
Veterans' Benefits Program
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December 8, 2021

Department of Veterans Affairs
Pension Intake Center
P.O. Box 5365
Janesville, WI 53547-5365

RE: Brief in Support of Decision Review Request
FILE NUMBER: [REDACTED]

To Whom It May Concern:

Please find the attached evidence brief in support of [REDACTED] review request of the decision to reduce her survivor's pension benefits. [REDACTED] reduction of VA survivor pension benefits to \$0 a month was determined August 2, 2021. In accordance with 38 C.F.R. § 3.2501, [REDACTED] submits the following packet, containing new and relevant evidence to support this request for reinstatement of benefits.

Thank you in advance for your assistance in this matter. If there are any questions or concerns, please contact me at [REDACTED]

Respectfully Submitted,

[REDACTED]

BRIEF IN SUPPORT OF BENEFICIARY, [REDACTED]

I. BACKGROUND

[REDACTED] requests review and reinstatement of the survivor's pension benefits terminated by the VA in August of 2021. The veteran, [REDACTED] and [REDACTED] were married [REDACTED].¹ [REDACTED] a World War II era veteran, serving in the Navy from April 12, 1944 – January 25, 1946.² Sadly, [REDACTED] passed away on July 21, 2000, of arteriosclerotic cardiovascular disease, leaving behind his wife [REDACTED] and disabled stepson [REDACTED].³ [REDACTED] is not [REDACTED] biological child, however, [REDACTED] provided for and was involved in [REDACTED] life since [REDACTED] was nine years old.

In March of 2009, prior to [REDACTED] eighteenth birthday, [REDACTED] requested an amendment to her death pension award based on the change in dependency of [REDACTED].⁴ [REDACTED] requires Mrs. [REDACTED] for support and assistance in most daily activities and medical care due to his disabilities. The January 2010 rating decision recognized [REDACTED] diagnosis of [REDACTED] and determined [REDACTED] is permanently incapable of self-support and incompetent to handle the disbursement of funds.⁵ In addition to caring for the health and safety of her son, Mrs. [REDACTED] was diagnosed with [REDACTED] in the later part of 2020. The added medical expenses increase her reliance on her survivor's pension benefits to meet her financial obligations and provide for herself and son.

The VA initiated termination of benefits after a routine audit combined Mrs. [REDACTED] \$691.50 monthly social security administration (SSA) benefits⁶ and [REDACTED] \$813.00 monthly

¹ Marriage Certificate of [REDACTED] BEXAR CTY. TEX., [REDACTED] (Sept. 4, 1998).

² US DEPT OF VETERAN AFFAIRS, Rating Decision at 1 (Jan. 25, 2010).

³ Certificate of Death of [REDACTED] (Jul. 31, 2000).

⁴ US DEPT VETERAN AFFAIRS, Award Proposal [REDACTED] at 1 (Feb. 24, 2010).

⁵ Rating Decision, US DEPT VETERAN AFFAIRS, 2 (Jan. 25, 2010)

⁶ U.S. SOC. SEC. ADMIN., FORM SSA-4926-SM-SP (1-2021), [REDACTED] (Jan. 2021).

SSA benefits.⁷ In a letter dated May 17, 2021, the VA notified Mrs. [REDACTED] her survivor's pension benefits were terminated, effective October 1, 2017. The effective date leaves Mrs. [REDACTED] indebted to the VA for three years and seven months of "over-payments" of benefits. In separate correspondence, the VA explains [REDACTED] is not recognized as Mr. [REDACTED] adopted or biological child and is therefore NOT entitled to VA benefits or support. However, [REDACTED] social security benefits MUST BE included in the calculation of household income available for reasonable support unless waived due to hardship. As such, Mrs. [REDACTED] and her son's annual income exceeds the maximum annual pension rate (MAPR) annual income amount by \$4,639.⁸

Without the VA's pension disbursement, Mrs. [REDACTED] must survive on her SSA award of \$691.50 a month, which creates an insurmountable hardship. Mrs. [REDACTED] requests: (1) [REDACTED] income is not, and should have never been included in the calculation of Mrs. [REDACTED] income because of the resulting hardship inclusion creates, 38 U.S.C. §1543(2); or (2) if the hardship [REDACTED] face is not severe enough to warrant exclusion, then Mrs. [REDACTED] income should be reduced by her and [REDACTED] unreimbursed medical expenses in accordance with 38 C.F.R. § 3.272(g); and (3) the overpayment debt dating back to October 2017, adjudicated by the VA is waived.

II. Analysis

a. Inclusion of [REDACTED] Income Creates a Hardship and Should be Excluded

If a spouse's annual income, when combined with any dependent's income reasonably available for the spouse's support, exceed the applicable MAPR, then no pension will be awarded. 38 U.S.C. §§1541(b), 5312; 38 C.F.R. §3.23(b) (2020). The Secretary may exclude the dependent's income *if inclusion would work a hardship on the spouse*. 38 U.S.C. §1541(g). A

⁷ JP MORGAN CHASE BANK, Checking Summary of [REDACTED] (Jul. 23, 2021–Aug. 20, 2021).

⁸ US DEPT VETERAN AFFAIRS, Award Letter [REDACTED] (Aug. 2, 2021).

hardship exists when annual expenses necessary for reasonable family maintenance exceed the sum of countable annual income. 38 C.F.R. §3.23(d)(6); *McDaniel-May v. Principi*, 18 Vet.App. 412 (2003).

Mrs. [REDACTED] and her son's current annual combined available income is \$11,761.71. Mrs. [REDACTED] pays, \$8,400 annually (\$700 a month) in rent;⁹ \$1,149.60 annually for electricity;¹⁰ and according to the U.S. Dept. of Agriculture, should be spending a minimum of \$5,805.60 annually or less than \$8 per person a day on food.¹¹ In short, for Mrs. [REDACTED] to simply provide food and shelter for herself and son, she requires \$1,279.60 a month. That monthly required amount does not include expenses related to medical co-pays, medication, travel costs, and other reasonable family expenses. As the [REDACTED]'s reasonable family maintenance expenses exceed their available income, the [REDACTED] are experiencing the type of hardship the statute seeks to avoid. 38 C.F.R. §3.24(a).

As stated previously, the VA made the termination of benefit payments effective October of 2017, leaving Mrs. [REDACTED] in debt to the VA. However, the hardship factors discussed above are not recent developments and were consistently present since October of 2017. Had Mrs. [REDACTED] not received pension payments from the VA during this period, she would not have been able to provide food, shelter, or electricity. [REDACTED]'s income should be excluded from Mrs. [REDACTED]'s available income due to the hardship she has faced since the passing of her husband.

Exclusion of [REDACTED]'s social security income from the survivor's pension calculation, results in Mrs. [REDACTED] receiving \$8,298 annually from SSA and \$3,931 annually in VA survivor's pension benefits. As such, their actual combined household income would total \$17,430.26.¹²

⁹ Residential Lease Agreement between [REDACTED] and [REDACTED] (Jan. 1, 2018).

¹⁰ CPS Energy, Customer Account Billing History (Oct. 5, 2021) (amount represents the average monthly payment expressed in an annual amount).

¹¹ USDA, Official USDA Food Plans: Cost of Food at Home at Three Levels, U.S. Average, September 2021 (Oct. 2021).

Neither [REDACTED] nor Mrs. [REDACTED] are able to work and cannot supplement their income, thus \$17,430.26 a year is the most this household of two can ever hope to live on. This amount remains below the 2021 national poverty threshold and thus will not provide a lavishly comfortable life but will provide the [REDACTED]'s with the means to survive.¹³

b. Unreimbursed Medical Expenses Reduce Mrs. [REDACTED]'s Income Below the MAPR.

Surviving spouses of veterans who served during wartime may be entitled to improved death pension benefits. 38 U.S.C. §1541(a). Entitlement to pension payments is determined by the spouse's annual income. 38 U.S.C. §3.271. A spouse's annual income may be reduced by an amount equal to the spouse's unreimbursed medical expenses exceeding five percent of the MAPR. 38 C.F.R. §3.272(g)(2).

In 2021, Mrs. [REDACTED] amassed \$3,930 in unreimbursed medical expenses; [REDACTED] amassed \$615.53, totaling \$4,545.74.¹⁴ Expenses were incurred due to [REDACTED] treatments, medications, and numerous tests/procedures with providers spread across the San Antonio Metroplex. In addition to Mrs. [REDACTED]'s own medical needs, [REDACTED] requires on-going monitoring and treatment for his [REDACTED].¹⁵ The current MAPR for a qualified spouse, with one dependent is \$12,229,¹⁶ Mrs. [REDACTED] and [REDACTED] have a combined annual income of \$15,696.00.¹⁷ However, when unreimbursed medical expenses in excess of five percent of the MAPR are deducted, the [REDACTED]'s actual annual household income is \$11,761.71.

¹² Reflects the resulting total household income amount reduced by unreimbursed medical expenses.

¹³ OFFICE OF THE ASSISTANT SECRETARY FOR PLANNING AND EVALUATION, Computations for the 2021 Annual Update of the HHS Poverty Guidelines for the 48 Contiguous States and the District of Columbia at <https://aspe.hhs.gov/topics/poverty-economic-mobility/poverty-guidelines/prior-hhs-poverty-guidelines-federal-register-references/2021-poverty-guidelines/2021-poverty-guidelines-computations> (last visited Oct. 27, 2021).

¹⁴ See VA Form 21P-8416; Attachment #1 Medical Expense Report Continuation Worksheet.

¹⁵ [REDACTED] Diagnosis and Medical Information Letter (Sept. 17, 2021).

¹⁶ 2021 VA Survivors Pension Benefit Rates, VA.GOV at <https://www.va.gov/pension/survivors-pension-rates/> (last visited Oct. 27, 2021).

¹⁷ DEPT VET. AFF., Award Letter [REDACTED] (Aug. 2, 2021).

Mrs. [REDACTED]'s unreimbursed medical expenses should be excluded because: (1) Mrs. [REDACTED] has paid or will pay the medical expenses for herself and her son;¹⁸ (2) the medical expenses were and will be incurred on behalf of herself and her dependent son; (3) the unreimbursed medical expenses are more than 5 percent of the applicable maximum annual pension rates. 38 C.F.R. §§ 3.372(g)(i), *et seq.* As Mrs. [REDACTED]'s actual annual income of \$11,761.71 is less than the maximum annual pension rate of \$12,229, her survivor's pension benefits should be reinstated.

c. Collecting Mrs. [REDACTED]'s Overpayment is Inequitable and Can Not Occur in Good Conscience.

“Recovery of overpayments of any benefits made under laws administered by the VA shall be waived if there is no indication of fraud, misrepresentation, or bad faith on the part of the person or persons having an interest in obtaining the waiver and recovery of the indebtedness from the payee who received such benefits would be against equity and good conscience.” 38 U.S.C. § 5302(a); 38 C.F.R. § 1.963(a). Mrs. [REDACTED]'s overpayment debt should be waived because: (1) Mrs. [REDACTED] did not contribute to the creation of the debt; (2) Fraud or bad faith was not a factor in the overpayment; and (3) Collection would deprive the [REDACTED] of basic necessities thus creating a hardship. 38 U.S.C. §5302(a); 38 C.F.R. §1.965(a); *Cullen v. Brown*, 5 Vet.App. 510, 511–12 (1993). Fault cannot be clearly ascribed to Mrs. [REDACTED] for the overpayment of benefits and as such asks the VA to follow its policy by assuming the fault and erasing the debt against her. 38 U.S.C. § 5302; *Dent v. McDonald*, 27 Vet.App. 362, 380 (2015); Vet. Aff. Op. Gen. Couns. Prec. 2-90, VAOGCPREC 2-90, 1990.

Mrs. [REDACTED] was originally born in Guadalajara, Mexico.¹⁹ Although she can communicate in English, her proficiency is not at a level in which she is able to fully understand the VA

¹⁸ See Appendix A for supporting receipts.

¹⁹ Birth Certificate of [REDACTED], CONST. COUNCIL OF GUADALAJARA (Aug. 26, 1951).

correspondence sent to her in English. Mrs. [REDACTED] depends on others to read to the letters and help her understand what she is being told and what is being requested. Many veterans, for whom English is their primary language, have difficulty understanding VA rules and procedures when it comes to benefit rules.

Mrs. [REDACTED] has been responsive to requests for information from the VA, she sought out help from veteran organizations to ensure the correct procedures were followed and attempted to follow the instructions contained in the various VA letters she received. Besides the language barrier, one other factor contributed to Mrs. [REDACTED]'s misunderstanding. In 2017, the [REDACTED]'s requested a VA benefits statement for [REDACTED] which stated “[t]o be clear, Mr. [REDACTED] could not be entitled to “ANY” monies from the Department of Veteran Affairs because he is not a veteran nor is he the son of the deceased veteran.” Mrs. [REDACTED] incorrectly assumed that if [REDACTED] was not eligible to receive benefits, then his SSA benefits would not be used to decrease her award.

The only way Mrs. [REDACTED] could have knowingly contributed to the overpayment debt is if she understood her pension amount should have been decreased by the amount received from Social Security and not accept any monies in excess of that amount. As discussed in para. IIa, by including [REDACTED]'s income in the calculation of Mrs. [REDACTED]'s annual income has and will continue to cause a hardship on this family. If Mrs. [REDACTED] is forced to pay for the VA's overpayment, the only source of income available is her SSA benefits, which as previously shown, does not cover her expenses for rent, food, and electricity. Additionally, Mrs. [REDACTED] is seventy years-old, recovering from [REDACTED] and responsible for her adult disabled son. She cannot find or keep meaningful employment to supplement her income nor pay back a debt created by the VA's overpayment. Enforcing repayment of benefits is inequitable and flies in the

face of the VA mission “[t]o fulfill President Lincoln’s promise ‘[t]o care for him who shall have borne the battle, and for his widow, and his orphan’ by serving and honoring the men and women who are America’s veterans.”²⁰

III. Conclusion

For the foregoing reasons, [REDACTED] prays the VA recognizes the hardship created by the inclusion of [REDACTED]’s Social Security Disability Benefits, grants a waiver of [REDACTED]’s income, and back dates the waiver to the beginning of the overpayment period. In the alternative, if hardship is not found, Mrs. [REDACTED] asks her medical expenses are deducted from her income, which should reinstate her benefits, and she asks that the debt created by overpayment is waived in the interest of equity and in support of the VA’s mission.

Respectfully Submitted,

[REDACTED]

²⁰ DEPT VET. AFF., Mission Statement at https://www.va.gov/ABOUT_VA/index.asp (last visited Nov. 8, 2021).

Adjusted Income Worksheet

Name	Service	Monthly Amount	Annual Amount
CPS	Electricity Utility	95.80 (2020 Average)	\$1,149.60
	Rent	\$700.00	\$8,400.00
Food		\$483.80	\$5,805.60
	Total		\$15,355.20