

# Chapter Ten

## VA Programs for Veterans’ Family Members and Survivors

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### *Introduction*

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Some VA benefits may be available to the dependents of a living veteran or to the surviving family members of a deceased veteran. Even though these VA benefits are paid to family members, entitlement to benefits is established through the veteran. This means that the veteran must meet certain eligibility requirements before benefits are awarded and there must be a qualifying relationship between the veteran and the beneficiary. The requirements for a veteran to qualify for VA benefits are discussed in Chapter 3, “Compensation,” in section A, “Eligibility for VA Benefits.”

The major types of VA benefits for a veteran’s surviving family members are accrued benefits, dependency and indemnity compensation (DIC) for a service-connected death, and death pension, which is a needs-based survivor benefit. Accrued benefits and dependency and indemnity compensation will be covered in this chapter along with educational benefits for family members. Information on death pension is available in the Chapter 4, “Needs-Based Pension for Low-Income Veterans or Survivors.” The requirements for the

benefits discussed in this section may be complicated and there are exceptions to every rule. You should discuss the specific circumstances of your case with your veterans service organization representative (also known as a “service rep”) or with an attorney experienced in veterans benefits law. You will want to make your best possible case.

### ***Qualifying Family Relationships***

The surviving spouse, child and parents of a veteran all have the potential to qualify for VA benefits if the right circumstances exist. The surviving spouse is usually the first person entitled to benefits, with the veteran’s children next in line. If there is no spouse or child, the veteran’s dependent parents may be eligible to receive some benefits, but most survivor benefits do not apply to parents.

#### ***Spouses***

For VA benefits purposes, a spouse is defined as a “person of the opposite sex who is a wife or husband” of the servicemember. Same-sex partners do not qualify as spouses for VA benefits. You must have a “valid” marriage to be eligible for benefits as a spouse. In order for a marriage to be recognized by the VA, a valid marriage must have been formed under state law and neither party can be married to another person at the time of the marriage. The VA recognizes common-law marriages as valid so long as they are legally recognized in the state where they were created.

In most cases, the VA will require only a veteran’s written statement as proof of a valid marriage. The statement must include a list of all prior marriages for both the veteran and the spouse. This marital history must include the first and last names of prior marriage partners, how the prior marriages were ended (by death, divorce, or annulment), and the date and location where the previous marriages were terminated. Usually, the VA will not require other evidence. However, if questions arise, the VA may require more documentation, such as a copy of the record of marriage, the original marriage certificate, an official report of a marriage occurring during service, an affidavit from the person who officiated at the ceremony, or affidavits from eyewitnesses to the ceremony. If none of these documents is available, any evidence that supports the belief that a valid marriage actually occurred should be submitted. The VA may also require proof that a previous marriage ended.

For survivor benefits, in addition to showing that you were the valid spouse of the veteran at the time of the veteran's death, you may need to show that you and the veteran were married for at least one year or that you had a child together. The veteran and surviving spouse also must have lived continuously together during the marriage. There are some exceptions to this rule for spousal abuse or abandonment by the veteran without fault by the abandoned spouse. Further discussion of the eligibility requirements for a surviving spouse or child may be found in the Chapter 3 section "Eligibility for VA Benefits."

In the past, a surviving spouse lost all his or her VA benefits if he or she remarried. From November 1, 1990 until October 1, 1998, the remarriage of a surviving spouse ended both entitlement to further benefits and eligibility for VA benefits unless the later marriage was annulled or found to be void. As of October 1998, a surviving spouse may be eligible to have DIC reinstated, or to receive DIC for the first time, if the remarriage ends due to divorce, annulment, dissolution or the death of the second spouse or (where no legal marriage was created) if the spouse stops living with the other person or stops holding himself or herself out to be that person's spouse.

Now, surviving spouses who remarry on or after turning age 57 and apply for benefits on or after December 16, 2003 are eligible for service-connected death benefits (DIC), VA home loan benefits, and other VA benefits, such as medical care (CHAMPVA). The remarriage need not end in order for these spouses to be eligible. They may remain remarried and still be entitled to benefits based on their earlier marriage to the veteran. This means that a spouse who remarried in 2002 (but after he or she turned 57) would be eligible for DIC if the application was filed after December 16, 2003. Still, the surviving spouse is not eligible for non-service-connected death pension.

To apply for benefits as the survivor of a deceased veteran, you should submit VA Form 21-534, "Application for Dependency and Indemnity Compensation, Death Pension, and Accrued Benefits by a Surviving Spouse or Child" to the VA. You can obtain a copy of the form from your service organization representative or apply on-line at [www.va.gov/onlineapps.htm](http://www.va.gov/onlineapps.htm). You should also submit a copy of the veteran's death certificate, a copy of the veteran's discharge or form DD-214, and a copy of the marriage certificate or any other documents that prove a valid marriage existed. Veterans service organizations offer claimants free assistance in filing and preparing claims for benefits. Take advantage of their knowledge and experience.

## ***Benefits Available When a Veteran Dies with a Pending Claim***

There are two main types of survivor benefits that may result if a veteran dies while the VA is still deciding his or her claim. They are accrued benefits and non-negotiated benefits.

### ***Accrued Benefits***

Normally, if a VA claimant dies before establishing a right to receive a claimed VA benefit, the claim for the benefit dies as well. Generally, a survivor is not able to step into the shoes of a deceased claimant in order to continue a claim or an appeal. The only way a survivor can recover any of the claimed VA benefits is by filing a claim for accrued benefits. If a veteran dies with a claim for benefits pending and the VA decides, based on evidence in the veteran's file at the time of death, that the veteran would have been awarded benefits, then the VA may pay accrued benefits to the veteran's survivors. The accrued benefits consist of the benefits that would have been awarded to the veteran had he or she survived. Accrued benefits may also be awarded when a veteran received a favorable VA decision prior to his or her death, but the benefit was not actually paid before the veteran died.

Accrued benefits can be sought for any type of monthly VA benefit that was "due and unpaid" based on the evidence in file at the time of claimant's death. Please note that the VA will not award accrued benefits for a one-time payment: the benefit must be of the monthly recurring type. Accrued benefits are not considered death benefits, rather they are unpaid benefits owed to the veteran for an earlier period of time.

For accrued benefits to be awarded, the claimant must be the surviving spouse, child, or dependent parent of the deceased veteran, and he or she must apply within one year of the veteran's death. The one-year deadline will be enforced. The veteran's claim for VA benefits must have been pending when the veteran died and the evidence at the time of death must show that the veteran was entitled to the benefit. A pending claim is one in which no decision was made prior to the veteran's death, or if a decision was made, it had not yet become final at the time of the veteran's death. A decision becomes final when the appeal process has been exhausted or when the deadline to appeal goes by without an appeal. A survivor can also be awarded accrued benefits when VA benefits were awarded prior to death but remained unpaid at death, or when entitlement otherwise can be shown from an existing rating decision.

Accrued benefits may also be paid to reimburse any individual who paid for the last sickness or burial of the deceased veteran even if the individual is not a spouse, child or parent. Fiduciaries, such as trustees, are not entitled to claim or receive accrued benefits.

Survivors who successfully claim accrued benefits are entitled to the entire amount of benefits that would have been paid to the veteran had he or she lived if the veteran's death occurred on or after December 16, 2003. For deaths that occurred before December 16, 2003, survivors may recover only up to two years of accrued benefits.

### *Non-Negotiated Benefits*

If a check for benefits is received by the veteran but not deposited or cashed prior to his or her death, the amount of the check is considered a non-negotiated benefit. The VA will pay non-negotiated benefits in the same way that it pays accrued benefits. There is no time limit by which a survivor must file a claim for non-negotiated benefits.

Non-negotiated benefits may be paid to the same people who are eligible for accrued benefits.

### *Service-Connected Death Benefits*

A veteran's surviving spouse, child, or parent may apply for Dependency and Indemnity Compensation (DIC) when the veteran's death is connected to service. The death may happen during service or after service from a service-connected cause. DIC is usually paid to a surviving spouse with an increase in benefits if the spouse is the parent or guardian of the veteran's child. If there is no surviving spouse, a surviving child is next in line to receive DIC payments. If the veteran died prior to January 1, 1957, the survivor may receive death compensation or elect to receive DIC instead.

A DIC claim may be filed at any time after the veteran's death. If your DIC claim is received by the VA within a year of the veteran's death, you will be retroactively paid back to the date of the veteran's death. Therefore, it is important to file a DIC claim within one year of the death to receive the earliest possible effective date. A claim for DIC is also considered to be a claim for death pension and accrued benefits, so the VA must consider whether these benefits are due as well. The same application, VA Form 21-534, is used by a spouse or child to apply for all three benefits. Parents applying for DIC use VA Form 21-535.

There are two different methods that a survivor may use to establish that he or she is eligible for DIC. With the first method, a survivor may show that the veteran's death resulted from service, from a service-connected disability, or from a condition that could have been service-connected. The second method applies when a veteran's death is not service-connected, but the veteran was rated, or should have been rated, as totally disabled for ten years before the veteran's death.

As a general rule, if a servicemember dies while on active duty, the VA will conclude that the death was service-connected and grant an eligible survivor DIC. The same rule applies where the serviceperson is missing or missing in action and death is presumed by the service department. In some circumstances, the VA will determine whether an active duty death will be considered service-connected, including where the in-service death is a result of suicide, a result of a disease that occurred during the initial six months of active service, or potentially a result of misconduct.

Entitlement to DIC is also relatively easy to establish where a disability or condition for which the veteran was receiving service-connected disability compensation is shown to be a main or contributing cause of the veteran's death. The medical cause of death is usually reported on the veteran's death certificate.

DIC claims get more complicated if the veteran never applied for service-connected disability compensation or if the veteran's claim was denied during his or her lifetime. In such cases, the survivor may still prove entitlement to DIC by overcoming two hurdles. First, the DIC claimant must show that the veteran would have qualified for service-connected disability benefits for the particular condition. To do this, the claimant must gather and submit evidence similar to the evidence you would submit if you were filing an original claim for disability compensation. The needed evidence will include: first, medical evidence that the veteran had the particular disability at the time of death; second, evidence of an injury, disease or event that happened in service; and third, medical evidence linking the disability at the time of death to the in-service injury, disease or event. Each of these three elements is more fully explained in Chapter 3, "Compensation."

After the claimant demonstrates that the particular condition was service-connected, the second hurdle is to show that this same condition was an immediate or underlying cause of the veteran's death. This is usually done by submitting a copy of the veteran's death certificate, but if the death certificate omits the particular condition, you could submit a letter from the veteran's

doctor explaining why the condition should be considered a principal or underlying cause of death. The service-connected condition does not have to be the sole or even the main cause of death as long as it was a contributing factor.

The second method to establish DIC is more complex. If a veteran was receiving or was eligible to receive compensation for a service-connected disability continuously for the ten-year period immediately prior to the veteran's death, a survivor may receive benefits as if the veteran's death was service-connected. The distinction here is that the veteran's cause of death may not actually be service-connected, but instead, the veteran suffered from a totally disabling service-connected disability for the ten years prior to death. This type of DIC benefit is often referred to as a Section 1318 DIC claim because it is found in Section 1318 of Title 38 of the United States Code (federal law).

The VA is obligated to consider entitlement to Section 1318 DIC when the VA denies service connection for a veteran's cause of death but the veteran had a totally disabling service-connected condition at the time of death. A survivor is eligible for Section 1318 DIC when a VA rating decision granted the veteran a total disability rating using the rating guidelines in the VA rating schedule. A survivor may also be eligible for Section 1318 DIC if the VA granted the veteran a "total disability rating based on individual unemployability" (TDIU). TDIU is granted when the VA judges that a veteran's service-connected disability prevents him or her from finding and retaining substantially gainful employment even if his or her symptoms are not rated at 100% under the VA's rating schedule. It is a separate way of getting a total disability rating. Once you establish that the veteran suffered from a totally disabling service-connected condition, you must then show that he or she was totally disabled by the condition for at least the ten years prior to death.

Section 1318 DIC claims may get even more complex. If a veteran was not actually receiving compensation at a total disability rating for the last ten years of his or her life, a survivor may still establish entitlement to benefits in a few additional ways. A survivor may show entitlement to DIC by showing that but for a "clear and unmistakable" error by the VA, the veteran would have received total disability compensation for the required period of time. An explanation of what sort of error constitutes a "clear and unmistakable error" is found in Chapter 5, "VA Claims and Appeals." Another way to obtain Section 1318 DIC is to show that the VA did not consider existing service department records at the time of a prior VA decision and those records would have changed the outcome of the decision. Finally, a veteran's survivor may still be eligible for DIC if at the time of the veteran's death, he or she had

a service-connected disability that was rated continuously and totally disabling by the VA for the required time, but he or she was not receiving compensation because it was being withheld for indebtedness, or paid to his or her dependents, or he or she was receiving retired pay instead. These rules are complicated and contain other exceptions. If you think you potentially have a Section 1318 DIC claim, you should consult a service organization representative or an attorney experienced in veterans law about your case.

The payment rate chart the VA uses in calculating the amount of DIC benefits due to a survivor can be found at [www.vba.va.gov/bln.21/Rates](http://www.vba.va.gov/bln.21/Rates). For service-connected deaths occurring on or after January 1, 1993, DIC payments to surviving spouses start with a monthly base amount. The monthly base amount may be increased in accordance with an annual cost-of-living increase. As of December 1, 2007, this amount was \$1,091. Additional incremental amounts are paid if the spouse has minor children or if the spouse requires the “aid and attendance” of another due to a state of helplessness or if the spouse is “permanently housebound,” meaning that he or she is substantially confined to the home.

As of January 1, 2006, the VA has added a transitional DIC benefit of \$250 to the surviving spouse’s monthly DIC amount if there are children under the age of 18. This is paid for two years from the date DIC entitlement started and is discontinued when there is no child under the age of eighteen. The basic rate of DIC is also increased if the veteran was receiving or entitled to receive compensation for a service-connected disability rated totally disabling for at least eight years prior to death. However, only periods during which the veteran was married to the surviving spouse are considered, so if the surviving spouse was married to the veteran for less than eight years, he or she is not eligible for this enhanced DIC rate.

In cases where the veteran died on or before December 31, 1992, the rate of DIC compensation paid to a surviving spouse is based on the highest pay grade attained by the deceased veteran in the service. The higher the rank, the more the survivors get paid. However, if this amount is less than the standard monthly base rate for deaths occurring after January 1, 1993, the VA pays higher amount.

If there is no surviving spouse and the veteran’s minor children are eligible for DIC benefits, the children will be paid in equal shares at the same rate as a surviving spouse, except that surviving children are not entitled to the transitional DIC benefit or the enhanced DIC benefit. A surviving child who is determined to be “helpless” by the VA and who is over the age of eighteen

may be entitled to DIC benefits in his or her own right. As of December 1, 2007, a “helpless child” is entitled to receive an additional \$462 per month. Also, a qualifying surviving child between the ages of 18 and 23, who is pursuing his or her education at an approved educational institution, is entitled to receive DIC. As of December 1, 2007, children pursuing their education were entitled to receive \$230 per month in DIC. However, the child must choose DIC benefits or educational benefits and cannot receive both. Educational benefits are discussed toward the end of this chapter. Normally, the educational benefit is greater than the DIC benefit for education.

Although the amount of DIC paid to a surviving spouse or child is not based on need, DIC payments to a veteran’s dependent parents are based on the parents’ annual income. The income guidelines are very strict and parents who receive DIC are required to complete an annual “expected” income questionnaire. Most parents have too much income to qualify for DIC. Like a surviving spouse, dependent parents may be eligible for an increased DIC allowance if they require “aid and attendance” or are “housebound,” but they are not eligible for transitional or enhanced DIC.

### *Restored Entitlement Program for Survivors*

The Restored Entitlement Program for Survivors (REPS) are benefits payable to certain surviving spouses and children of veterans who died during active duty before August 31, 1981 or who died of a service-connected disability that arose or was aggravated before that date. (Veterans exposed to Agent Orange fall under this rule because their exposure occurred before 1981.) REPS benefits are payable to surviving spouses if, since the time of the veteran’s death, the surviving spouse was caring for the veteran’s child between the ages of sixteen and eighteen. The only exception to this is if the child is considered mentally incompetent and continues to receive Social Security benefits after his or her sixteenth birthday. REPS entitlement is terminated if the spouse remarries, but can be reestablished if the remarriage ends by death or divorce.

REPS benefits are available to a surviving child if, since the time of the veteran’s death, the child was between the ages of eighteen and twenty-two and was enrolled in a course of approved full-time postsecondary education and was unmarried during this time. Unlike a surviving spouse, the child cannot reestablish eligibility if the child’s marriage ends.

To apply for REPS, the surviving spouse or child should complete and submit VA Form 21-8924, “Application of Surviving Spouse or Child for REPS Benefits.” The claimant’s income during the period of eligibility has a

direct effect on entitlement. If the survivor is entitled to both Social Security and REPS, the REPS benefit will be offset dollar-for-dollar by the Social Security payment if it is less, or cancelled completely if the Social Security amount is equal to or more than the potential REPS payment.

### ***Educational Assistance for Spouse and Children of Veterans***

Spouses and dependent children of certain veterans are potentially entitled to education assistance under the Survivors' and Dependents' Educational Assistance Program (DEA). This benefit may also be referred to as "Chapter 35" because of its location in the United States Code. The purpose of DEA is to provide educational opportunities for children whose education could be interrupted or impeded because their veteran-parent suffers from a severe service-connected disability. DEA also provides educational assistance for the spouses of veterans with a service-connected total disability for the purpose of assisting the spouse in preparing to support his or her family.

A spouse of a living servicemember is entitled to DEA benefits in the following circumstances: when the veteran has a total and permanent service-connected disability; when the servicemember is listed as missing in action; or when the servicemember is a prisoner of war. A surviving spouse of a deceased veteran is entitled to DEA when the veteran died from a service-connected disability or died with a total and permanent service-connected disability rating. The surviving spouse of a veteran who died on active duty may receive DEA benefits for twenty years from the date of the veteran's death. Other surviving spouses usually have to apply for DEA benefits within ten years of the veteran's death or within ten years of a VA decision either that the death was service-connected or that the veteran's service-connected disability is total and permanent.

Children may be entitled to DEA when the veteran-parent died of a service-connected disability, when the veteran-parent died from or suffers from total and permanent service-connected disability, or when the veteran-parent is listed as missing in action or a prisoner of war.

Please note that even though a veteran may be receive a 100% disability rating for a service-connected disability, the VA must also rate the disability as "total and permanent" for the veteran's spouse and children to be eligible for DEA. Veterans who receive 100% disability ratings without the additional finding of "total and permanent" may appeal the award. As of the year 2000,

children and spouses who file for DEA within one year after the VA's award of DIC or a total and permanent disability rating if the veteran is living, may receive DEA back to the effective date of the award of DIC or total and permanent disability.

### ***“Transferred” Montgomery GI Bill Education Benefits***

Some spouses and dependents are eligible for VA education benefits that were transferred to them by a spouse or parent eligible for benefits under the Montgomery GI Bill (MGIB). Individuals who are entitled to educational assistance under the MGIB may seek approval from the service department to transfer a portion of this entitlement to a dependent or dependents. Transfers may be approved where the servicemember requests permission to transfer entitlement and has completed six years of service, has either a designated critical military skill or is in a military specialty designated as requiring critical military skills, and agrees to serve at least four more years in the military. If a servicemember transfers his or her MGIB, he or she may modify or revoke the transfer of any unused portion at any time. The death of a servicemember does not affect the surviving spouse or child's use of the education benefits that were transferred.

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- Placing meritorious cases (especially cases involving claims of servicemembers and veterans of Iraq and Afghanistan) with volunteer pro bono attorneys.