 of Public Law No. 107-103

To: Director, Compensation and Pension Service (21)

QUESTIONS PRESENTED:

A. When the benefits of a veteran's surviving spouse are terminated pursuant to 38 U.S.C. § 5313B because the surviving spouse is a fugitive felon, may benefits be paid to the surviving spouse's dependent children?

B. When the benefits of a veteran's child are terminated pursuant to 38 U.S.C. § 5313B because the child is a fugitive felon, and there are other children of the veteran in receipt of benefits, how are the other children's benefits affected?

DISCUSSION:

1. On December 27, 2001, Congress enacted the Veterans Education and Benefits Expansion Act of 2001, Pub. L. No. 107-103, 115 Stat. 976. Section 505(a) of Public Law No. 107-103, 115 Stat. at 995, added 38 U.S.C. § 5313B, which provides in part that:

A veteran who is otherwise eligible for a benefit [under chapters 11, 13, 15, 17, 19, 30, 31, 32, 34, 35, or 37 of title 38] may not be paid or otherwise provided such benefit for any period during which such veteran is a fugitive felon. A dependent of a veteran who is otherwise eligible for [such] a benefit . . . may not be paid or otherwise provided such benefit for any period during which such veteran or such dependent is a fugitive felon.

The term "dependent" in the statute is defined to include "a spouse, surviving spouse, child, or dependent parent of a veteran." 38 U.S.C. § 5313B(b)(3).

2. Section 505(a) of Public Law No. 107-103 derived from S.1088, 107th Cong. The Senate report on S.1088 explained that that provision was patterned after Public Law No.104-193, which barred fugitive felons from receiving Supplemental Security Insurance from the Social Security Administration and food stamps from

the Department of Agriculture. Public Law No.104-193 “was designed to cut off the means of support that allows fugitive felons to continue to flee.” S. Rep. No. 107-86, at 17 (2001). The report went on to explain that the bill “would bar veterans and eligible dependents from receiving veterans benefits while fugitive.” Id. Clearly, Congress’ intention was to deny fugitives the means to maintain themselves in that status. Yet the language ultimately adopted by Congress went somewhat beyond that of S.1088 by also barring benefits to dependents of fugitive veterans.

3. If the surviving spouse of a veteran becomes a fugitive felon, the surviving spouse would be ineligible for benefits under the referenced chapters because the statute bars payment of such benefits to a “dependent” who is a fugitive felon. Additional amounts of dependency and indemnity compensation (DIC) and improved death pension payable to the surviving spouse on account of the veteran’s children would cease to be paid because, under the terms of authorizing statutes, 38 U.S.C. §§ 1311(b) and 1541(b), the additional amounts are the entitlement of the surviving spouse, not the children. See also 38 C.F.R. § 3.152(c)(1) (where child’s entitlement to DIC arises by reason of termination of surviving spouse’s entitlement or by reason of attaining age 18, claim will be required). DIC and improved death pension being apportioned to the veteran’s children not in the custody of the surviving spouse pursuant to 38 U.S.C. § 5307(b) would also cease, because apportionment under that statute is only authorized for benefits “otherwise payable to the surviving spouse.” However, if a child of a deceased veteran has independent eligibility for DIC or improved death pension, the child would not be barred from receiving the benefits, notwithstanding the fugitive status of the surviving spouse, because, while the child would fit the definition of “dependent” under section 5313B(b)(3), neither the child nor the veteran would be a fugitive felon.

4. The operation of these rules in the case of DIC would be as follows. If a surviving spouse is in receipt of DIC with additional benefits payable for children of the veteran under 38 U.S.C. § 1311(b), and the surviving spouse becomes a fugitive felon, the full amount of the award, including any amounts being apportioned under 38 U.S.C. § 5307(b) to children not in the surviving spouse’s custody, would cease. However, when the surviving spouse loses eligibility for DIC by operation of section 5313B, the children would become eligible for DIC in their own right under 38 U.S.C. § 1313(a) because there would be “no surviving spouse of a deceased veteran entitled to [DIC]” and an award to the children would not be barred by section 5313B as they are not fugitive felons or the dependents of a veteran who is a fugitive felon. A similar result would occur in the case of benefits under the improved pension program, where, pursuant to 38 U.S.C. § 1542, the children of a deceased veteran may qualify for death pension in their own right if they are “not in the custody of a surviving spouse eligible for pension.” Children who become eligible in their own right should make application for the benefits.

5. Turning to the question of the effect on the benefits payable to other children of a veteran when the benefits of one such child are terminated under 38 U.S.C. § 5313B because the child is a fugitive felon, that statute does not address the issue, and reference must be made to the statutes governing entitlement to particular benefits. In the case of improved pension, the benefits payable to other children will not be affected because, under 38 U.S.C. § 1542, the amount of benefits payable to any particular child of a veteran is not affected by the number of other children of that veteran who may qualify for pension benefits. With regard to DIC, 38 U.S.C. § 1313(a) provides that a specified monthly amount of DIC, based on the number of children “shall be paid in equal shares to the children of the deceased veteran.” The statute makes no provision for increasing the shares of other children when one of the children loses eligibility, so long as the child who loses eligibility continues to meet the definition of a child for title 38 purposes. Section 3.704 (a) of title 38, Code of Federal Regulations, which addresses a situation somewhat analogous to this one, provides that where one child loses eligibility for a monthly benefit due to the election of another benefit, that action generally does not serve to increase the benefit payable to the other children who retain their eligibility for the benefit in question. Accordingly, we conclude that the amount of DIC payable to other children of a veteran when one child loses eligibility by operation of 38 U.S.C. § 5313B does not change, the amount payable to each entitled child being computed based on the number of children who would be eligible but for section 5313B.

HELD:

A. If a surviving spouse of a veteran becomes a fugitive felon and consequently loses eligibility for dependency and indemnity compensation (DIC) or improved death pension benefits by operation of 38 U.S.C. § 5313B, additional benefits payable to the surviving spouse for children of the veteran would cease. Statutes governing DIC, 38 U.S.C. § 1313(a), and improved death pension, 38 U.S.C. § 1542, provide independent eligibility for a veteran’s children where there is no surviving spouse eligible for benefits. Thus, the children may receive benefits in their own right.

B. If a veteran’s child in receipt of improved death pension benefits loses eligibility for those benefits by operation of 38 U.S.C. § 5313B upon becoming a fugitive felon, the improved pension benefits payable to other children of the veteran would not be affected. Similarly, in the case of DIC, as long as the child who loses eligibility under 38 U.S.C. § 5313B continues to meet the definition of child for title 38 purposes, the shares of other children receiving DIC will not increase.

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