

DATE: 07-18-90

CITATION: VAOPGCPREC 58-90
Vet. Aff. Op. Gen. Couns. Prec. 58-90

TEXT:

Subject: War Orphans Benefits for the Children of New Philippine Scouts Who Have Elected to Receive Lump-sum BEC Benefits

(This opinion, previously issued as General Counsel Opinion 4-69, dated November 6, 1969, 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:

May the deceased veteran's widow and children be paid dependents' educational assistance allowance provided by Chapter 35 of Title 38, United States Code under the facts stated below?

FACTS:

Veteran died in service November 2, 1947, while serving as a reservist in the U.S. Army (Philippine Scout under PL 190, 79th Congress). His widow was paid death compensation for herself and the veteran's three children from November 3, 1947, to April 30, 1953, inclusive, when payments were terminated because she elected to receive BEC. At time of discontinuance, she was receiving death compensation of \$143.20 monthly. BEC was then payable at a total monthly rate of \$211.50 for the widow and three children. Monthly payments of BEC in that amount were paid from May 1, 1953, through January 31, 1955, when they were terminated because lump-sum payments of \$6,768.00 for the widow and \$9,098.29 on behalf of the children were made to the widow.

The veteran's widow has filed an informal claim for resumption of death compensation by the VA and a formal application for dependents' educational assistance allowance for the child, * * * born March 18, 1948. She contends that concurrent benefits are not involved since she has not received any payments from BEC since the lump-sum payments in 1955."

COMMENTS:

Under the factual situation related, the widow of this deceased veteran would not be eligible for chapter 35 educational benefits, regardless of the effect of her previous election to receive BEC lump-sum benefits under section 14 of the Federal Employees' Compensation Act (now 5 U.S.C. § 8135) since the provisions of

subchapter VII of chapter 35 of title 38, United States Code, providing educational assistance for children of certain Philippine veterans, do not apply to widows. (See also 38 U.S.C. § 107(b)).

The provisions of subchapter VII of chapter 35 would, however, appear to encompass the children of the deceased veteran making them eligible for educational assistance benefits, unless they are otherwise barred from receiving such benefits by the language of sections 8116(b) or 8135 of title 5, United States Code. Section 8116(b) requires, in essence, that whenever an individual is entitled to receive Federal Employees' Compensation Act benefits and is also entitled to receive other Federal benefits based on the same death or disability, an irrevocable election must be made as to which benefits, he will receive. Section 8135 provides for the election of a lump-sum payment of the FECA benefits authorized, but also provides that such lump-sum payment will discharge the liability of the United States for compensation to the beneficiary. In addition, it provides that in computing the lump-sum payment, the probability of the happening of any other contingency affecting the amount or duration of compensation shall be disregarded.

The widow received VA death compensation for herself and the veteran's three children from November 3, 1947, to April 30, 1953, at which time she elected to receive FECA benefits. Since the language with respect to the irrevocability of an election (now 5 U.S.C. § 8118(b) was not placed in the law until the enactment of Public Law 86-767 on September 13, 1960, she (acting for the children) would not be precluded by this provision of law from re-electing VA chapter 35 benefits at a future date. (See VA Regulation 1708).

There remains to be resolved, however, the question as to whether the receipt of lump-sum FECA payment for the children would bar them from the receipt of benefits, under chapter 35 of title 38. Section 8135(a) of title 5, United States Code, provides:

"(a) The liability of the United States for compensation to a beneficiary in the case of death or of permanent total or permanent partial disability may be discharged by a lump-sum payment equal to the present value of all future payments of compensation computed at 4 percent true discount compounded annually if—

- (1) the monthly payment to the beneficiary is less than \$5 a month;
- (2) the beneficiary is or is about to become a nonresident of the United States; or
- (3) The Secretary of Labor determines that it is for the best interest of the beneficiary.

The probability of the death of the beneficiary before the expiration of the period during which he is entitled to compensation shall be determined according to the American Experience Table of Mortality, but the lump-sum payment to a widow or widower of the deceased employee may not exceed 60 months' compensation. The probability of the

happening of any other contingency affecting the amount or duration of compensation shall be disregarded."

In the absence of clear legislative history, the legislative intent must be gleaned from the language of the section itself. Initially, it provides that the "... liability of the United States for compensation to a beneficiary ... may be discharged by lump-sum payment ..." War Orphans educational benefits under chapter 35 of title 38 are not "compensation" as such term appears to be intended in section 8135. Moreover, we do not believe that section 8135 would bar a future payment of another benefit which would not be barred if the payment of FECA benefits had been continued on a monthly basis. In this connection, we have held, in effect that the election of and receipt of FECA benefits did not bar a future election of a VA benefit not in existence at the time the election was made. (See Op.G.C. 2-68). Moreover, this office also held in the same opinion that the receipt of FECA up to the age of 23 did not bar an election of War Orphans educational benefits after age 23 when concurrent benefits are no longer payable. It would be unreasonable to conclude that future VA benefits not barred by the election and receipt of FECA benefits payable on a monthly basis until exhausted, would be barred by the acceptance of lump-sum payment of FECA benefits representing the commuted value of future benefits which, but for the lump-sum, would be paid on a monthly basis.

HELD:

(a) That the widow of the deceased veteran has no entitlement to educational assistance under chapter 35 of title 38, in force on November 6, 1969.

(b) That the election by the widow, effective January 31, 1955, to receive on behalf of herself and her children a lump-sum payment of FECA benefits would not bar payment of benefits under chapter 35 of title 38 to an otherwise eligible child over age 18.

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