

**Department of  
Veterans Affairs**

# Memorandum

Date: September 8, 1998

VAOPGCPREC 10-98

From: Acting General Counsel (022)

Subj: Surviving Spouse's Benefit for Month of Veteran's  
Death--38 U.S.C. § 5310(b); 38 C.F.R. § 3.20(c)

To: Director, Compensation and Pension Service (21)

**QUESTIONS PRESENTED:**

- a. Does the condition in 38 U.S.C. § 5310(b)(1) that a deceased veteran's surviving spouse not be entitled to death benefits under 38 U.S.C. ch. 11, 13, or 15 for the month of the veteran's death require a decision on the merits of whether the surviving spouse is entitled to death benefits or may VA consider the condition satisfied based on the lack of a claim by the surviving spouse for death benefits?
- b. May a veteran's surviving spouse apply for only the benefit provided by 38 U.S.C. § 5310(b)? If so, may he or she use VA Form 21-534 for such a claim?
- c. If a claimant uses VA Form 21-534 to claim only the benefit provided by 38 U.S.C. § 5310(b), must VA also treat the claim as one for dependency and indemnity compensation, death pension, and accrued benefits? What effect does *Isenhardt v. Derwinski*, 3 Vet. App. 177 (1992), have on using VA Form 21-534?
- d. If a veteran's surviving spouse is awarded the benefit provided under 38 U.S.C. § 5310(b) and later establishes entitlement to death benefits for the month of the veteran's death at a rate higher than the veteran would have received in compensation or pension for that month if he or she had not died, is the surviving spouse still entitled to the section 5310(b) benefit? What, if any, effect do 38 U.S.C. § 5111(c) and 38 C.F.R. §§ 3.20(b) and 3.31 have?

**COMMENTS:**

1. The questions presented arise from an amendment to 38 U.S.C. § 5310 made by section 506 of the Veterans' Benefits Improvements Act of 1996, Pub. L. No. 104-275, § 506(a), 110 Stat. 3322, 3343. Before the amendment, section 5310 provided a minimum amount of death benefits for the month of a veteran's death if the veteran's surviving spouse was entitled to death benefits for that month. 38 U.S.C. § 5310(a); 38 C.F.R. § 3.20(a). As amended by section 506(a) of Pub. L. No. 104-275, section 5310 now also provides a benefit for the month of a veteran's death if the veteran's surviving spouse is *not* entitled to death benefits for that month. 38 U.S.C. § 5310(b); 38 C.F.R. § 3.20(c). Specifically, it provides that:

If the surviving spouse of a veteran who was in receipt of compensation or pension at the time of death is not entitled to death benefits under chapter 11, 13, or 15 of [title 38] for the month in which the veteran's death occurs, that surviving spouse shall be entitled to a benefit for that month in the amount of benefits the veteran would have received under chapter 11 or 15 of [title 38] for that month but for the death of the veteran.

38 U.S.C. § 5310(b)(1). VA's regulation implementing section 5310(b)(1) provides that:

Where a veteran receiving compensation or pension dies after December 31, 1996, the surviving spouse, if not entitled to death compensation, dependency and indemnity compensation, or death pension for the month of death, shall be entitled to a benefit for that month in an amount equal to the amount of compensation or pension the veteran would have received for that month but for his or her death.

38 C.F.R. § 3.20(c)(1). Thus, the benefit provided to a surviving spouse by section 506 of Pub. L. No. 104-275 is a one-time payment conditioned on the surviving spouse's nonentitlement to death benefits for the month of the veteran's death.

2. You have asked whether this condition requires a merits decision on the question of a surviving spouse's

entitlement to death benefits or whether the condition can be satisfied by a lack of a death-benefits claim. The language Congress enacted does not address this question. It merely requires that the surviving spouse be "not entitled to death benefits . . . for the month in which the veteran's death occurs." Similarly, the legislative history of section 506 does not indicate Congressional intention with respect to what is required to satisfy the condition. If Congress has not directly spoken to a precise question, it has implicitly delegated the matter to the administering agency, and any reasonable interpretation is permissible. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984); *Degmetich v. Brown*, 104 F.3d 1328, 1332 (Fed. Cir. 1997).

3. In our opinion, both of your proposed interpretations for section 5310(b) are reasonable. Both interpretations provide a legal basis for concluding that a surviving spouse is not entitled to death benefits for the month of death. Neither interpretation, however, precludes a surviving spouse who has been granted the section 5310(b) benefit from later establishing entitlement to death benefits for the month of death. Whichever interpretation you choose to adopt, it should be adopted through properly issued regulations.

4. Concluding that a surviving spouse is not entitled to death benefits for the month of death based on the lack of a death-benefits claim is reasonable because an individual is not entitled to any VA benefit unless he or she has filed a specific claim. See 38 U.S.C. § 5101(a). If a surviving spouse has not filed a death-benefits claim, he or she cannot be entitled to death benefits. However, a grant of the section 5310(b) benefit based on the lack of a death-benefits claim would not preclude a subsequent death-benefits claim, which could result in entitlement to death benefits for the month of death if filed within one year after the veteran's death, thus negating the condition on which the section 5310(b) benefit was granted. See 38 U.S.C. § 5110(d); 38 C.F.R. § 3.400(c) (effective date of dependency and indemnity compensation (DIC) the first day of the month of death if claim received within one year from date of death; effective date of death pension the first day of the month of death if claim received within 45 days from date of death).

5. Requiring a merits decision on the question of a surviving spouse's entitlement to death benefits for the

month of death would reduce the likelihood of a surviving spouse establishing entitlement to death benefits for the month of death after having been granted the section 5310(b) benefit. It would not eliminate the possibility of doing so, however, since even a denial of death benefits on the merits could be reversed on appeal or on the basis of clear and unmistakable error in the original denial. In either case of reversal, the death-benefits award would be effective the month of death if the original claim had been filed within one year after death. 38 U.S.C. §§ 5109A(b), 7111(b); 38 C.F.R. § 3.400(k).

6. We can discern no legal reason why a surviving spouse should not be able to claim only the section 5310(b) benefit, if that is how VA chooses to administer the benefit. Nothing in the statutory language or in the legislative history of section 506 of Pub. L. No. 104-275 indicates a Congressional intent to require a claim for another benefit to be made in conjunction with one for the section 5310(b) benefit. Nor are we aware of any other provision that would require a section 5310(b) claim to be made with a claim for another benefit. However, neither can we find any evidence of Congressional intent to prohibit VA from requiring a concurrent claim. It would not be inconsistent with the statute for VA to require a surviving spouse to claim death benefits if one year from the veteran's death has not yet elapsed and VA wished to rely on a merits decision on the question of the surviving spouse's nonentitlement to death benefits for the month of death.

7. Furthermore, in our opinion, a surviving spouse may use VA Form 21-534 to apply for only the section 5310(b) benefit, provided that VA has prescribed VA Form 21-534 for such a claim. The Secretary is authorized to prescribe rules and regulations necessary or appropriate to carry out the laws administered by VA, including "the forms of application by claimants under such laws." 38 U.S.C. § 501(a). In addition, a specific claim in the form prescribed by the Secretary must be filed for benefits to be paid or furnished to any individual under the laws administered by the Secretary. 38 U.S.C. § 5101(a). These provisions afford VA considerable latitude. All they require is that VA prescribe some form to be used as a claim for the section 5310(b) benefit, since a specific claim in such form must be filed for VA to pay the benefit to a surviving spouse. To prescribe a form to be used as a

section 5310(b) benefit claim, VA should issue an appropriate regulation.

8. The use of VA Form 21-534 as a claim for the section 5310(b) benefit would be consistent with instruction B(1) on page 1 of the form, which instructs individuals to use the form to apply for VA benefits they may be entitled to as a surviving spouse. However, the title of the form, "Application for [DIC], Death Pension and Accrued Benefits by a Surviving Spouse or Child (Including Death Compensation If Applicable)," does not reflect a use as an application for the section 5310(b) benefit, which is neither DIC, death pension, nor accrued benefits. Therefore, if VA wishes to prescribe VA Form 21-534 as the form to be used by a surviving spouse to claim the section 5310(b) benefit, VA should modify the form accordingly.

9. If, in accordance with VA prescription, a surviving spouse uses VA Form 21-534 to claim only the section 5310(b) benefit, VA need not consider the claim as one for DIC, death compensation, or accrued benefits. In *Isenhardt v. Derwinski*, 3 Vet. App. 177 (1992), the Court of Veterans Appeals held that VA was required to consider a VA Form 21-534 on which a surviving spouse claimed DIC but appeared not to be claiming death pension as not only a DIC claim, but as a death pension and accrued benefits claim as well. Such result was required by 38 U.S.C. § 5101(b)(1), which explicitly provides that:

A claim by a surviving spouse or child for compensation or [DIC] shall also be considered to be a claim for death pension and accrued benefits, and a claim by a surviving spouse or child for death pension shall be considered to be a claim for death compensation (or [DIC]) and accrued benefits.

3 Vet. App. at 179. However, we are aware of no statutory or regulatory requirement that VA consider a claim for the section 5310(b) benefit to be a claim for another benefit. There is no statutory or regulatory basis for requiring VA to treat a section 5310(b) claim as a claim for DIC, death pension, or accrued benefits, even if VA prescribes that the same form be used to claim any of those benefits. We believe that *Isenhardt* has no effect on the use of VA Form 21-534 to claim the section 5310(b) benefit.

10. The establishment of entitlement to death benefits for the month of death by a surviving spouse who has already been paid the section 5310(b) benefit negates the surviving spouse's entitlement to the section 5310(b) benefit. Since the section 5310(b) benefit is conditioned on a surviving spouse's not being entitled to death benefits for the month of death, a surviving spouse cannot be entitled to the section 5310(b) benefit if he or she is entitled to death benefits for the month of death. It matters not that the section 5310(b) benefit has already been paid. If a condition on which a benefit has been paid is subsequently unfulfilled, the beneficiary is no longer entitled to the benefit. See VADIGOP, 5-24-83 0 (Legal) (VA has a legal right and obligation to recover travel expenses already paid and conditioned on veteran's receiving health care for which travel expenses were paid where veteran refused the health care).

11. Section 5111 of title 38, United States Code, generally prohibits the payment of money based on a compensation, pension, or DIC award for any period before the first day of the calendar month following the month in which the award became effective. 38 U.S.C. § 5111(a); 38 C.F.R. § 3.31. In effect, section 5111 prohibits payment for the first calendar month of entitlement. Section 5111(c) excepts certain situations from the general prohibition. As pertinent to section 5310, it reads:

[Section 5111] shall apply to payments made pursuant to section 5310 . . . only if the monthly amount of [DIC] or pension payable to the surviving spouse is greater than the amount of compensation or pension the veteran would have received, but for such veteran's death, for the month in which such veteran's death occurred.

38 U.S.C. § 5111(c)(1). This provision is implemented by 38 C.F.R. §§ 3.20(b) and 3.31(c)(1).

12. Congress enacted the provisions currently codified in section 5111 before section 506(a) of Pub. L. No. 104-275 added subsection (b) to section 5310. See Omnibus Budget Reconciliation Act of 1982, Pub. L. No. 97-253, § 401(a)(1), 96 Stat. 763, 801-802 (provisions now in section 5111 were then codified at 38 U.S.C. § 3011). Thus, when Congress enacted section 5111, there was no section 5310(b) benefit for a surviving spouse who was not entitled to death benefits for the month of death. The

reference in section 5111(c)(1) to "payments made pursuant to section 5310" meant payments made pursuant to what is now section 5310(a). Section 5310 then provided, as section 5310(a) still does, that the rate of death benefits otherwise payable to a surviving spouse for the month of death shall be not less than the rate of compensation or pension the veteran would have received for that month but for his or her death. See also 38 C.F.R. § 3.20(a).

13. Section 5111(a)'s general prohibition of payment for the first calendar month of entitlement would have eliminated any benefit provided by section 5310(a) for the month of death, the first calendar month of entitlement for death benefits based on a claim received within one year (or 45 days in the case of death pension) after the veteran's death. 47 Fed. Reg. 46,696, 46,697 (1982) (proposing 38 C.F.R. § 3.20(b)). However, through section 5111(c)(1), Congress excepted from the general prohibition payments of death benefits boosted by section 5310(a). *Id.* Only if a surviving spouse's rate of DIC or death pension for the month of death exceeds the rate of compensation or pension the veteran would have received for that month but for death (i.e., there is no increase to the DIC or death pension rate by section 5310(a)), does section 5111 prohibit payment of death benefits for the month of death.

14. In this respect, 38 C.F.R. § 3.20(b) is inconsistent with 38 U.S.C. § 5111(c)(1). Section 5111(c)(1) provides, with respect to payments under section 5310, that payment for the first calendar month of entitlement is prohibited only if the amount of DIC or death pension payable exceeds the amount of compensation or pension that would have been payable to the veteran. 47 Fed. Reg. at 46,697. Section 3.20(b) provides that payment for the first calendar month is permitted only if the amount of compensation or pension that would have been payable to the veteran exceeds the amount of DIC or death pension payable. These two provisions give different results if the amount of DIC or death pension payable equals the amount of compensation or pension that would have been payable to the veteran (viz. neither amount exceeds the other). In that case, the statute would allow payment for the month of death, but the regulation would not. To that extent,

section 3.20(b) is inconsistent with section 5111(c)(1) and therefore invalid.<sup>1</sup>

15. Section 5111 does not apply to payments under section 5310(b). By its express terms, section 5111 applies to "an award or an increased award of compensation, [DIC], or pension." 38 U.S.C. § 5111(a); see also 38 C.F.R. § 3.31. A payment under section 5310(b) is not compensation, pension, or DIC. Furthermore, section 5111 applies to "payments made pursuant to section 5310" only if the amount of DIC or pension payable to a surviving spouse exceeds the amount of compensation or pension that would have been payable to the veteran for the month of death. 38 U.S.C. § 5111(c)(1). Because entitlement to the section 5310(b) benefit is conditioned on nonentitlement to death benefits for the month of death, a payment under section 5310(b) necessarily implies that no DIC or pension is payable to the surviving spouse for that month but that some amount of compensation or pension would have been payable to the veteran for that month. Thus, in the case of a section 5310(b) payment, the condition in section 5111(c)(1) for section 5111 to apply could never be met. This result is reasonable, since section 5111 was intended to delay the beginning of recurrent benefits, but the section 5310(b) benefit is a one-time payment for the month of death.

16. If a surviving spouse who has already been paid the section 5310(b) benefit establishes entitlement to death benefits for the month of death at a rate higher than the rate of compensation or pension the veteran would have received for that month but for his or her death, section 5111(c)(1) requires the application of the general rule of prohibition that no payment be made on the death benefits award for the month of death. In this situation, section 3.20(b) gives the same result: no payment of death pension or DIC may be made for the month of death.

**HELD:**

a. Subsection (b) of section 5310, title 38, United States Code, as added by section 506 of the Veterans' Benefits Improvements Act of 1996, Pub. L. No. 104-275, § 506, 110 Stat. 3322, 3343, provides a benefit for the month of a

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<sup>1</sup> The inconsistency could be cured by inserting "or equal to" after "greater than" in section 3.20(b).



veteran's death if the veteran's surviving spouse is not entitled to death compensation, dependency of indemnity compensation, or death pension for the month of death. It would be reasonable to interpret the condition of nonentitlement to death benefits as being satisfied by the lack of any claim for death benefits filed by the surviving spouse or by a decision on the merits on the question of whether the surviving spouse is entitled to death benefits for the month of death. Whichever interpretation the Department of Veterans Affairs chooses to adopt, it should be adopted through properly issued regulations.

b. A surviving spouse may apply for only the benefit provided by 38 U.S.C. § 5310(b) and may do so using any form VA prescribes for the purpose of applying for that benefit. The form to be used should be prescribed by issuing an appropriate regulation.

c. If, in accordance with VA's prescription, a surviving spouse uses VA Form 21-534, Application for Dependency and Indemnity Compensation, Death Pension and Accrued Benefits by a Surviving Spouse or Child (Including Death Compensation If Applicable), to apply for only the benefit provided by 38 U.S.C. § 5310(b), VA need not consider the claim as one for dependency and indemnity compensation, death pension, or accrued benefits.

d. The establishment of entitlement to death benefits for the month of death by surviving spouse who has already been paid the benefit provided by 38 U.S.C. § 5310(b) negates the entitlement to the section 5310(b) benefit. If the surviving spouse is entitled to death benefits for the month of death at a rate higher than the rate of compensation or pension the veteran would have received for that month but for his or her death, 38 U.S.C. § 5111(c)(1) and 38 C.F.R. §§ 3.20(b) and 3.31 prohibit payment on the

death benefits award for any period before the first day of the month following the calendar month of death.

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