IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

MARLESA D. LYNCH, Appellant, AND CYNTHIA M. MARTINEZ, Appellant, v. PETER O'ROURKE, Acting Secretary of Veterans Affairs, Appellee.	No. 16-0541

APPELLANTS' SUPPLEMENTAL MEMORANDUM OF LAW PURSUANT TO COURT ORDER DATED MAY 3, 2018

On May 3, 2018, the Court issued an order directing the parties to file a memorandum of law to address the following questions:

(1) Under certain circumstances, surviving "children" of a deceased veteran are entitled to receive DIC benefits. *See, e.g.*, 38 U.S.C. §§ 1310, 1313. The term "child" is defined in 38 U.S.C. § 101(4)(A). What is the appropriate date on which to assess whether a person qualifies as a "child" under 38 U.S.C. § 101(4)(A)? Is it the date an application for DIC benefits is filed, the date of initial resolution of that claim, or some other date? In addressing this question, the parties should specifically consider *Sucic v. Shulkin*, 29 Vet.App. 121 (2017) (per curiam order), and *Burris v. Principi*, 15 Vet.App. 348 (2001), in addition to any authorities the parties deem relevant.

(2) In the January 2016 decisions on appeal, the Board determined that the appellants were not "children" as of the date of their August 2010 applications and denied the claims on that basis; the decisions

did not explicitly address whether the appellants are David Philpot's biological children. Does this treatment constitute an implicit favorable factual finding the Court is bound to accept, or does the question of paternity remain a legal determination subject to appellate review? In addressing this question, the parties should specifically consider *McDowell v. Shinseki*, 23 Vet.App. 207 (2009), in addition to any authorities the parties deem relevant.

(3) The appellants are not listed on the April 1969 application for DIC that was filed by David Philpot's parents. What authorities support, or contradict, a finding that the April 1969 application remained incomplete until it was completed by appellants' 2010 applications?

I. The appropriate date on which to assess whether a person qualifies as a "child" under 38 U.S.C. § 104(4)(A) is the date of the veteran's death, or the date the application for DIC benefits is filed, whichever is later.

38 U.S.C. § 101(4)(A) defines a child as an unmarried person who is under the age of eighteen; who is over the age of eighteen but under the age of 23 and is pursuing a higher education at an approved institution; or who became permanently incapable of self-support before the age of eighteen.

An individual must qualify as a child under 38 U.S.C. § 101(4)(A) both at the time of the veteran's death and when the claim is filed, unless the claim is filed within one year of the veteran's death. Thus, it would be the later of the two events that would be the appropriate date for assessment of whether the individual qualifies as a "child" under 38 U.S.C. § 101(4)(A) and is therefore eligible to receive benefits. To find otherwise would allow an individual who qualifies as a child under 38 U.S.C. § 101(4)(A) to file a claim for DIC prior to the death of the veteran, and obtain benefits after the veteran passed away, even though that individual had exceeded the age of majority by the time the veteran passed away. However, this does not prohibit an individual who qualifies as

a child under 38 U.S.C. § 101(4)(A) at the time of the veteran's death from filing a claim while still a child and collecting benefits after the age of majority due to the claim not being decided until after the individual reached the age of majority.

A finding that the date for determining when a claimant is a "child" is the date of death or date of claim, is supported by 38 U.S.C. § 5110 and its implementing regulation, 38 C.F.R. § 3.400, both of which provide that the date benefits would begin would be the date that entitlement arose, or the date that the claim was filed, whichever was later. Entitlement would arise at the time of the veteran's death, but the benefit could not be granted prior to the date the claim was filed. It should be noted, however, that in some circumstances the appropriate date for assessment of whether the individual qualified as a child would be the date of the veteran's death alone, such as when a claim is filed within one year of the veteran's death. 38 U.S.C. § 5110(d) and 38 C.F.R. § 3.400(c) both provide that the effective date for a claim for dependency and indemnity compensation will be the first day of the month in which the veteran's death occurred if the claim is received within one year after the date of death. Thus, an individual who exceeded the age of majority six months after the veteran's death, would still be eligible for benefits for the six months following the veteran's death, as long as the claim was filed within one year of the veteran's death.

This is also consistent with the Court's holdings in *Sucic v. Shulkin* and *Burris v. Principi*. In *Sucic*, the Court found that the appropriate date for determination of whether an individual qualifies as an accrued benefits beneficiary is the date of death of the veteran. *Sucic v. Shulkin*, 21 Vet.App. 121 (2017). In that case, the claim in question had

been pending since June 1992. *Id*. at 123. At the time the claim was filed, and for a portion of the appeal period, the veteran's offspring qualified as "children" under 38 U.S.C. § 101(4)(A); however, the veteran was not deceased during the period for which his offspring would have qualified as "children." *Id*. Thus, they were not entitled to receive accrued benefits.

In *Burris*, the Court concluded that because the claimant was 70 years old at the time he filed his claim, he did not qualify as a "child" under 38 U.S.C. § 101(4)(A). *Burris v. Principi*, 15 Vet.App. 348 (2001). The claimant had asserted clear and unmistakable error in a 1931 decision, and at the time of that decision, the claimant would have qualified as a "child" under 38 U.S.C. § 101(4)(A). *Id*. The Court noted that "although a claimant ***eligible for*** DIC benefits may demonstrate entitlement to an award based upon a finding of CUE, this appellant is not eligible for additional benefits because he does not satisfy the statutory definition of a "child". *Id*. at 353. The veteran was not deceased at the time of the 1931 decision; therefore, the claimant would not have been eligible to receive benefits at that time, and by the time the veteran passed away and the new claim was filed, the claimant was over the age of majority. Thus, the claimant could not have been eligible for DIC benefits.

In the present case, Ms. Martinez and Ms. Lynch were children within the meaning of 38 U.S.C. § 101(4)(A) at the time of the veteran's death, unlike the claimants in *Sucic* and *Burris*. In addition, they were children within the meaning of 38 U.S.C. § 101(4)(A) at the time of the incomplete/defective/informal application that was filed by their grandparents in 1969. The 2010 applications merely served as notice to VA of the

defect/incompleteness of the 1969 application and presence of an informal claim that had remained unadjudicated. Thus, the age of Ms. Martinez and Ms. Lynch at the time of the 2010 application is irrelevant, as it does not alter the determination that they would have been entitled to benefits in 1969 and until they reached the age of majority, but for an error in the processing of the 1969 application.

II. VA has conceded that Ms. Martinez and Ms. Lynch were the natural children of the veteran, and this is a favorable factual finding that cannot be disturbed by the Court.

Whether an individual is the child of a veteran within the meaning of 38 U.S.C. § 101(4)(A) is a substantially factual determination. The Secretary, through the Board or the Regional Office, is permitted to consider an array of evidence, weigh that evidence, and determine whether the evidence supports a finding that an individual is a legitimate child, legally adopted child, stepchild, or illegitimate child, thereby supporting a finding that this is a factual determination.

This is supported by the Court's decision in *McDowell v. Shinseki*. 23 Vet.App. 207 (2009). In that case, the Board listed its determination that the genetics testing had established that the veteran was not the father of the minor as a factual finding in its decision. No. 03-37 141, 2007 BVA LEXIS 8569, at *1 (BVA Mar. 22, 2007). When the appeal reached the Court, there were two questions – whether the Board was permitted to consider DNA evidence when determining whether the individual in question qualified as an illegitimate child of the veteran, and whether the Secretary correctly interpreted the regulation he promulgated to require a biological element to the determination of whether a veteran was the father of an individual. The Court found that the Board's consideration

of DNA evidence was permissible in determining whether the individual in question qualified as an illegitimate child of the veteran and that the Secretary's interpretation of his own regulation was proper. *McDowell* at 216. What evidence can and should be considered and the interpretation of regulations are legal questions. However, the actual determination of whether the evidence indicates that an individual is a child of the veteran is a substantially factual determination, which the Court is not permitted to disturb. *See Medrano v. Nicholson*, 21 Vet.App. 165 (2009) (holding that the Court gives deference to the Board's findings of fact provided that they are not clearly erroneous).

In both of May 2012 Statements of the Case, the Regional Office explicitly conceded that Ms. Martinez and Ms. Lynch were the "natural daughter[s] of the veteran." R. at 127-41, 144-58. 38 U.S.C. § 101(4)(A) provides that the evidence must merely be "satisfactory to the Secretary" that the veteran is the father of the illegitimate child. The Regional Office's determination that Ms. Martinez and Ms. Lynch were the natural children of the veteran indicates that the evidence was "satisfactory to the Secretary." The Board did not disturb this finding. Accordingly, the Secretary has already conceded that Ms. Martinez and Ms. Lynch are the natural children of the veteran and that this is a factual finding that cannot be disturbed in the absence of any indication that the finding is clearly erroneous.

III. The 1969 DIC application remained incomplete because it did not contain critical information needed to decide the claim, or because it was an informal claim for the children which remained pending until the 2010 formal application was filed[1].

The April 1969 application remained incomplete until the 2010 applications were received because information regarding the veteran's dependent children, a critical element in processing an application for DIC, was omitted. 38 U.S.C. 5103(a). In *Fleshman v. West*, 138 F.3d 142 (1998), the Court stated that a finding that an application is incomplete involves a determination of whether the missing item on the form is a critical element. In *Fleshman*, the veteran neglected to sign the portion of the application which consented to release of treatment information and a waiver of any privilege which would render the information confidential. *Id*. at 1432. The Court found that the veteran's signature was a critical element to the application. *Id*. In the context of a DIC application, the Court has held that the qualifying information to determine veteran status is a critical element of the claim. *See Pelea v. Nicholson*, 19 Vet. App. 296 (2005). As a claim for DIC involves a determination as to whether a surviving spouse, child, or parent is eligible for the benefit, information regarding potentially eligible individuals is a critical element. Further, the fact that the form specifically requests information about dependent children supports a finding that this information is critical to a decision on the

[1] Although the Court asks about whether the 1969 incomplete application remained pending, there is a possibility that there may be a formal claim pending from that time. 38 U.S.C. § 5105(b) provides that if an application for survivor benefits is filed with either the Secretary or Commissioner of Social Security, it shall be deemed an application for benefits under chapter 13. The record does not document any attempts made by VA to determine whether there was an application for survivor benefits filed with the Social Security Administration which would be accepted as an application for DIC.

claim. Either the information requested regarding dependent children was necessary to a determination about entitlement to DIC, or the information requested was to notify VA of the existence of other individuals who may be eligible for benefits. Either way, the information was critical to VA's determination of who may be entitled to DIC. In light of the fact that the 1969 application did not contain this critical information regarding the veteran's dependent children, the 1969 application remained incomplete until the 2010 applications were submitted.

The regulations in place in 1969 provided that, if an application was incomplete, VA would notify the claimant of the evidence necessary to complete the application. 38 C.F.R. § 3.109(a)(1969); *see also Jernigan v. Shinseki*, 25 Vet.App. 200, 228 (2012), *aff'd*, 521 F. Appx. 931 (Fed. Cir. 2013) (*quoting* Manual M21-1.iii.2.01(e) (Sept. 14, 1992))[2]. If the evidence needed was not received within one year from the date of such notification, pension, compensation, or DIC would not be paid based upon that informal application. *Id*. The regulation specifically provided that this notice requirement was applicable to original applications (formal or informal), and to applications for increased benefits by reason of (in relevant part) the existence of a dependent. 38 C.F.R. § 3.109(b) (1969). In this case, VA did not provide notice that the 1969 application was incomplete or what evidence was needed to complete the application. The critical, missing information needed to complete the application was not provided until 2010. If VA had provided notice of the evidence necessary to complete the application and there had been

[2] Appellants note the internal VA Adjudication Manual referred to a "defective" application, which is also considered an incomplete application.

no response within one year from notification, then the application would not have remained pending. However, in this case, VA did not provide notice of the evidence necessary to complete the application, so Appellants had a chance to provide the critical information, which they did in 2010 when the formal applications were filed. Thus, the 1969 incomplete claim remained pending until the complete applications were provided in 2010.

Appellants acknowledge that the 1969 application provided to the veteran's parents was an "Application for Dependency and Indemnity Compensation by Parent(s)" and not expressly an application for dependent children, and that the information regarding the veteran's parents was complete. R. at 340-45. However, the actual title of the application indicates that it is an application for DIC made *by* the parents, but not necessarily *for* the parents alone. Thus, on its face the application for DIC was not limited to just a claim for benefits for the parents. Additionally, there is nothing which precludes VA from finding that the 1969 application submitted by the parents was also an application for the children, or that the 1969 application could be construed as an informal claim for the children.

Both the language of the statute and the DIC applications (in 1969 and currently) support a determination that it is only necessary to file one application for DIC. 38 U.S.C. § 5110(a) provides that "the effective date of an award based upon *an* initial application, or *a* supplemental claim, of compensation, dependency and indemnity compensation, or pension, shall be fixed in accordance with the facts found, but shall not be earlier than the date of receipt of application therefor." (emphasis added). The

language of statue is singular, in that only one application is referenced. In addition, 38 U.S.C. § 5110(d) provides that "the effective date of an award of death compensation, dependency and indemnity compensation, or death pension for which *application* is received within one year from the death of death shall be the first day of the month in which the death occurred." (emphasis added). Again, the language of the statute refers to a single application. Additionally, the title of the 1969 form (Application for DIC by Parents) suggests that a claim for DIC could be made by the parents, but was not restricted to a claim *for* the parents. Further, the application itself asked for information about the dependent children. Logically, the only reason VA would ask for that information was if it was relevant to a determination about entitlement to DIC, otherwise it would be superfluous. The record indicates that the dependent children were living with the veteran's parents at the time of his death, and that the veteran's parents were appointed (at some point) as guardians for the children. R. at 52-53 (50-72); 240. If the parents had checked the box on the application and had indicated there were children (living with them and under their guardianship), then VA may have processed the claim as an application for DIC benefits for children. Further, Appellants note that the current version of the DIC application is used for all potential recipients (surviving spouse, children, and parents). As this demonstrates that only one application was, and still is necessary, to apply for DIC benefits, the parents' 1969 application was also an application for DIC for the children which (because it was incomplete) remained pending until the 2010 applications were filed.

The regulations also illustrate instances in which VA can construe an individual's claim as one for the children. 38 C.F.R. § 3.152(c)(1969) provided that a claim filed by a widow who did not have entitlement to DIC would be accepted as a claim for a child or children in her custody named in the claim. Additionally, 38 C.F.R. § 3.702(b) (1969) provided that, where DIC was payable to or for a child by reason of a widow's election of this benefit, DIC to or for a child would commence as of the date of the award of DIC to the widow. These regulations demonstrate that DIC can be paid to or for dependent children without a claim or application filed by the child. Finally, 38 C.F.R. 3.155(a)(1969) provided that any communication or action which indicated an intent to apply for a benefit from a claimant (or his authorized representative or person acting as next friend of a claimant) may be considered an informal claim. In this case, the veteran's dependent children were minors, and the veteran's parents were (at some point) appointed as their guardians. As illustrated by the regulations, the Board was permitted to construe the parents' DIC application as an informal claim for DIC benefits for the dependent, minor children which remained pending until the formal application was submitted in 2010.

In addition to the fact that there is nothing preventing VA from construing the parents' DIC claim as a claim for the children, it is important to note that the veteran's children were not only minors, but they were also one and a half and five months old at the time of his death. R. at 209; 217. There is simply no way that, at the time of the veteran's death, the dependent children could have filed an application for DIC benefits on their own behalf. Thus, in order for a claim for DIC benefits to be filed, someone else

(next of kin, an authorized representative, or a guardian) would have to file the claim for them. As the veteran's parents were both relatives of the dependent children and appointed (at some point) as their guardians, VA had the ability to construe the parents' application for DIC benefits as a claim for DIC benefits for the dependent children.

Finally, the application also remained pending because the evidence indicates that the marking of the box "neither" was simply a misunderstanding. In *Van Valkenburg v. Shinseki*, 23 Vet. App. 113 (2009), the Court found that the Board failed to discuss the conflict between the claimant's DIC application (on which she marked that she had never filed for burial or flag benefits) and the fact that she did apply for burial flag benefits. The Court stated that the Board should have addressed this conflict and whether the marking of the box was simply a mistake. In this case, as the parents' marking of the box "neither" is in conflict with the fact veteran did have dependent children who lived with them and over whom the parents served as guardians. As payment of DIC for children does not preclude payment of benefits to parents, the parents had no apparent motive to lie about the existence of children. Thus, it appears the checking of the box was simply a mistake or misunderstanding.

Because the 1969 application was missing critical information which rendered the application incomplete, and because VA did not provide notice of what information was needed to complete the application, the 1969 application remained incomplete until the 2010 applications were submitted. Additionally, the statute, regulations, and application forms illustrate VA could construe the parents' 1969 application for DIC as an informal

application for the children which remained pending until the formal application was submitted in 2010.

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APPENDIX

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DOCKET NO. 03-37 141) DATE
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On appeal from the
Department of Veterans Affairs Regional Office in Atlanta, Georgia

THE ISSUE

Whether [redacted] may be recognized as a child of the veteran for purposes of Department of Veterans Affairs (VA) benefits.

REPRESENTATION

Appellant represented by: Vietnam Veterans of America

ATTORNEY FOR THE BOARD

James R. Siegel, Counsel

INTRODUCTION

The veteran served on active duty from November 1969 to February 1972, and died in March 1992. The appellant is [redacted] mother.

In an Administrative Decision dated August 2003, the Regional Office (RO) denied the appellant's claim for VA benefits on behalf of [redacted]. She was notified of this action by letter dated later that month and appealed it to the Board of Veterans' Appeals (Board). In a July 2005 decision, the Board remanded the claim to the RO to ensure due process. As the requested actions have been accomplished, the case is again before the Board for appellate consideration.

FINDINGS OF FACT

1. The veteran died on March [redacted], 1992, and [redacted] was born on November [redacted], 1992.

2. Genetics testing establishes that there is a less than one percent chance that the veteran is [redacted] father.

CONCLUSION OF LAW

[redacted] may not be recognized as a child of the veteran. 38 C.F.R. § 3.210 (2006).

REASONS AND BASES FOR FINDINGS AND CONCLUSION

The Veterans Claims Assistance Act of 2000 (VCAA), Pub. L. No. 106-475, 114 Stat. 2096 (Nov. 9, 2000) (codified at 38 U.S.C.A. §§ 5100, 5102, 5103, 5103A, 5106, 5107, and 5126 (West 2002) redefined VA's duty to assist the veteran in the development of a claim. VA regulations for the implementation of the VCAA were codified as amended at 38 C.F.R. §§ 3.102, 3.156(a), 3.159, and 3.326(a) (2005).

The notice requirements of the VCAA require VA to notify the appellant of any evidence that is necessary to substantiate her claim, as well as the evidence VA will attempt to obtain and which evidence she is responsible for providing. Quartuccio v. Principi, 16 Vet. App. 183 (2002). Such notice must be provided to a claimant before the initial unfavorable decision on a claim for VA benefits by the agency of original jurisdiction (in this case, the RO). Id; see also Pelegrini v. Principi, 18 Vet. App. 112 (2004). However, the VCAA notice requirements may be satisfied if any errors in the timing or content of such notice are not prejudicial to the claimant. Id.

In this case, in a September 2005 letter, the RO provided notice to the appellant regarding what information and evidence is needed to substantiate the claim, as well as what information and evidence must be submitted by her, what information and evidence will be obtained by VA, and the need for the appellant to advise VA of or submit any further evidence in her possession that pertains to the claim.

The record also reflects that VA has made reasonable efforts to obtain relevant records adequately identified by the appellant. Specifically, the information and evidence that have been associated with the claims file includes statements and medical evidence submitted by the appellant, as well as the report of a VA hospitalization.

As discussed above, the VCAA provisions have been considered and complied with. The appellant was notified and aware of the evidence needed to substantiate this claim, the avenues through which she might obtain such evidence, and the allocation of responsibilities between herself and VA in obtaining such evidence.
There is no indication that there is additional evidence to obtain, there is no additional notice that should be provided, and there has been a complete review of all the evidence without prejudice to the appellant. As such, there is no indication that there is any prejudice to the appellant by the order of the events in this case. See Pelegrini, supra; Bernard v. Brown, 4 Vet. App. 384 (1993). Moreover, as the Board concludes below that the preponderance of the evidence is against the appellant's claim, any question as to an effective date to be assigned is rendered moot. Any error in the sequence of events or content of the notice is not shown to have any effect on the case or to cause injury to the claimant. Thus, any such error is harmless and does not prohibit consideration of this matter on the merits. See Dingess, supra; Mayfield v. Nicholson, NO. 02-1077 (Vet. App. Dec. 21, 2006); see also ATD Corp. v. Lydall, Inc., 159 F.3d 534, 549 (Fed. Cir. 1998).

Analysis

The Board has reviewed all the evidence in the appellant's claims file, which includes: her multiple contentions, a VA hospital report, numerous statements submitted by and on behalf of the appellant, and the report of genetics testing. Although the Board has an obligation to provide adequate reasons and bases supporting this decision, there is no requirement that the evidence submitted by the appellant or obtained on her behalf be discussed in detail. Rather, the Board's analysis below will focus specifically on what evidence is needed to substantiate the claim and what the evidence in the claims file shows, or fails to show, with respect to the claim. See Gonzales v. West, 218 F.3d 1378, 1380-81 (Fed. Cir. 2000) and Timberlake v. Gober, 14 Vet. App. 122, 128-30 (2000).

Under the applicable criteria, age or relationship is established by one of the following types of evidence: a copy or abstract of the public record of birth; a copy of a church record of baptism; an affidavit or certified statement of the physician or midwife in attendance at birth; a copy of a Bible or other family record certified to by a notary public or other officer with authority to administer oaths, who should state in what year the Bible or other book in which the record appears was printed, whether the record bears any erasures or other marks of alteration, and whether from the appearance of the writing he believes the entries to have been made at the time purported; affidavits or certified statements of 2 or more persons, preferably disinterested, who will state their ages, showing the name, date, and place of birth of the person whose age or relationship is being established, and that to their knowledge such person is the child of such parents (naming the parents) and stating the source of their knowledge; and other evidence which is adequate to establish the facts in issue, including census records, original baptismal records, hospital records, insurance policies, and school, employment, immigration, or naturalization records. 38 C.F.R. § 3.209 (2006).

As to the mother of an illegitimate child, proof of birth is all that is required. As to the father, the sufficiency of evidence will be determined in accordance with the facts in the individual case. Proof of such relationship will consist of: (1) an acknowledgment in writing signed by him; or (2) evidence that he has been identified as the child's father by a judicial decree ordering him to contribute to the child's

support or for other purposes; or (3) any other secondary evidence which reasonably supports a finding of relationship, as determined by an official authorized to approve such findings, such as (i) a copy of the public record of birth or church record of baptism, showing that the veteran was the informant and was named as a parent of the child; or (ii) statements of persons who know that the veteran accepted the child as his; or (iii) information obtained from service department or public records, such as school or welfare agencies, which shows that with his knowledge the veteran was named as the father of the child. 38 C.F.R. § 3.210.

The evidence supporting the appellant's claim includes her statements, photographs of [redacted] and the veteran, and various lay statements, including from relatives of the veteran. In essence, the appellant argues that the veteran is [redacted]'s father. She argues that the veteran acknowledged that [redacted] was his daughter and asserts that they planned to get married, but that he died before they could. The veteran's sister submitted a statement in June 2005 that the veteran was [redacted]'s father. She related that she did not like the appellant, but that the veteran wanted the child and accepted it as his. She claims that she accepted [redacted] as her niece.

Another sister of the veteran asserted that the veteran wanted to have a child with the appellant and that he had acknowledged that child as being his. G.R. maintained that the appellant had lived with her and that the veteran had called the appellant while he was in the hospital. She added that the veteran had told the appellant that he would buy her a car if the child was a girl. She also stated that [redacted] looks like the veteran.

The evidence against the claim includes the birth certificate, a VA hospital report and the report of a genetics test. Initially, the Board observes that the appellant has conceded that she was not married to the veteran at the time of his death. The appellant submitted a copy of a birth certificate showing that [redacted] was born on November [redacted], 1992, and that she is [redacted]'s mother. The veteran's name is written by hand as the "real" father. The appellant alleges that she was not permitted to list the veteran as the father since he had died by the time [redacted] was born.

A report of contact dated March 2003 reveals that the appellant acknowledged that the veteran was not listed on [redacted]'s birth certificate and that she had no legal paperwork showing that the veteran was her father.

The veteran was hospitalized by the VA from January 14, 1992, through February 18, 1992. This was during the period in which [redacted] was allegedly conceived. The diagnoses on discharge included post-traumatic stress disorder and erectile dysfunction.

A report from a genetics testing facility is of record. It was noted that specimens had been collected in February 2004 from the appellant, [redacted] and two of the veteran's sisters. It was concluded that the Combined Paternity Index that the veteran produced a child with the genotype of [redacted] was 0.00208 to 1, compared to a randomly chosen Caucasian male. All else being equal, the probability of paternity was 0.208%.

In this case, the statements of the appellant and others to the effect that the veteran had known that the appellant was pregnant and had accepted the child as his are of less probative value than the results of the genetics testing which make it extremely unlikely that the veteran is [redacted]'s child. The Board concludes, accordingly, that the preponderance of the evidence is against the appellant's claim that [redacted] may be recognized as the child of the veteran.

ORDER

Since [redacted] may not be recognized as the child of the veteran, the appeal is denied.

K. A. BANFIELD
Veterans Law Judge, Board of Veterans' Appeals

Department of Veterans Affairs

tinuance of pension payments currently being made, the award will be reduced or discontinued effective the last day of the month in which reduction or discontinuance of the award is approved. The veteran will be notified at his latest address of record of the action taken and furnished detailed reasons therefor, and the conditions under which his claim may be reopened. (38 U.S.C. 3012(b)(5); Public Law 87–825)

[26 F.R. 1569, Feb. 24, 1961, as amended at 27 F.R. 4364, May 8, 1962; 27 F.R. 11886, Dec. 1. 1962]

CROSS REFERENCES: Effective dates. See § 3.400. Reductions and discontinuances. See § 3.500. Protection; service connection. See § 3.957.

§ 3.106 Renouncement.

(a) Any person entitled to pension, compensation, or dependency and indemnity compensation under any of the laws administered by the Veterans Administration may renounce his right to that benefit. The renouncement will be in writing over the person's signature. Upon receipt of such renouncement in the Veterans Administration, payment of such benefits and the right thereto will be terminated, and such person will be denied any and all rights thereto from such filing. (38 U.S.C. 3106(a))

(b) The renouncement will not preclude the person from filing a new application for pension, compensation, or dependency and indemnity compensation at any future date. Such new application will be treated as an original application, and no payments will be made thereon for any period before the date such new application is received in the Veterans Administration. (38 U.S.C. 3106(b))

(c) The renouncement of dependency and indemnity compensation by one beneficiary will not serve to increase the rate payable to any other beneficiary in the same class.

(d) The renouncement of dependency and indemnity compensation by a widow will not serve to vest title to this benefit in children under the age of 18 years or to increase the rate payable to a child or children over the age of 18 years.

[26 F.R. 1569, Feb. 24, 1961]

§ 3.107 Awards where all dependents do not apply.

Except as provided in § 3.251(a)(4), in any case where claim has not been filed by or on behalf of all dependents who may be entitled, the awards (original or amended) for those dependents who have filed claim will be made for all periods at the rates and in the same manner as though there were no other dependents. However, if the file reflects the existence of other dependents who have not filed claim and there is potential entitlement to benefits for a period prior to the date of filing claim, the award to a person who has filed claim will be made at the rate which would be payable if all dependents were receiving benefits. If at the expiration of the period allowed, claims have not been filed for such dependents, the full rate will be authorized for the first payee.

[29 F.R. 9564, July 15, 1964]

§ 3.108 State Department as agent of Veterans Administration.

Diplomatic and consular officers of the Department of State are authorized to act as agents of the Veterans Administration and therefore a formal or informal claim or evidence submitted in support of a claim filed in a foreign country will be considered as filed in the Veterans Administration as of the date of receipt by the State Department representative.

[26 F.R. 1569, Feb. 24, 1961]

CROSS REFERENCE: Evidence from foreign countries. See § 3.202.

§ 3.109 Time limit.

(a) *Notice of time limit for filing evidence.* (1) If a claimant's application is incomplete, the claimant will be notified of the evidence necessary to complete the application. If the evidence is not received within 1 year from the date of such notification, pension, compensation, or dependency and indemnity compensation may not be paid by reason of that application (38 U.S.C. 3003(a)). Information concerning the whereabouts of a person who has filed claim is not considered evidence.

(2) The provisions of this paragraph are applicable to original applications, formal or informal, and to applications for increased benefits by reason of increased disability, age, or the existence of a dependent and to applications for reopening or resumption of payments. If substantiating evidence is required with respect to the veracity of a witness or the authenticity of documentary evidence timely filed, there will be allowed for the submission of such evidence 1 year from

the date of the request therefor. However, any evidence to enlarge the proofs and evidence originally submitted is not so included.

(b) *Failure to furnish claim form or notice of time limit.* Failure to furnish a potential claimant any form or information concerning the right to file claim for pension, compensation, or dependency and indemnity compensation, or to furnish notice of the time limit for the filing of a claim or submission of evidence will not extend the periods allowed for these actions. As to appeals, see § 19.110 of this chapter.

[26 F.R. 1569, Feb. 24, 1961, as amended at 26 F.R. 2231, Mar. 16, 1961; 29 F.R. 1462, Jan. 29, 1964; 30 F.R. 133, Jan. 7, 1965]

§ 3.110 Computation of time limit.

In computing the time limit for any action required of a claimant, including the filing of claims or evidence requested by the Veterans Administration, the first day of the specified period will be excluded and the last day included. This rule is applicable in cases in which the time limit expires on a workday. Where the time limit would expire on a Saturday, Sunday, or holiday, the next succeeding workday will be included in the computation.

[28 F.R. 29, Jan. 1, 1963]

§ 3.112 Fractions of one cent.

In all cases where the amount to be paid under any award involves a fraction of a cent, the fractional part will be excluded.

[26 F.R. 1570. Feb. 24, 1961]

§ 3.113 Signature by mark.

All signatures by mark or thumbprint must be:

(a) Witnessed by two persons who can write and who have signed their names and addresses; or

(b) Certified by a notary public or other person having authority to administer oaths for general purposes; or

(c) Certified by a Veterans Administration employee under authority of Veterans Administration Form 4505 series.

[27 F.R. 4365, May 8, 1962]

§ 3.114 Change of law or Veterans Administration issue.

(a) *Effective date of awards.* Where pension, compensation, or dependency and indemnity compensation is awarded or increased pursuant to a liberalizing law or a liberalizing Veterans Administration issue, approved by the Administrator or by his direction, the effective date of such award or increase shall be fixed in accordance with the facts found, but shall not be earlier than the effective date of the act or administrative issue.

(1) If a claim is reviewed on the initiative of the Veterans Administration within 1 year from the effective date of the law or Veterans Administration issue, or at the request of a claimant received within 1 year from that date, benefits may be authorized from the effective date of the law or Veterans Administration issue.

(2) If a claim is reviewed on the initiative of the Veterans Administration more than 1 year after the effective date of the law or Veterans Administration issue, benefits may be authorized for a period of 1 year prior to the date of administrative determination of entitlement.

(3) If a claim is reviewed at the request of the claimant more than 1 year after the effective date of the law or Veterans Administration issue, benefits may be authorized for a period of 1 year prior to the date of receipt of such request. (38 U.S.C. 3010(g); Public Law 87–825)

(b) *Discontinuance of benefits.* Where the reduction or discontinuance of an award is in order because of a change in law or a Veterans Administration issue, or because of a change in interpretation of a law or Veterans Administration issue, the payee will be notified at his latest address of record of the contemplated action and furnished detailed reasons therefor, and will be given 60 days for the presentation of additional evidence. If additional evidence is not received within that period, the award will be reduced or discontinued effective the last day of the month in which the 60-day period expired. (38 U.S.C. 3012 (b)(6); Public Law 87–825)

[27 F.R. 11886, Dec. 1, 1962]

CLAIMS

§ 3.150 Forms to be furnished.

(a) Upon request made in person or in writing by any person applying for benefits under the laws administered by the Veterans Administration, the appropriate application form will be furnished. (38 U.S.C. 3002)

(b) Upon receipt of notice of death of a veteran, the appropriate application form will be forwarded for execution by or on behalf of any dependent who has apparent entitlement to pension, compensation, or dependency and indemnity

compensation. If it is not indicated that any person would be entitled to such benefits, but there is payable an accrued benefit not paid during the veteran's lifetime, the appropriate application form will be forwarded to the preferred dependent. Notice of the time limit will be included in letters forwarding applications for benefits.

(c) When disability or death is due to Veterans Administration hospital treatment, training, medical or surgical treatment, or examination, a specific application for benefits will not be initiated.

[26 F.R. 1570, Feb. 14, 1961, as amended at 30 F.R. 133, Jan. 7, 1965]

CROSS REFERENCE: Failure to furnish claim form or notice of time limit. See § 3.109(b).

§ 3.151 Claims for disability benefits.

A specific claim in the form prescribed by the Administrator must be filed in order for benefits to be paid to any individual under the laws administered by the Veterans Administration (38 U.S.C. 3001(a)). A claim by a veteran for compensation may be considered to be a claim for pension; and a claim by a veteran for pension may be considered to be a claim for compensation. The greater benefit will be awarded, unless the claimant specifically elects the lesser benefit.

[26 F.R. 1570, Feb. 24, 1961]

CROSS REFERENCE: Informal claims. See § 3.155(b).

§ 3.152 Claims for death benefits.

(a) A specific claim in the form prescribed by the Administrator (or jointly with the Secretary of Health, Education, and Welfare, as prescribed by § 3.153) must be filed in order for death benefits to be paid to any individual under the laws administered by the Veterans Administration. (38 U.S.C. 3001(a))

(b)(1) A claim by a widow or child for compensation or dependency and indemnity compensation will also be considered to be a claim for death pension and accrued benefits, and a claim by a widow or child for death pension will be considered to be a claim for death compensation or dependency and indemnity compensation and accrued benefits. (38 U.S.C. 3001(b)(1))

(2) A claim by a parent for compensation or dependency and indemnity compensation will also be considered to be a claim for accrued benefits. (38 U.S.C. 3001(b)(2))

(c)(1) Where a child's entitlement to dependency and indemnity compensation arises by reason of termination of a widow's right to dependency and indemnity compensation or by reason of attaining the age of 18 years, a claim will be required (38 U.S.C. 3010(e)). See subparagraph (4). Where the award to the widow is terminated by reason of her death, a claim for the child will be considered a claim for any accrued benefits which may be payable.

(2) A claim filed by a widow who does not herself have entitlement will be accepted as a claim for a child or children in her custody named in the claim.

(3) Where a claim of a widow is disallowed for any reason whatsoever and where evidence requested in order to determine entitlement of a child or children named in the widow's claim is submitted within 1 year from date of request, requested either before or after disallowance of the widow's claim, an award for the child or children will be made as though the disallowed claim had been filed solely on their behalf. Otherwise, payments may not be made for the child or children for any period prior to the date of receipt of a new claim.

(4) Where payments of pension, compensation or dependency and indemnity compensation to a widow have been discontinued because of remarriage or death, or a child becomes eligible for dependency and indemnity compensation by reason of attaining the age of 18 years, and any necessary evidence is submitted within 1 year from date of request, an award for the child or children named in the widow's claim will be made on the basis of the widow's claim having been converted to a claim on behalf of the child. Otherwise, payments may not be made for any period prior to the date of receipt of a new claim.

[26 F.R. 1570, Feb. 24, 1961, as amended at 30 F.R. 133, Jan. 7, 1965]

CROSS REFERENCES: State Department as agent of Veterans Administration. See § 3.108.

Change in status of dependents. See § 3.651.

§ 3.153 Claims filed with Social Security.

An application on a form jointly prescribed by the Administrator and the Secretary of Health, Education, and Welfare filed with the Social Security Administration on or after January 1, 1957, will be considered a claim for death benefits, and to have been received in the Veterans Administration as of the date

of receipt in Social Security Administration. The receipt of such an application (or copy thereof) by the Veterans Administration will not preclude a request for any necessary evidence. (38 U.S.C. 3005)

[26 F.R. 1570, Feb. 24, 1961]

§ 3.154 Injury due to hospital treatment, etc.

A formal claim for pension, compensation, dependency and indemnity compensation or any statement in a communication showing an intent to file a claim for disability or for death benefits resulting from the pursuit of a course of vocational rehabilitation, hospitalization, medical or surgical treatment, or examination under Veterans Administration laws may be accepted as a claim. (38 U.S.C. 351; sec. 3, Public Law 87–825)

[27 F.R. 11887, Dec. 1, 1962]

CROSS REFERENCES: Effective dates. See § 3.400.

Disability or death due to hospitalization, etc. See § 3.800(a).

§ 3.155 Informal claims.

(a) Any communication or action, indicating an intent to apply for one or more benefits under the laws administered by the Veterans Administration, from a claimant, his duly authorized representative, a Member of Congress, or some person acting as next friend of a claimant who is not sui juris may be considered an informal claim. Such informal claim must identify the benefit sought. Upon receipt of an informal claim, if a formal claim has not been filed, an application form will be forwarded to the claimant for execution. If received within 1 year from the date it was sent to the claimant, it will be considered filed as of the date of receipt of the informal claim.

(b) A communication received from a service organization, an attorney, or agent may not be accepted as an informal claim if a power of attorney was not executed at the time the communication was written.

(c) When a claim has been filed which meets the requirements of § 3.151 or 3.152, an informal application for increase or reopening will be accepted as a claim.

[26 F.R. 1570, Feb. 24, 1961]

CROSS REFERENCE: State Department as agent of Veterans Administration. See § 3.108.

§ 3.156 New and material evidence.

(a) New and material evidence received prior to the expiration of the appeal period, or prior to the appellate decision, will be considered as having been filed in connection with the claim which was pending at the beginning of the appeal period.

(b) Where the new and material evidence consists of a supplemental report from the service department, received before or after the decision has become final, the former decision will be reconsidered by the adjudicating agency of original jurisdiction. This comprehends official service department records which presumably have been misplaced and have now been located and forwarded to the Veterans Administration. Also included are corrections by the service department of former errors of commission or omission in the preparation of the prior report or reports and identified as such. The retroactive evaluation of disability resulting from disease or injury subsequently service connected on the basis of the new evidence from the service department must be supported adequately by medical evidence. Where such records clearly support the assignment of a specific rating over a part or the entire period of time involved, a retroactive evaluation will be assigned accordingly except as it may be affected by the filing date of the original claim.

[27 F.R. 11887, Dec. 1, 1962]

CROSS REFERENCES: Effective dates—general. See § 3.400.

Correction of military records. See § 3.400 (g).

§ 3.157 Report of examination or hospitalization as claim for increase or to reopen.

(a) *General.* Effective date of pension or compensation benefits, if otherwise in order, will be the date of receipt of a claim or the date when entitlement arose, whichever is the later. A report of examination or hospitalization which meets the requirements of this section will be accepted as an informal claim for benefits under an existing law or for benefits under a liberalizing law or Veterans Administration issue, if the report relates to a disability which may establish entitlement. Acceptance of a report of examination or treatment as a claim for increase or to reopen is subject to the requirements of § 3.114 with respect to action on Veterans Administration initiative or at the request of the

which disability severance pay is granted, an award of compensation will be made subject to recoupment of the disability severance pay. There is no prohibition against payment of compensation where the veteran received nondisability severance pay or where disability severance pay was based upon some other disability. Compensation payable for service-connected disability other than the disability for which disability severance pay was granted will not be reduced for the purpose of recouping disability severance pay.

(b) *Dependents.* Except as provided in § 3.703, the receipt of pension, compensation, or dependency and indemnity compensation by a widow, child, or parent on account of the death of any person, or receipt by any person of pension or compensation on account of his own service, will not bar the payment of pension, compensation, or dependency and indemnity compensation on account of the death or disability of any other person. (38 U.S.C. 3104(b)(1))

[26 F.R. 1601, Feb. 24, 1961, as amended at 27 F.R. 12044, Dec. 6, 1962; 29 F.R. 11359, Aug. 6, 1964; 29 F.R. 15207, Nov. 11, 1964; 30 F.R. 11389, Sept. 8, 1965]

§ 3.701 Elections of pension or compensation.

(a) *General.* Except as otherwise provided, a person entitled to receive pension or compensation under more than one law or sections of a law administered by the Veterans Administration may elect which benefit to receive regardless of whether it is the greater or lesser benefit and even though his election results in reducing the benefits of his dependents. This person may at any time elect or reelect the other benefit. An election by a veteran controls the rights of all dependents in that case and an election by a widow controls not only her claim but those of the children as well, including children over the age of 18 and children not in the widow's custody.

(b) *Form of election.* A statement which meets the requirements of an informal claim may be accepted as an election.

(c) *Change from one law to another.* Except as otherwise provided, where payments of pension or compensation are being made to a person under one law, the right to receive benefits under another law being in suspension, and a higher rate of pension or compensation becomes payable under the other law, benefits at the higher rate will not be paid for any date prior to the date of receipt of an election.

[26 F.R. 1602, Feb. 24, 1961, as amended at 27 F.R. 340, Jan. 12, 1962]

§ 3.702 Dependency and indemnity compensation.

(a) *Right to elect.* Any person who is eligible for death compensation by reason of a death occurring before January 1, 1957, may receive dependency and indemnity compensation upon the filing of a claim. Payments may be authorized as of the date when the rate of dependency and indemnity compensation becomes greater than the monthly payment of death compensation or servicemen's indemnity, or both, provided the claim is filed within a reasonable period (generally not to exceed 120 days) before that date.

(b) *Child; widow elects dependency and indemnity compensation.* Where dependency and indemnity compensation is payable to or for a child by reason of a widow's election of this benefit, dependency and indemnity compensation to or for a child will commence as of the date of the award of dependency and indemnity compensation to the widow where:

(1) Death compensation was payable for the child on December 31, 1956, who was under 18 years of age and not in the widow's custody, or

(2) The child attained the age of 18 years prior to January 1, 1957.

(c) *Limitation.* A claim for dependency and indemnity compensation may not be filed or withdrawn after the death of the widow, child, or parent.

(d) *Finality of election.* An election to receive dependency and indemnity compensation based on the death of a veteran who died prior to January 1, 1957, is final and the claimant may not thereafter reelect death pension or compensation in that case. (See § 3.706 as to children who are eligible for servicemen's indemnity.) The election is final when the payee (or his fiduciary) has negotiated one check for this benefit or dies after filing claim and prior to receipt or negotiation of a check. There is no right of reelection.

(e) *Widow becomes entitled.* A widow who becomes eligible to receive death compensation by reason of liberalizing provisions of any law may receive death compensation or elect dependency and

indemnity compensation even though dependency and indemnity compensation has been paid to a child or children of the veteran.

(f) *Death pension rate.* (1) Effective October 1, 1961, where the monthly rato of dependency and indemnity compensation payable to a widow who has children is less than the monthly rate of death pension which would be payable to such widow if the veteran's death had not been service connected, dependency and indemnity compensation shall be paid to such widow in an amount equal to the pension rate for any month (or part thereof) in which this rate is greater. (38 U.S.C. 412(b); PL 87-268)

(2) Effective June 22, 1966, where the monthly rate of dependency and indemnity compensation payable to a widow who has children is less than the monthly rate of death pension which would be payable for the children if the veteran's death had not been service connected and the widow were not entitled to such pension, dependency, and indemnity compensation shall be payable to the widow in an amount equal to the monthly rate of death pension which would be payable to the children for any month (or part thereof) in which this rate is greater. (38 U.S.C. 412(b); Pub. Law 89-466)

[26 F.R. 1602, Feb. 24, 1961, as amended at 27 F.R. 4993, May 29, 1962; 31 F.R. 9850, July 21, 1966]

CROSS REFERENCE: Deaths prior to January 1, 1957. See § 3.400(c)(3)(i).

§ 3.703 Two parents in same parental line.

(a) *General.* Death compensation or dependency and indemnity compensation is not payable for a child if dependency and indemnity compensation is paid to or for a child or to the widow on account of the child by reason of the death of another parent in the same parental line where both parents died before June 9, 1960. Where the death of one such parent occurred on or after June 9, 1960, gratuitous benefits may not be paid or furnished to or on account of any child by reason of the death of more than one parent in the same parental line.

(b) *Election.* The child or his fiduciary may elect to receive benefits based on the service of either veteran. An election of pension, compensation or dependency and indemnity compensation based on the death of one parent places the right to such benefits based on the death of another parent in suspension. The suspension may be lifted at any time by making another election.

(c) *Other payees.* Where a child has elected to receive pension, compensation, dependency and indemnity compensation or war orphans' educational assistance based on the death of a veteran, he will be excluded from consideration in determining the eligibility or rate payable to a widow or another child or children in the case of another deceased veteran in the same parental line. See § 3.659(b).

[27 F.R. 4993, May 29, 1962, as amended at 29 F.R. 9564, July 15, 1964]

CROSS REFERENCES: Two-parent cases. See § 3.503(g). Two parents in same parental line. See § 3.659.

§ 3.704 Elections within class of dependents.

(a) *Children.* Where children are eligible to receive monthly benefits under more than one law in the same case, the election of benefits under one law by or on behalf of one child will not serve to increase the rate allowable for any other child under another law in that case. The rate payable for each child will not exceed the amount which would be paid if all children were receiving benefits under the same law. Where a child is no longer eligible to receive pension, compensation or dependency and indemnity compensation because of having elected war orphans' educational assistance, the child will be excluded from consideration in determining the rate payable for another child or children.

(b) *Children; servicemen's indemnity.* Where there is a child or children in receipt of servicemen's indemnity under the provisions of § 3.706, the rate of dependency and indemnity compensation for another child or children in that case will not exceed the amount which would be paid if all children were receiving dependency and indemnity compensation.

(c) *Parents.* If there are two parents eligible for dependency and indemnity compensation and only one parent files claim for this benefit, the rate of dependency and indemnity compensation for that parent will not exceed the amount which would be paid to him if both parents had filed claim for dependency and indemnity compensation. The rate of death compensation for the other parent will not exceed the amount which would

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