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Vet. Aff. Op. Gen. Couns. Prec. 78-90

TEXT:

Subject: Effect of Veteran's Election to Receive Military-Retirement Pay on Surviving Spouse's Entitlement to DIC under 38 U.S.C. § 410(b)

(This, opinion, previously issued as General Counsel Opinion 4-87, dated July 17, 1987, is reissued as a Precedent Opinion pursuant to 38 C.F.R. §§ 2.6(e)(9) and 14.507. The text of the opinion remains unchanged from the original except for certain format and clerical changes necessitated by the aforementioned regulatory provisions.)

QUESTION PRESENTED:

The legal question presented is whether a surviving spouse is entitled to death benefits at the dependency and indemnity compensation (DIC) rates when the veteran's service-connected pulmonary tuberculosis was rated totally disabling by the VA more than 10 years before the veteran's nonservice-connected death, but the veteran had not received disability compensation due to an election to receive military-retirement pay. We are asked to consider, as a corollary question, whether the result would be different if the reason there had been no reduction in the veteran's disability rating prior to death had been Veterans Administration error in not conducting a physical examination since such examination might have concluded in diagnosis of "inactive" tuberculosis.

COMMENTS:

In brief, the record shows the veteran had active duty from December 1936 to December 1939 and from January 1940 to May 1944, when the veteran was retired for disability due to pulmonary tuberculosis. Initial rating action by the VA Regional Office in February 1945 established entitlement to service connection for chronic, active, moderately advanced pulmonary tuberculosis on the ground of incurrence in service. The 100% schedular evaluation assigned this disability, effective from May 29, 1944, and confirmed and continued in 1947 and 1950, was never reduced by any subsequent rating action. The veteran's demise occurred in April 1985. The Board of Veterans Appeals determined that the veteran's service-connected disability played no role in the cause of death.

Section 410(b)(1) of title 38, United States Code, as in effect at the time of the veteran's demise, provides that:

"when any veteran dies, not as the result of the veteran's own willful misconduct, if the veteran was in receipt of or entitled to receive (or but for the receipt of retired or retirement pay was entitled to receive) compensation at the time of death for a

service-connected disability that either (A) was continuously rated totally disabling for a period of ten or more years immediately preceding death, or (B) if so rated for a lesser period, was so rated continuously for a period of not less than five years from the date of such veteran's discharge or other release from active duty, the Administrator shall pay benefits under this chapter to the veteran's surviving spouse, if such surviving spouse was married to such veteran for not less than two years immediately preceding such veteran's death, and to such veteran's children, in the same manner as if the veteran's death were service connected."

Our analysis must focus on the language giving rise to eligibility for survivors of veterans who at death were "entitled to receive ... compensation ... for a service-connected disability ... continuously rated totally disabling for a period of 10 years." More specifically, we must decide whether (1) VA is authorized to pay benefits simply on the basis that the last disability rating of record, if extant for 10-plus years, was of 100% disability, or (2) VA must make a posthumous judgment concerning the actual level of disability suffered by the veteran over the last 10 years of life. In other words, was this veteran at death "entitled to receive" compensation at the total-disability rate, as those terms are used in the law?

Prior to October 1978, payment of DIC benefits under 38 U.S.C. § 410 was restricted to the survivors of those servicemembers who died on active duty or veterans who died after service as the result of a service-connected disability. However, it was drawn to Congress' attention by the Blinded Veterans Association and other veterans' organizations that certain service-connected disabilities, like blindness, which warrant a 100% disability rating, are rarely found to cause, or contribute to cause, a veteran's death. As the result of congressional concern for the plight of survivors of such veterans, section 204 of the Veterans' Disability Compensation and Survivors' Benefits Act of 1978 (Pub.L. No. 95-479; 92 Stat. 1564), which added 38 U.S.C. § 410(b), came into being. Reports of the Senate and House Committees on Veterans' Affairs reveal that one of the primary considerations in enactment of 38 U.S.C. § 410 (b) was Congress' recognition of the financial dependence of the survivors of deceased, totally disabled veterans on the Federal benefits available during the veterans' lifetimes. However, the background material is not illuminating with respect to defining "entitled to receive," as it appears in 38 U.S.C. § 410 (b).

As suggested in the request for opinion, the question arises whether entitlement to DIC benefits is justified merely because the most recent rating decision by the VARO, dated in 1950, continued the 100% rating for the deceased veteran's pulmonary tuberculosis. As a threshold matter, we note that 38 U.S.C. § 110, pertaining to preservation of disability ratings, is inapplicable to this case. Section 110, which preserves ratings which have been continuously "in force" for 20 or more years, has been interpreted as not applying to disability ratings in the context of non-waiver of retired pay. In that opinion (Op. G.C. 8-79), it was held that ratings would be considered in force and protected against reduction only if they "have been the foundation for the payment of awards for a period of at least 20 years, such that recipients have grown to rely upon the payments and the rating authorities have had reason to monitor the level

of disability for possible changes."

A search of agency precedents does not reveal any definition of "entitled to receive" relevant to the facts in this case. However, the specific terms of 38 U.S.C. § 410 (b) require, inter alia that a veteran be entitled to receive disability compensation "at the time of death" but for receipt of retired or retirement pay. While the deceased veteran in the present case was entitled to receive compensation at the total rate for pulmonary tuberculosis at the time of old rating actions establishing and continuing the 100%-disability rating, this might not have been true at the time of the veteran's demise. Hence, we are of the opinion that the VA must decide whether this veteran met the requirements for a 100% service-connected disability rating at death, a question not resolved by an evaluation dated more than 35 years ago.

Our conclusion, which simply rests on a literal interpretation of 38 U.S.C. § 410 (b)(1), is fortified by Op. G.C. 2-81. That opinion considered the question whether section 410(b) was intended to create entitlement to survivors' benefits when a veteran was in receipt of compensation for total disability at death, but the total-disability rating was not actually in effect for ten years because of VA error. In concluding such was not intended, we emphasized that one of Congress' primary considerations in the enactment of 38 U.S.C. § 410 (b)(1) was recognition of the financial dependence of survivors of deceased, totally disabled veterans on disability compensation available during the veterans' lifetimes. The shorter the period of time between a rating of total disability and the veteran's death, the less dependent the survivors should be expected to be on the disability income. In the present case, the veteran had never been in receipt of disability-compensation payments.

HELD:

In the case of a veteran who has elected to receive military-retirement pay in lieu of VA disability compensation, the VA is not authorized to pay DIC benefits to a surviving spouse merely on the basis of a 100% rating extant for 10 years immediately preceding death. Rather, the literal terms of 38 U.S.C. § 410(b) necessitate that the VA make a posthumous determination whether the 100% rating was warranted "at the time of death," and for the requisite duration theretofore (ordinarily, 10 years).

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