

**Department of
Veterans Affairs**

Memorandum

Date: March 28, 2000

VAOPGCPREC 1-2000

From: General Counsel (022)

Subj: Countable Income for Death Pension Purposes--Deduction of Expenses Paid for Veteran's Last Illness Subsequent to Veteran's Death, but Prior to Date of Entitlement

To: Chairman, Board of Veterans' Appeals (01)

QUESTIONS PRESENTED:

a. Is the last sentence of 38 C.F.R. § 3.272(h) consistent with 38 U.S.C. § 1503(a)(3) in providing that expenses of a veteran's last illness paid by a surviving spouse subsequent to the veteran's death, but prior to the date of entitlement to improved death pension, may not be excluded from countable income for the purpose of determining death pension entitlement?

b. If so: (1) what is the basis for the differing treatment accorded by section 3.272(h) to expenses paid prior to the date of death and those paid after the date of death but before the date of entitlement; and, (2) does Congress' intent in enacting Pub. L. No. 98-369 to limit retroactive payments of pension in the case of claimants who file claims more than 45 days after the date of a veteran's death provide an adequate basis for prohibiting consideration of expenses in determining prospective entitlement for the period following the date of claim?

DISCUSSION:

1. These issues arise in the context of an order issued by the Court of Veterans Appeals (now the Court of Appeals for Veterans Claims (CAVC)) in *Wilson v. West*, Vet. App. No. 96-834 (October 30, 1998), in which the court granted a joint motion to remand the appeal to the Board of Veterans' Appeals (BVA) and vacated the BVA's May 21, 1996, determination that expenses paid for the veteran's last illness were not deductible from the appellant's countable income for the purpose of determining entitlement to death pension benefits. The veteran died on November 11, 1991, and the appellant, the veteran's surviving spouse, filed an application for Department of Veterans Affairs (VA) death

pension benefits on December 31, 1991. The appellant reported having paid unreimbursed expenses relating to the veteran's last illness in November and December 1991. Pursuant to 38 C.F.R. § 3.272(h), expenses paid subsequent to a veteran's death, but prior to the surviving spouse's date of entitlement to improved death pension are not deductible from countable income for the purpose of determining entitlement to death pension. The appellant had argued before the CAVC that 38 C.F.R. § 3.272(h) is inconsistent with its authorizing statute, 38 U.S.C. § 1503(a)(3). The parties agreed to a remand for the BVA to readjudicate the appellant's claim in light of the appellant's arguments pertaining to the statute and regulation.

2. Section 1541 of title 38, United States Code, directs the Secretary of Veterans Affairs to pay a pension at a specified rate to the surviving spouse of each veteran of a period of war who met specified service requirements or who at the time of death was receiving or entitled to receive compensation or retirement pay for a service-connected disability. This section also requires a reduction in the annual rate by the amount of the surviving spouse's annual income. Section 1503(a)(3)(B) of title 38, United States Code, provides for the deduction from annual income of amounts equal to amounts paid by a surviving spouse or child of a deceased veteran for the expenses of such veteran's last illness.

3. Pursuant to section 38 C.F.R. § 3.271, payments of any kind from any source shall be counted as income during the 12-month annualization period in which received unless specifically excluded under section 3.272. Section 3.272 lists various exclusions from countable income for the purpose of determining entitlement to improved pension. Section 3.272 also states that, unless otherwise provided, expenses deductible from income under that section are deductible only during the 12-month annualization period in which they are paid. As specifically authorized by 38 U.S.C. § 1503(a)(3), the exclusions listed in section 3.272 include amounts paid by a spouse before a veteran's death for expenses of the veteran's last illness and amounts paid by a surviving spouse or child for the veteran's just debts and expenses of last illness and burial. 38 C.F.R. § 3.272(h)(1) and (2). The last sentence of section 3.272(h) provides that amounts paid by a surviving

spouse subsequent to a veteran's death but prior to the date of entitlement to improved death pension for expenses of the veteran's last illness are not deductible from the surviving spouse's income.

4. The sentence of 38 C.F.R. § 3.272(h) relating to expenses paid subsequent to the veteran's death but prior to the date of the surviving spouse's entitlement was added in 1988, following issuance of a nonprecedential opinion of the General Counsel, VADIGOP, 10-23-86 (1-17 38 C.F.R. § 3.272). That opinion had concluded that amounts paid for expenses of a veteran's last illness and burial between the date of the veteran's death and the date of the surviving spouse's entitlement to death pension are not deductible in computing the surviving spouse's income for pension purposes. The opinion noted that, in practice, income received by a death pension claimant before his or her entitlement date is not included in income for pension purposes, and reasoned that, consequently, any permitted credits or exclusions should be limited to those paid during the same time frame as the income is received, unless further deductions are specifically permitted by statute or regulation. The opinion noted the limitations on retroactive pension payments established by the Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 2501, 98 Stat. 494, 1116, and concluded that limiting the deductibility of amounts paid by a surviving spouse for a veteran's last illness to those amounts paid after the surviving spouse's date of entitlement is consistent with the intent of that statute. Finally, the opinion reasoned that amounts paid by a spouse for expenses of a veteran's last illness prior to the veteran's death could nonetheless be deducted from the surviving spouse's income for death pension purposes after the veteran's death because such a deduction is authorized by the statute currently codified at 38 U.S.C. § 1503(a)(3).

5. We have reviewed the reasoning of VADIGOP, 10-23-86, and find that it does not provide an adequate basis for the conclusion that amounts paid by a surviving spouse for expenses of a veteran's last illness between the date of the veteran's death and the date of the surviving spouse's entitlement to death pension are not deductible in computing the surviving spouse's income for death pension purposes. As discussed further below, the governing statute authorizes deduction of expenses of a veteran's last illness from income received in subsequent periods. Moreover, we question whether, under the statutory terms, there is a basis for distinguishing such expenses paid prior to the veteran's death from those paid subsequently. Finally, we do not believe that Congress' intent in enacting Pub. L. No. 98-369 to limit retroactive payments in the case of pension claimants who file claims more than 45 days after the date of a veteran's death provides an adequate basis for prohibiting con-

sideration of last-illness expenses paid after a veteran's death in determining prospective entitlement for the period following the date of claim.

6. Turning first to the terms of 38 U.S.C. § 1503(a)(3), that statute specifically provides for exclusion from income for pension purposes, "amounts equal to amounts paid by a spouse of a veteran for the expenses of such veteran's last illness, and by a surviving spouse . . . of a deceased veteran for . . . the expenses of such veteran's last illness." The statute contains no language limiting the period in which such amounts may be deducted. Further, the statute necessarily recognizes that some such amounts will be deducted from income received in periods other than those in which the amounts are paid, since, because the spouse could have no pension entitlement until after the veteran's death, amounts paid by a spouse prior to a veteran's death would in all cases be deducted from income received by the surviving spouse after the veteran's death. Moreover, the nearly identical language excluding payments by a spouse and those by a surviving spouse in no way suggests that Congress intended to distinguish between the two types of payments with respect to the scope of their deductibility from income. While it is true that not all payments for last-illness expenses made by a surviving spouse after a veteran's death would necessarily be made in a period prior to that of the surviving spouse's death pension entitlement, it could easily be foreseen that some would be, even under the more liberal retroactivity rules in effect prior to 1984, which gave the surviving spouse a period of one year after the veteran's death to file a death pension claim which could be paid from the date of the veteran's death rather than the date of the surviving spouse's claim. We see no basis in the statute for distinguishing between amounts paid for a veteran's last illness prior to a veteran's death and those paid after the veteran's death. Although we recognize the introductory text of 38 C.F.R. § 3.272 provides, as a general rule, that expenses are to be deducted in the period in which they are paid, section 1503(a)(3) clearly contemplates the deduction of certain expenses from income received in a later period and must be read as superceding the general rule in the case of expenses of a veteran's last illness paid prior to the date of entitlement.

7. There is nothing in the legislative history of section 1503(a)(3) which leads us to a different conclusion. The exclusion for expenses of a veteran's last illness originated in the Veterans' Pension Act of 1959, Pub. L. No. 86-211, 73 Stat. 432, which permitted deduction of amounts paid by a surviving spouse for a veteran's last-illness expenses. The purpose of that statute was to give the

"greatest amount of pension to those in the greatest need." S. Rep. No. 666, 86th Cong., 1st Sess. 1 (1959), reprinted in 1959 U.S.C.C.A.N. 2190. The legislative history of that statute did not make explicit the reason for the last-illness exclusion. However, the exclusion appears to have been based on a bill, H.R. 475, 86th Cong., 1st Sess. (1959), proposed by Congressman John W. Byrnes, to exclude from annual income of a veteran's surviving spouse or child amounts paid by the surviving spouse or child "in any year" for the just debts of the veteran and the expenses of the veteran's last illness and burial. See Operation of Pension Program: Hearings Before the Committee on Veterans' Affairs, House of Representatives, 86th Cong., 1st Sess. 535 (1959) (statement of Rep. John W. Byrnes). Congressman Byrnes' statement in support of his bill indicates that the measure was intended to correct a serious inequity resulting from the inclusion of commercial insurance proceeds as income of a veteran's survivors. *Id.* Congressman Byrnes explained that, in many cases, survivors used all or part of the proceeds of commercial insurance to pay expenses that resulted from the death of the veteran, including the cost of burial, expenses of the veteran's last illness, and the veteran's just debts. *Id.* He also noted that the inequitable situation arose most frequently during the year following the death of the veteran. *Id.*

8. While the referenced legislative history is not conclusive, it appears that the last-illness exclusion was intended to provide relief generally to surviving spouses whose income otherwise countable for death pension purposes is needed to offset sums owing or paid as a result of a veteran's last illness. The equity of excluding the amount of income needed to offset such expenses is the same regardless of whether the expenses are paid before or after the veteran's death. Further, Congressman Byrnes' reference to amounts paid "in any year" by a surviving spouse for expenses of a veteran's last illness suggests that the time at which the payments are made should not affect the deductibility of the amount of the expenses.

9. The exclusion of amounts paid by a veterans' spouse prior to the veteran's death was added by Pub. L. No. 90-77, § 103(a), 81 Stat. 178 (1967). The legislative history of that amendment contains little explanation of Congress' intention, except a reference indicating Congress' understanding that amounts paid by a spouse during the veteran's lifetime would be deducted from the surviving spouse's income after the veteran's death. 113 Cong. Rec. A4225 (daily ed. Aug. 21, 1967) (statement of Rep. Hamilton supplying summary prepared by House Committee on Veterans' Affairs).

10. In order to align pension payments more closely to actual need, Congress eliminated a number of income exclusions when it enacted the Veterans' and Survivors' Pension Improvement Act of 1978, Pub. L. No. 95-588, 92 Stat. 2497. H.R. Rep. No. 1225, 95th Cong., 2d Sess. 28, *reprinted in* 1978 U.S.C.C.A.N. 5583, 5609. However, it continued certain exclusions thought not to conflict with the basic principles of the pension program. *Id.* There is no indication in either the terms of Pub. L. No. 95-588 or the legislative history of that statute that Congress intended to place any limitations on the scope of the last-illness exclusion.

11. In enacting section 2501 of Pub. L. No. 98-369, Congress limited the payment of retroactive death pension benefits to surviving spouses. Prior to the enactment of section 2501, the effective date of an award of death pension was the first day of the month in which the veteran's death occurred, if VA received an application within one year from the date of the veteran's death. Pursuant to the amendment made by section 2501, an award of death pension may be effective the first day of the month in which the veteran's death occurs only if VA receives an application within 45 days of the date of the veteran's death. Otherwise, the award may not be effective earlier than the date of receipt of the application. This amendment was intended to achieve a substantial cost savings by limiting retroactive pension awards. 130 Cong. Rec. S8401 (daily ed. June 27, 1984) (statement of Sen. Cranston). While limiting the deductibility of amounts a surviving spouse paid for the veteran's last illness to those amounts paid subsequent to the surviving spouse's date of entitlement to death pension benefits may achieve cost savings, the terms and legislative history of Pub L. No. 98-369 suggest no intention on the part of Congress to achieve cost savings in this manner. Limiting the last-illness deduction, which relates solely to the amount of income that will be counted to determine eligibility for pension, affects prospective eligibility for benefits. The imposition of a restriction relating to the effective date of a surviving spouse's entitlement to death pension benefits in no way implies an intent to restrict deduction from income of certain expenses. Section 2501 of Pub. L. No. 98-369 simply did not deal with exclusions from income or the deductibility of expenses for purposes of determining entitlement to pension or calculating the rate of pension and provides no support for the last sentence of section 3.272(h).

12. Based on the foregoing, we find that the last sentence of 38 C.F.R. § 3.272(h) is inconsistent with 38 U.S.C. § 1503(a)(3) in prohibiting deduction in computation of income for improved death pension purposes of expenses of a

veteran's last illness paid subsequent to the veteran's death but before the date of a surviving spouse's entitlement to death pension. VA generally may not impose restrictions on rights granted by mandatory and unambiguous statutory provisions. See *Skinner v. Brown*, 27 F.3d 1571, 1574 (Fed. Cir. 1994); *Davenport v. Brown*, 7 Vet. App. 476, 482 (1995). In *Lofton v. West*, 198 F.3d 846, 850 (Fed. Cir. 1999), the United States Court of Appeals for the Federal Circuit recognized that, "[a] regulation does not contradict the statutory scheme . . . simply because it addresses an issue on which the scheme is silent," and that VA may promulgate reasonable "'gap-filling'" measures under its authority in 38 U.S.C. § 501(a) to issue regulations "'necessary or appropriate to carry out the laws administered by the Department and . . . consistent with those laws.'" However, the court also noted that section 501(a) does not authorize VA to promulgate regulations that are contrary to congressional enactments. *Lofton*, 198 F.3d at 850. Based on the foregoing discussion of the language of 38 U.S.C. § 1503(a)(3) and its history and purpose, we conclude that Congress intended expenses of a veteran's last illness to be deductible from a surviving spouse's income for death pension purposes without regard to whether those expenses were paid subsequent to a veteran's death and before the surviving spouse's date of entitlement and that a regulation providing otherwise is contrary to the statute and unauthorized. Therefore, VA may not rely on the last sentence of 38 C.F.R. § 272(h) as a basis for denying a death pension claim or reducing the amount of benefits payable.

HELD:

a. The last sentence of 38 C.F.R. § 3.272(h) is inconsistent with 38 U.S.C. § 1503(a)(3) in providing that expenses of a veteran's last illness paid by the veteran's surviving spouse subsequent to the veteran's death, but prior to the date of the surviving spouse's entitlement to death pension, may not be deducted from countable income for the purpose of determining entitlement to improved death pension. VA may not rely upon the last sentence of 38 C.F.R. § 3.272(h) as a basis for denying a death pension claim or reducing the amount of benefits payable.

b. (1) There is no basis for the differing treatment currently accorded under 38 C.F.R. § 3.272(h) for expenses of a veteran's last illness paid prior to the date of a veteran's death and those paid after the date of death but before the date of a surviving spouse's entitlement to death pension.

(2) Congress' intent in enacting Pub. L. No. 98-369 to limit retroactive payments of pension in the case of claimants who file claims more than 45 days after the date of a veteran's death does not provide an adequate basis for prohibiting consideration of expenses of a veteran's last illness in determining prospective entitlement for the period following the date of a claim for improved death pension.

Leigh A. Bradley