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Survivors and Dependents

The Department of Defense (DoD) has authorization under title 10 of the U.S. Code (U.S.C.) to provide a wide spectrum of services to family members, which not only include spouses and children, but also parents, siblings, extended family, and significant others. This broad definition of family is applied when DoD gives support to next of kin or survivors. DoD can provide significant financial assistance, travel assistance, and housing near military treatment facilities for these families.

By contrast, when a service member separates from active duty, becomes a veteran, and applies for benefits and services from the Department of Veterans' Affairs (VA), the types of benefits and services VA can provide family members are very few. Under 38 U.S.C., VA has no statutory authority to treat or assist veterans' family members, other than in some very limited capacities. There is no VA office that mirrors DoD's Military Community and Family Policy Office. There are no special programs or projects designed for the spouses, children, parents, or siblings of severely injured veterans. VA cannot give family members of veterans the same kinds of travel and per diem benefits as those offered by DoD when an injured service member is recuperating while on active duty. Substantial family support, which DoD often identifies as a main component of successful transition, is a benefit that VA can not presently provide. (See recommendation 10-12).

I Definitions of Survivors and Dependents

A surviving spouse is legally defined by VA as "a person of the opposite sex who was the spouse of the veteran at the time of the veteran's death...and who has not remarried...since the death of the veteran, or...held himself or herself out openly to the public to be the spouse of such other person" (38 U.S.C. § 101 [3] [2006]).

An individual may be considered to be a spouse if the couple's marriage was in accordance with the law of the place where the parties resided at the time of the marriage (38 U.S.C. § 103 [c] [2006]).

A child is defined as a person who is unmarried and

- is under age 18, or
- became permanently incapable of self-support before age 18, or
- between ages 18 and 23 is pursuing education or training at an approved educational institution, or
- was legally adopted by the veteran, or
- is a stepchild of the veteran, or
- is an illegitimate child of the veteran (38 U.S.C. § 101[4][A][i]–[iii], [B] [2006]).

Dependents can be spouses, minor children, or parents. A parent is considered a dependent of the veteran before or after the veteran's death if their monthly income is less than the maximum levels that the VA Secretary has prescribed by regulation, giving due regard to the marital status of the parents and any additional family members who are (their dependents) (38 U.S.C. § 102[a][b] [2006]).

II Appropriateness of the Benefits

The Commission assessed whether the benefits available for survivors are appropriate. The benefits and services currently available to survivors has its basis in the veteran's service and resulting disability and the survivor's relationship to the veteran. Again, to the maximum extent possible, the impact of the loss of the veteran and his or her income on the survivors is mitigated, and benefits and services (e.g., dependency and indemnity compensation, death pension, home loan, and education) are made available based on the circumstances of the veteran's death.

II.1 Survivors

Both DoD and VA offer benefit programs to the survivors of deceased veterans whose death was due to service. The DoD survivor benefit program, which is open to all survivors of retirees and of service members who die on active duty is called the Survivor Benefit Plan (SBP). It is similar to an annuity option under a life insurance plan, purchased with premiums paid by a retiree but free to survivors of service members who die on active duty.

By contrast, VA's Dependency and Indemnity Compensation (DIC) program is only for survivors of veterans whose deaths occur on active duty, are service

connected, or follow from a period of permanent and total service-connected disability. DIC also differs from SBP in that it is a tax-free, flat-rate, monthly payment.

II.1.A DoD's Survivor Benefit Plan

The DoD's Survivor Benefit Plan was established in 1972 by Public Law 92-425 "to ensure that the surviving dependents of military personnel who die...will continue to have a reasonable level of income."¹ SBP is available to all military retirees as part of their retirement package. As of September 11, 2001, all surviving spouses, surviving children, or both of individuals who died while on active duty became entitled to SBP without regard to the number of years served. The spouse, children, or both of active service members are covered by SBP (National Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 107-107 § 642, 115 Stat. 1012 [2001]). Military retirees receive retirement pay from DoD, but this retirement pay ceases once the retiree dies. A military retiree may choose to pay a certain amount of his retirement pay into the SBP program, which will then provide a monthly annuity to his or her survivors. Immediately prior to retirement, the service member elects SBP. After the retiree's death, the annuity paid to her or his beneficiaries will equal 55 percent of the base amount.² Thus, "full" SBP coverage—meaning the base amount is equal to the veteran's complete monthly retirement payment—will give the veteran's survivors 55 percent of his or her retirement pay, an amount chosen because similar federal government programs determined 55 percent as a "reasonable level of income." In the case of an active-duty death, the SBP benefit amount is based on the amount of retired pay as if the member, if eligible, retired on the date of death or, if not retirement eligible, as if the member were 100 percent disabled on the date of death.

II.1.B VA's Dependency and Indemnity Compensation

The Dependency and Indemnity Compensation (DIC) program was established in 1957 as "indemnification for the service-connected death and partial compensation for the resulting economic loss to survivors."³ Congress intended for DIC to serve as recognition of the sacrifices made by service members and veterans whose deaths are service-related and to replace a significant portion of income lost after a veteran's death, while providing a minimum level of income and an acceptable standard of living for eligible surviving spouses and the dependents of veterans.

¹ Department of Defense, *Military Compensation Background*, 906–907.

² Department of Defense, *Military Compensation*, 1.

³ VA Office of Policy, *Program Evaluation of Benefits*, 11.

Originally, a veteran's death was required to be the result of a service-connected condition for survivors to qualify for DIC. Since 1978, however, the benefit has been extended to survivors of those veterans with a service-connected disability rated at 100 percent for a period of 10 years, regardless of whether the cause of death was service connected (Pub. L. No. 84-881, 70 Stat 8870 [1956]). When a service-connected veteran dies, DIC provides a monthly payment of \$1,067, as of 2007. There are several other benefits such as those for a dependent child and a housebound surviving spouse.⁴ As of March 2007, there were an estimated 314,719 surviving spouses receiving DIC benefits, at an annual cost of \$4.36 billion.⁵ Over 63,000 surviving spouses had their SBP partially or totally offset by their DIC.

II.2 Dependents' and Other Survivors' Benefits

II.2.A Compensation

Veterans with service-connected disabilities of 30 percent or greater receive additional compensation for dependents. Veterans with disabilities rated 30 percent to 90 percent receive for each dependent that fraction of the allowance for a dependent of a veteran rated 100 percent that corresponds to their percentage ratings. The additional compensation for a child who became permanently incapable of self-support will continue for the life of that child. Lastly, the additional compensation for the child while in school is at a higher rate than the normal additional compensation for a child to help offset the cost of that education or training.

II.2.B Health Care under CHAMPVA

To provide medical care for dependents and survivors of totally disabled veterans and survivors of veterans who died of service-connected causes, Congress created the Civilian Health and Medical Program of the Department of Veterans Affairs, CHAMPVA, by Public Law 93-82, enacted in 1973. Specifically, the program reimburses the costs of the following types of medical care: inpatient, outpatient, pharmacy, mental health, prescription medication, skilled nursing care, and durable medical equipment.

The eligible dependents include

- spouses and children of permanently and totally disabled veterans, or
- surviving spouses or children of a veteran who died from a VA-rated service-connected disability, or who at the time of death, was rated permanently and totally disabled, or

⁴ Carroll, *Dependency and Indemnity Compensation*.

⁵ Wells, E-mail, April 18, 2007.

- surviving spouses and children of military members who die on active duty and are not otherwise eligible for the Defense Department's Tricare program.

As of 2005, the most current data, there are approximately 190,000 permanent and total (P&T) veterans who have 263,700 beneficiaries enrolled in CHAMPVA, of which approximately 40,000 were children and another 213,941 were adults between the ages of 26 and 64, although only 103,555 of these enrollees were actual users. With Medicare eligibility, it becomes the primary payer and CHAMPVA is secondary. Because VA identifies and categorizes beneficiaries by age distribution and gender only, the Commission could not distinguish between those who are eligible as spouses and those who are eligible as children for purposes of estimating the total numbers in each.

In general, 40 percent of CHAMPVA enrollees use it as a secondary insurance and have another plan as a primary. Approximately 25,000 beneficiaries became entitled in FY 2006, and 18,000 lost their eligibility.

There are also parents, grandparents, siblings, and significant others who are caregivers to veterans who do not have legal status as dependents of the veteran for whom they provide care. Therefore, they are not eligible for CHAMPVA. However, many of these individuals give up jobs, along with their health insurance, to care for a severely disabled veteran. Extending CHAMPVA eligibility to these individuals while they are providing care would provide the veteran with a healthier caregiver and reduce the burden on the person who has taken on this role. Consideration should also be given to providing the caregiver a benefit like a "caregiver allowance" as an incentive to continue providing care to the severely disabled veteran.

Recommendation 8.1

Congress should extend eligibility for the Civilian Health and Medical Program of the Department of Veterans Affairs to caregivers and create a "caregiver allowance" for caregivers of severely disabled veterans.

II.2.C Survivors' and Dependents' Educational Assistance Program

Congress intended the Survivors' and Dependents' Educational Assistance program, chapter 35, for the spouse of a veteran to support the veterans' family at a standard of living consistent with the level that a veteran could have expected to provide for his or her family had the veteran not become disabled or

died. The benefit is also intended to provide educational opportunities to the surviving spouses and children of service-connected disabled veterans. A beneficiary is eligible for chapter 35 benefits if the veteran

- died of a service-connected disability, or
- has a total disability permanent in nature resulting from a service-connected disability (includes 100 percent schedular evaluations or those being paid at the 100 percent level due to receipt of Individual Unemployability (IU) benefits with no future examination scheduled), or
- is missing in action, or
- captured in line of duty by hostile force, or
- forcibly detained and/or interned in line of duty by a foreign government or power.⁶

Chapter 35 benefits are provided starting at the age of 18 or on the successful completion of the person's secondary schooling, whichever occurs first, and ending when the person completes their education or on the person's 26 birthday. Entitlement to chapter 35 is for 45 months.

As of 2008, 86,400 survivors will receive chapter 35 benefits.⁷ VA projects chapter 35 benefits to increase to \$478,342,000 by FY 2008.⁸

II.2.D Bereavement Counseling

Bereavement counseling is available to all family members including spouses, children, parents, and siblings of service members who have died while on active duty. Family members of service member activated from the National Guard and reserves are also eligible. In 2006, over 800 families of service members killed in Iraq or Afghanistan received counseling.

Presently, there is little else in the way of grief counseling for families provided by VA. This resource is vital in supporting service members' families. They need to be aware of available benefits, especially for National Guard and reserve families and families in rural areas.

II.2.E Burial Benefits

Burial in a VA National Cemetery is available for eligible veterans, spouses, and dependents. They are only eligible for a headstone or a marker if buried in a national or state veterans' cemetery. The veteran does not have to predecease

⁶ Cornell University, "Subsection 3501."

⁷ VA Summary Volume IV. 1-17

⁸ Ibid., 3A-14

his or her dependents for them to be eligible. Under certain circumstances, deceased veterans may also be entitled to a burial flag, a burial allowance, and a plot allowance. Surviving spouses of veterans who die after January 1, 2000, do not lose their eligibility for burial if they remarry.

II.2.F Benefits for Birth Defects

Vietnam veterans' and some Korean veterans' children who suffer from spina bifida or certain other birth defects may be eligible for a monthly monetary benefit, health care for their disability, and vocational training.

II.2.G Home Loan Guaranty

A VA home loan guaranty may be available to a surviving spouse of a veteran or service member who died as a result of a service-connected disability; this includes the spouse of a service member listed as missing in action or a prisoner of war (POW) for more than 90 days. The surviving spouse of a service member who was missing in action or a prisoner of war is limited to one loan.

II.2.H Veterans' Preference

A dependent of a deceased veteran is eligible for a 10-point veterans' preference for federal employment if

- she or he is the unmarried spouse of certain deceased veterans, or
- the spouse of a veteran unable to work because of a service-connected disability, or
- the mother of a veteran who died in service or who is permanently and totally disabled, where the father is also permanently and totally disabled.

II.2.I Aid and Attendance

A veteran who is rated 30 percent or more disabled is entitled to receive an additional payment for a spouse. This spouse may need aid and attendance by another caregiver. Should the spouse need such aid and attendance, the veteran will be awarded an additional allowance.

III Appropriateness of the Level of Benefits

The survivor and dependents' benefits previously described for their appropriateness were also reviewed by the Commission for their level of compensation (as applicable.)

III.1 Survivor Concurrent Receipt

III.1.A Issue

When the survivors of a retiree are eligible for both SBP and DIC, the survivors' SBP payments are offset, or reduced, by the amount of their DIC payment. The level of SBP benefit is reduced by one dollar for every dollar of DIC benefit the survivor receives, regardless of the amount the retiree paid into the SBP system. In addition, while the offset decreases the SBP annuity, which is guaranteed to the survivor by the premium paid by the retiree, it does not decrease the overall level of survivor benefits below the guaranteed 55 percent. For survivors of retirees below the rank of E-6, the offset effectively negates most, if not all, of their SBP benefit. If the survivor's SBP is offset by their DIC, the amount the retiree paid into the SBP program relative to the amount of DIC will be refunded to his survivors without interest. Should a retiree's beneficiaries die before the retiree does, the premiums that he or she paid into SBP will revert to the U.S. Treasury.

The most common argument against the offset, again mirroring the debate over veteran's concurrent receipt, asserts that the two programs have distinctly different purposes that do not overlap, and that it is therefore unfair to offset them. It is argued that SBP is "retiree-purchased insurance," while DIC is "a special indemnity payable when military service causes the service member's premature death."⁹ Many argue that the differences in purpose between these two programs are even more pronounced than those between military retirement and VA disability compensation. SBP is fundamentally an insurance program, because the military retiree must pay a premium in order to qualify. Because the retiree has already paid into this program, many argue that it is unfair to offset the benefits guaranteed by those premiums for any reason.

Those in favor of the offset argue that SBP and DIC both compensate a veteran's survivor for a single event, namely the veteran's death. Other arguments against survivor concurrent receipt focus on the costs to the Federal Government of removing the offset. DoD has estimated that eliminating the SBP/DIC offset would cost DoD \$6.8 billion during the first 10 years.¹⁰ As in the debate over veteran's concurrent receipt, this argument also points to a study that revealed that eliminating the offset between DoD retirement and VA disability benefit would result in little, if any, measurable increase in recruitment or retention.¹¹

⁹ Military Officers Association, "Widows Hit Hard."

¹⁰ Office of Management and Budget. *Administration Policy on S.2766*.

¹¹ Dye, *Prohibition on Concurrent Receipt*, 20.

III.1.B Findings

The arguments surrounding survivors' concurrent receipt are in many ways similar to those surrounding veterans' concurrent receipt. Those opposed to eliminating SBP offset say it would be too costly to the military. In addition, they claim that there would be no discernable increase in recruitment or retention rates as a result of concurrent receipt. Those in favor of concurrent receipt for survivors, however, argue that the two programs have distinctly different purposes, and it is therefore unfair to offset one by the other. Moreover, SBP premiums are paid by the retiree, and are therefore akin to an insurance program. The retiree pays a certain payment in order to guarantee a certain annuity for his survivors, and many argue that it is unfair to subtract from this guaranteed annuity. Eliminating the SBP/DIC offset would acknowledge the difference in the purpose of these two benefits and allow survivors of those whose death was as a result of military service to receive additional compensation.

To date, no laws have been passed to eliminate the SBP/DIC offset. The Commission finds that the purposes of the DIC and SBP programs are distinctly different: DIC compensates for deaths related to service while SBP provides a continuing retirement payment for the survivors of all retirees regardless of the cause of death. The Commission is particularly concerned with the situation of the enlisted survivors. The Commission also finds that refunding premiums without interest is not justified. The Commission concluded that the offset of SBP by DIC payments is not appropriate and should be discontinued.

Recommendation 8.2

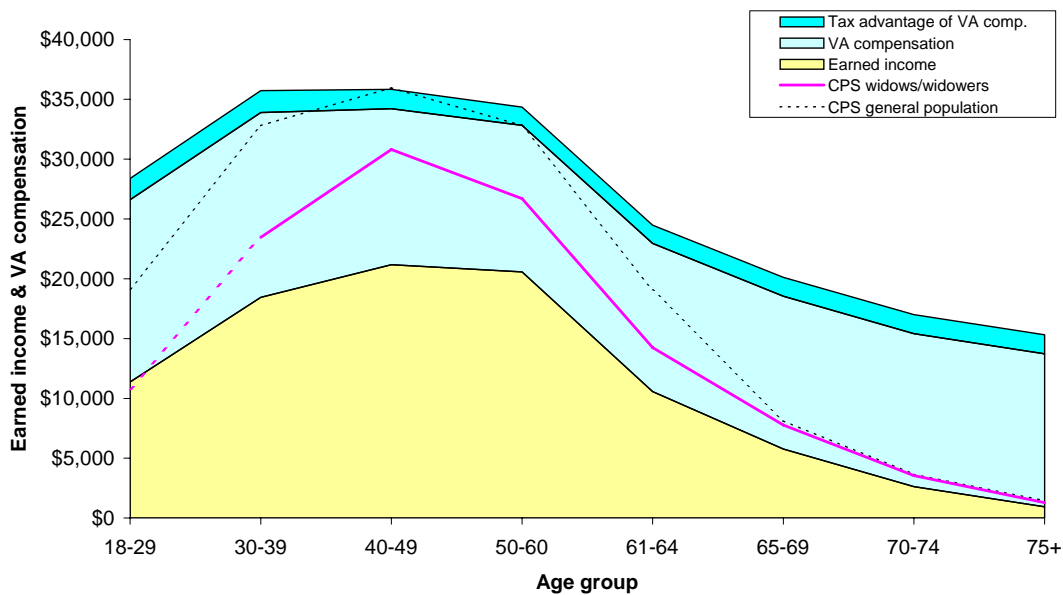
Congress should eliminate the Survivor Benefit Plan/Dependency and Indemnity Compensation offset for survivors of retirees and in-service deaths.

III.2 Earnings

To better assess the adequacy of benefits for survivors of deceased veterans, the Commission contracted with the CNA Corporation (CNAC) to include surviving spouses in its economic analysis of veteran's benefits. Using techniques similar to those used in analyzing benefits for veterans, CNAC concluded that a veteran's disability does have a negative financial effect on surviving spouses, but that current benefits paid to surviving spouses are comparable to or higher than the earnings of widowers and widows in the general population.

At all ages, surviving spouses of veterans have lower employment rates than widows in the general population. In addition, they have lower earned income than widows in the general population, as illustrated in Figure 8.1. In this figure, the thin pink line represents surviving spouses in the general population, while the dotted blue line represents the general population itself. The blue line at the edge of the yellow area represents veterans' surviving spouses, and at every age, these spouses have a significantly lower average earned income than both the general population and other surviving spouses. The data depicted in the chart shows that DIC and surviving spouses' earnings equates to the current population survey (CPS) of widows and widowers' income.

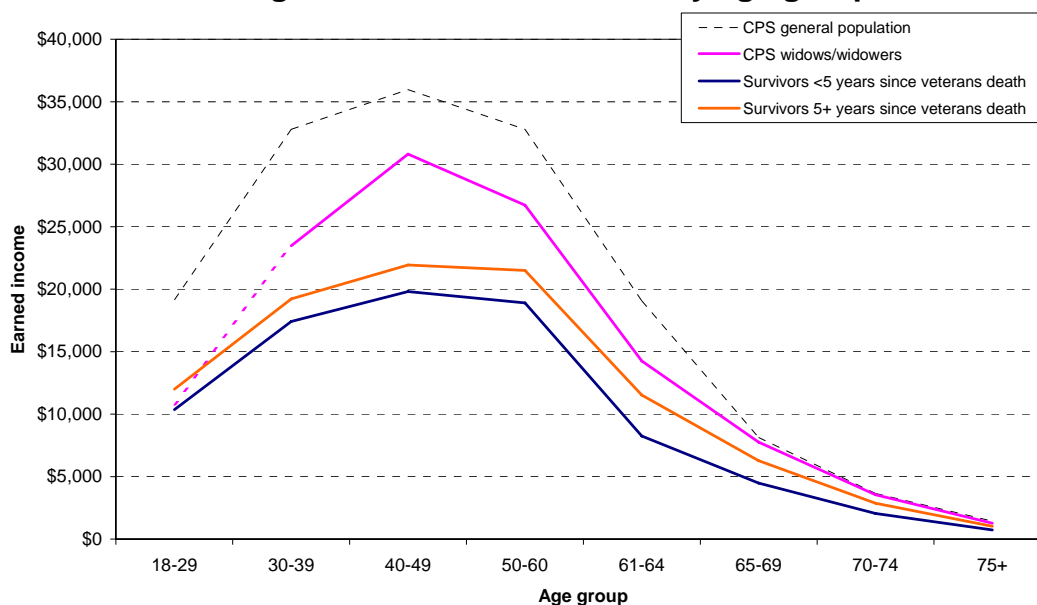
Figure 8.1 Earned Income and VA Compensation by Age Group.



SOURCE: CNAC, *Final Report*, Page 103.

The economic impact of a veteran's death is most significant for younger widows (Figure 8.1). CNAC also found that impairment of employment and earnings are most severe within 5 years of the veteran's death, as shown in Figure 8.2.¹² This indicates that the most significant economic consequences of a veteran's death are incurred during the spouse's transition, although these consequences do continue throughout the spouse's lifetime.

¹² CNAC, *Final Report*, 104–106.

Figure 8.2 Earned income by age group

SOURCE: CNAC, *Final Report*. Page 105.

In examining the specific effect of the SBP/DIC offset, CNAC found that surviving spouses younger than 40 whose benefits were offset had lower employment rates and lower average earnings than spouses whose benefits were not offset. After the age of 40, the offset has no discernable effect on either employment or earnings.¹³ CNAC also found that DIC payments were adequate for every group of survivors studied.¹⁴ In addition, survivors seemed to be generally satisfied with their compensation. Eighty-nine percent of survivors were satisfied with their DIC payments. Seventy-one percent of survivors were satisfied with their SBP benefit, but of those who were not satisfied, most identified the offset as the source of their dissatisfaction.¹⁵

CNAC concluded that a veteran's death does have a significant and measurable impact on his or her surviving spouse's economic situation, as evidenced by decreased employment rates and loss in average earnings. These negative effects are most severe for younger spouses, and are also more severe within 5 years after the veteran's death. However, current payments adequately compensate most survivors for these financial losses. Finally, most survivors are satisfied with their current level of compensation, although the SBP offset is the source of most dissatisfaction.

¹³ *Ibid.*, 107

¹⁴ *Ibid.*, 109.

¹⁵ *Ibid.*, 119.

III.3 Quality of Life

CNAC also analyzed the effects that a veteran's disability and death has on his or her surviving spouse's quality of life. Using techniques similar to those used when surveying veterans, CNAC surveyed surviving spouses to determine how their lives were affected by the veteran's disability and death. CNAC then used the earnings analysis outlined above to determine whether the current level of benefits paid to survivors includes an implicit payment for quality of life.

First, CNAC sought to determine how the veteran's disability affected the spouse's life before the veteran's death. Of the 56.6 percent of disabled veterans who required a significant amount of care, 78.6 percent were cared for by their spouses.¹⁶ Of spouses who provided a significant amount of care, 57 percent reported negative health effects, and 83 percent reported a negative impact on their social lives. The degree of these negative effects was related to the amount of care provided.¹⁷ In addition, regardless of whether the spouse provided the care or not, 86 percent of spouses of veterans requiring significant care reported that they worried more than they otherwise would have, a statistic used as a rough measure of how the spouse's emotional health was affected by the veteran's disability.¹⁸

Having established how the spouse is affected by a veteran's disability prior to the veterans' death, CNAC then examined surviving spouses of deceased veterans. It should be noted that CNAC excluded male survivors from this analysis because they represent such a small portion of the overall survivor population. Table 8.1 provides the results of the first part of this analysis, which examined to what extent the veteran's death affects the spouse's mental and physical health.

¹⁶ A "significant" amount of care was defined as "[at least] 4 or more hours per day at least 5 days per week for at least 2 years."

¹⁷ CNAC, *Final Report*, 110.

¹⁸ *Ibid.*, 111.

Table 8.1 Physical and Mental Health Status of Women: Comparison with Women in General Population

HEALTH MEASURE AND AGE GROUP	MEANS		DIFFERENCE IS STATISTICALLY SIGNIFICANT
	Survivors	U.S. Population	
Physical Summary Score			
Ages 18-24	n.r	52.97	
Ages 25-34	54.21	52.71	
Ages 35-44	45.58	51.26	*
Ages 45-54	46.80	48.20	
Ages 55-64	40.33	46.28	*
Ages 65-75	37.05	43.60	*
Ages 75 and older	33.32	39.53	*
Mental Summary Score			
Ages 18-24	n.r	44.33	
Ages 25-34	45.49	47.22	
Ages 35-44	41.68	47.59	*
Ages 45-54	45.16	49.64	*
Ages 55-64	47.76	50.14	*
Ages 65-75	49.91	51.05	
Ages 75 and older	49.71	49.09	

Note: "n.r." indicates that results are not reportable because the sample did not contain enough respondents.

SOURCE: CNAC, *Final Report*, Page 115.

This table clearly shows that survivors tend to have worse health than the general population. CNAC was reluctant to attribute this difference solely to the veteran's death, though. Furthermore, despite tending to be in worse health than the general population, 74 percent of survivors surveyed by CNAC reported having "a lot" to "a fair amount" of overall satisfaction with their lives. Only 9 percent of those surveyed reported having little to no satisfaction.¹⁹

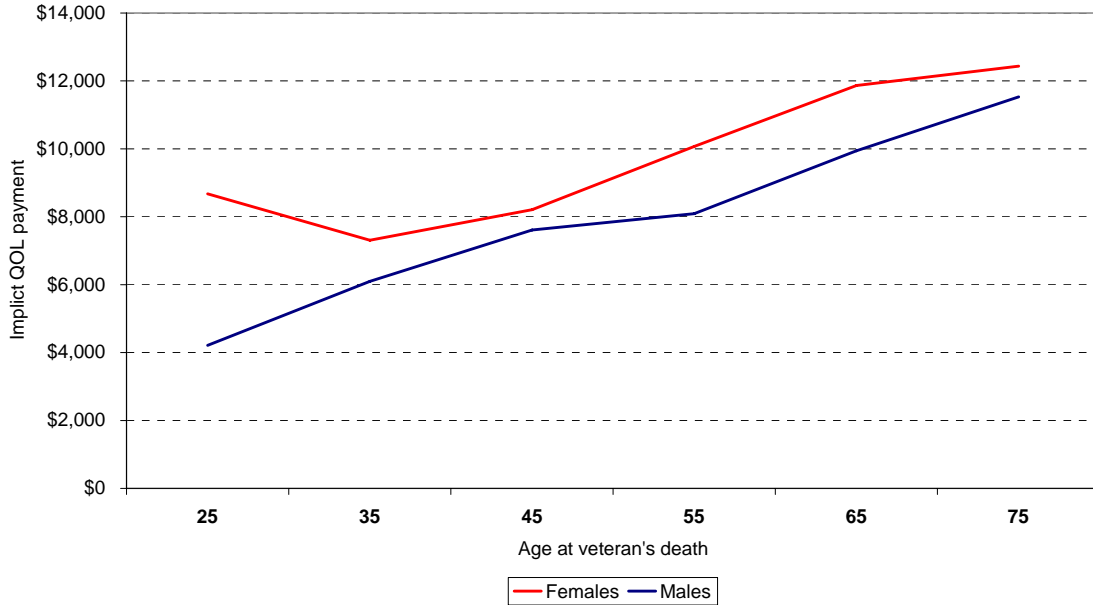
After determining what noneconomic effects a veteran's death has on his spouse, CNAC used its economic analysis of survivors to determine if there is an implicit quality-of-life payment built into the current level of the DIC benefit paid to survivors. Figure 8.3, below, clearly shows that there is a positive implicit quality-of-life payment for all survivors, and that the amount of this payment increases based on age.

Table 8.2 further quantifies this implicit quality-of-life payment. It consistently increases with age, which roughly corresponds to the decrease in overall health

¹⁹ Ibid., 116–117.

as the survivor ages. This correspondence is not perfect, though, as the table shows.

Figure 8.3 Implicit Quality-of-Life Payments by Gender and Age at Veteran's Death



SOURCE: CNAC, *Final Report*, Page 119.

Table 8.2 Summary of Earnings and Quality-of-Life Analyses

	Survivor's Age At Time of Veteran's Death					
	25	35	45	55	65	75
Annual DIC	\$12,729	\$12,729	\$12,729	\$12,729	\$12,729	\$12,729
Annual Earned Income Loss	\$4,064	\$5,402	\$4,770	\$2,854	\$945	\$294
Implicit QOL Payment	\$8,665	\$7,327	\$7,959	\$9,875	\$11,784	\$12,435
Overall Health Percentile	49%	21%	34%	28%	29%	35%

SOURCE: CNAC, *Final Report*, Page 129.

CNAC concluded that current survivor compensation levels “do not seem to be problematic.” A veteran’s disability and death clearly affect his spouse, and survivors reported increased levels of worrying, while frequently suffering from negative impacts on their education, social activities, and health. However, as the earnings analysis demonstrated, survivors are generally as satisfied with their financial situation as the general population, and 90 percent of survivors are satisfied with the current level of DIC payments. Thus, the current DIC level does provide an implicit quality-of-life payment, which, given the factors outlined above, appears to be satisfactory to most survivors.²⁰

III.4 Cost of Living Allowance (COLA) Adjustment

During the review of compensation and ancillary benefits for dependents and survivors, the Commission concluded that those benefits and any cost of living adjustments that would be needed were already covered by the Commission’s recommendations regarding veterans’ compensation and ancillary benefits and obviate further discussion in this chapter. However, it should be understood that these dependents’ and survivors’ benefits must also be brought back to originally intended levels and be automatically adjusted annually to keep pace with the cost of living.

IV Determination Standards for Benefits

The standards for determining VA benefits and services for survivors and other dependents hinges on the eligibility and entitlement status of the disabled veteran. The Commission has enunciated its concerns with the lack of statutory authority to provide families with VA services. It recognizes that once such authority is granted, VA will need to establish rules for providing these services and encourages a fair and equitable regulatory process. At this point, the Commission has addressed issues with existing benefits and services and notes that any changes it has recommended are to be applied to veterans’ families as well, when appropriate. In chapter 7 of this report, the Commission has addressed concerns regarding apportionments and garnishments, which also affects dependents. The other standard that the Commission finds needs further action is the following regarding pending claims.

V Pending Claim Ends with Death

V.1 Issue

A veteran’s claim for VA disability benefits is considered closed when that veteran dies. After death, VA solicits a claim for accrued benefits if there is

²⁰ Ibid, 122.

evidence of a spouse, children, or parents, in that order. These dependents must file an accrued benefits claim within 1 year after the veteran's death, and the claim must be based on the evidence of record in VA possession on the date of the veteran's death. Accrued benefits are those that were due to the veteran but unpaid prior to his death.

Over the past 15 years, courts have consistently held that a veteran's pending claim for benefits is considered closed when the veteran dies. Appeals have been made on behalf of survivors on various grounds, from constitutionality to alleged contradictions within the statutes. In every case, the courts have upheld previous decisions, which render pending claims closed upon the veteran's death.

There are two sections of the U.S. Code which are generally referred to when examining this issue. The first is 38 U.S.C. § 5112 (b)(1), which reads:

(b) The effective date of a reduction or discontinuance of compensation...

(1) By reason of...death of a payee shall be the last day of the month before such marriage, remarriage, or death occurs.

The second is 38 U.S.C. § 5121(a), which reads:

(a) [Periodic monetary benefits] to which an individual was entitled at death under existing ratings or decisions or those based on evidence in the file at date of death (hereinafter...referred to as "accrued benefits") and due and unpaid, shall, upon the death of such individual be paid as follows...

Section 5121(a) goes on to provide the order in which eligible dependents are to be paid any accrued benefits. Court decisions have generally relied on these two sections of the U.S. Code to adjudicate appeals on this issue.

One of the first major court cases which challenged the termination of pending claims upon the veteran's death, and one of the cases most often cited by later decisions, was *Landicho v. Brown*, a 1994 case heard in the U.S. Court of Veterans' Appeals. In its decision, the court held that 38 U.S.C. § 5112(b) (1) specifically provides for the cessation of veterans' disability compensation payments due to the payee's death (*Landicho v. Brown*, 7 Vet. App. 42, 52, § II:A:1 [1994]). Although the law provides a means for payment of *accrued benefits*, disability compensation is specifically terminated upon the veteran's death. Accrued benefits are benefits to which a veteran was entitled on the date of death, but which were not paid. An accrued benefit decision is based on existing ratings or decisions, or evidence on file in VA on the date of death,

including reports of VA hospitalization, reports of private hospitalization, treatment, records, examination authorized by VA, and reports of autopsy.²¹

Subsequent court decisions upheld and expanded upon *Landicho* precedent. The 1998 *Richard v. West*²² decision noted that the “clear intent expressed by the structure and language of the statutory scheme at issue” was to terminate pending claims when the applying veteran dies.

In January of 2007, the U.S. Court of Appeals for the Federal Circuit decided the case of *Padgett v. Nicholson*, in which a veteran’s surviving spouse sought to be substituted for the deceased veteran in an appeal of a disability compensation decision. The court made its decision in two parts. First, it ruled that if a veteran had submitted his appeal for decision to the Court of Appeals for Veterans Claims (CAVC) but died before the court issued its’ decision, it had authority to issue its decision after the veteran’s death. Second, the appeals court held that, in this limited circumstance, a surviving spouse could be substituted for the deceased veteran in the appeal (*Padgett v. Nicholson*. 473 F. 3d 1364, 4–5 [Fed. Cir. 2007]).

The most common argument against altering the status quo is based on the court decisions. The U.S. Court of Appeals for the Federal Circuit has consistently decided that a pending claim is terminated when the veteran dies. Another common argument against changing the law is to point out that the veteran’s survivors are eligible to file a claim for accrued benefits. It is argued that, since the veteran is not available to take medical exams or answer questions about his or her experience, the next best “evidence” is evidence in the VA’s possession at the time of the veteran’s death. Any benefits determined due the veteran but unpaid due to his or her death are paid to the survivors.

Veterans argue that the laws that terminate a veteran’s pending claim at the veteran’s death are unfair to the veteran’s survivors. First, some claim that, for a variety of reasons, many military veterans are reluctant to apply for VA benefits, particularly if they feel that “they will be able to live with [the disability].” It is argued that such a situation takes “inappropriate advantage of [the] member’s reluctance to claim disability compensation.”²³ Second, because “many appeals cases take years to make their way through the system,” it is unfair to prevent survivors from receiving benefits for which they are eligible but which were not granted due to the tardiness of the current system. Third, when medical evidence, possibly new, about the veteran from non-VA medical facilities is

²¹ VA, *Adjudication Procedures Manual*, VIII.3.1.e.

²² *Richard V. West*, 161 F.3d 719 Fed. Cir. 1998

²³ The Military Coalition, Hayden Statement. 10.

critical to the claim but is not in the veteran's file at the time of the veteran's death, it should be considered. Fourth, if the survivors could replace the veteran in the claim or appeal process, VA could save administrative processing time and staffing by not having to repeat the initial claim processing steps, including requesting evidence from the surviving spouse. Claims for accrued benefits must essentially "start over" in the claims process, instead of proceeding from where the veteran's claim was at the time of death. By allowing a survivor to simply continue the original claim, rather than beginning a new claim, VA could save time and resources that could be used to process other claims and appeals.

V.2 Findings

The current system imposes a significant burden on a veteran's family and dependents by not allowing survivors to continue processing the veteran's claim. It can take years for a veteran to advance his or her claim to completion, and requiring that survivors begin this entire process again after the veteran dies is unfair. The veteran's dependents, in order of precedence—surviving spouse, children, and dependent parents—clearly would be appropriate substitutes.

Recommendation 8.3

Allow the veteran's survivors, but not a creditor, to pursue the veteran's due but unpaid benefits and any additional benefits by continuing the claim that was pending when the veteran died, including presenting new evidence not in VA's possession at the time of death.

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