

### § 3.1000

### 38 CFR Ch. I (7-1-08 Edition)

program except the improved pension program.

(Authority: Sec. 306 of Pub. L. 95-588, 92 Stat. 2497)

[44 FR 45944, Aug. 6, 1979, as amended at 56 FR 28824, June 25, 1991]

#### ACCRUED

#### § 3.1000 Entitlement under 38 U.S.C. 5121 to benefits due and unpaid upon death of a beneficiary.

(a) *Basic entitlement.* Except as provided in §§ 3.1001 and 3.1008, where death occurred on or after December 1, 1962, periodic monetary benefits (other than insurance and servicemembers' indemnity) authorized under laws administered by the Department of Veterans Affairs, to which a payee was entitled at his or her death under existing ratings or decisions or those based on evidence in the file at date of death, and due and unpaid will, upon the death of such person, be paid as follows:

(Authority: 38 U.S.C. 5121(a))

(1) Upon the death of a veteran to the living person first listed as follows:

- (i) His or her spouse;
- (ii) His or her children (in equal shares);
- (iii) His or her dependent parents (in equal shares) or the surviving parent.

(2) Upon the death of a surviving spouse or remarried surviving spouse, to the veteran's children.

(3) Upon the death of a child, to the surviving children of the veteran entitled to death pension, compensation, or dependency and indemnity compensation.

(4) Upon the death of a child claiming benefits under chapter 18 of this title, to the surviving parents.

(5) In all other cases, only so much of the accrued benefit may be paid as may be necessary to reimburse the person who bore the expense of last sickness or burial. (See § 3.1002.)

(b) *Apportionments.* (1) Upon the death of a person receiving an apportioned share of benefits payable to a veteran, all or any part of such unpaid amount is payable to the veteran or to any other dependent or dependents of the veteran.

(Authority: 38 U.S.C. 5121(a)(1))

(2) Where at the date of death of the veteran an apportioned share is being paid to or has been withheld on behalf of another person, the apportioned amount remaining unpaid for periods prior to the last day of the month before the veteran's death is payable to the apportionee.

(3) Where the accrued death pension, compensation or dependency and indemnity compensation was payable for a child as an apportioned share of the surviving spouse's benefit, payment will be made under the provisions of paragraph (a)(4) of this section, on the expenses of such deceased child's last sickness or burial.

(c) *Claims and evidence.* Application for accrued benefits must be filed within 1 year after the date of death. A claim for death pension, compensation, or dependency and indemnity compensation, by an apportionee, surviving spouse, child or parent is deemed to include claim for any accrued benefits. (See § 3.152(b)).

(1) If an application for accrued benefits is incomplete because the claimant has not furnished information necessary to establish that he or she is within the category of eligible persons under the provisions of paragraphs (a)(1) through (a)(4) or paragraph (b) of this section and that circumstances exist which make the claimant the specific person entitled to payment of all or part of any benefits which may have accrued, VA shall notify the claimant:

- (i) Of the type of information required to complete the application;
- (ii) That VA will take no further action on the claim unless VA receives the required information; and
- (iii) That if VA does not receive the required information within 1 year of the date of the original VA notification of information required, no benefits will be awarded on the basis of that application.

(2) Failure to file timely claim, or a waiver of rights, by a preferred dependent will not serve to vest title in a person in a lower class or a claimant for reimbursement; neither will such failure or waiver by a person or persons in a joint class serve to increase the

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amount payable to another or others in the class.

(Authority: 38 U.S.C. 5121(c); 5112(b))

(d) *Definitions.* (1) *Spouse* means the surviving spouse of the veteran, whose marriage meets the requirements of §3.1(j) or §3.52. Where the marriage meets the requirements of §3.1(j) date of marriage and continuous cohabitation are not factors.

(2) *Child* is as defined in §3.57 and includes an unmarried child who became permanently incapable of self-support prior to attaining 18 years of age as well as an unmarried child over the age of 18 but not over 23 years of age, who was pursuing a course of instruction within the meaning of §3.57 at the time of the payee's death. However, upon the death of a child in receipt of death pension, compensation, or dependency and indemnity compensation, any accrued will be payable to the surviving child or children of the veteran entitled to death pension, compensation, or dependency and indemnity compensation. Upon the death of a child, another child who has elected dependents' educational assistance under 38 U.S.C. chapter 35 may receive accrued death pension, compensation, or dependency and indemnity compensation, payable on behalf of the deceased child for periods prior to the commencement of benefits under that chapter.

(3) *Dependent parent* is as defined in §3.59: *Provided*, That the mother or father was dependent within the meaning of §3.250 at the date of the veteran's death.

(4) *Evidence in the file at date of death* means evidence in VA's possession on or before the date of the beneficiary's death, even if such evidence was not physically located in the VA claims folder on or before the date of death, in support of a claim for VA benefits pending on the date of death.

(5) *Claim for VA benefits pending on the date of death* means a claim filed with VA that had not been finally adjudicated by VA on or before the date of death. Such a claim includes a deceased beneficiary's claim to reopen a finally disallowed claim based upon new and material evidence or a deceased beneficiary's claim of clear and unmistakable error in a prior rating or

decision. Any new and material evidence must have been in VA's possession on or before the date of the beneficiary's death.

(e) *Subsistence allowance.* Subsistence allowance under the provisions of 38 U.S.C. ch. 31 remaining due and unpaid at the date of the veteran's death, is payable under the provisions of this section.

(f) *Dependents' educational assistance.* Educational assistance allowance or special restorative training allowance under 38 U.S.C. ch. 35, remaining due and unpaid at the date of death of an eligible surviving spouse or eligible child is payable to a child or children of the veteran (see paragraphs (a)(2), (a)(3) and (d)(2) of this section), or on the expenses of last sickness and burial (see paragraph (a)(4) of this section.) Benefits due and unpaid at the date of death of an eligible spouse are payable only on the expenses of last sickness and burial (see paragraph (a)(4) of this section).

(g) *Veterans educational assistance.* Educational assistance allowance under 38 U.S.C chapters 30, 32, or 34, and 10 U.S.C. chapter 1606 remaining due and unpaid at the date of the veteran's death is payable under the provisions of this section.

(Authority: 38 U.S.C. 5121)

(h) *Clothing allowance.* Clothing allowance under 38 U.S.C. 1162 remaining due and unpaid at the date of the veteran's death is payable under the provisions of this section.

(i) *Active service pay.* Benefits awarded under this section do not include compensation or pension benefits for any period for which the veteran received active service pay.

(Authority: 38 U.S.C. 5304(c))

[26 FR 1608, Feb. 24, 1961, as amended at 27 FR 11892, Dec. 1, 1962; 30 FR 11389, Sept. 8, 1965; 31 FR 4790, Mar. 22, 1966; 34 FR 840, Jan. 18, 1969; 39 FR 15126, May 1, 1974; 56 FR 18733, Apr. 24, 1991; 56 FR 24239, May 29, 1991; 61 FR 67950, Dec. 26, 1996; 62 FR 5529, Feb. 6, 1997; 62 FR 35423, July 1, 1997; 67 FR 65708, Oct. 28, 2002; 71 FR 78369, Dec. 29, 2006]