

**DATE:** 05-31-91

**CITATION:** VAOPGCPREC 57-91  
Vet. Aff. Op. Gen. Couns. Prec. 57-91

**TEXT:**

Eligibility for Burial Benefits Based on Service in the American Merchant Marine--Period for Submission of Claims

**QUESTION PRESENTED:**

Are burial benefits which are subject to the two-year limit for filing of claims under 38 U.S.C. § 904 payable on behalf of an individual whose veteran status is based on service in the American Merchant Marine in Oceangoing Service, where the individual was buried subsequent to November 23, 1977, but prior to January 19, 1988, and the claim for burial benefits was submitted more than two years after the date of burial, but within two years after January 19, 1988?

**COMMENTS:**

1. The late \* \* \* served in the American Merchant Marine from June 1943 through August 1945. He died June 10, 1981, and was buried on June 12, 1981. \* \* \* widow filed an application for burial benefits with VA on May 3, 1989. Accompanying her application was a DD Form 214 indicating \* \* \* honorable discharge from the Merchant Marine. Her claim was denied because it was filed more than two years after the veteran's burial. We conclude that the claim was properly denied.

2. Section 401(a)(1) of Pub. L. No. 95-202, 91 Stat. 1433, 1449-50 (1977), authorizes the Department of Defense to determine that the service of members of the Women's Air Forces Service Pilots and similarly situated groups of civilians who rendered what had previously been considered civilian or contractual service to the Armed Forces constituted active military service. Upon the making of such a determination and issuance of a discharge from such service under honorable conditions, the service shall be considered active duty for purposes of all laws administered by VA. 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 November 23, 1977, the date of enactment of Pub. L. No. 95-202, as a result of that enactment. On January 19, 1988, the Secretary of the Air Force determined that the service of members of the American Merchant Marine in Oceangoing Service during the period December 7, 1941, to August 15, 1945, would be considered active duty for purposes of all laws administered by VA. See 53 Fed. Reg. 2,775 (1988) (announcement). Individuals such as Mr. \* \* \* became potentially eligible for veterans' benefits as a result of that decision.

3. In O.G.C. Prec. 9-89, we held that 38 U.S.C. § 904 which requires that claims for burial benefits based on nonservice-connected deaths under 38 U.S.C. § 902 be filed

within two years of the veteran's burial, does not apply to claims for burial benefits for service-connected deaths under 38 U.S.C. § 907. In O.G.C. Concl. 7-89, we held that the application under 38 C.F.R. § 3.1601(a) of the two-year filing limitation to claims for the plot allowance provided by 38 U.S.C. § 903(b) is consistent with congressional intent in enacting 38 U.S.C. ch. 23. In O.G.C. Prec. 18-89, we held that the date of burial will control in determining entitlement to burial benefits. In that opinion, we indicated that VA is generally authorized to pay benefits for burials of veterans recognized as such under the provisions of Pub. L. No. 95-202 occurring on or after the effective date of that law--November 23, 1977-- without regard to the date of the Department of Defense's determination of recognition or the date of issuance of a discharge by the Department of Defense. However, none of these opinions addressed the application of section 904 to veterans claiming eligibility under Pub. L. No. 95-202.

4. Section 904 of title 38, United States Code, provides generally that applications for payment under 38 U.S.C. § 903 must be filed within two- years after the burial of the veteran. The two-year limitation on filing of claims is, however, inapplicable in cases where a veteran's discharge has been posthumously changed by competent authority to reflect a discharge from the service under conditions other than dishonorable, and benefits may be paid if a claim is filed within two years of the date of the correction. This exception was added by Pub. L. No. 88-3, 77 Stat. 4 (1963).

5. In its report to the Chairman of the Senate Committee on Finance dated February 18, 1963, on H.R. 212, 88th Cong., which became Pub. L. No. 88-3, VA noted that, under then-current law, it was forced to deny claims for burial and funeral expenses in those situations where a discharge was corrected by competent authority after death to conditions other than dishonorable, if the action of the correcting board was delayed beyond the two-year period for filing a claim with VA. See S. Rep. No. 68, 88th Cong., 1st Sess., reprinted in 1963 U.S. Code Cong. & Admin. News 616, 617. VA supported H.R. 212 as a means to correct this situation "by adjusting the time for filing a claim to provide that all persons will have an equal period of time to apply for the burial allowance, once the eligibility to receive it exists." Id. However, the amendment applied by its terms only to discharges posthumously "corrected by competent authority," and the legislative history of the provision does not suggest Congress intended the provision to have any broader application. See id. at 616-17. Both Congress and VA believed that only a few cases would be affected by Pub. L. No. 88-3 and that the cost associated with its enactment would be insignificant. Id. Further, Congress certainly could not have contemplated that this exception would apply to former merchant seaman, who would have no entitlement to issuance of a discharge until some time after the enactment of Pub. L. No. 95-202 14 years later.

6. We are aware that in Op. G.C. 14-75 (7-31-75) we held that the combined effect of a court decision that members of the Russian Railway Service Corps (RRSC) performed service in the U.S. Army and were entitled to honorable discharges and all benefits incident thereto and the actual issuance of a posthumous honorable discharge to a former member of the RRSC was tantamount to a correction of discharge within the purview of 38 U.S.C. § 904. As a result, an application for burial benefits based on an

RRSC member's service filed more than two years after burial but within two years after issuance of the "corrected" discharge certificate was held to be timely filed. However, in O.G.C. Prec. 18-89, we questioned the reasoning of Op. G.C. 14-75, stating that "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 ... in which there was no 'original' discharge issued." We believe that the reasoning of O.G.C. Prec. 18-89 is persuasive in pointing out the departure of Op. G.C. 14-75 from the terms and legislative history of 38 U.S.C. § 904 Congress, in 1963, contemplated that the exception created by Pub. L. No. 88-3 would be limited in scope and would apply to only those veterans whose discharges had been "corrected," after death, to discharges under conditions other than dishonorable. Further, we believe the conclusion in Op. G.C. 14-75 was heavily influenced by the finding of the U.S. district court that RRSC personnel would be entitled to "all benefits" incident to issuance of an honorable discharge, a situation not presented here. Accordingly, we decline to extend the reasoning of Op. G.C. 14-75 to the question now before us.

7. There is nothing in either the language or the legislative history of section 904 or Pub. L. No. 95-202 which suggests that individuals granted veteran status by virtue of service in the American Merchant Marine in Oceangoing Service are relieved of the requirement that claims for burial benefits must be filed within two years after burial. See generally, e.g., S. Rep. No. 68, 88th Cong., 1st Sess., reprinted in 1963 U.S. Code Cong. & Admin. News 616; Joint Explanatory Statement of Compromise Agreement, 123 Cong. Rec. S18815 (daily ed. Nov. 4, 1977), reprinted in 1977 U.S. Cong. Code & Admin. News 3912. Once their discharges are issued by the Department of Defense, former merchant seamen gain eligibility for VA benefits on the same footing as veterans of the armed forces. While burial benefits may be paid based on their service, a claim for benefits to which section 904 applies must be filed within two years after burial, just as it must in the case of veterans of the armed forces.

**HELD:**

Claims for burial benefits for nonservice-connected deaths subject to the two-year filing limit imposed by 38 U.S.C. § 904 may be paid on behalf of individuals whose veteran status is based on service in the American Merchant Marine in Oceangoing Service and who were buried after November 23, 1977 (the date of enactment of Pub. L. No. 95-202, the law authorizing recognition of Merchant Marine service for VA benefit purposes), but prior to January 19, 1988 (the date on which the Department of Defense made a determination as to recognition of the service of that group). However, such claims may only be paid if they were filed within two years of the veteran's burial.

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