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TEXT:

Entitlement to Burial Benefits Following Change in Law--Pub. L. No. 95-202; Pub. L. No. 100-321

QUESTIONS PRESENTED:

(a) With regard to the availability of burial benefits based on service in the American Merchant Marine in Oceangoing Service:

(1) Does entitlement to burial benefits, including benefits under 38 U.S.C. § 906 (d), exist if death and burial occurred prior to the date of recognition of service under the provisions of Pub. L. No. 95-202?

(2) Does entitlement to burial benefits exist when death occurred prior to and burial was on or after the date of recognition of service?

(3) If entitlement to burial benefits exists regardless of the date of death or burial, what determines the rate of payment of the benefit: the date of burial; the date of recognition of service under Pub. L. No. 95-202; the date the individual's application for discharge is received by the military service; or, the date a discharge is issued by the military service?

(b) With regard to the availability of burial benefits for service-connected death under 38 U.S.C. § 907 when a veteran's death is adjudged service-connected solely on the basis of the presumptions for radiogenic diseases set forth in 38 U.S.C. § 312(c)(2):

(1) Is the greater service-connected burial benefit payable if death and burial occurred prior to the effective date of Pub. L. No. 100-321?

(2) Is the greater service-connected burial benefit payable when death occurred prior to the effective date of Pub. L. No. 100-321 and burial was on or after that date?

(3) If the greater service-connected burial benefit is payable, what determines the rate of payment: the date of burial; or, the effective date of the law?

COMMENTS:

1. There are several types of monetary burial benefits available based on veterans' deaths. Generally, under 38 U.S.C. § 902(a), an allowance for the expenses of burial (not to exceed \$300) is payable on behalf of veterans who, at the time of death, were in receipt of compensation or pension. For the benefit of wartime veterans, veterans entitled under section 902, and certain other veterans, 38 U.S.C. § 903(b) provides a plot allowance not to exceed \$150. Under 38 U.S.C. § 907, survivors of veterans who die of a service-connected disability are entitled to reimbursement of burial and interment costs not to exceed \$1,500; this reimbursement is in lieu of any benefits under 38 U.S.C. §§ 902 and 903. Under 38 U.S.C. s 906(d), an allowance may be paid as reimbursement for non-government headstones and markers. Finally, under 38 U.S.C. § 908 reimbursement for the cost of transportation for burial in a national cemetery is available in the case of veterans who were receiving disability compensation at the time of death or who died as the result of a service-connected disability.

2. Former members of the American Merchant Marine in Oceangoing Service, who served between December 7, 1941, and August 15, 1945, became eligible for veterans' benefits on January 19, 1988, as a result of the decision of the Secretary of the Air Force under the authority of section 401 of Pub. L. No. 95-202, 91 Stat. 1433, 1449-50 (1977), 38 U.S.C. § 106 note. See 53 Fed. Reg. 2,775 (1988) (announcement). Section 401(a)(1) of that act provides in part as follows:

Notwithstanding any other provision of law, the service of any person as a member of the Women's Air Forces Service Pilots ... or the service of any person in any other similarly situated to the Armed Forces of the United States in a capacity considered civilian employment or contractual service at the time such service was rendered, shall be considered active duty for the purposes of all laws administered by the Department of Veterans Affairs if the Secretary of Defense, pursuant to regulations which the Secretary shall prescribe, ... determines, on the basis of judicial and other appropriate precedent, that the service of such group constituted active military service, and ... issues to each member of such group a discharge from such service under honorable conditions where the nature and duration of the service of such member so warrants.

See 32 C.F.R. §§ 47.1-47.7 (Department of Defense implementing regulations for determination of active military service). Section 401(b)(1) of Pub. L. No. 95-202, 91 Stat. at 1450, provides that " no benefits shall be paid to any person for any period prior to the date of enactment of this title as a result of the enactment of subsection (a) of this section." The act was approved November 23, 1977.

3. The changes mandated by Pub. L. No. 95-202 were implemented by VA by the addition of 38 C.F.R. § 3.7(x). That regulation includes as veterans those

with active military service certified as such by the Secretary of Defense under section 401 of Pub. L. No. 95-202 if the Secretary of Defense issues a discharge under honorable conditions. The regulation further provides that effective dates for an award based upon such service shall be as provided by 38 C.F.R. § 3.400(z) (generally setting the later of date of claim or date entitlement arose as the effective date) and 38 U.S.C. § 3010 (relating to effective dates in general). Finally, the regulation provides "that in no event shall such an award be made effective earlier than November 23, 1977." Neither the law nor the implementing regulations speak directly to the subject of burial benefits.

4. Generally, in the absence of unmistakable legislative intent to the contrary, statutes affecting substantive rights and liabilities are not retroactively effective, Bennett v. United States, 470 U.S. 632, 638-641 (1985); Alaska Pipeline Service v. United States, 624 F.2d 1005, 1013 (Ct.Cl.1980); 73 Am.Jur.2d Statutes § 350 (1974); 2 N. Singer, Sutherland Statutory Construction § 41.04 (4th ed.1986), and an act of Congress takes effect from its date of enactment unless the act itself provides a different date. See generally 73 Am. Jur.2d Statutes § 361 (1974). VA has consistently held that retroactive payments may not be made under statutes authorizing new benefits or classes of beneficiaries unless there is authority for such payments in the statute. A.D. No. 665 (1945); Op. Sol. 249-51 (6-20-51); Op. Sol. 248-51 (6-20-51). In the case of Pub. L. No. 95-202, the statute explicitly states that no benefits may be paid "for any period" prior to its enactment, i.e., November 23, 1977.

5. The legislative history of Pub. L. No. 95-202 provides no evidence of an intent that the statute operate retroactively. The original Senate bill, S. 247, would have made Women's Air Forces Service Pilot's (WASP) eligible for veterans' benefits. The concept of the Secretary of Defense certifying groups emerged as a House-Senate compromise shortly before final passage, with no VA comment until this procedure was part of an enrolled enactment. Although VA did comment on earlier versions of the "WASP" provision in H.R. 3277 and S. 247, 95th Congress, the issue of retroactive burial benefits does not seem to have been considered. Finally, the internal VA records which reveal some discussion about burial benefits as a result of these bills do not indicate that any cost estimate was made based on the assumption that retroactive burial benefits would be authorized.

6. VA regulations touching on retroactivity are consistent with the above-referenced principles but generally apply only to effective dates of compensation and pension awards. Under 38 C.F.R. § 3.7(x), effective dates of awards based on active service certified under Pub. L. No. 95-202 are to be determined under 38 U.S.C. § 3010 and 38 C.F.R. § 3.400(z). Under 38 U.S.C. § 3010(g), where compensation, pension, or DIC is awarded pursuant to an act of Congress or administrative issue, the effective date of such an award may not be prior to the effective date of the Act or issue; subject to that restriction, VA may authorize such benefits for up to one year prior to the date of claim. Under 38 C.F.R. §

3.400(z), it is generally the rule that benefits may not be authorized prior to the later of the date of claim or the date entitlement arose. That regulation incorporates by reference the balance of 38 C.F.R. § 3.400; in turn, 38 C.F.R. § 3.400(p), incorporates 38 C.F.R. § 3.114, subsection (a) of which, like 38 U.S.C. § 3010(g), provides that, when benefits are payable based on a change in law or departmental issue, the effective date for an award of benefits is the earlier of the date of claim or up to one year prior to the date of claim if filed within one year of the change. In no event, however, can benefits be authorized for any period prior to the effective date of the change. Like 38 U.S.C. § 3010(g), sections 3.114 and 3.400 of title 38, Code of Federal Regulations, apply by their terms only to compensation, DIC, and pension. Further, as they deal specifically with effective dates of awards, a concept inapplicable to one-time benefits, their relevance to the award of burial benefits is limited. The regulations governing burial benefits, 38 C.F.R. § 3.1600, et seq., do not address the issue of retroactivity.

7. Pertinent VA legal opinions have indicated that, while a change of discharge by competent authority can bestow veterans' benefits eligibility from the original date of separation from service, the retroactive payment of benefits is a matter of statutory construction. A.D. No. 665 (1945). This principle has been held to apply not only to recurring payments, such as compensation and pension, A.D. No. 665 (1945), and death compensation, A.D. No. 807 (1949), but also to one-time payments such as burial benefits, Op. Sol. 249- 51 (6-20-51). Accordingly, even if a corrected discharge is considered to have been in effect for a given period, retroactive benefits cannot be paid based on that discharge in the absence of statutory authority.

8. We are aware of one instance in which the General Counsel has found authority for retroactive payment of burial benefits. In Op. G.C. 14-75 (7-31- 75), we considered a claim for burial benefits under 38 U.S.C. § 902 based on the service of a former member of the Russian Railway Service Corps (RRSC) who became eligible for benefits by virtue of the decision in Hoskin v. Resor, 324 F. Supp. 271 (D.D.C.1971), aff'd, No. 71-1513 (D.C.Cir.1973) (unreported), which resulted in the issuance of a posthumous discharge. While the Hoskin court did not discuss either retroactive benefits or burial benefits, it did hold that the service of members of the RRSC was of such a nature that they were entitled to receive honorable discharges. The question presented in Op. G.C. 14-75 was whether a burial claim would be timely if filed two years and 14 days after the date of burial, but within two years after the issuance of the court decision. We held as follows:

The combined effect of the affirmed court decision and issuance of the honorable discharge certificate in this case was to establish eligibility that had not existed at the veteran's death. In my opinion this is tantamount to a correction of discharge within the purview of 38 U.S.C. § 904. I therefore feel that an acceptable

application for burial allowance under 38 U.S.C. 904 may be filed within two years after issuance of the "corrected" discharge certificate.

9. The conclusion reached in Op. G.C. 14-75 is not clearly supported by the applicable language in 38 U.S.C. § 904 or its legislative history. The second sentence of section 904 was added by Pub. L. No. 88-3, 77 Stat. 4 (1963). The Senate Finance Committee report indicates only that the sentence is applicable to situations in which "a veteran's discharge has been corrected, after death, to one under conditions other than dishonorable." S. Rep. No. 68, 88th Cong., 1st Sess., reprinted in 1963 U.S. Code Cong. & Admin. News 616. Moreover, the report of the Veterans Administration, in which the Committee concurred, stated that the bill was "directed toward the situation where a discharge originally issued under conditions other than honorable is corrected by competent authority after the veteran's death." *Id.*, 1963 U.S. Code Cong. & Admin. News at 617. It is far from clear that the language of section 904, which applies to the "correction" of a discharge, is also applicable to a situation, such as this, in which there was no "original" discharge issued.

10. In any event, the basis of benefit entitlement created under Pub. L. No. 95-202 is distinguishable from that of the RRSC. The basis for the Hoskin decision was that the members of the RRSC were actually members of the Army. 324 F. Supp. at 279-90. Under Pub. L. No. 95-202, on the other hand, the attributes of a civilian group are examined to determine whether that group's service constituted active military service. Unlike the RRSC veterans, there is no question that groups such as the WASP's and the Merchant Marine were considered to have served in a civilian capacity. Finally, Op. G.C. 14-75 was based on entitlement established under a judicial decision, rather than a statute subject to the general rules limiting retroactivity. In this case, section 401(b)(1) of Pub. L. No. 95-202 specifically provides that no benefits are to be paid for any period prior to the date of enactment of that statute. For these reasons, we do not consider Op. G.C. 14-75 helpful in determining issues of retroactivity with respect to Pub. L. No. 95-202.

11. Applying the above-described principles to the issue presented in question (a)(1), we find an absence of legislative intent that Pub. L. No. 95-202 authorize payment of benefits for any period prior to the date of its enactment. Further, the terms of the statute explicitly state that no benefits shall be paid "for any period prior to the date of enactment" of that law as a result of its enactment. We consider the plain meaning of the term "for any period" to encompass payment of a benefit which represents reimbursement for costs incurred within a given period, e.g., for burial expenses incurred prior to November 23, 1987. Accordingly, we conclude that in no event is payment of burial benefits based on Pub. L. No. 95-202 authorized where events purportedly giving rise to entitlement occurred prior to November 23, 1977.

12. Pursuant to section 401 of Pub. L. No. 95-202, eligibility for VA benefits is conditioned on a determination by the Secretary of Defense that a class of individuals meets appropriate standards and upon issuance by the Defense Department of an appropriate discharge. In the case of the American Merchant Marine in Oceangoing Service, the Secretary did not make a determination until January 19, 1988, and discharges could not be issued until after that date. In light of VA's longstanding interpretation that retroactive benefits are not payable in the absence of specific authorization, a significant question arises whether the date of the Secretary's determination or the date of issuance of a discharge, rather than the date of enactment of Pub. L. No. 95-202, should be the operative date limiting retroactivity. We observe that section 3010(g), limiting retroactive effective dates in awards based on administrative issues, applies by its terms only to effective dates of awards of compensation, DIC, and pension. See also 38 C.F.R. § 3.114 and 3.400(p) (which are similarly limited in scope and which further refer only to VA issues, rather than those of other agencies such as the Defense Department). Further, under widely accepted principles of statutory construction, a statute should be construed so as to give effect to all of its provisions. 2A N. Singer, Sutherland Statutory Construction § 46.06 (4th ed.1984). Congress was no doubt aware in enacting section 401(b) of Pub. L. No. 95-202 that 38 U.S.C. § 3010(g) already limited retroactive payments based on administrative issues in compensation, DIC, and pension claims. If Congress intended that the date of the Secretary of Defense's determination or the date of issuance of a discharge were to control in the award of other benefits such as burial benefits, section 401(b) would be superfluous. Thus, giving effect to VA's established policy of applying the law under a liberal interpretation for the benefit of veterans and their survivors, we find the inclusion of that provision as indicative of Congress' intention that the date of enactment of Pub. L. No. 95-202, not some later date, be the controlling date for purposes of burial-benefit eligibility and that by including that provision Congress authorized payment of burial benefits based on events occurring after that date. In so holding, we note that nothing in Pub. L. No. 95-202 overrides the limitations in 38 U.S.C. § 3010 applicable to establishment of effective date for periodic benefits.

13. As to whether the date of death or date of burial is controlling for purposes of application of the limit on retroactivity, the provisions of chapter 23 of title 38, U.S. Code, generally provide that burial benefits will be paid as reimbursement for costs incurred for burial, funeral, and transportation expenses of a deceased veteran. See, e.g., 38 U.S.C. §§ 903(b) (payment conditioned on burial under specified circumstances), 906(d) (reimbursement for actual costs in acquiring non-government headstone or marker in connection with burial), and 908 (payment of cost of transportation for burial in a national cemetery); see also 38 U.S.C. § 904 (application deadline based on date of burial). Because payment of burial benefits is associated under chapter 23 with the burial itself. We consider date of burial, rather than date of death, as determinative in assessing eligibility based on either Pub. L. No. 95-202 or Pub. L. No. 100-321.

14. Regarding the appropriate rate of payment, per question (a)(3), above, Pub. L. No. 95-202 provides no guidance as to the applicable rate. Since November 23, 1977, burial-benefits rates have been modified on two occasions. Pub. L. No. 95-479, § 303, 92 Stat. 1560, 1565 (1978), increased from \$250 to \$300 benefits payable under 38 U.S.C. §§ 902(a) and 903(a)(1) for non-service-connected burial and funeral expenses and raised the maximum amount payable under 38 U.S.C. § 907 for burial and funeral expenses for service-connected deaths from \$800 to \$1,100. Pub. L. No. 100-322, § 303, 102 Stat. 487, 534 (1988), further increased the section 907 maximum to \$1,500. Also, Pub. L. No. 95-476, § 203, 92 Stat. 1497, 1505 (1978), added 38 U.S.C. § 906(d), creating new authority for reimbursement for non-government headstones and markers.

15. Section 303 of Pub. L. No. 95-479 became effective on October 1, 1978. Pub. L. No. 95-479, s 401(a), 92 Stat. at 1566. The amendments made by section 303 were intended to make burial benefits more closely approximate then current funeral costs. See, e.g., S. Rep. No. 95-1054, 95th Cong., 2d Sess. 32, reprinted in 1978 U.S. Code Cong. & Admin. News 3465, 3490. There is no suggestion in the terms of the statute or in its legislative history to suggest Congress intended the amendments to have retroactive effect beyond October 1, 1978.

16. Section 304 of Pub. L. No. 100-322, 102 Stat. 534, provided that the increase in the section 907 maximum benefit made by section 303 of that law would take effect on April 1, 1988. This change was also intended to assure that reimbursements more closely reflected the then current costs of funerals. S. Rep. No. 100-215, 100th Cong., 1st Sess. 69 (1987). There is no suggestion in the statute or its legislative history that the amendment was to be applied retroactively prior to April 1, 1988.

17. Finally, the authority for reimbursement for non-government headstones and markers in section 203 of Pub. L. No. 95-476 was specifically made effective on the date of enactment of the statute, i.e., October 18, 1978. Pub. L. No. 95-476, s 205(a), 92 Stat. at 1506. This authority was added by a Senate/House conference committee without reference to effective dates. Explanatory Statement on H.R. 12028, 124 Cong. Rec. S 16907 (daily ed. October 2, 1978), reprinted in 1978 U.S. Code Cong. & Admin. News 3383, 3387. Again, there is no indication that Congress intended this new substantive authority to have retroactive effect. Applying the above-described principles governing retroactivity of laws affecting substantive rights, we conclude that the increased benefit rates payable under Pub. L. No. 95-479, § 303, and Pub. L. No. 100-322, § 303, and the entitlement created by Pub. L. No. 96-476, § 203, are applicable only where burial occurs on or after the respective effective dates of those provisions as stated in the cited statutes.

18. With respect to your questions concerning Pub. L. No. 100-321, 102 Stat. 485 (1988), section 2 of that statute added subsection (c) to 38.U.S.C. § 312

providing presumptions of service connection with respect to certain diseases incurred by certain veterans who may have been exposed to ionizing radiation. The law further provided that this new subsection "shall take effect on May 1, 1988." Pub. L. No. 100-321, § 2(b), 38 U.S.C. § 312 note.

19. Although the May 1, 1988, effective date was several days prior to the date of the statute's approval by the President on May 20, 1988, there is no indication in the terms of the statute that Congress intended the statute to have any further effect in authorizing retroactive benefits. Nor does the legislative history support inference of such an intent. The House Committee on Veterans' Affairs did note in its report on the legislation that, although the bill as reported included a prospective effective date of October 1, 1987, for payment of benefits, "it is the Committee's intention that disability and/or death benefits can be paid beginning in October 1987 for disabilities or deaths which occurred prior to that date." H.R. Rep. No. 100-235, 100th Cong., 1st Sess. 4 (1987), reprinted in 1988 U.S. Code Cong. & Admin. News 412, 415. However, it does not appear that the Committee intended by this statement to suggest that burial benefits could be paid after the statute's effective date for burials which occurred prior to that date.

Rather, the Committee report indicates that the Committee had focused its attention solely on payment of compensation and DIC benefits and had not considered burial-benefit eligibility. H.R. Rep. No. 100-235, *supra* at 2, 1988 U.S. Code Cong. & Admin. News at 413. See also Congressional Budget Office cost estimate, H.R. Rep. No. 100-235, *supra* at 6, 1988 U.S. Code Cong. & Admin. News at 416 (computing costs for compensation and DIC benefits only).

20. As explained above in paragraph 4, a statute is not considered retroactively effective in the absence of unmistakable legislative intent. Since Congress does not appear to have considered the prospect of retroactive burial benefits in enacting Pub. L. No. 100-321, we find no evidence of such unmistakable intent here. Accordingly, we find no authority for payment of burial benefits on behalf of veterans who died from disabilities service connected under Pub. L. No. 100-321, where burial occurred prior to May 1, 1988. In light of this conclusion, no response to question (b)(3), above, is necessary.

HELD:

(a) Public Law No. 95-202, under which the American Merchant Marine in Oceangoing Service was recognized by the Secretary of Defense as having performed active service for purposes of VA benefits, provides that no benefits shall be paid as a result of its enactment for any period prior to the date of enactment, i.e., November 23, 1977. Burial benefits under chapter 23, title 38 U.S. Code, including burial and plot allowance, reimbursement for non-government headstones and markers, and reimbursement for the cost of transportation for burial in a national cemetery, may not be paid based on burials which occurred prior to that date. However, such benefits may generally be paid for burials occurring on or after that date without regard to the date of the

Secretary of Defense's determination of recognition or the date of issuance of a discharge by the Department of Defense. Reimbursement for the cost of a non-government headstone or marker pursuant to 38 U.S.C. § 906(d) is subject to the further limitation that burial must have occurred on or after October 18, 1978, the effective date of the statutory authority for such reimbursement. Payment of the increased non-service-connected burial and funeral benefit of \$300, authorized by Pub. L. No. 95-479 (38 U.S.C. §§ 902(a) and 903(a)(1)), is authorized only for burials occurring on or after October 1, 1978. Claims under 38 U.S.C. § 907 for burial and funeral expenses for service-connected death are subject to the increased maximum rate of reimbursement of \$1,100 provided under Public Law No. 95-479 only if burial occurred on or after October 1, 1978, and to the increased maximum rate of \$1,500 provided under Public Law No. 100-322 only if burial occurred on or after April 1, 1988.

(b) Public Law No. 100-321 added a new subsection (c) to 38 U.S.C. § 312, providing presumptions of service connection for certain diseases incurred by certain veterans who may have been exposed to ionizing radiation in service. Burial benefits for service-connected death, payable under 38 U.S.C. § 907 are not available where burial occurred prior to May 1, 1988, the effective date of Public Law No. 100-321.

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