

CITATION: VAOPGCPREC 9-89
Vet. Aff. Op. Gen. Couns. Prec. 9-89

Date: 5-1-89

TEXT:

Subject: Time Period for Filing Claim for Burial Benefits for Death from Service-Connected Disability—

1. You have requested our opinion as to whether the two-year time limit in 38 U.S.C. § 904 and 38 C.F.R. § 3.1601(a) for filing claims for burial benefits applies to claims under 38 U.S.C. § 907 for benefits based on death from service-connected disability. For the reasons set forth below, we conclude that it does not.

2. The veteran died November 28, 1984, and was buried in a private cemetery on November 30, 1984. On December 14, 1984, a VA Form 21-530, 'Application for Burial Benefits,' was filed. The claimant was the cemetery director; the veteran's surviving spouse signed as the person authorizing the charges. On January 2, 1985, a VA Form 21-534, 'Application for Dependency and Indemnity Compensation. . .,' was filed by the surviving spouse. On January 28, 1985, the Regional Office determined that the veteran's death was not as a result of service. On January 30, 1985, an award of \$150.00 was authorized for a plot allowance, with the notation that there was no evidence of service connection for the cause of death. On February 6, 1985, the surviving spouse was informed that no death benefits were payable because the evidence did not establish that the veteran's death was due to a service-connected disability. On February 25, 1985, the surviving spouse was informed by a form letter that only a \$150 plot allowance was paid to the cemetery; the letter repeated that VA had no evidence to show that the veteran's death was due to a service-connected condition.

3. On July 1, 1985, the surviving spouse filed a Notice of Disagreement with respect to the denial of service-connection for the veteran's death. On May 19, 1987, the Board ruled that death was as a result of service. A DIC award letter was sent to the surviving spouse on July 14, 1987. By letter dated July 16, 1987, the Regional Office sent the surviving spouse a VA Form 21-530 and requested that the surviving spouse 'complete and return the form to this office for processing, since the veteran's death has been determined to be service connected.' The surviving spouse filed this form on August 11, 1987. By letter dated October 13, 1987, the surviving spouse was informed the claim was denied because it was filed more than two years after 'death or cremation.' On July 29, 1988, the Board denied the appeal based upon a mistaken (as discussed below) view that a statutory limitation period had lapsed before the claim was filed. The claim is now before the Board on reconsideration.

4. Section 907 of title 38, U.S. Code, provides in pertinent part as follows: In any case in which a veteran dies as the result of a service-connected disability or disabilities, the

Administrator, upon the request of the survivors of such veteran, shall pay the burial and funeral expenses incurred in connection with the death of the veteran in an amount not exceeding . . . \$1,500 Funeral and burial benefits provided under this section shall be in lieu of any benefits authorized under sections 902 and 903(a)(1) and (b) of this title. Section 907 does not provide a time limit for filing claims, nor does any statute prescribing time limitations refer to section 907.

5. The regulations governing burial allowance are found at 38 C.F.R. §§ 3.1600-3.1610. In pertinent part, 38 C.F.R. § 3.1600(a) provides that, in lieu of other burial or plot allowances, if a veteran dies as a result of a service-connected disability or disabilities, an amount not to exceed the amount specified in 38 U.S.C. § 907 . . . may be paid toward the veteran's funeral and burial expenses Entitlement to this benefit is subject to the applicable further provisions of this section and §§ 3.1601 through 3.1610. . . (38 U.S.C. § 907) (Emphasis added). Section 3.1601(a) of that title provides in relevant part that ' claims for reimbursement or direct payment of burial and funeral expenses, transportation of the body, and plot or interment allowance, must be received by the Department of Veterans Affairs within 2 years after the permanent burial or cremation of the body. . . . (38 U.S.C. § 904) In its decision, the Board interpreted these regulations to mean that the two-year filing period applies to claims for service-connected death benefits under 38 U.S.C. § 907.

6. Until 1973, there was a single monetary benefit available to cover veterans' funeral and burial expenses. This benefit provided no plot allowance and drew no distinction between the funeral and burial benefits paid on behalf of veterans who died from service-connected causes and those who died from nonservice-connected causes. For most veterans, this benefit was provided as a reimbursement of expenses, subject to a dollar limit, as set forth in 38 U.S.C. § 902. In the special case of a veteran who died in a VA facility, 38 U.S.C. § 903 generally required (and still requires) the Administrator to pay the actual cost of such a veteran's burial and funeral, not to exceed \$300. Under 38 U.S.C. § 904 claims under section 902 must be filed within two years after the burial of the veteran. A similar restriction has been embodied in predecessor statutes since the early days of VA. E.g., Act of June 29, 1936, Ch. 867, s 402, 49 Stat. 2031, 2034. This two-year limitation period was reflected in VA regulations for many years under a regulation denominated VA Regulation 2692, a predecessor to 38 C.F.R. §§ 3.1600 and 3.1601.

7. The National Cemeteries Act of 1973, Pub. L. No. 93-43, s 5, 87 Stat. 75, 80, made two major changes to burial benefits: First, it added section 907 to title 38, United States Code, to provide, for the first time, a separate and greater burial benefit for veterans who died as a result of service-connected disabilities. Second, it amended 38 U.S.C. § 903--adding section 903(b)--to provide a plot allowance, in addition to burial and funeral benefits, in the case of veterans eligible for benefits under section 902 or 903. As a result of this Act, 38 C.F.R. § 3.1600(a) was amended to add a parenthetical reference to the greater benefit for service-connected death. 38 Fed. Reg. 30,105, 30,106 (1973). At the same time, 38 C.F.R. § 3.1601(a) was amended to include claims for plot allowance in those claims subject to a two-year limitation. This 1973 regulatory

amendment, however, made no specific reference to time limitations for filing claims under section 907.

8. In 1981, Pub. L. No. 97-35, s 2001, 95 Stat. 357, 781, amended 38 U.S.C. § 902 to restrict payment of the nonservice-connected-death burial allowance to veterans who, at the time of their death, were in receipt of pension or compensation. Shortly thereafter, 38 C.F.R. § 3.1600(a) was amended to read in a manner similar to the language set forth in paragraph 5, supra. In its explanation of this change, the Agency stated that ' t his regulation conforms strictly to Pub. L. 97-35, and adds no regulatory burdens not already imposed by that law.' 47 Fed. Reg. 11,012 (1982).

9. Section 907 contains no time limit for filing claims. The section-904 time limit predated establishment of the section-907 benefit. There is no evidence in the legislative history of Pub. L. No. 93-43 that Congress intended to extend application of the section-904 time period to section 907 claims. See generally, e.g., S. Rep. No. 93-55, 93d Cong., 1st Sess., reprinted in 1973 U.S. Code Cong. & Admin. News 1401, 1417-18, 1423. Further, the familiar principle of *expressio unius est exclusio alterius* suggests claims under section 907 should not be subjected to the time limitation of section 904, which is specifically directed to claims under section 902. See 2A N.J. Singer, Sutherland Statutory Construction § 47.23 (4th ed. 1984). Indeed, the fact that Congress could have amended section 904 to include a reference to section 907 at the time of enactment of the latter section, but chose not to do so, is some evidence that no such implication was intended. 73 Am. Jur. 2d Statutes s 169 (1974). The service-connected allowance in new section 907 was added separately, as a new benefit, and is specifically exclusive from benefits under section 902 and 903(b). 1/ There is thus nothing in either the language or history of the sections in question which suggests that the limitation period in section 904 should apply to section-907 claims.

10. It has been observed that, where a statute does not contain a time limit, 'the courts are loath to infer that the legislature intended that administrative proceedings in matters of private rights shall not be barred by the lapse of time as are judicial proceedings.' 2 Am. Jur. 2d Administrative Law § 322 (1962). However, the same source notes that, in some situations, 'there may be no statutory time limitations applicable to particular administrative proceedings and the question of whether or not there is a bar by time may turn on the question of laches'. Id. § 321. In this regard, we note that there are other veterans' benefits as to which there are no statutory time limitations for filing claims. See, e.g., 38 U.S.C. § 1902 (no time limit for claims for automotive adaptive equipment); 38 U.S.C. § 1802 (no time limit for use of home loan guaranty benefit).

11. When there is no period of limitations in the statute under review, courts have on occasion borrowed statutes of limitations from analogous statutes. 3A N.J. Singer, Sutherland Statutory Construction § 70.03 (4th ed. 1986). It appears that the limitation period in section 904 has, without explanation, been assumed to have been 'borrowed' and to apply to claims under section 907. However we do not believe it would be equitable to impose section 904's two-year standard on claims for section-907 benefits. Benefits under section 907 are conditioned upon an adjudication of death as

the result of service. An adjudication of service-connected death will always involve the rating board, will often require time for development, and will frequently involve an appeal to the Board of Veterans Appeals. 2/ Claims involving denial of service connection by the regional office and appeal to the Board may entail a processing time close to two years. As exemplified by the subject claim, potential burial-benefit claimants may be lulled into inactivity by the knowledge that a cemetery director has filed a burial-benefit claim and, as happened here, not be informed of the need to file a separate claim until after the lengthy adjudication process has run its course. In light of this, we do not consider it appropriate to artificially construct a limitation period for claiming section-907 benefits.

12. Regardless of what authority VA may have to set reasonable time limits in connection with claims for benefits consistent with applicable statutes, see generally 38 U.S.C. § 210(c); *Durant v. United States*, 749 F.2d 1554 (111th Cir.1985) (per curiam), VA is not authorized to promulgate regulations at odds with Congress' intention. Further, the history of the regulatory provisions at issue here reveals no specific intent to impose a time limit on section-907 claims. Indeed, it is not clear that, in framing the 1973 amendments to sections 3.1600 and 3.1601, VA even considered the question of extending the limitation period to section-907 benefits. Finally, as noted above, the 1981 regulatory amendment was explicitly intended to do no more than implement the restriction on nonservice-connected burial allowance. No effect on section-907 claims was intended.

13. HELD: The relevant statutes in title 38, chapter 23, prescribe no period for filing section-907 benefit claims, and the history of those statutes suggests no intention to establish such a period. In implementing those statutes, VA does not appear to have formally addressed the issue of whether the section-904 filing limit should be extended to claims for section-907 benefits. In addition, section 907 has been made specifically exclusive of the claims governed by section 902. For these reasons, we conclude that the two-year limitation in section 904 does not apply to claims under section 907. Further, we conclude that, to the extent VA regulations purport to impose a limitation period on section-907 claims, such regulations are invalid. Accordingly, there currently is no limitation period applicable to the section- 907 benefit.

1 Because the plot allowance added in section 903(b) by Pub. L. No. 93-43 was explicitly made an adjunct to the section-902 benefit, VA's incorporation of the two-year limitation in 38 C.F.R. § 3.1601(a) with respect to claims for plot allowance may be consistent with the statutory scheme. At least from 1973-81, that interpretation may have been mandatory. Under the language of the National Cemeteries Act of 1973, entitlement to the plot allowance was conditioned on entitlement to benefits under section 902 or 903(a). Generally, section 904 makes filing a claim within two years a condition of eligibility under section 902. See Op. Sol. 249-51 (6-20-51). Since most veterans do not die in VA facilities, the two-year time limit would necessarily have applied to plot allowance claims for most veterans.

2 While payment of a plot allowance is also conditioned upon an adjudication, the determination of whether, for example, an individual was a wartime veteran--the most broadly applicable eligibility criterion for the plot allowance--is easily made by a review of documents readily available to survivors and does not involve the participation of the rating board