

CITATION: VAOPGCPREC 17-90
Vet. Aff. Op. Gen. Couns. Prec. 17-90

DATE: 06-13-90

TEXT:

SUBJECT: Time Period for Filing Claims for Reimbursement of Plot, Transportation, and Headstone Expenses

(Originally issued as O.G.C. Conclusive 7-89, July 31, 1989)

QUESTION PRESENTED:

Are the respective two-year time limits, established by VA regulations for the filing of claims for entitlement to the following benefits, valid: (a) plot allowance under 38 U.S.C. § 903(b); (b) monetary allowance in lieu of a headstone or grave marker under 38 U.S.C. § 906(d); and, (c) allowance for transportation of a deceased veteran to a national cemetery under 38 U.S.C. § 908?

COMMENTS:

1. For the reasons set forth below, we conclude that the two-year regulatory limit is valid only with respect to claims for the section 903(b) plot allowance.
2. Our opinion of May 1, 1989, to the Chairman, Board of Veterans Appeals, O.G.C. Prec. 9-89, concluded that the two-year limitation period for burial- benefit claims at 38 U.S.C. § 904 does not apply to claims under section 907 for the greater funeral and burial benefits available when the cause of death is service-connected. The opinion further held that VA regulations purporting to impose such a limitation period on section-907 claims were invalid, and, consequently, there is no limitation period applicable to the section-907 benefit. The opinion stated that the relevant statutes in title 38, chapter 23, prescribe no period for filing section-907 benefit claims and that the statutes' history suggests no intention to establish such a period. Further, the opinion pointed out that VA did not appear to have formally addressed the issue of whether the section-904 filing limit should be extended to claims under section 907, which had been made specifically exclusive of claims governed by section 902.
3. Section 908 of title 38, U.S. Code, provides, in pertinent part, as follows:

Where a veteran dies as the result of a service-connected disability, or is in receipt of (but for the receipt of retirement pay or pension under this title would have been entitled to) disability compensation, the Secretary may pay, in

addition to any amount paid pursuant to section 902 or 907 of this title, the cost of transportation of the deceased veteran for burial in a national cemetery.

Section 908 provides no time limit for filing claims, and no other statute prescribes any time limitation for a section-908 claim.

4. Section 3.1601(a) of title 38 Code of Federal Regulations, provides in relevant part that "claims for reimbursement or direct payment of ... 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)" Section 904 provides that claims for reimbursement under section 902 must be filed within two years after burial of the veteran. By its plain language, section 904 applies exclusively to section-902 claims and provides no authority for regulatory imposition of the two-year limitation to section-908 transportation claims. Section 908 was added to title 38, U.S. Code, by Public Law No. 94-433, § 04(a), 90 Stat. 1374, 1377 (1976), to provide for payment of the cost of transportation for burial in a national cemetery of a veteran either dying as the result of service-connected disability or in receipt of disability compensation at death (or entitled to receive such compensation but for receipt of retirement pay or veterans' pension). However, the reference in 38 C.F.R. § 3.1601(a) to claims for "transportation of the body" preceded enactment of the new section 908 and undoubtedly referred to the provision of section 902 concerning "transporting the body to the place of burial." This regulatory wording was not amended to reflect the added statute.

5. We conclude that the analysis applied in O.G.C. Prec. 9-89 in determining that 38 C.F.R. § 3.1601(a) could not validly be applied to section- 907 benefit claims is equally pertinent to claims under section 908. In this respect, your attention is directed to the discussion in paragraphs 9 through 12 of that opinion which outlines factors analogous to those implicated by section-908 claims. In particular, section 908 contains no time limit for filing claims, and the section-904-time limit preceded passage of legislation creating the section-908 benefit. The legislative history of the section-908 benefit evinces no intent to extend the section-904 time period to section-908 claims. See generally, e.g., Senate Report No. 94-1226, 94th Cong., 2d Sess., reprinted in 1976 U.S. Code Cong. & Admin. News 2537, 2538. While Congress could have amended section 904 to include a reference to section 908, it chose not to do so, implying an intent to make no change. Further, the service-connected allowance in section 908 was added separately as a new benefit, and thus is definitively independent of benefits under sections 902 and 903(b). Finally, the wording of 38 C.F.R. § 3.1601(a) was not changed as a consequence of enactment of section 908. This indicates VA did not even consider the question of expanding the two-year limitation period to section-908 benefits. Consequently, we conclude that the two-year limitation period in section 904 does not apply to claims under section 908, and, to the extent that VA regulations purport to impose such a limitation on section-908 claims, they must be considered invalid.

6. Section 906(d) of title 38, U.S. Code, provides, in pertinent part, that:

In lieu of furnishing a headstone or marker ... the Secretary, in the Secretary's discretion, having due regard for the circumstances in each case, may reimburse the person entitled to request such headstone or marker for the actual costs incurred by or on behalf of such person in acquiring a non-Government headstone or marker for placement in any cemetery other than a national cemetery in connection with the burial or memorialization of the deceased individual. Reimbursement under the preceding sentence may be made only upon the request of the person entitled to request the headstone or marker ...

Section 906(d) was added to title 38 by the Veterans' Housing Benefits Act of 1978, Public Law No. 95-476, § 203(a), 92 Stat.1497, 1505. Neither the text, nor legislative history, of section 906(d) reveals any intent to establish a limit for filing claims. See S. Rep. No. 95 1055, 95th Cong., 2d Sess. 23, reprinted in 1978 U.S. Code Cong. & Admin. News 3347, 3362. See also Explanatory Statement on H.R. 12028, 95th Cong., 2d Sess., reprinted in 1978 U.S. Code Cong. & Admin. New 3383, 3387. As part of the implementing regulations for new section 906(d), VA added 38 C.F.R. § 3.1612(g), which reads, in relevant part:

A claim for payment under this section must be received by VA within 2 years after the permanent burial or cremation of the deceased, or the date of purchase of the non-Government headstone or marker or the services for adding the veteran's identifying information on an existing headstone, whichever date is later.... (38 U.S.C. § 906(d))

In promulgating this change, VA cited as statutory authorization only section 906(d). 44 Fed. Reg. 58,710, 58,711 (1979). The basis for the two-year limit was nowhere stated in connection with promulgation of the regulation.

7. Section 906(d) contains no time limits for filing claims. As noted above, its legislative history demonstrates no basis for such a limitation. Section 906 itself originated in the National Cemeteries Act of 1973, Public Law No. 93- 43, § 5, 87 Stat. 75, 80, the same statute which added section 907. The legislative record reveals no intent to impose a time limit on applications for markers or headstones. See generally, e.g., S. Rep. No. 93-55, 93 Cong., 1st Sess., reprinted in 1973 U.S. Code Cong. & Admin. News 1401, 1423. Congress could have amended section 904 upon enactment of either Public Law No. 93-43 or Public Law No. 95-476 to include a time limit for section 906 claims but did not do so.

Further, in drafting section 906(d), Congress specifically addressed the issue of requests for reimbursement, but provided no time limit for filing such requests. Moreover, the section 906(d) benefit is totally independent of benefits under sections 902 and 903(b). We are thus confronted with a situation analogous to that discussed above in respect to section-908 claims. Specifically, as was done

in connection with the section-907 benefit, it appears that the two-year limitation period in section 906(d) has been administratively "borrowed" from section 904 without explanation (see paragraph 11 of O.G.C. Prec. 9-89), although in this case such borrowing was clearly intended by VA.

8. The reasoning set forth above, in support of our determination that a two-year limit for section-908 claims is invalid, leads us to the same conclusion with regard to the section-906(d) benefit. Section 906 specifies no time limit for claims, and the statutory limit in section 904 predated creation of the section 906(d) benefit. Congress could have inserted a claim-filing deadline when enacting section 906(d) but did not do so. Further, the headstone or grave marker allowance is independent of benefits conferred by sections 902 and 903(b). Thus, the time limit for section-906(d) claims promulgated in 38 C.F.R. § 3.1612(g) is inconsistent with the statutory scheme Congress created, and it is invalid.

9. Finally, we turn to the validity of applying the two-year limitation period of 38 C.F.R. s 3.1601(a) to plot-allowance claims filed pursuant to 38 U.S.C. § 903(b). As we noted in O.G.C. Prec. 9-89, the plot allowance was added in section 903(b) by Public Law No. 93-43, § 5, as an adjunct to the section-902 benefit.

Under the terms of Public Law 93-43, § 5, entitlement to the plot allowance provided thereunder was conditioned on benefit entitlement under section 902 as then in force (entitlement based on service-connected death, wartime service, discharge for disability, or death while in receipt of compensation) or section 903(a) (entitlement based on death in a VA facility). Section 904 makes filing a claim within two years of the veteran's burial a condition of section-902 eligibility. From 1973 until enactment of Public Law No. 97-35, s 2001, 95 Stat. 357, 781 (1981), section 902's two-year time limit would clearly have applied to most claims for plot allowance, since most veterans do not die in VA facilities.

Consequently, Congress must have contemplated that the two-year limit in section 904 would apply to most section-903(b) claims. Further, we do not think Congress could

have contemplated differential treatment of plot-allowance claims resulting from the particular statute, i.e., section 902 or section 903(a), upon which entitlement was based. Hence, for the 1973-1981 time period, based on the close relationship between entitlement under section 902 and section 903(b), we conclude that the two-year limit imposed by section 3.160(a) on claims for the plot allowance was valid as consistent with the statutory scheme and with Congress' intent.

10. In 1981, Public Law No. 97-35 amended 38 U.S.C. § 902 to generally restrict payment of the nonservice-connected death burial allowance to veterans who, at the time of death, were receiving pension or compensation. This amendment affected entitlement to the section 903(b) plot allowance to the extent such entitlement is predicated on eligibility for benefits provided under section 902.

However, Public Law No. 97-35 also amended section 903(b) to provide eligibility for the plot allowance to a veteran discharged from the active service for

a disability incurred in or aggravated in line of duty and to a veteran of any war. The legislative history shows Congress' intent to essentially preserve the grounds for entitlement to the allowance as they had been in effect from 1973 to 1981. See House Conference Report No. 97-208, 97th Cong., 1st Sess., reprinted in 1981 U.S. Code Cong. & Admin. News 1010, 1306. Since there was essentially no change in entitlement criteria, we conclude that retention of the two-year limit for section 903(b) claims is consistent with Congress' intent, and that limit may be applied subsequent to enactment of Public Law No. 97-35.

11. Further, we note that the consideration set forth in footnote 2 of O.G.C. Prec. 9-89 is relevant to claims filed following the effective date of the 1981 revision to section 903(b): namely, that a plot-allowance adjudication is easily made by a review of documents readily available to survivors and does not involve prior rating-board participation in determination of service connection, as would be required in section-907 claims. Hence, there is no inherent inequity in imposing the two-year limitation. Finally, the reference to the two-year limitation on plot-allowance claims initially appeared in 38 C.F.R. § 3.1601(a) in 1973, following enactment of Public Law No. 93-43. 38 Fed. Reg. 30,106 (1973). It is clear from the 1973 amendment that VA intended to include plot-allowance claims within the two-year filing requirement and that section 3.1601(a) should be so interpreted.

HELD:

The two-year limitation in section 904, title 38, U.S. Code, does not apply to claims under section 908 of that title for transportation of a deceased veteran to a national cemetery or under section 906(d) for the monetary allowance paid in lieu of a government-provided headstone or grave marker. VA regulations at 38 C.F.R. §§ 3.1601(a) and 3.1612(g), to the extent they purport to impose a limitation period on such claims, are invalid. Consequently, there is no limitation period applicable to claims for the section-908 or section-906(d) benefit. With respect to claims for the plot allowance established by section 903(b) of title 38, U.S. Code, the VA regulation, 38 C.F.R. § 3.1601(a), applying a two-year filing limit, is consistent with congressional intent. Accordingly, to the extent VA regulations establish a limitation period of two years applicable to the section-903(b) benefit, those regulations are valid.

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