

**Department of
Veterans Affairs**

Memorandum

Date: December 23, 2003 VAOPGCPREC 9-2003

From: General Counsel (022)

Subj: Scope of Protection Provided by 38 U.S.C. § 2305 in Claims for Burial Benefits Under 38 U.S.C. Chapter 23

To: Chairman, Board of Veterans' Appeals (01)
Director, Compensation and Pension Service (21)

ISSUE PRESENTED:

What is the scope of the protection provided by 38 U.S.C. § 2305 in claims for burial benefits under 38 U.S.C. chapter 23?

DISCUSSION:

1. The Board of Veterans' Appeals (Board) and the Compensation and Pension Service have separately requested our opinion concerning the scope of the protection provided by 38 U.S.C. § 2305 in claims for burial benefits under 38 U.S.C. chapter 23. In the facts underlying the Board's opinion request, a veteran had active service in the United States Air Force from November 1950 to November 1954 and died from a nonservice-connected cause in 2000. In the facts underlying the Compensation and Pension Service's opinion request, the veteran had active service in the United States Marine Corps from May 1944 to February 1946 and died from a nonservice-connected cause in 2002. In each case, the Department of Veterans Affairs (VA) regional office denied a claim for nonservice-connected burial benefits because the veteran did not meet current eligibility criteria for such benefits.

2. Generally, a burial and funeral allowance may be payable under 38 U.S.C. § 2302(a) or § 2303(a) where a veteran dies from a nonservice-connected cause, if: the veteran was in receipt of compensation or pension from VA at the time of death; the veteran was a veteran of any war or was discharged or released from service for a disability incurred or aggravated in line of duty, where the veteran's body was held by a state and was unclaimed; or the veteran was properly hospitalized by VA at the time of death. The veterans whose deaths gave rise to the burial-benefit claims in question were wartime veterans but did not satisfy the criteria for nonservice-connected burial and funeral allowance under current 38 U.S.C. §§ 2302(a) and 2303(a). Under the laws in effect on December 31, 1957, these veterans' circumstances would have potentially met the criteria for a

nonservice-connected burial and funeral allowance based solely on the veterans' wartime service. The question then arises whether 38 U.S.C. § 2305 authorizes payment of a burial allowance under these circumstances.

3. Section 2305 of title 38, United States Code, provides that:

The death of any person who had a status which would, under the laws in effect on December 31, 1957, afford entitlement to the burial benefits and other benefits provided for in [chapter 23], but who did not meet the service requirements contained in [that] chapter, shall afford entitlement to such benefits, notwithstanding the failure of such person to meet such service requirements.

We interpret the statutory reference to persons "who did not meet the service requirements" contained in chapter 23, read in the context of the reference to the "death of any person," as referring to persons who did not meet the service requirements at the date of death. However, as the differences of opinion noted in the opinion requests point up, the statutory references to "status" and "service requirements" are somewhat ambiguous and may be subject to differing interpretations. VA's implementing regulation at 38 C.F.R. § 3.954 provides that, "[w]hen any person who had a status under any law in effect on December 31, 1957, which afforded entitlement to burial benefits dies, the burial allowance will be paid, if otherwise in order, even though such status does not meet the service requirements of 38 U.S.C. ch. 23." This regulation, which has been in effect since 1961, indicates a relationship between "status" and "service requirements" in referring to status that does not meet service requirements. However, a review of the history of the statute and VA's interpretations of it are necessary to better understand the meaning of these terms in the context of section 2305.

4. On December 31, 1957, the pertinent law governing eligibility for nonservice-connected burial benefits was Veterans Regulation No. 9(a), as amended. Veterans Regulation No. 9(a) provided, in relevant part, that a nonservice-connected burial and funeral allowance was available where "an honorably discharged veteran of any war, a veteran of any war in receipt of pension or compensation, a veteran discharged from the Army, Navy, Marine Corps, or Coast Guard for disability incurred in line of duty, or a veteran of the Army, Navy, Marine Corps, or Coast Guard in receipt of [compensation] for service-connected disability die[d] after discharge." Effective January 1, 1958, Veterans Regulation No. 9(a) was repealed by section 2202(129) of the Veterans' Benefits Act of 1957 (Veterans' Benefits Act), Pub. L. No. 85-56, 71 Stat. 83, 167. The relevant part in Veterans Regulation No. 9(a), concerning nonservice-connected burial and funeral expenses, was replaced by section 802(a) of the Veterans' Benefits Act. That provision provided that a nonservice-connected burial and funeral allowance was available on behalf of a deceased veteran who "(1) was a veteran of any war; (2) had been discharged from the active military, naval, or air service for a

disability incurred or aggravated in line of duty; or (3) was in receipt of disability compensation.” The Veterans’ Benefits Act also included a saving provision concerning burial benefits in section 805, which is now codified, with only minor changes, as 38 U.S.C. § 2305. The purpose of section 805 and other similar saving provisions applicable to other benefits was addressed in letters from the then Administrator of Veterans’ Affairs stating “it is important to note that in each of the ‘benefit’ titles, provision is made for extending entitlement to all classes of persons who prior to the enactment of the bill had an eligibility status for the benefit, notwithstanding the specific service requirements of the bill.”¹

5. Comparison of Veterans Regulation No. 9(a) with its replacement, section 802(a) of the Veterans’ Benefits Act, indicates that the eligibility requirements for burial benefits were not narrowed in the new provision. This indicates that the saving provision in section 805 of the Veterans’ Benefits Act was not directed at any changes in service-related eligibility criteria in the burial-benefit statute itself, such as the provision authorizing burial benefits for a “veteran of any war.” However the Veterans’ Benefits Act did make changes in the definitions of certain terms pertaining to service status affecting benefit eligibility. In addition to repealing Veterans Regulation No. 9(a), section 2202(129) of the Veterans’ Benefits Act also repealed Veterans Regulation No. 10, which in relevant part defined the terms “military or naval forces,” “person who served,” and “veteran of any war.” As discussed below, a review of certain General Counsel opinions issued subsequent to the enactment of the Veterans’ Benefits Act reveals that certain classes of individuals who had held a status qualifying them for benefits as of December 31, 1957, were excluded from the scope of coverage of the applicable provisions subsequent to that date by reason of these changes. In the absence of the saving provision, the repeal of Veterans Regulation No. 10 would have prevented certain individuals who met the requisite service definitions on December 31, 1957, but who no longer did so after that date, from qualifying for burial benefits.²

6. In VAOPGC 18-58 (7-2-58), issued on July 2, 1958, the VA (then Veterans’ Administration) General Counsel considered the eligibility for hospitalization of a

¹ These letters from the Administrator of Veterans’ Affairs, dated, respectively, February 6, 1957, and May 16, 1957, were directed to the Chairman, House Committee on Veterans’ Affairs, and to the Chairman, Senate Committee of Finance, and were incorporated, respectively, in H.R. Rep. No. 85-279 and S. Rep. No. 85-332, both of which related to H.R. 53, 85th Congress.

² This group of individuals included, for example, certain women who served as Army nurses under contract during the Spanish-American War and members of the Women’s Army Auxiliary Corps, the Women’s Reserve of the Navy and Marine Corps, and the Women’s Reserve of the Coast Guard who served during World War II. Compare Veterans Regulation No. 10 with Pub. L. No. 85-56, §§ 101, 2104, 71 Stat. at 88, 154.

former member of the Women's Army Auxiliary Corps. Such members had been specifically deemed included in the relevant service definition under Veterans Regulation No. 10 as in effect on December 31, 1957. The General Counsel found that, although Veterans Regulation No. 10 had been repealed by the Veterans' Benefits Act as of January 1, 1958, and former Women's Army Auxiliary Corps members were eligible for hospitalization only if they met more restrictive requirements relating to their service under laws in effect after that date, such former members, due to their status as such, had a protected right to hospitalization under a saving provision comparable to what is now 38 U.S.C. § 2305. Subsequently, in VAOPGC 17-75 (4-15-75), the General Counsel made a similar finding regarding the eligibility of former members of the Women's Army Auxiliary Corps for purposes of various burial benefits, based on the statute that is now 38 U.S.C. § 2305.

7. In VAOPGC 5-60 (4-19-60), issued on April 19, 1960, the VA (then Veterans' Administration) General Counsel discussed whether a deceased individual's attendance at a Camp Stanley training camp in 1918 as a member of the Texas National Guard could be considered as meeting service requirements for purposes of entitlement to various benefits under the saving provisions of the Veterans' Benefits Act. The opinion noted that the law in effect on December 31, 1957, recognized such members of the Texas National Guard as having qualifying service for purposes of benefit eligibility. The opinion referenced the letters from the Administrator of Veterans' Affairs in the legislative history of the Veterans' Benefits Act and stated that, "[i]t is apparent from . . . [the] Administrator's analysis of Public Law 85-56, that that statute was intended to protect: (a) persons already in receipt of benefits under prior laws; (b) persons who met all requirements for benefits under prior laws but who had not yet received an award; and (c) persons who met the eligibility requirements of prior laws respecting service but regarding whom the disability or death condition had not yet occurred." The opinion held that, under the facts present in that case, "the actual attendance of the veteran, as a member of the Texas National Guard, at the training camp . . . at Camp Stanley, . . . may be deemed to be qualifying service in determining entitlement to pension, dependency and indemnity compensation, and statutory burial benefits authorized by [title 38, United States Code]." These opinions, while not precedential, indicate VA's contemporaneous construction of the saving provisions of the Veterans' Benefits Act that they served to preserve rights individuals had under prior law based on their status as members of particular units or organizations that fell within the scope of the laws defining classes of individuals potentially eligible for benefits.

8. On April 1, 1998, the VA General Counsel issued a precedent opinion, VAOPGCPREC 4-98, which discussed the applicability of 38 U.S.C. § 2305 in claims for burial benefits based upon service in the Commonwealth Army of the Philippines during World War II. The opinion stated that section 2305 was a saving provision that preserved burial-benefit eligibility that predated the

January 1, 1958, effective date of the Veterans' Benefits Act. According to the opinion, as a result of 38 U.S.C. § 2305, "veterans who cannot meet the current criteria for chapter 23 burial benefits may still be eligible for such benefits if they had been potentially eligible for burial benefits under laws in effect on December 31, 1957, but did not meet service requirements for burial benefits imposed by the Veterans' Benefits Act." The opinion held that because burial benefits based on service in the Philippine Commonwealth Army did not confer potential eligibility for burial benefits under the laws in effect on December 31, 1957, individuals with such service had no potential eligibility which could be preserved by section 2305, and section 2305 was not applicable. The holding of VAOPGCPREC 4-98 is consistent with the reading of the Veterans' Benefits Act saving provisions reflected in the above-referenced General Counsel opinions in that the later opinion turned on whether membership in a particular unit or organization conferred a status under prior law that was protected by the saving provision. We do not read the above-quoted reference in VAOPGCPREC 4-98 concerning "veterans who cannot meet the current criteria for chapter 23 burial benefits" as having any broader meaning than this.

9. The opinion requests raise the issue of whether a veteran who was potentially eligible for burial benefits under Veterans Regulation No. 9(a) as of December 31, 1957, as a "veteran of any war" but who dies subsequent to the enactment of legislation removing that criterion as a basis for burial-benefit eligibility is nonetheless eligible for burial benefits on the basis of 38 U.S.C. § 2305. The Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 2001, 95 Stat. 357, 781, amended what is now 38 U.S.C. § 2302(a) to eliminate for purposes of deaths occurring after September 30, 1981, eligibility for burial benefits under that provision based on wartime service. In our view, the above discussion of the history and early application of what is now section 2305 indicates that that section was intended to give protection to status based on membership in particular units or organizations, not to eligibility based on any of the various circumstances giving rise to burial-benefit eligibility as of December 31, 1957. In particular, although being a "veteran of any war" could be viewed as a service requirement for purposes of the saving provision, the fact that that eligibility criterion was not narrowed under the amendments made by the Veterans' Benefits Act strongly suggests that satisfaction of such criteria was not what Congress sought to protect in enacting the saving provision. Further, VA's implementing regulation, issued shortly after enactment of the saving provision, provides that, for persons with a protected status, the burial allowance will be paid "if otherwise in order." The phrase "if otherwise in order" in the regulation implies that the saving provision applies only on behalf of individuals who otherwise satisfy the criteria for a specific burial benefit, notwithstanding lack of the requisite service status after December 31, 1957.

10. In addition, the legislative history of the Omnibus Budget Reconciliation Act of 1981 strongly suggests that Congress, in enacting that legislation, did not contemplate that veterans whose potential eligibility for nonservice-connected

burial benefits was based on wartime service before January 1, 1958, would be exempted from the change in law by operation of 38 U.S.C. § 2305, of which Congress may be presumed to have been aware. The history of section 2001 of the Omnibus Budget Reconciliation Act of 1981 indicates that Congress was concerned about the growing cost of nonservice-connected burial benefits and particularly about the increased cost expected to result from the increasing death rate among World War II veterans. S. Rep. No. 97-139, at 1019 (1981), reprinted in 1981 U.S.C.C.A.N. 396, 999. Certainly, Congress' objective of reducing these increasing costs could not have been realized if section 2305 exempted World War II veterans from the amended eligibility criteria. Further, congressional discussion of the substantial cost savings from the amended criteria, as estimated by the Congressional Budget Office, contained no suggestion that any large classes of veterans would be exempted from the new eligibility criteria by operation of the section 2305 saving provision. S. Rep. No. 97-139, at 1022-23, reprinted in 1981 U.S.C.C.A.N. at 1002-04; see also H.R. Conf. Rep. No. 97-208, at 944, reprinted in 1981 U.S.C.C.A.N. 1010, 1306. Thus, the legislative history of the Omnibus Budget Reconciliation Act of 1981 supports the view that veterans with wartime service prior to January 1, 1958, were not exempted by section 2305 from operation of the amendments to the eligibility criteria for nonservice-connected burial benefits made by the Omnibus Budget Reconciliation Act of 1981.

11. The Compensation and Pension Service's request for opinion also inquires as to the amount of benefits payable where current entitlement to nonservice-connected burial benefits is based solely on protected status under 38 U.S.C. § 2305. Section 2305 provides that the death of person with a status protected under that provision shall afford entitlement to the burial benefits provided for in chapter 23 of title 38, United States Code. There is no implication in the words of the statute that the benefits to be provided are any other than those payable under current law. We therefore conclude that persons entitled to burial benefits pursuant to section 2305 are to be paid based on the rates in effect on the date of their burial. See VAOPGCPREC 18-89 (O.G.C. Prec. 18-89) (payment of increased burial and funeral benefit for nonservice-connected deaths payable only for burials occurring on or after date of enactment of authorizing statute); see also VAOPGCPREC 15-95 (maximum amount of burial allowance that may be paid is governed by the burial-allowance statute in effect on the date of burial).

12. Finally, the Compensation and Pension Service's request for opinion asks whether 38 U.S.C. § 2305 and 38 C.F.R. § 3.954 preserve entitlement notwithstanding the final denial of a burial-benefit claim. We presume this question was asked in the event we would hold that these provisions preserve entitlement in claims such as those that gave rise to the opinion requests, i.e., where a veteran's claim is based on wartime service prior to January 1, 1958. It is our understanding that it has been the practice of the Compensation and

Pension Service to deny benefits in such cases. Given the conclusion reached in this opinion, we believe this question is moot.

HELD: Section 2305 of title 38, United States Code, preserves rights individuals had under laws in effect on December 31, 1957, based on their status as members of particular units or organizations that fell within the scope of the laws defining classes of individuals potentially eligible for burial benefits under chapter 23 of title 38. Veterans with wartime service prior to January 1, 1958, are not exempted by section 2305 from the amendments to eligibility criteria for nonservice-connected burial and funeral allowance currently codified in 38 U.S.C. § 2302(a) made by the Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, which eliminated wartime service as a basis for eligibility. Burial benefits provided by operation of 38 U.S.C. § 2305 are to be paid based on the rates in effect on the date of the veteran's death.

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Attachment: XC-files (2)