

DATE: 07-18-90

CITATION: VAOPGCPREC 80-90
Vet. Aff. Op. Gen. Couns. Prec. 80-90

TEXT:

SUBJECT: Interpretation of 38 U.S.C. § 410(b)(1) in Relation to 38 U.S.C. § 351

(This, opinion, previously issued as General Counsel Opinion 5-86, dated January 31, 1986, 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 surviving spouse of a veteran entitled to receive disability compensation continuously at the 100-percent rate for 10 or more years under 38 U.S.C. § 351 whose death was neither service-connected nor due to the disability for which compensation was paid under section 351, qualify to receive Dependency and Indemnity Compensation (DIC) under 38 U.S.C. § 410(b)(1)?

COMMENTS:

For reasons that follow, the answer is yes. The veteran was, for more than 10 years preceding the veteran's death, continuously entitled to receive disability compensation at the 100-percent rate, under 38 U.S.C. § 351 because of disability that resulted from hospital treatment by the Veterans Administration (VA), independent of the veteran's service-connected disability. The veteran died May 27, 1984, because of illness unrelated either to the veteran's service-connected condition or the condition for which compensation had been paid under section 351.

Section 351 states in pertinent part:

"Where any veteran shall have suffered an injury, or an aggravation of an injury, as the result of hospitalization, medical or surgical treatment, ... and such injury or aggravation results in additional disability to or the death of such veteran, disability or death compensation ... and dependency and indemnity compensation ... shall be awarded in the same manner as if such disability, aggravation, or death were service- connected"
" (Emphasis added.)

Clearly, DIC would not be payable under section 351 in this case, because the disability for which the veteran qualified under section 351 was not a contributory cause of death. Nor would benefits be payable under section 410(a), which confers DIC eligibility for service-connected deaths. Therefore, entitlement to DIC, if it exists, must be found under section 410(b)(1). Even so, as we shall discuss, the history of section 351

provides a helpful backdrop for proper construction of section 410(b)(1).

Section 410(b)(1) of title 38 states in pertinent part:

"When any veteran dies, ... if the veteran was in receipt of or entitled to receive ... compensation at the time of death for a service-connected disability that ... was continuously rated totally disabling for a period of ten or more years immediately preceding death, ... the Administrator shall pay ... DIC to the veteran's surviving spouse, ... in the same manner as if the veteran's death were service-connected." (Emphasis supplied.)

If these words were to be given a literal construction, DIC could not be paid in this case, as the veteran's section 351 entitlement for which compensation was paid did not exist because of a service-connected disability but because the veteran's treatment-derived disability was considered "as if" it were service connected, that is, quasi-service connected (see section 351, *supra*). However, it has long been held that the words of a statute are not always to be given their literal meaning. The Supreme Court, in 1922, held that where a literal construction "leads to an unreasonable result plainly at variance with the policy of the legislation as a whole, we must examine the matter further." *Ozawa v. United States*, 260 U.S. 178, 194. (Sections 351 and 410(b)(1) stand in *pari materia* and thus should be construed together. 2A Sutherland Stat. Construction s 51.01 (4th ed. 1984). As will be discussed, there would be a manifest inconsistency, which we believe Congress did not intend, between these provisions if section 410(b)(1) were interpreted to mean that survivors of veterans who drew disability compensation for service-connected disability could qualify for DIC, but survivors of veterans who drew disability compensation for quasi-service-connected disability could not.

The pertinent language of section 351 is essentially the same as that introduced into veterans' benefits law by section 213 of the World War Veterans' Act, 1924 (Ch. 320, 43 Stat. 607, 623). Both the language and history of the provision make clear that Congress intended that all veterans' monetary benefits payable for service-connected disability or death be payable for. Rep. No. 397, 68th Cong., 1st Sess. 5 (1924); Proposed Legislation as Recommended by the Director of the United States Veterans' Bureau, et al.: Hearings of H.R. 7320 Before the House Comm. on World War Veterans' Legislation, 68th Cong., 1st Sess. 113 (1924). It would be impossible to achieve such result, insofar as DIC entitlement under section 410(b)(1) is concerned, if DIC were payable to the survivors of those who had been rated totally disabled for the requisite time because of service-connected disability, but not to the survivors of those who had been so rated for the requisite time because of quasi-service-connected disability.

We do not believe Congress intended such inconsistent result. "Experience indicates that a legislature does not deliberately enact inconsistent provisions when it is cognizant of both, without expressly recognizing the inconsistency" (emphasis supplied.) Sutherland, *supra*. We believe that under this principle, if Congress had intended to preclude such payment, it would have expressed recognition of the inconsistency by specifically excluding such class of claimants from section 410(b)(1) coverage, which it

did not do. "It is a 'familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.' " Steelworkers v. Weber, 443 U.S. 193,201 (1979), quoting Holy Trinity Church v. United States, 143 U.S. 457, 459 (1982). Furthermore, nothing in the history of the provision indicates that Congress intended to create such exclusion. See history of Pub.L. No. 95-479, *infra*

. Section 410(b)(1) is in the nature of remedial legislation. See history of Pub.L. No. 95-479, § 204 (1978), S. Rep. No. 1054, 95th Cong., 2d Sess. 27-31, reprinted in 1978 U.S.Code Cong. & Ad. News 3485-3489, wherein the Senate Committee on Veterans Affairs went on record observing, "The appropriate Federal obligation to these survivors should ... be the replacement of the support lost when the veteran dies," that is, "to provide income security to the survivors." As section 351 provides for quasi-service-connected disability, section 410(b)(1) provides for quasi-service-connected death. Such remedial legislation is to be broadly construed. (Indeed, section 351 was also characterized as remedial at its inception. S. Rep. No. 397, *supra*, at 1.) Tcherepnin v. Knight, 389 U.S. 332, 336 (1967). Similarly, the statute is entitled to expansive construction by virtue of its being in the nature of a public benefit, 2A Sutherland, *supra*, at § 54.05, and because of long-standing policy set forth in VA regulations, at 38 C.F.R. § 3.102. The intent of the legislature is paramount in statutory construction, and that intent may, as would be the case here, be defeated by giving a statute a too-literal interpretation. Equity sometimes requires enlargement of the letter of a statute so as to give effect to the legislative intent. Beley v. Naphtaly, 169 U.S. 353, 360 (1898). We believe, in light of what has been said, the references to service connection in the statute and in its history must be seen as merely descriptive of the usual basis upon which disability compensation is awarded, and not intended to preclude the entitlement of the section 410(b)(1) benefit to otherwise qualified survivors of veterans whose permanent disabilities were quasi-service-connected under section 351.

HELD:

The surviving spouse of a veteran entitled to receive disability compensation continuously at the 100-percent rate for 10 or more years under 38 U.S.C. § 351 whose death was neither service connected nor due to the disability for which compensation was paid under section 351, may qualify to receive DIC under 38 U.S.C. § 410(b)(1).

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