

CITATION: VAOPGCPREC 6-89
Vet. Aff. Op. Gen. Couns. Prec. 6-89

DATE: 3-8-89

TEXT:

Improved Pension Income--Deduction of Expenses for Last Illness, Burial, and Just Debts

1. You have requested our opinion regarding the period of time for which the deductible expenses of a veteran's last illness, burial, and just debts should be deducted from income in computing the surviving spouse's countable income for improved-pension purposes. We have concluded that, under the then-current regulations, 1/ the aforementioned expenses are deductible from the surviving spouse's income for the 12-month period commencing in February 1986 for expenses of the veteran's last illness and burial and in March 1986 for the payment of just debts.

2. The veteran died on December 19, 1985. The surviving spouse's claim for survivors' benefits was received by the VA on January 2, 1986, showing no expected income for the period December 19, 1985, to December 31, 1985, and for the following calendar year, 1986. By letter dated February 6, 1986, the VA informed the surviving spouse of an award of improved-pension payments of \$307.00 per month effective January 1, 1986, based on assumed receipt of a \$255 Social Security lump-sum death benefit. This letter also notified the surviving spouse that the award would be increased to \$328 per month, effective December 1, 1986, based on no expected income thereafter.

3. On February 20, 1986, the VA received notification from the surviving spouse of receipt of \$6,679.58 life-insurance proceeds on February 10, 1986, and of the surviving spouse's payment of the expenses of the veteran's last illness and burial, totaling \$6,340.52 in February 1986. By letter dated February 28, 1986, the surviving spouse was informed that, based on the revised income and expense information, the award was adjusted to pay: \$328 per month from January 1, 1986, based on no countable income; \$266 per month from March 1, 1986, based on \$745 countable income; and no benefits effective December 1, 1986, based on \$6,679 income. The countable income for each of the aforementioned award changes was, as far as we can discern, computed as follows:

Effective January 1, 1986, the \$255 Social Security death benefit was eliminated by \$255 of the expenses of last illness and burial, paid by the surviving spouse.

Effective March 1, 1986, the \$255 Social Security death benefit plus the life-insurance proceeds of \$6,679.58 were reduced by the expenses of last illness and burial, paid by the surviving spouse in the amount of \$6,340.52, which

amount was reduced by the \$150 VA plot- allowance award for a net deductible for those expenses of \$6,189. Effective December 1, 1986, the deduction for the expenses of last illness and burial was eliminated and the life-insurance proceeds of \$6,679.58 reappeared as countable income, causing the termination of the surviving spouse's award.

4. On March 17, 1986, the VA received notice from the surviving spouse that on March 13, 1986, the surviving spouse had paid an \$802.43 Sears bill owed by the veteran at death. The VA response, dated April 3, 1986, did not specifically address the payment of the veteran's bill. Instead, the VA informed the surviving spouse that the insurance proceeds constituted income from March 1, 1986, to March 1, 1987, thereby precluding payment of pension for the period December 1, 1986, to March 31, 1987, and that if the surviving spouse's income as of April 1987 was lower than the income limitation, the claim could be reopened.

5. On May 8, 1986, the VA received a letter from the surviving spouse questioning how the VA computed income, specifically mentioning the expenses and debts paid. By letter dated May 28, 1986, the VA notified the surviving spouse that the life-insurance proceeds were countable through March 1987 and that the Sears bill did not constitute a just debt for the purpose of reducing countable income. Subsequently, the claim was re-opened and pension benefits awarded from April 1, 1987, based on no expected income. A notice of disagreement was filed regarding denial of the Sears bill as a just debt and termination of pension from December 1, 1986, to March 31, 1987. On May 12, 1987, the VA notified the surviving spouse that the award was adjusted, effective March 1, 1986, based on no income for the period March 1, 1986, to November 30, 1986. Entitlement was still denied from December 1, 1986, to March 31, 1987, because the life-insurance proceeds were counted for that period. The adjustment for the period March 1, 1986, to November 30, 1986, took into account the Sears-bill payment as a deductible just debt.

6. The statement of the case furnished the surviving spouse by letter dated April 16, 1987, incorrectly cited to 38 C.F.R. §3.262(p) regarding the deductible expenses of last illness, burial, and just debts rather than 38 C.F.R. § 3.272(h), the section applicable to such expenses in improved-pension cases. In addition, the Regional Office set forth a paraphrasing of language from section 9.22a(1), VA Manual M21-1, as the basis for the deductible period for the claimed expenses.

7. Then-section 3.272(h) provided, in pertinent part:

The expenses specified in paragraphs (h)(1) and (2) of this section shall be deducted from annual income for the year in which their payment is made. However, if payment is made during the year following that in which the death occurred, the deduction may be taken from the annual rate of income for the year of the last illness or burial if to do so is advantageous to the beneficiary. (38

U.S.C. 210(c))

(1) Veteran's final expenses.

* * * *

(ii) Amounts paid by a surviving spouse or child of a veteran for the veteran's just debts, expenses of last illness and burial (to the extent such burial expenses are not reimbursed under Chapter 23 of Title 38, United States Code) will be deducted from the income of the surviving spouse or child. (38 U.S.C. 503(a)(3)).

The above-cited language states that the 'final expenses' deduction shall be made in the 'year' in which payment is made without defining or otherwise specifying what constitutes the 'year' referred to. In addition, the above-cited section does not provide when the deductible period should begin. Therefore, we must look to statutory provisions and/or other improved-pension implementing regulations for resolution. No provision of either title 38, United States Code, or its implementing regulations contains specific provisions addressing what the term 'year' means or when the deduction in question should commence and the period over which such deduction is effective.

8. The monthly improved-pension rate payable in initial and reopened claims is controlled by the provisions of 38 C.F.R. of § 3.273(a). Under this provision, the claimant's annual rate of countable income on the effective date of entitlement is subtracted from the maximum applicable annual pension rate, with the remainder divided by 12. Section 3.273(b)(2) controls when a running award is involved and there is a change in the claimant's annual rate of countable income. Under this provision, the new countable rate of income is subtracted from the maximum applicable annual pension rate on the effective date of the change in income, with the remainder divided by 12. Section 3.273(c) is the controlling regulation for nonrecurring income (e.g., an inheritance). The provision requires that the nonrecurring income be added to the claimant's annual rate of income for a 12-month period on the effective date on which said income is countable. None of these provisions supports the procedures set forth in section 9.20, VA Manual M21-1, which provides that, in cases of original or reopened awards, 'deductions from and additions to income during the initial year will necessitate annualization from the beginning date of the award,' or those found in section 9.22a(1) regarding the period of exclusion for deductible expenses in original or reopened claims.

9. Consistent with section 3.273(c), the Regional Office properly added the claimant's life-insurance proceeds as of the month of receipt, February 1986, for a prospective 12-month period. However, with regard to the deductible expenses, section 3.273(b)(2), governing running awards, requires re-computation of income as of the effective date of a change in income. There is no distinction drawn in that section, between changes in income resulting from an increase or decrease in income actually received by a claimant and changes resulting from

changes in

amounts properly deductible from income under applicable regulations. Section 3.273(c) goes on to provide for counting of nonrecurring expenses in running awards over a prospective 12-month period. In the interest of consistency, we believe the same method of counting one-time changes in deductible expenses must be used in entitlement re-computations as that which is used for counting nonrecurring income in such re-computations, except where the special liberalizing provision of section 3.272(h) permits counting expenses from an earlier date when advantageous to the claimant. Accordingly, a new rate computed under section 3.273(b) as of the effective date of a change in income, regardless of whether based on nonrecurring income or expenses, must be applied for a prospective 12-month period, except as section 3.272(h) specifically provides an earlier date for the claimant's benefit or future changes in income may require additional prospective adjustments. In this claim, the change in the claimant's annual rate of income caused by payment of excludable expenses in February 1986, should have been applied prospectively for a 12-month period running from the month of payment, rather than retroactively to the date of award. Similarly, the additional expenses paid in March 1986 should have been deducted for a 12-month period running from March 1986.

10. The provisions of VA Manual M21-1 discussed above and, in part, relied on by the Regional Office in computing the claimant's income, are intended as procedural guidelines. Given the fact that their substantive content has not been the subject of notice-and-comment rulemaking procedures, they cannot be construed as a regulation binding on the Board under 38 U.S.C. § 4004(c), and the Board is not required to follow such procedural guidelines. In addition, to the extent the M21-1 provisions are in conflict with existing regulations, they cannot be given effect.

11. In view of the foregoing, it is our opinion that the deductible amounts for the veteran's last illness, burial, and just debts should be excluded from the claimant's countable income effective the first of the month in which the amounts were paid by the claimant, and the new rate of improved pension should be effective over the 12-month period beginning on that date.

HELD:

Where the surviving spouse of a veteran who died in December 1985 is awarded improved-pension payments from January 1986, and where the surviving spouse paid the expenses of the veteran's last illness and burial in February 1986, and paid the veteran's just debts in March 1986, the aforementioned expenses are deductible from income for improved pension purposes for the 12-month period commencing February 1986 for expenses of the veteran's last illness and burial, and for the 12-month period commencing March 1986 for the payment of just debts. A new rate of improved pension for a prospective 12-month period would become effective at the beginning of each of the months in which the

amounts were paid, rather than on the date of the original award. Although regulations governing pension income were amended in June 1988, 53 Fed. Reg. 23,235, to incorporate, among other changes, use of the 12-month-annualization-period concept, application of these amendments to this claim would not change our conclusion.

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